EMORY | LAW

Emory Law Journal

Volume 65 | Issue 4

2016

Freedom of Conscience in War Time: World War I and the Limits of Civil Liberties

Laura M. Weinrib

FREEDOM OF CONSCIENCE IN WAR TIME: WORLD WAR I AND THE LIMITS OF CIVIL LIBERTIES[†]

Laura M. Weinrib[*]

This Article examines the relationship between expressive freedom and freedom of conscience as the modern First Amendment took shape. It focuses on efforts by the American Union Against Militarism and National Civil Liberties Bureau—the organizational precursors to the ACLU—to secure exemptions from military service for conscientious objectors whose opposition to American involvement in the First World War stemmed from socialist or radical labor convictions rather than religious scruples. Although such men asserted secular, ethical objections to war, advocates strained to expand the First Amendment's Free Exercise Clause to encompass them. Concurrently, they sought to import a generalized theory of freedom of conscience into constitutional constructions of freedom of speech and press, within and outside the courts. The conception of liberty of conscience that they advanced, which they linked to an "Anglo-Saxon tradition" of individual rights, clashed with progressive understandings of democratic citizenship and failed to gain broad-based traction.

Civil liberties advocates consequently reframed their defense of political objectors in terms that emphasized democratic dissent rather than individual autonomy. Sympathetic academics and a few judges embraced this progressive theory of free speech, which celebrated discursive openness as a prerequisite for democratic legitimacy and justified, rather than cabined, the exercise of state power. Even in the interwar period, however, the proponents of this vision remained deeply ambivalent about the courts and generally suspicious of individual rights. Although some accepted a limited role for judicial enforcement of the First Amendment's Free Speech Clause, most declined to

---

[†] This Article originated as a contribution to the 2015 Randolph W. Thrower Symposium, "The New Age of Communication: Freedom of Speech in the 21st Century." The Thrower Symposium was held on February 5, 2015, at Emory University School of Law, and the other symposium articles are available in Volume 65, Issue 2 of the *Emory Law Journal*.

[*] Assistant Professor of Law and Herbert and Marjorie Fried Teaching Scholar, University of Chicago Law School. I thank Mary Anne Case, Hendrik Hartog, Aziz Huq, Jeremy Kessler, Martha Nussbaum, and Geoffrey Stone for helpful comments. I am grateful to the Thrower family and to the Roger Levin Faculty Fund for their generous support, and to the *Emory Law Journal*, especially Matt Johnson and Matt Bailey, for invaluable assistance.

endorse a court-centered and constitutional right to exemption from generally applicable laws.

INTRODUCTION

In his seminal account of the First Amendment and the First World War, *Freedom of Speech in War Time*, Zechariah Chafee, Jr., described an "unprecedented extension of the business of war over the whole nation."[1] On Chafee's telling, the sweeping scope of the wartime propaganda campaign had transformed the United States into a "theater of war."[2] Public officials and mainstream Americans lost sight of the tradeoff between order and freedom and denounced all criticism of the country's cause as a threat to public safety. Hundreds of prosecutions ensued, and the cessation of hostilities in Europe failed to check the demand for censorship at home.[3] The new speech-restrictive climate, in Chafee's assessment, made it "increasingly important to determine the true limits of freedom of expression," as a matter of national policy as well as the First Amendment.[4]

Almost a century after Chafee published his influential tract, scholars continue to trace the emergence of the "modern First Amendment" to the enforced conformity of the war.[5] When the wartime hysteria receded, they explain, prominent officials and intellectuals recognized the high toll of repression and awoke to the value of countermajoritarian constitutionalism in the domain of free speech.[6] Although it would take another decade for a

---

[1] Zechariah Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 937 (1919).

[2] *Id.*

[3] *Id.* at 932–33.

[4] *Id.* at 933–34.

[5] For example, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1038–39 (7th ed. 2013), describes "speech that 'causes' unlawful conduct" as the "first issue of first amendment interpretation to capture the Court's sustained interest," and traces the Court's engagement with the issue to "a series of cases concerning agitation against the war and the draft during World War I." *See also* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 1 (1997) (noting that the majority of scholars locate "the creation of the modern First Amendment" during the period beginning with the passage of the Espionage Act of 1917). On Chafee's influence, see MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM 2 (1991) (describing Chafee as "the early twentieth-century jurist most responsible for developing the modern interpretation of the First Amendment"); *id.* at 122 (summarizing literature).

[6] *E.g.*, PAUL L. MURPHY, THE MEANING OF FREEDOM OF SPEECH: FIRST AMENDMENT FREEDOMS FROM WILSON TO FDR 8–9 (1972) (emphasizing the "World War I crisis in civil liberties" and the ensuing Red Scare as the catalysts of interwar contestation over free speech); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 230 (2004) ("The government's extensive repression of dissent during World War I and its conduct in the immediate aftermath

Supreme Court majority to overturn a conviction on First Amendment grounds, the path forward purportedly was clear: the courts would prevent overzealous legislators and administrators from abridging expressive freedom.

Of course, the modern First Amendment contains other provisions than the one that prohibits Congress from abridging freedom of speech, and it reflects other values than open democratic debate. During the First World War, self-described civil libertarians endorsed these wider commitments. The very same advocates who litigated speech claims under the Espionage Act also invoked the Free Exercise Clause of the First Amendment to defend an asserted right of conscientious objectors to refuse military service. And yet, though the scholarship on wartime civil liberties advocacy has thoroughly canvassed contestation over dissenting speech,[7] it rarely dwells on the consequences of patriotic repression for freedom of conscience,[8] either as a species of religious freedom or as a secular concept justifying civil

---

of the war had a significant impact on American society. It was at this moment, in reaction to the country's excesses, that the modern civil liberties movement truly began.").

[7] *E.g.*, CHRISTOPHER CAPOZZOLA, UNCLE SAM WANTS YOU: WORLD WAR I AND THE MAKING OF THE MODERN AMERICAN CITIZEN (2008); GRABER, *supra* note 5; THOMAS HEALY, THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA (2013); PAUL MURPHY, WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES (1979); STONE, *supra* note 6; JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW (2007).

[8] An important exception is Jeremy Kessler's recent article, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083 (2014). Kessler demonstrates that key War Department officials, including Felix Frankfurter and Newton Baker, were sympathetic to conscientious objectors and sought to accommodate their claims despite contrary legislative language and substantial resistance from military personnel. *Id.* at 1088, 1095. Their efforts to implement administrative accommodations were a crucial antecedent of one strand of interwar civil libertarianism. *Id.* at 1090. As Kessler acknowledges, however, many government officials opposed their lenient attitude toward objectors. *Id.* This Article highlights the dominant sentiment among Progressives—including many of Frankfurter and Baker's own allies—that exemption from military service threatened social interests. It also emphasizes that the War Department considered conscientious objection to the taking of human life to raise special concerns, not implicated by moral and political objection to other government policies. *See also* CAPOZOLLA, *supra* note 7, at 55–82 (concluding, after discussion, that "the objectors were some of twentieth-century America's first modern citizens" and that "[w]hat made them distinctive was their assertion of individual rights against the modern state"); RICHARD POLENBERG, FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH (1987) (discussing Harry Weinberger's work on behalf of the No-Conscription League). There is, of course, a substantial literature on conscientious objectors during the First World War that explores issues other than legal categories and rights claims. *See, e.g.*, GEORGE Q. FLYNN, CONSCRIPTION AND DEMOCRACY: THE DRAFT IN FRANCE, GREAT BRITAIN, AND THE UNITED STATES (2002); GEORGE Q. FLYNN, THE DRAFT, 1940–1973 (1993); H. C. PETERSON & GILBERT C. FITE, OPPONENTS OF WAR, 1917–1918 (Greenwood Press, 1986) (1957); LILLIAN SCHLISSEL, CONSCIENCE IN AMERICA: A DOCUMENTARY HISTORY OF CONSCIENTIOUS OBJECTION IN AMERICA, 1757–1967 (1968); LOUISA THOMAS, CONSCIENCE (2011); R.R. Russell, *Development of Conscientious Objector Recognition in the United States*, 20 GEO. WASH. L. REV. 409 (1952); U.S. Selective Service System, Conscientious Objection (Special Monograph No. 11, 1950).

disobedience or counseling legislative restraint.[9] Nor does the expansive literature on demands for exemptions from generally applicable laws—an issue that has recently assumed increased significance[10]—devote much attention to the failure of such claims during these formative years of the modern First Amendment.[11]

The most intuitive explanations for the divergence in emphasis will not hold up to scrutiny. One might assume, for example, that the literature has discounted wartime claims for exemption because they were unsuccessful in the courts.[12] On the whole, however, claims for free speech were just as unavailing.[13] Similarly, one might emphasize that the Free Exercise Clause was not formally incorporated into the Fourteenth Amendment, and thus made applicable to the states, for over two decades after the Armistice.[14] But the

---

[9] For example, Samuel Walker attributes "[t]he idea of personally confronting government power through nonviolent direct action" to the efforts of conscientious objectors during the Second, rather than First, World War. SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 151 (2d ed. 1999). On the distinction between secular and religious understandings of freedom of conscience, see *infra* note 169 and accompanying text.

[10] For discussion of the growth and transformation of exemption claims, see Mary Anne Case, *Why "Live-And-Let-Live" Is Not a Viable Solution to the Difficult Problems of Religious Accommodation in the Age of Sexual Civil Rights*, 88 S. CAL. L. REV. 463, 480–82 (2015) (emphasizing shift from accommodation of beliefs and modes of worship to "religiously motivated differences in how to live"); Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015) (discussing new prevalence of claims involving complicity in the putatively sinful conduct of others).

[11] In general, scholars have devoted relatively little consideration to legal arguments for exemption during the years between *Reynolds v. United States*, 98 U.S. 145 (1879), the 1879 Supreme Court decision denying Mormons' First Amendment claim to exemption from a federal anti-bigamy statute, and *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the 1940 case in which the Supreme Court incorporated the First Amendment's Free Exercise Clause into the Due Process Clause of the Fourteenth Amendment, thus rendering it binding on the states. For example, Kent Greenawalt discusses *Reynolds v. United States* and then jumps to *Cantwell v. Connecticut* after noting, in a single sentence, that "[i]n a series of cases in the 1920s and 1930s, the Supreme Court rejected claims that conscientious objectors had a free exercise right to avoid military service." KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 28 (2006). Given the stakes of Founding-era "historical understanding," there is considerably more scholarship on eighteenth century statutes, debates over constitutional provisions, and early judicial opinions—though perhaps less than in other areas of constitutional law. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1415 (1990) ("Even opponents of originalism generally agree that the historical understanding is relevant, even if not dispositive."); *id.* at 1414 (noting dearth of historical scholarship on the early understandings of "free exercise," in contrast to the Establishment Clause, at the time of publication).

[12] *See, e.g.*, 12 WILLIAM WIECEK, THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953, at 213, 220 (2006) (concluding that the Supreme Court "hand[ed] down no significant religion-clause cases before 1940").

[13] STONE, *supra* note 6, at 170–82.

[14] *Cantwell*, 310 U.S. at 303.

Selective Service Act (like the Espionage Act) was federal legislation.[15] And if incorporation matters because it enhanced or reflected the perceived importance of religious liberty, it bears emphasis that the Free Speech Clause was not incorporated until 1925 (and even then only in dicta)[16]—two years after the Court counted the freedom "to worship God according to the dictates of [one's] own conscience" among the rights undoubtedly denoted by the term *liberty* in the Due Process Clause of the Fourteenth Amendment.[17]

It is tempting, but insufficient, to attribute the disproportionate focus on expressive freedom to the supposed aberration of wartime speech and press restrictions, which so troubled Chafee.[18] Certainly the scale of official investment in homogenizing public opinion during World War I produced new challenges for minorities and dissenters.[19] At the same time, there was ample precedent for suppression of free speech as well as freedom of conscience. Although both were consistently touted as central features of American democracy throughout the nineteenth and twentieth centuries, both faced significant limitations in practice.[20] State constitutions often included protective provisions, but enforcement was left to local discretion, and public officials routinely policed perceived threats to state security, religious customs, or social norms. In the domain of religious practice, exemptions were permitted and occasionally required, but only for influential religious sects and only under state law.[21] Lawyers sometimes defended both radical expression

---

15 Selective Service Act, ch. 15, 40 Stat. 76 (1917); Espionage Act, ch. 30, 40 Stat. 217 (1917).

16 Gitlow v. New York, 268 U.S. 652, 666 (1925). The Supreme Court reversed a conviction under a state criminal syndicalism law based on insufficiency of the evidence in *Fiske v. Kansas*, 274 U.S. 380 (1927). In *Stromberg v. California*, 283 U.S. 359, 368 (1931), which set aside a conviction under California's red flag law, the Court reiterated its position that "the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech." The Free Press Clause was incorporated in *Near v. Minnesota*, 283 U.S. 697, 707 (1931).

17 Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

18 Chafee, *supra* note 1, at 951–52 (arguing that "only once in our history prior to 1917 ha[d] an attempt been made to apply these doctrines" of bad tendency and presumptive intent, and that "[t]he revival of those doctrines is a sure symptom of an attack upon the liberty of the press").

19 *See generally* CAPOZZOLA, *supra* note 7; DAVID M. KENNEDY, OVER HERE: THE FIRST WORLD WAR AND AMERICAN SOCIETY (1980).

20 *See generally* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985) (describing weak speech-protective tradition during the eighteenth and early nineteenth centuries); RABBAN, *supra* note 5, at 8 (describing the "restrictive prewar judicial tradition").

21 McConnell, *supra* note 11, at 1492–503. Philip Hamburger has argued that McConnell overstates the extent to which Founding-era theorists and judges anticipated the availability even of these limited exemptions. *See also* MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 120–26 (2008) (reviewing McConnell and Hamburger's arguments and evidence and concluding that "accommodations were seen as a good thing, and perhaps in many cases, by

and incursions on conscience by reference to the U.S. Constitution, in terms that resembled, anachronistically, the understanding of civil liberties that emerged after the war.[22] Such efforts, however, rarely succeeded in the courts.[23] Indeed, the continuity of oppression was a theme of a 1918 conference on American Liberties in War Time.[24] "Summarize the outrages showing that this suppression of liberty is no new affair in American life," a conference circular advised.[25]

In retrospect, of course, the Espionage Act prosecutions, which singled out speakers for their disfavored viewpoints, present core violations of the First Amendment's Free Speech Clause. By contrast, the political objectors who challenged the draft demanded exemption from a generally applicable law on the basis of ethical disagreement with its objectives—a peripheral free exercise claim at best. Still, that both sets of claims were doctrinally implausible when they were raised and both anticipated future advocacy and analysis suggests that something more than hindsight bias is at work.

In the end, the puzzle may stem primarily from the sources upon which the modern First Amendment is presumed to rest: the agonized debates among Progressive theorists and a few esteemed judges over the legitimacy of majoritarian oppression and the role of the courts. The justification for constitutional insulation of expressive freedom that emerged after World War I among liberal academics and some judges imagined free speech as a prerequisite for democratic legitimacy, essential to robust public debate and to the informed formulation of government policy.[26] It emphasized pluralism in place of individual autonomy and endorsed free speech to buttress rather than undermine state power.[27] The proponents of this vision remained deeply ambivalent about the courts and generally hostile to individual rights, though some accepted a limited role for judicial enforcement of the First Amendment's Speech Clause.[28] I argue elsewhere that these post-Progressive

many people, as implicit in the notion of religious liberty"). *See generally* Philip A. Hamburger, *The Constitutional Right of Religious Exemption*, 60 GEO. WASH. L. REV. 915 (1992).

[22] *See* RABBAN, *supra* note 5, at 26–76.

[23] *See id.* (describing free speech advocacy by the National Defense Association and Free Speech League, among other groups).

[24] Nat'l Civil Liberties Bureau, Circular (Dec. 29, 1917), *microformed on* American Civil Liberties Union Records, The Roger Baldwin Years (1917–1950), Reel 1, Vol. 3 [hereinafter ACLU Papers].

[25] *Id.* at 4. It continued, "Refer to the negro, radical movements and labor in the past." *Id.*

[26] *See generally* GRABER, *supra* note 5.

[27] I develop this argument in Laura Weinrib, *From Public Interest to Private Rights: Free Speech, Liberal Individualism, and the Making of Modern Tort Law*, 34 L. & SOC. INQUIRY 187 (2009).

[28] GRABER, *supra* note 5, at 66–86.

advocates of expressive freedom were only one component of an interwar civil liberties coalition that also included conservative defenders of individual liberty and labor radicals hostile to all manifestations of state power. It was the Progressives, however, who most cogently articulated their views and who have therefore dominated subsequent analysis. And those Progressives declined to endorse a constitutional defense of exemption from generally applicable laws.

This Article interrogates the relationship between expressive and religious freedom by shifting our lens to the advocates who resisted wartime repression on the ground and, occasionally, in the courts. It demonstrates the extent to which the modern understanding of free speech was bound up, at its inception, with claims by conscientious objectors for exemption from military service. At the same time, it argues that these two components of the First Amendment were understood in starkly different terms, even if they served similar ends. It focuses on efforts by the American Union Against Militarism (AUAM) and National Civil Liberties Bureau (NCLB)—the organizational precursors to the American Civil Liberties Union (ACLU)—to secure exemptions for so-called "political objectors," whose opposition to American military involvement in the First World War stemmed from socialist or radical labor convictions rather than religious scruples.

Given the formative role played by the interwar ACLU in fashioning the modern understanding of civil liberties, the NCLB has figured prominently in histories of the First Amendment, and rightly so. Generations of scholars have painstakingly documented the NCLB's early engagements with restrictive wartime laws and the officials that enforced them.[29] Most, however, have read the vision of the mature ACLU into the operations of its wartime precursor. They have emphasized the NCLB's appeal to neutral constitutional principles, its steadfast defense of the rights of dissenters, independent of its own policy preferences.[30] In so doing, they have exaggerated the continuities between the NCLB and its interwar heir. They have also inflated the influence of the

[29] On the origins of the ACLU, see ROBERT C. COTTRELL, ROGER NASH BALDWIN AND THE AMERICAN CIVIL LIBERTIES UNION (2000); DONALD JOHNSON, THE CHALLENGE TO AMERICAN FREEDOMS: WORLD WAR I AND THE RISE OF THE AMERICAN CIVIL LIBERTIES UNION (1963); PEGGY LAMSON, ROGER BALDWIN: FOUNDER OF THE AMERICAN CIVIL LIBERTIES UNION (1976); WALKER, *supra* note 9; WITT, *supra* note 7.

[30] *E.g.*, WALKER, *supra* note 9, at 19–20 ("The dispute that had produced the Civil Liberties Bureau defined the basic terms of the free speech fight. The principled defense of civil liberties was a two-sided struggle: It fought the suppression of free speech by government officials and conservative superpatriots, but at the same time, it rejected liberal pragmatism. The temptation to ignore violations of civil liberties in the name of pursuing some other worthy social objective was a constant theme in ACLU history.").

organization's wartime work, even as they have understated or misconstrued the effect of the war on the ACLU's foundational commitments. The NCLB had few successes in the courts. Between the spring of 1917 and the following winter, its leadership drew on a broad range of prewar arguments in its effort to defend dissenters.[31] The classical liberal language of individual rights and the Progressive commitment to robust public discussion of social problems found a few sporadic supporters, but both proved inadequate to disrupt the forces of wartime repression.

Still, amidst all the false starts and dead ends, there was one strand of argument that proved especially unavailing. Even before American troops entered combat in Europe, the organizers of the NCLB sought to shield conscientious objectors from compulsory military service.[32] They represented objectors of all type, but their particular concern was those draftees whose opposition to military service stemmed from political objections to a capitalist war. Although such men asserted secular, ethical objections to war, the NCLB strained to expand the First Amendment's Free Exercise Clause to encompass them. Concurrently, it sought to import a generalized theory of freedom of conscience into constitutional concepts of freedom of speech and press. The NCLB claimed that conscripting its clients would impede their liberty of conscience, and the state was bound to exempt them from forced service to the state. During the First World War, that was not a tenable position.

The stakes of under-examining exemption claims during the First World War come more sharply into focus when one observes that scholars have not ignored wartime advocacy on behalf of conscientious objectors altogether. On the contrary, histories of civil liberties regularly mention the NCLB's efforts to publicize and curtail the military's mistreatment of conscientious objectors. But they tend to collapse such endeavors into a broader campaign against the authoritarian tendencies of the wartime state—a "modern civil liberties movement" to match the modern First Amendment.[33] On this view, religious freedom may be a core component of the modern First Amendment, but World War I figures in its lineage only as a precursor to subsequent expansion—the

---

[31] LAURA M. WEINRIB, THE TAMING OF FREE SPEECH (forthcoming 2016).

[32] For elaboration of the NCLB's attempts to shield conscientious objectors from service, see *infra* Part II.

[33] *E.g.*, COTTRELL, *supra* note 29, at 49–50 ("As the United States officially entered the war, the AUAM . . . . became most concerned about protecting the rights of conscientious objectors and safeguarding the civil liberties of those who opposed Wilson's policies. . . . In the process the modern civil liberties movement was spawned. This was the first sustained effort to safeguard the personal liberties guaranteed under the Bill of Rights against encroachments by federal or state agents.").

first step along a continuous path curtailing state incursions on the rights of minorities and dissenters.

In descriptions of the NCLB, there is a pervasive slippage between its advocacy on behalf of conscientious objectors and its defense of expressive freedom.[34] But while both failed, the former was particularly maligned. Distaste for the NCLB's theory among even the founders' own colleagues demarcates the boundaries of pluralistic tolerance as a basis for personal rights. The Progressive theorists who pressed sympathetic judges and liberal scholars to expand the reach of the First Amendment in the immediate aftermath of the war had encountered claims to conscience as well as expressive freedom. That their defense of a countermajoritarian First Amendment extended only to the latter was a deliberate choice, not a historical accident, and it warrants more careful attention than the existing literature has afforded it.

This Article proceeds in four Parts. Part I describes the founding and early operations of the Conscientious Objectors' Bureau of the AUAM and the Progressive sympathies of its early leadership. Part II examines the deep divisions among Progressives with respect to conscientious objection, which eventually precipitated the creation of the NCLB as an independent entity. Part III explores the NCLB's legal and policy arguments and the treatment of its claims by judges and government officials. Part IV canvases the attitudes toward liberty of conscience and religious exemptions among liberals and conservatives during the interwar period and gestures toward the limits of the Progressive theory of conscience espoused by the NCLB.

The conception of liberty of conscience that the Conscientious Objectors' Bureau advanced, which it linked to an "Anglo-Saxon tradition" of individual rights, clashed with Progressive understandings of democratic citizenship and failed to gain broad-based traction.[35] The organization consequently reframed its defense of political objectors (along with its own title) in terms that emphasized democratic dissent rather than individual autonomy. Over time, sympathetic academics and a few judges embraced this Progressive theory of free speech, which celebrated discursive openness as a mechanism of social change and justified, rather than cabined, the enlistment of state power on behalf of social welfare.[36]

---

[34] *See, e.g.*, POLENBERG, *supra* note 8, at 79–80.

[35] *Infra* note 163 and accompanying text.

[36] *See* GRABER, *supra* note 5, at 2 (describing Zechariah Chafee's reconceptualization of free speech "as a functional requirement of democratic government, rather than as an aspect of a more general right of

Despite its central role in promoting the Progressive vision of expressive freedom to the public and in the courts, the early ACLU largely abandoned it. Chastened not only by the wartime prosecution of labor radicals but also by federal involvement in crushing the great coal and steel strikes of 1919, the ACLU's founders lost their confidence in state power.[37] During the 1920s and 1930s, they engineered the civil liberties consensus reflected in the New Deal settlement, which melded Progressive enthusiasm for democratic deliberation with conservatives' state-skepticism and commitment to judicial review.[38] For decades, however, they failed to convince their Progressive allies to countenance claims for exemption from generally applicable laws.[39] The implications of their choices are apparent in controversies over the First Amendment and democratic legitimacy in the context of both expressive and religious freedom today.[40]

I. LIBERTY IN THE PROGRESSIVE ERA

In the fall of 1914, a group of social workers and settlement house directors gathered informally in New York City to discuss strategies for keeping America out of the war in Europe.[41] Although they came to few definite conclusions, they sensed a need for an organization uniting the various forces opposed to American military intervention abroad. First known as the Henry Street Group, the new body tested a variety of names before settling on the American Union Against Militarism (AUAM), a label that reflected its twin goals of "guard[ing] against militarism" and "build[ing] toward world federation."[42]

---

individual liberty"); RABBAN, *supra* note 5, at 4 (arguing that "the postwar civil libertarians based their emerging concern about free speech on its contribution to democracy rather than its status as a natural right of autonomous individuals").

37 WEINRIB, *supra* note 31.

38 *Id.*; *see also* Laura Weinrib*, Civil Liberties Outside the Courts*, 2014 SUP. CT. REV. 297.

39 *Infra* Part IV.

40 Proponents of accommodations have linked their project to the First Amendment. For example, the "First Amendment Defense Act," proposed in the wake of the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), has the stated purpose of "prevent[ing] discriminatory treatment of any person on the basis of views held with respect to marriage" as a means of "remedying, deterring, and preventing Government interference with religious exercise in a way that complements the protections mandated by the First Amendment to the Constitution of the United States." H.R. REP. NO. 2802 (2015).

41 C. ROLAND MARCHAND, THE AMERICAN PEACE MOVEMENT AND SOCIAL REFORM, 1898–1918, at 223–25 (1973).

42 Am. Union Against Militarism, Pamphlet, *microformed on* American Union Against Militarism Records, 1915–1922, Reel 10:1 (Am. Union Against Militarism) [hereinafter AUAM Papers]. The records are available in the Swarthmore College Peace Collection.

The AUAM quickly grew into a large national organization with fifteen hundred active members.[43] Its principal constituency was social workers, but it also included academics, clergy members, writers, and newspaper editors. Notable members included Lillian Wald, director of New York's Henry Street Settlement House; Paul Kellogg, editor of the social work periodical the *Survey*; Jane Addams, founder of Hull House in Chicago; Rabbi Stephen Wise; Unitarian minister John Haynes Holmes; Oswald Garrison Villard, publisher of the *New York Evening Post* and the *Nation*; and Crystal Eastman, a leader of the Woman's Peace Party and future co-founder of the NCLB.[44] The organization's anti-war message, while by no means universally endorsed, was a respectable one, and it attracted considerable support within and outside government.[45]

In its first years of operation, the AUAM orchestrated a national campaign against preparedness—a movement that President Woodrow Wilson embraced in 1915 despite earlier assurances that he would avoid military engagement.[46] Mass meetings throughout the country drew huge crowds.[47] Organizers lambasted preparedness but were careful not to criticize the president.[48] In fact, the AUAM exercised considerable influence with both the Wilson Administration and Congress, and Wilson received an AUAM delegation.[49] In May 1916, Germany pledged to provide adequate warning before attacking merchant and passenger vessels.[50] The following month, Wilson signed the National Defense Act.[51] Although it provided for a significant expansion of the National Guard, the statute was limited in scope, and the AUAM was gratified that it did not authorize conscription.[52] Meanwhile, diplomatic developments appeared promising. By the summer of 1916, the AUAM was satisfied with its successes and considered its work largely accomplished.[53]

---

43 JOHNSON, *supra* note 29, at 5.

44 *Id.* at 5–6.

45 *Id.* at 5.

46 MARCHAND, *supra* note 41, at 239–45.

47 JOHNSON, *supra* note 29, at 7.

48 *Id.*

49 *Id.* In January 1916, Jane Addams (officially on behalf of the Woman's Peace Party) addressed the House Committee on Military Affairs. *To Increase the Efficiency of the Military Establishment of the United States*, *Hearings Before the H. Comm. on Military Affairs*, 64th Cong. 201–12 (1916) (statement of Jane Addams, Woman's Peace Party).

50 JOHNSON, *supra* note 29, at 8.

51 National Defense Act of 1916, ch. 134, 39 Stat. 166.

52 JOHNSON, *supra* note 29, at 7.

53 In fall 1916, the Board considered disbanding. *Id.* at 8.

All that changed in February 1917, when Germany resumed unrestricted submarine warfare on vessels carrying supplies to Britain.[54] Suddenly, the United States was hurtling toward war, and many within the AUAM approved of the new trajectory. Over the ensuing weeks, the organization scrambled to redefine its position. Some, like Rabbi Stephen Wise and Oswald Garrison Villard, thought the change of circumstances warranted reconsideration of the desirability of war.[55] Others, though horrified at the new German policy, were resolutely against a military solution.[56]

Norman Thomas, a Presbyterian minister and future leader of the Socialist Party, proposed a possible strategy. Falling back on a time-worn Progressive tactic, he urged the AUAM to organize a campaign for a war referendum in order to persuade government officials that ordinary Americans continued to oppose intervention.[57] As with the suffrage and Prohibition movements, the "combination of agitation with direction" would arouse the people to action.[58] The AUAM pursued the suggestion, apparently unconcerned that popular support might favor nationalist militancy. Later that month, the executive committee discussed the agenda for an upcoming meeting with President Wilson.[59] In addition to soliciting the president's support for a national referendum, the AUAM delegation would argue that conscription undermined the national interest.[60] But the organization's efforts were fruitless, and the march toward war continued.

A few weeks later, an important new recruit joined the AUAM board. Roger Nash Baldwin arrived in New York City in March 1917 as Crystal Eastman recovered from a complicated pregnancy.[61] Baldwin appeared to be a perfect replacement. Like Eastman, he had substantial experience in Progressive reform movements. He had spent ten years in St. Louis, where he was an active municipal reformer and a leader of myriad Progressive

---

[54] MARCHAND, *supra* note 41, at 249.

[55] JOHNSON, *supra* note 29, at 8–9; MARCHAND, *supra* note 41, at 252.

[56] *See, e.g.*, Am. Union Against Militarism, Minutes (Feb. 20, 1917), *microformed on* AUAM Papers, *supra* note 42, Reel 10 (describing Amos Pinchot's statement, "with the apparent agreement of the committee, that . . . if anything could stop [Germany], it would be the realization that further provocation might lose her the friendship of a great neutral power").

[57] Letter from Norman Thomas to the Exec. Comm., Am. Union Against Militarism (Feb. 10, 1917), *microformed on* AUAM Papers, *supra* note 42, Reel 10:1.

[58] *Id.*

[59] Am. Union Against Militarism, Minutes (Feb. 27, 1917), *microformed on* AUAM Papers, *supra* note 42, Reel 10:1.

[60] *Id.*

[61] WITT, *supra* note 7, at 197.

organizations, including a settlement house, the National Probation Officers Association, the Civic League, and the St. Louis Committee for Social Service Among Colored People, the city's first interracial organization.[62] Through these activities, Baldwin embedded himself in a network of nationally known social workers whose most prominent representatives, including Jane Addams, Paul Kellogg, and Lillian Wald, invited him to join the AUAM.[63]

In his early career, Baldwin had worked to improve rather than revolutionize existing social and economic conditions. Increasingly, however, he began to flirt with radical causes. He embarked on a decades-long correspondence with Emma Goldman and warmed to her anarchist aspirations, namely, "a society with a minimum of compulsion, a maximum of individual freedom and of voluntary association, and the abolition of exploitation and poverty."[64] Inspired by the Industrial Workers of the World (IWW), he helped to create municipal lodging and open a soup kitchen in St. Louis.[65] He also began reading the *Masses*, a socialist magazine whose editor, Max Eastman, was Crystal Eastman's brother.[66]

As much as his Progressive credentials, his new concern for industrial inequality fitted Baldwin for the anti-militarism of the AUAM. The leaders of the AUAM attacked the war effort as a conscious industrial campaign to undercut domestic reform and to increase international trade.[67] Like them, Baldwin believed that economic interests were responsible for the war; without the profit motive, American industry would be far less invested in preparedness.[68]

In March 1917, Baldwin accepted the AUAM's invitation to take over Eastman's duties.[69] When he arrived in New York, the organization lacked a clear sense of its wartime goals. Working with Norman Thomas,[70] Baldwin

---

62 On Baldwin's early life, see COTTRELL, *supra* note 29, at 1–30.

63 *Id.* at 48–49.

64 *Id.* at 31.

65 *Id.* at 44.

66 *Id.*

67 MARCHAND, *supra* note 41, at 45–46.

68 Civil Liberty Def. League, Proposed Press Release, *microformed on* AUAM Papers, *supra* note 42, Reel 10:1; *see also* MARCHAND, *supra* note 41, at 244–48.

69 COTTRELL, *supra* note 29, at 48–49. He had rejected an earlier offer to become the organization's secretary, but had headed the St. Louis branch. *Id.* at 47–48.

70 On the Protestant roots of Thomas's commitment to individual conscience, see THOMAS, *supra* note 8, at 163–78.

focused on securing a statutory exemption for conscientious objectors.[71] The practice of excusing members of the historic peace churches (such as the Quakers and Mennonites) from military service, generally conditioned on paying a fine or procuring a substitute, was well established in the United States.[72] What Baldwin and Thomas advocated was, however, far bolder. As Thomas explained in an August article in the *Survey*, "the phrase 'religious liberty' [had] come to have meaning and value to mankind," and religious objectors were therefore afforded a measure of understanding.[73] But in Thomas's view, other rationales—including "humanity, respect for personality, economic considerations of the capitalistic exploitation at the root of all wars, . . . or 'common sense' observation of that failure of war as an efficient means to progress"—deserved just as much consideration.[74]

AUAM representatives met with Newton D. Baker, Wilson's Secretary of War, who expressed interest in the organization's position.[75] In its communications with Baker and, subsequently, with members of Congress, the AUAM cast its defense of conscientious objectors as a "matter not of corporate but of individual conscience."[76] The organization consistently expressed concern for the rights of non-religious objectors, including members of "the Socialist Party, and other political, industrial and pacifist groups," as well as unaffiliated individuals who espoused antiwar views.[77] It argued that objectors should be sorted according to their attitudes toward service—that is, whether a given objector was willing to provide non-combatant service or no service at all—rather than by motivation, be it religious, economic, or otherwise. For those who were willing to accept it, the AUAM urged the government to offer alternative service. Even for the so-called "absolutists," it pled tolerance,

---

71 COTTRELL, *supra* note 29, at 49.

72 For discussion of military exemption and its limits during the founding period, see McConnell, *supra* note 11, at 1500–03; *see also* Hamburger, *supra* note 21, at 929–30.

73 Norman M. Thomas, *War's Heretics: A Plea for the Conscientious Objector*, SURVEY, Aug. 4, 1917, at 391, 391–94. On Christian pacifism during World War I, see JOSEPH KIP KOSEK, ACTS OF CONSCIENCE: CHRISTIAN NONVIOLENCE AND MODERN AMERICAN DEMOCRACY 16–48 (2009). The Christian conscientious objectors emphasized "the freedom of the Christian conscience to follow God wherever he might direct." *Id.* at 37.

74 Thomas, *supra* note 73, at 392.

75 JOHNSON, *supra* note 29, at 16. On Baker's service as Secretary of War, see DANIEL R. BEAVER, NEWTON D. BAKER AND THE AMERICAN WAR EFFORT, 1917–1919 (1966); C.H. CRAMER, NEWTON D. BAKER: A BIOGRAPHY (1961).

76 *E.g.*, Letter from Lillian Wald, Jane Addams & Norman Thomas to Newton D. Baker, Sec'y, U.S. Dep't of War (Apr. 12, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 3, Vol. 16.

77 Suggestions for Dealing with Men of Conscription Age Who Are Conscientious Objectors to War (June 28, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 3, Vol. 16.

"especially if their own normal or voluntary employment is socially valuable."[78]

At Baker's urging, the Selective Service Act included an exemption from combatant service for clergy and for members of well-recognized religious sects opposed to participation in war.[79] It authorized local draft boards to determine whether an individual had established a qualifying religious affiliation and was therefore eligible for non-combatant service.[80] This was a significant, and unpopular, concession.[81] To Baldwin and Thomas, however, an exemption confined to well-recognized religious sects was worse than no exemption at all.[82] "If the interests of the state are so great that she cannot permit conscience or conviction to hold sway in the matter of participation in war, then she should conscript everyone," they argued.[83] By conflating conscience with sectarian affiliation, the conscription bill misunderstood the term. "Conscience is individual or it is nothing," they insisted.[84]

A few years after the war, Roger Baldwin offered an overview of the nonsectarian objectors who refused to comply with conscription and who sought the assistance of the AUAM.[85] First, there were "a handful of religiously minded men imbued with the 'early Christian' or Tolstoian faith," most of whom also held radical political and economic views.[86] Unlike other political objectors, these men evinced an "inherent reverence for human life" and opposed physical violence for any purpose, including class war.[87] The majority, however, "accepted the state as an institution," and (unlike the anarchists) acknowledged its power to "order them to do what they did not

---

[78] Letter from Lillian Wald et al. to Newton D. Baker, *supra* note 76.

[79] Selective Service Act of 1917, ch. 15, § 4, 40 Stat. 76, 78–80, *repealed by* Act of June 15, 1917, ch. 29, § 4, 40 Stat. 217, 217; Kessler, *supra* note 8, at 1097.

[80] Selective Service Act of 1917, ch. 15, § 4.

[81] CAPOZOLLA, *supra* note 7, at 55–56 ("With few exceptions, Americans actively opposed draft exemptions for conscientious objectors."); *see also* NAT'L CIVIL LIBERTIES BUREAU, THE FACTS ABOUT CONSCIENTIOUS OBJECTORS IN THE UNITED STATES 27 (1918) (noting, based on "a considerable mass of clippings from all over the United States," that the "average newspaper man" and thus the "average citizen" regarded conscientious objectors as slackers).

[82] For an argument linking religious freedom to equal rights and addressing concerns of this type, see NUSSBAUM, *supra* note 21.

[83] Letter from Norman Thomas & Roger N. Baldwin to the Conference Comm. on the Army Bill (May 1, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 3, Vol. 16.

[84] *Id.*

[85] Memorandum from Roger N. Baldwin, Am. Civil Liberties Union, to Clarence M. Case, Professor, State Univ. of Iowa (Apr. 1921), *microformed on* ACLU Papers, *supra* note 24, Reel 23, Vol. 163.

[86] *Id.*

[87] *Id.*

regard as wrong."[88] The second and larger category of nonsectarian objector comprised the class-conscious socialists, who were willing to comply with the commands of a working-class, but not a capitalist, state.[89]

The AUAM's appeals on behalf of these "political objectors" failed to persuade either Congress or the War Department. Baker would not budge, though he promised the AUAM administrative moderation.[90] Congress overwhelmingly rejected amendments proposed by Wisconsin Senator Robert La Follette and Colorado Representative Edward Keating to broaden the class of objectors, despite Norman Thomas's assurances that most conscientious objectors were engaged in socially useful and often dangerous work on a voluntary basis.[91] While the conscription bills were in conference, Baldwin tried again, citing British legislation that made the distinction he recommended.[92] His efforts, however, were unsuccessful. As war fervor intensified, claims to moderation faltered and the AUAM's popularity "hit bedrock."[93] On May 18, President Wilson signed the Selective Service Act into law.[94]

Baldwin responded by organizing within the AUAM a Bureau for Conscientious Objectors to assist inductees whose anti-war commitments

---

[88] *Id.*

[89] *Id.* Despite the internationalist orientation of many prewar pacifist groups, the "'philosophy of internationalism' played almost no part in determining objection, except as reflected in the international solidarity of the socialist movement—a purely class concept." *Id*. Baldwin was aware of "only three objectors who rested their case on a broad interpretation of international concord." *Id*.

[90] JOHNSON, *supra* note 29, at 17–18. Baldwin sent a telegram to Jane Addams advising her that the "amendment providing for conscientious objectors will be defeated unless Baker specifically requests its inclusion." Letter from Roger N. Baldwin to Jane Addams (Apr. 27, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 3, Vol. 16. At Baldwin's request, Addams sent Baker a telegram urging him to act. Letter from Jane Addams to Roger N. Baldwin (May 5, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 3, Vol. 16. Baker told Addams that a legislative exemption was unlikely, though he promised to express her view to the Conference Committee. *Id.* The alternative he proposed was administrative moderation of the law. *Id.*

[91] 55 CONG. REC. 928 (1917) (quoting a memorandum from Norman Thomas).

[92] Letter from Roger N. Baldwin to the Senate and House Conferees on the Army Bill (May 2, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 3, Vol. 16. On the treatment of conscientious objectors in Britain, see JOHN RAE, CONSCIENCE AND POLITICS: THE BRITISH GOVERNMENT AND THE CONSCIENTIOUS OBJECTOR TO MILITARY SERVICE, 1916–1919 (1970).

[93] Letter from C.T. Hale to Members of the Exec. Committee (May 6, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 3, Vol. 16.

[94] Selective Service Act of 1917, ch. 15, § 4, 40 Stat. 76, 78–80, *repealed by* Act of June 15, 1917, ch. 29, § 4, 40 Stat. 217, 217. The Act provided for three kinds of exemptions: absolute exemption for certain government officials, ministers, divinity students, and persons already in the military; non-combatant for members of well-recognized religious sects forbidding participation in war; and a large class who could be exempted by the president or assigned to "partial military service." *Id.* at 78. The law set up local and district boards to hear claims and appeals. For Baldwin's arguments to Congress, see THOMAS, *supra* note 8, at 161.

prevented them from registering for the draft.[95] Its board attracted radical pacifists like Quaker activist L. Hollingsworth Wood, Norman Thomas, and Scott Nearing, a radical economist and activist who would shortly join the Socialist Party and lead the People's Council of America for Democracy and Peace.[96] Some of the most established AUAM members, however, objected to the extension of the organization's activity. Several thought it better to establish an independent body, formally distinct from the AUAM.[97] When a majority of the directing committee voted to endorse Baldwin's Bureau,[98] Lillian Wald and Paul Kellogg contemplated resignation from the organization they had founded.[99]

Responding to Wald and Kellogg's concerns, Eastman mounted a spirited defense of the new bureau.[100] She argued that its program was "liberal" (the term that was replacing *Progressive* as the favored label for reformers[101]), not "extreme radical."[102] She believed the president had signaled a similarly liberal

---

[95] MARCHAND, *supra* note 41, at 254.

[96] *Id.* at 254, 320.

[97] Crystal Eastman, Minutes of the Special Meeting (June 1, 1917), *microformed on* AUAM Papers, *supra* note 42, Reel 10:1.

[98] Crystal Eastman, Meeting, June 4 (June 4, 1917), *microformed on* AUAM Papers, *supra* note 42, Reel 10:1.

[99] Letter from Crystal Eastman to the Exec. Comm. (June 14, 1917), *microformed on* AUAM Papers, *supra* note 42, Reel 10:1.

[100] *Id.* Kellogg worried that "an aggressive policy against prosecution of the war" was incompatible with "an aggressive policy for settling it through negotiation and organizing the world for democracy." *Id.* (quoting Paul Kellogg). Wald believed that the bureau's new ventures "must inevitably lead to a radical change in the policy of the Union" and would jeopardize the AUAM's friendly relationship with the administration as well as the prospects of "governmental cooperation." *Id.* (quoting Lillian Wald).

[101] On the shift from progressivism to liberalism, see ALAN BRINKLEY, END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR 9 (1995) (describing "reform" liberalism as an offshoot of progressivism, skeptical of laissez-faire principles and committed, through the exercise of state power, to providing all citizens "a basic level of subsistence and dignity" and protecting "individuals, communities, and the government itself from excessive corporate power"); JAMES T. KLOPPENBERG, UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870–1920, at 299 (1986) (defining the "new liberalism" that emerged during the Progressive Era as "a moral and political argument for the welfare state based on a conception of the individual as a social being whose values are shaped by personal choices and cultural conditions"). Gary Gerstle has argued that right-leaning Progressives touted cultural homogeneity and reemerged during the 1920s as "reactionaries." By contrast, left-leaning Progressives split into two camps: one, which included the founders of the ACLU, "refused to accept the legitimacy of the war or the use of government power to legislate conformity"; the other embraced the war effort after the Russian Revolution and then "suffer[ed] through the disillusionment of Versailles and the domestic repression of 1919," including the "virulent nativism" that their own efforts at moral improvement helped to spawn, and subsequently developed a single-minded focus on industrial democracy that swallowed problems of race, ethnicity, and culture. Gary Gerstle, *The Protean Character of American Liberalism*, 99 AM. HIST. REV. 1043, 1053–54 (1994).

[102] Letter from Crystal Eastman to the Exec. Comm., *supra* note 99, at 2.

attitude toward enforcement of the Selective Service Act in his appointments to the War Department, which included Frederick Keppel, dean of Columbia University, and Progressive ideologue Walter Lippmann.[103]

Eastman acknowledged that forthright opposition to recruitment would undermine the AUAM's influence,[104] but she considered assistance for conscientious objectors to be consistent with the administration's goals. The Bureau's ambition, she concluded, was "to enlist the rank and file of the people, who make for progressivism the country over, in a movement for a civil solution of this world-wide conflict and fire them with a vision of the beginnings of the U.S. of the World."[105] Her Progressive confidence convinced her that administrative insulation and bureaucratic expertise would lead to the just execution of the law; she believed that the bureau could in fact help the president to execute his plan of leniency and deference to individual conscience.[106]

To avoid the perception that the AUAM had eschewed its other objectives, including its foundational ambition of "lead[ing] the liberal sentiment for peace," Eastman proposed a structural reorganization.[107] She called upon the AUAM to establish a "legal bureau for the maintenance of fundamental rights in war time." Those rights, in Eastman's estimation, comprised "free press, free speech, freedom of assembly, and liberty of conscience."[108] Eastman's plan, which the board formally enacted in early July, entailed a change in nomenclature. Rather than a Conscientious Objectors' Bureau, which suggested opposition to the administration's war policy, she suggested a Bureau for the Maintenance of Civil Liberties.[109] The reorganization also betokened a shift in the bureau's emphasis: the new bureau would continue to

---

103 *Id.*

104 *Id.* at 5.

105 *Id.* at 6 (quoting Paul Kellog).

106 Eastman conceded that if it became clear that Wilson's underlying intentions were militaristic, "the American Union Against Militarism must become, deliberately and obviously, the focus for the opposition," a turn of events that might precipitate a breakup of the union. *Id.* at 4. "But," she asked,

> [W]hy cross the bridge till we come to it? At present, taking the President at his word and counting his War Department appointments as in some degree significant, our plans for defending liberty of conscience, as well as our plans for maintaining free speech, free press, and free assembly, should logically command the support of those liberal democrats whose avowed leader the President until recently has been.

Id.

107 *Id.* at 6.

108 *Id.*

109 *Id.*

protect conscientious objectors, but it would situate that project within a broader commitment to personal rights.

The resulting Civil Liberties Bureau framed its wartime agenda as an inexorable outcrop of the AUAM's earlier activities. "A Union Against Militarism becomes, during wartime, inevitably a Union for the Defense of Civil Liberty," the organization eventually explained.[110] In reality, there was nothing inevitable about the organization's change in tack. On the contrary, both its defense of conscientious objectors and its ensuing expansion into other aspects of "civil liberty" advocacy were contingent and contested.

Within the AUAM, opposition to the new program stemmed from two principal sources. The first turned on conservative opposition. The leadership of the AUAM feared that hawks, patrioteers, and government prosecutors would equate endorsement of dissenters' rights with support for their cause, a slippage that civil liberties advocates would continue to confront in later years.[111] The second obstacle, however, was in many ways more poignant. Progressives within and outside the AUAM were reluctant even to raise the banner of rights to undermine state policy and majority will.[112]

Between the turn of the century and the outbreak of hostilities in Europe, the Progressive umbrella encompassed a wide and often conflicting array of projects and policy commitments, from tenement housing laws and municipal ownership of public utilities to eugenics and prohibition.[113] Among the few features that united these disparate reformers were a deep distrust of the federal judiciary and an aversion to an individualist breed of constitutional rights-based claims, which together had operated to defeat many of the most important Progressive initiatives.[114] In place of the autonomous individual, the

---

[110] Am. Union Against Militarism, Proposed Announcement for Press (Sept. 24, 1917), *microformed on* AUAM Papers, *supra* note 42, Reel 10:1.

[111] Letter from Crystal Eastman to the Exec. Comm., *supra* note 99. The ACLU consistently emphasized that its neutral commitment to civil liberties bore no relation to the substantive views of the speakers it defended. *See, e.g.*, Transcript of Testimony of Arthur Garfield Hays at 30–31, ACLU v. Casey, *microformed on* ACLU Papers, *supra* note 24, Reel 153, Vol. 1051 ("We have defended the right of the Ku Klux Klan to hold meetings, as well as the right of labor to hold meetings, as well as the right of people who believe in birth control, as well as the right of negroes to hold meetings in the south. We all over the country have defended the right of free assemblage of everybody, no matter what they believed in.").

[112] GRABER, *supra* note 5, at 65–66.

[113] On the meaning of progressivism, see Peter Filene, *An Obituary for "The Progressive Movement,"* 22 AM. Q. 20 (1970); Daniel T. Rodgers, *In Search of Progressivism*, REVS. AM. HIST., Dec. 1982, at 113.

[114] Rodgers, *supra* note 113, at 124 (describing a revolt against "a particular set of formal fictions traceable to Smith, Locke, and Mill—the autonomous economic man, the autonomous possessor of property rights, the autonomous man of character").

Progressives championed the common good. Roscoe Pound, the architect of sociological jurisprudence, was emblematic of the dominant view. Pound believed that the crucial task of legal doctrine was to "free individual capacities in such a way as to make them available for the development of the general happiness or common good";[115] individual beliefs warranted protection only to the extent that they promoted the public welfare.[116]

For the AUAM leadership and many other Progressives, aversion to rights-based individualism was fundamentally bound up with the struggle between labor and capital. In their view, classical legal thinkers and, more to the point, judges, had defended private property because of a misguided belief in natural rights.[117] The Progressives, by contrast, regarded the allocation of wealth as a social function and the protection of property as a political and legal contingency.[118] Under appropriate circumstances, security in property and personal effects might serve the social welfare. But other economic policies were equally advisable, including a living wage (which would enhance political participation)[119] and collective bargaining (which would counter the consolidation of wealth).[120]

The widespread desire to moderate the class struggle and promote social harmony was a central motivation for Progressive reform.[121] Bolstered by the high cost of workplace tragedies, including the Monongah Mining disaster and the Triangle Shirtwaist fire, Progressive proposals proliferated during the early twentieth century. States and, in some cases, federal laws reached such issues

---

115 Roscoe Pound, *Interests of Personality* (pt. 1), 28 HARV. L. REV. 343, 347 (1915).

116 Roscoe Pound, *Interests of Personality* (pt. 2), 28 HARV. L. REV. 445, 453–54 (1915) ("[W]e have been accustomed to treat the matter [of free speech] from the standpoint of the individual interest. Undoubtedly there is such an interest, and there is the same social interest in securing it as in securing other individual interests of personality. . . . But this feeling may have an important social interest behind it. For the individual interest in free belief and opinion must always be balanced with the social interest in the security of social institutions and the interest of the state in its personality.").

117 ELDON J. EISENACH, THE LOST PROMISE OF PROGRESSIVISM 187 (1994).

118 *Id.*

119 *Id.* at 193.

120 *See, e.g.*, HERBERT CROLY, PROGRESSIVE DEMOCRACY (1914). In support of labor unions, Herbert Croly characteristically argued that the social web of industrial organization would turn individual workers into "enlightened, competent, and loyal citizens of an industrial commonwealth." *Id.* at 379; *see also* LEON FINK, PROGRESSIVE INTELLECTUALS AND THE DILEMMAS OF DEMOCRATIC COMMITMENT (1997); SHELTON STROMQUIST, REINVENTING "THE PEOPLE": THE PROGRESSIVE MOVEMENT, THE CLASS PROBLEM, AND THE ORIGINS OF MODERN LIBERALISM (2006); CLARENCE E. WUNDERLIN, VISIONS OF A NEW INDUSTRIAL ORDER: SOCIAL SCIENCE AND LABOR THEORY IN AMERICA'S PROGRESSIVE ERA (1992).

121 *See* STROMQUIST, *supra* note 120, at 4 (describing Progressive emphasis on "class harmony").

as workplace safety, minimum wage, maximum hours, and workers' compensation.[122]

Measures to buttress organized labor met with more resistance, but labor advocates too managed a few successes.[123] Among their notable achievements was the Manly Report of the United States Commission on Industrial Relations, issued in the summer of 1915, which documented a pattern of industrial and government collusion to infringe the rights of labor—a set of rights that advocates defined in collective rather than individual terms.[124] Created at the instigation of the very same Progressive social workers who founded the AUAM,[125] the Commission was initiated under William Howard Taft but executed under Wilson.[126] Although it included industry and public representatives in addition to labor, its overall composition skewed left, and its two years of hearings were far friendlier to labor than industry.[127] Among the hundreds of witnesses who testified was ACLU co-founder Crystal Eastman, who told the Commission that women "must raise their wages as men have raised their wages, by organization."[128] When the testimony concluded, each

---

122 *See, e.g.*, STROMQUIST, *supra* note 120; JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC (2004); Rodgers, *supra* note 113.

123 President Theodore Roosevelt made a few concessions to unions, conditioned on their good behavior. Although he countenanced neither class-consciousness nor the redistribution of wealth, his attitude satisfied moderate labor leaders like John Mitchell, president of the United Mine Workers of America, who came to regard the state as an essential tool of labor reform. MARC KARSON, AMERICAN LABOR UNIONS AND POLITICS, 1900–1918, at 90 (1958). The Woodrow Wilson Administration was somewhat more accommodating. Although he harbored real reservations about organized labor, Wilson's many pro-labor appointees ensured union representation in policymaking and in the resolution of particular labor disputes. By most accounts, Wilson abandoned his earlier anti-union sentiments in the interest of political expediency. *See, e.g.*, KATHLEEN DALTON, THEODORE ROOSEVELT: A STRENUOUS LIFE 402 (2002); ARTHUR S. LINK, WILSON: THE ROAD TO THE WHITE HOUSE 527 (1947); JOSEPH A. MCCARTIN, LABOR'S GREAT WAR: THE STRUGGLE FOR INDUSTRIAL DEMOCRACY AND THE ORIGINS OF MODERN AMERICAN LABOR RELATIONS, 1912–1921, at 15–16 (1997).

124 U.S. COMM'N ON INDUS. RELATIONS, FINAL REPORT AND TESTIMONY SUBMITTED TO CONGRESS BY THE COMMISSION ON INDUSTRIAL RELATIONS, S. DOC. NO. 415, vol. 1, at 17 (1st Sess. 1916) [hereinafter Manly Report] (report of Basil M. Manly).

125 *See* WEINRIB, *supra* note 31.

126 GRAHAM ADAMS, JR., AGE OF INDUSTRIAL VIOLENCE, 1910–15: THE ACTIVITIES AND FINDINGS OF THE UNITED STATES COMMISSION ON INDUSTRIAL RELATIONS 25–74 (1966).

127 *Id.* at 74.

128 S. DOC. NO. 415, vol. 11, at 10,782 (testimony of Crystal Eastman). Eastman appeared in her capacity as an executive board member of the Congressional Union for Woman's Suffrage. *Id.* at 10,781. Eastman was also appointed to the Commission's research division in 1913 to "take up the constitutional and legal aspects of industrial relations, the courts and the workers." *Industrial Relations Statistics or a Program?*, SURVEY, Nov. 8, 1931, at 152, 152. Although Eastman's appointment was reported, I have been unable to find any mention of it in her papers, nor is it more than mentioned in the secondary literature. *E.g.*, 2 Katja Wuestenbecker, *Crystal Eastman*, *in* THE ENCYCLOPEDIA OF WORLD WAR I: A POLITICAL, SOCIAL, AND MILITARY HISTORY 385, 385–86 (Spencer C. Tucker ed., 2005).

camp issued its own findings, but the report endorsed by Commission Chairman Frank P. Walsh was strongly pro-labor and called for "drastic" changes in the allocation of wealth and federal protection of unions' right to collective bargaining as well as federal provisions for social insurance.[129] Walsh boasted that it was "more radical than any report upon industrial subjects ever made by any government agency."[130] Baldwin, who knew Walsh from his work on juvenile justice, told him that the report would "do more to educate public opinion to the truth of existing conditions than any other one document in existence."[131]

Accomplishments like these bolstered Progressive confidence in state power. By the mid-1910s, even organized labor had warmed to government intervention.[132] One branch of government, however, consistently stood in the way of progress: again and again, the judiciary undercut reformers' most significant gains. The most notorious example, and a powerful Progressive rallying cry, was the Supreme Court's decision in *Lochner v. New York*, which invalidated a New York maximum-hours law because it interfered with an implicit constitutional "right of free contract."[133] Pet Progressive projects like the minimum wage, the eight-hour day, and workers' compensation all died at judicial hands.[134] And yet, the invalidation of state legislation was neither the

---

[129] *See generally* Manly Report, *supra* note 124.

[130] MELVYN DUBOFSKY, THE STATE AND LABOR IN MODERN AMERICA 55 (1994). On the tensions within progressivism between class-conscious labor advocates like Walsh and advocates of class reconciliation, see STROMQUIST, *supra* note 120, at 165–90. On the Commission on Industrial Relations, see generally ADAMS, *supra* note 126.

[131] COTTRELL, *supra* note 29, at 45. He was especially impressed by the testimony of Theodore Schroeder with respect to the suppression of workers' speech. *Id.*

[132] Unions worried that protective labor laws and state intervention in labor disputes would undermine union power. NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 11–12 (2002). Although the American Federation of Labor publicly championed "voluntarism"—the notion that labor activity should and did take place outside the realm of state power—labor historians have demonstrated that Samuel Gompers and his cohort used government adeptly when it suited their agenda. Nick Salvatore, *Introduction* to SAMUEL GOMPERS, SEVENTY YEARS OF LIFE AND LABOR: AN AUTOBIOGRAPHY xxii–xxiii, xxxv (ILR Press, Nick Salvatore ed., 1984) (1925). For discussion of the deep ties between President Wilson and organized labor, see DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865–1925, at 363–69 (1987); Salvatore, *supra*, at xxxv–xxxvii. Indeed, Wilson's secretary of labor was a former official of the UMW and openly favored the cause of labor. ARTHUR S. LINK, WILSON: THE NEW FREEDOM 19 (1956).

[133] 198 U.S. 45, 57 (1905). Notwithstanding revisionist claims about popular reaction to *Lochner* in the immediate aftermath of the case, *e.g.*, DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011), it is clear that by the 1910s Progressive antipathy toward the case had crystallized.

[134] The Commission on Industrial Relations assembled a long list of statutes invalidated by courts on constitutional grounds. Representative examples include statutes requiring statement of cause of discharge,

most pervasive judicial device nor the most damaging to organized labor. In the decades before World War I, employers (and organizations of employers, such as the National Association of Manufacturers) justified their open shop policies by reference to individual rights; closed shops, they argued, abridged workers' freedom by conditioning employment on their obligation to join the union.[135] Moreover, they argued that yellow-dog contracts prohibiting workers from joining unions protected individual rights by linking workers' duties to those which they had voluntarily assumed.[136] Courts agreed on both fronts, and with a handful of exceptions, they proved ready and willing to enjoin "coercive" labor practices—particularly efforts by workers to conduct boycotts or to dissuade strike-breakers.[137]

The "labor injunction" quickly became the first line of defense for beleaguered employers.[138] Judges often issued ex parte restraining orders unsupported by evidence of illegal behavior.[139] Meanwhile, in *Gompers v. Buck's Stove & Range Co.*,[140] the U.S. Supreme Court held boycotts to be enjoinable under the Sherman Act, rejecting the AFL's argument that publication of its "do not patronize" list was protected by the First Amendment.[141] This ruling came just three years after the Court struck down the Erdman Act's prohibition on yellow-dog contracts as an unconstitutional

---

prohibiting blacklisting, protecting members of labor unions, restricting the power of courts to grant injunctions, setting wages in public works, fixing time for payment of wages, and prohibiting or regulating company stores. Manly Report, *supra* note 124, at 44.

135 *See generally* DANIEL R. ERNST, LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM (1995); WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991).

136 The Supreme Court invalidated a state anti-yellow-dog statute on that basis in *Coppage v. Kansas*, 236 U.S. 1, 14 (1915) ("Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich, for the vast majority of persons have no other honest way to begin to acquire property save by working for money."); *see also* Daniel Ernst, *The Yellow-Dog Contract and Liberal Reform, 1917–1932*, 30 LAB. HIST. 251, 268–70 (1989).

137 *E.g.*, Transcript of Record at 627, Gompers v. Buck's Stove & Range Co., No. 372 (D.D.C. Dec. 23, 1908) ("[T]he labor unions and [their] officers meddle into a member's daily affairs deeper than does the law; restrict him in matters that the law leaves free . . . ."). For an early discussion of the dominant approach and its exceptions, see Note, *Strikes and Boycotts*, 34 HARV. L. REV. 880 (1921).

138 FORBATH, *supra* note 135, at 59.

139 *Id.* at 99, 193.

140 221 U.S. 418 (1911).

141 *Id.* at 438–39.

infringement on workers' freedom of contract under the Fifth Amendment,[142] a holding that it applied to state anti-yellow-dog laws in 1915.[143]

The judiciary's obstinacy on these issues, and its broader hostility to public regulation, threatened to undermine the Progressive reform agenda—and so Progressives railed against the judicial construction of the autonomous individual.[144] The liberty of an isolated worker to bargain over the conditions of his (or, increasingly, her[145]) labor blinked the reality of the modern labor market. By invoking formal rights in service of private property, classical legalism exacerbated social tensions.[146] According to Roscoe Pound, this blindness to law's practical effects was one major problem with the *Lochner*-era judiciary. As Roscoe Pound observed, "There may be a compulsion in fact when there is none in law."[147] A second, related problem was the propensity of the courts to "exaggerate private right at the expense of public interest," without taking social circumstances into account.[148]

These developments were a central presence in the lives and careers of the members of the AUAM. Most were actively involved in some aspect of improving workers' lives. Jane Addams famously worked to mitigate class injustice through social work, legislative reform, and, sometimes, union activity.[149] Lillian Wald (as well as Addams) helped to found the Women's

---

[142] Adair v. United States, 208 U.S. 161, 172 (1908). The Commission on Industrial Relations noted

> the inconsistency between the decisions in the Debs case, wherein it is held that the control of Congress over interstate commerce is so complete that it may regulate the conduct of the employees engaged therein to the extent of enjoining them from going on a sympathetic strike, and the decision in the Adair case, wherein it is held that Congress has so little power over the conduct of those engaged in interstate commerce that it can not constitutionally forbid employers engaged therein discharging their employees merely because of membership in a labor union.

Manly Report, *supra* note 124, at 45.

[143] Coppage v. Kansas, 236 U.S. 1, 13 (1915).

[144] The phenomenon was not limited to cases affecting labor disputes and labor protections. Indeed, the judiciary in the United States "was notorious as a graveyard for social-political initiatives." DANIEL T. RODGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE 58 (1998).

[145] The Supreme Court declined to extend that liberty to women in *Muller v. Oregon*, 208 U.S. 412 (1908), in which it upheld a maximum hour law applicable to women. In *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), however, the Court struck down federal minimum wage legislation for women on the grounds that it unconstitutionally infringed on liberty of contract.

[146] In their influential book *Ethics*, John Dewey and James Hayden Tufts explained, "[I]t is the possession by the more favored individuals in society of an effectual freedom to do and to enjoy things with respect to which the masses have only a formal and legal freedom, that arouses a sense of inequity." JOHN DEWEY & JAMES H. TUFTS, ETHICS 439 (1908).

[147] Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 463 (1909).

[148] *Id.* at 461.

[149] LOUISE W. KNIGHT, CITIZEN: JANE ADDAMS AND THE STRUGGLE FOR DEMOCRACY 213 (2005).

Trade Union League.[150] Florence Kelley established the National Consumers' League and drafted the brief on which the influential "Brandeis Brief" in *Muller v. Oregon* was modeled.[151] The list goes on. All were attentive to the advantages of state cooperation and the pitfalls of judicial intervention. Probably, all were skeptical of individual rights.

The experiences of Crystal Eastman, the AUAM's executive secretary, are illustrative. A reformist by upbringing, Eastman was trained as a lawyer but unable, as a woman, to find work as a practicing attorney.[152] Instead, she spent her early career in sociological research. She had studied political economy at Columbia before switching to law, and between 1908 and 1910 she applied both sets of skills in her evaluation of industrial accidents in New York.[153] Her analysis as secretary of the Wainwright Commission, which was created by the New York legislature to study the law of workplace accidents, steered the state's legislative effort to a new, no-fault compensatory system in lieu of the outmoded tort rules of employer liability.[154] But the high court of New York struck down the workers' compensation law Eastman helped to craft as a violation of employers' property rights.[155]

For Eastman and her colleagues, the decision to aid the cause of anti-militarism by invoking constitutional rights to inhibit state power was a remarkable development. The AUAM's leadership saw the state as an ally in the struggle against industrial inequality, and individual rights—especially judicially enforceable ones—as threats to democracy. It is not enough to assert that the defense of conscientious objectors grew out of the AUAM's opposition to war. Espousing a theory of individual autonomy threatened to prop up the very constitutional regime that the organization's founders habitually decried.

---

[150] On the Women's Trade Union League, see, for example, NANCY SCHROM DYE, AS EQUALS AND AS SISTERS: FEMINISM, THE LABOR MOVEMENT, AND THE WOMEN'S TRADE UNION LEAGUE OF NEW YORK (1980); Allen F. Davis, *The Women's Trade Union League: Origins and Organization*, 5 LAB. HIST. 3 (1964); Diane Kirby, *"The Wage-earning Woman and the State": The National Women's Trade Union League and Protective Labor Legislation, 1903–1923*, 28 LAB. HIST. 54 (1987).

[151] KATHRYN KISH SKLAR, FLORENCE KELLEY AND THE NATION'S WORK: THE RISE OF WOMEN'S POLITICAL CULTURE, 1830–1900, at 147–48, 255–64 (1995).

[152] WITT, *supra* note 7, at 166.

[153] CRYSTAL EASTMAN, WORK-ACCIDENTS AND THE LAW (1910); WITT, *supra* note 7, at 170.

[154] WITT, *supra* note 7, at 169–70.

[155] Ives v. S. Buffalo Ry., 94 N.E. 431, 439 (N.Y. 1911). New York subsequently amended its constitution to authorize workers' compensation. 1914 N.Y. Laws 216.

II. THE LIMITS OF CONSCIENCE

In June 1917, the AUAM announced its "war time program."[156] Its second objective, "a just and lasting peace," was the organization's standard fare.[157] It called for a clear statement of America's peace terms and publication of international agreements, and it aspired toward "world federation" once hostilities ceased.[158] Roger Baldwin, however, had a different and more immediate program in mind. His project, developed in cooperation with Crystal Eastman, fell under the heading "against militarism."[159] It entailed opposition to the permanent establishment of conscription, legal advice to conscientious objectors, and above all, the preservation of "civil liberty in war time."[160]

In other work, I explore Progressives' gradual embrace of countermajoritarian constitutionalism over the course of the 1920s and 1930s. I also examine the ACLU's rehabilitation of the courts as a forum for Progressive change.[161] Here, I take up an antecedent question: namely, the AUAM's brief flirtation with exemption claims grounded in freedom of conscience, and its subsequent retreat to other, more palatable personal rights.

The AUAM experimented with various justifications for exemption from military service. Sometimes, it cast liberty of conscience as an individual right (conscience is "nothing if it is not individual," it explained[162]). Eschewing the ordinary Progressive emphasis on public utility, it conjured an "Anglo-Saxon tradition for which our ancestors fought and died."[163] It linked this commitment to the "free exercise of religion according to the dictates of creed and conscience," which it cast as an "established and cherished right."[164]

---

156 Past Programes of the American Union Against Militarism (for reference), *microformed on* AUAM Papers, *supra* note 42, Reel 10:1.

157 *Id.*

158 *Id.*

159 *Id.*

160 *Id.*

161 WEINRIB, *supra* note 31; Laura M. Weinrib, *From Left to Rights: Civil Liberties Lawyering Between the Wars*, *in* LAW, CULTURE AND THE HUMANITIES (forthcoming 2016); Laura M. Weinrib, *From Public Interest to Private Rights: Free Speech, Liberal Individualism, and the Making of Modern Tort Law*, 34 L. & SOC. INQUIRY 187 (2009); Laura M. Weinrib, *The Sex Side of Civil Liberties:* United States v. Dennett *and the Changing Face of Free Speech*, 30 L. & HIST. REV. 325 (2012).

162 AM. UNION AGAINST MILITARISM, CONSCRIPTION AND THE CONSCIENTIOUS OBJECTOR TO WAR (May 1917), *microformed on* AUAM Papers, *supra* note 42, Reel 10:2.

163 *Id.*

164 NAT'L CIVIL LIBERTIES BUREAU, *supra* note 81, at 3.

The extent to which the tradition the AUAM described was respected in practice is, of course, a contentious question.[165] Certainly, appeals to freedom of conscience had strong colonial roots, but it seems unlikely that Founding-era judges and politicians anticipated judicial carve-outs of the kind the Supreme Court created in the twentieth century.[166] As a matter of legislative dispensation and prosecutorial non-enforcement, by contrast, exemptions from generally applicable laws probably occurred with some regularity.[167] In fact, the principal example was exemption from military service, which many statutes and state constitutions provided—contingent on payment or substitute service—despite opposition from dominant religious groups.[168] Still, it is reasonably clear that the historic case for exemptions was premised on denominational affiliation or, at least, religious belief.[169] With few exceptions, proponents of exemptions described a tension between competing spheres of sovereignty, worldly and spiritual, not the preservation of individual autonomy against the encroachment of state power.[170]

---

165 See Nathan S. Chapman, *Disentangling Conscience and Religion*, 2013 U. ILL. L. REV. 1457, 1464–71, for an overview of the literature.

166 *See, e.g.*, Hamburger, *supra* note 21, at 918. For scholarship on the founding period, see, for example, NUSSBAUM, *supra* note 21, at 84–114, 120–30; DAVID SEHAT, THE MYTH OF AMERICAN RELIGIOUS FREEDOM (2011); 12 WIECEK, *supra* note 12, at 203–49, 205 (reviewing "the 'prehistory' of religion-clause jurisprudence"); McConnell, *supra* note 11.

167 McConnell, *supra* note 11, at 1468–69.

168 Hamburger, *supra* note 21, at 929 n.65.

169 JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 39 (2000); Kent Greenawalt, *The Significance of Conscience*, 47 SAN DIEGO L. REV. 901, 901 (2010); McConnell, *supra* note 11, at 1492–503. A few Founding-era thinkers, and a fair number of later ones, have sought to decouple exemptions from religion, either for policy reasons or on Establishment Clause grounds. James Madison may have held such a view. *See* Sehat, *supra* note 166, at 31–50; *see also* NUSSBAUM, *supra* note 21, at 97–104 (describing the various drafts of the Free Exercise Clause and observing that the Framers may have seen little difference between the terms "conscience" and "religion"). For later examples, see DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION (1986); Andrew Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*, 15 LEGAL THEORY 215 (2009). Other scholars reject the favored treatment of religious claims to exemption and argue that the state need not accommodate either religious or secular claims of conscience in the context of generally applicable, non-persecutory laws. *E.g.*, BRIAN LEITER, WHY TOLERATE RELIGION? (2012); Case, *supra* note 10; Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994). In *Liberty of Conscience*, Martha Nussbaum advocates the intermediate solution of "defend[ing] at least some accommodations as constitutionally required, and many other legislative accommodations as permissible," while "mitigat[ing] the unfairness to nonreligious searchers as much as we possibly can, by extending the account of religion as far as we can, compatibly with administrability." NUSSBAUM, *supra* note 21, at 173; *cf.* GREENAWALT, *supra* note 11.

170 McConnell, *supra* note 11, at 1497. In fact, "[l]iberty could only be obtained by submission to the civil laws of civil government." Hamburger, *supra* note 21, at 936. On the other hand, Founding-era thinkers typically shared a Protestant understanding of individual, not institutional, accountability with respect to personal salvation. *See, e.g.*, Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U.

And yet, by the 1910s (when references to "conscience" in the *Survey* were routinely preceded by the modifier "public"[171]), arguments for exemption smacked suspiciously of *Lochner*-style individual rights. When conservatives denounced the administration's incursions on *civil liberty*—as they did often during the war—they cited purported abuses of property rights as distinguished from personal rights.[172] Nonetheless, their language invoked the state's interference with "individual freedom" and its intrusion on "intimate concerns."[173] As Norman Thomas observed, the same conservatives who accused conscientious objectors of antisocial attitudes were "rampant individualists" who regularly rejected proposals for the "conscription of wealth."[174]

Conservatives were not alone in attacking state power. Over the previous decade, anarchists and free lovers had seized on state-skeptical constitutionalism, as well. Just months before passage of the Selective Service Act, Margaret Sanger ambitiously if unavailingly went so far as to challenge birth control laws for infringing her "absolute right of enjoyment of intercourse unless the act be so conducted that pregnancy be the result"—a restriction she deemed incompatible with "her free exercise of conscience and pursuit of happiness."[175] Lawyers for the Free Speech League, founded in 1902, had pursued constitutional litigation as well as publicity and political persuasion to advance the free speech cause.[176] Its head, Theodore Schroeder, championed such "personal liberties" as Sunday regulations, public expenditures by religious institutions, the suppression of secularists and free-thought lecturers,

---

L. REV. 346, 373 (2002). Recent historical work "challenge[s] the notion that institutional autonomy was a meaningful or common concern among early Americans or their governments," and "[g]overnment involvement in disputes over the rights of religious institutions traditionally protected individual conscience rather than institutional autonomy." Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. PA. L. REV. 307, 313, 372 (2014).

171 *E.g.*, *Tariff Revision and Wage Cuts*, SURVEY, May 24, 1913, at 261, 261 ("The public conscience demands that they work under healthy conditions."); *Potlach vs. Sociology*, SURVEY, July 26, 1913, at 542, 543 ("[T]he public conscience is waking up.").

172 *See* WEINRIB, *supra* note 31. For example, the president of the American Bar Association denounced the government's wartime abridgment of civil liberty by reference to "fixing hours of labor and rates of wages." Walter George Smith, *Civil Liberty in America*, 4 A.B.A. J. 551, 558, 560 (1918).

173 Smith, *supra* note 172, at 560.

174 Thomas, *supra* note 73, at 393. By contrast, even the "most individualistic" of the conscientious objectors "favor[ed] increased social control of property." *Id.* He explained: "In order to defend our economic system they are . . . more tender in their treatment of money and profit, which have no conscience, than of the deepest convictions of men." *Id.*

175 People v. Byrne, 163 N.Y.S. 682, 687 (Sup. Ct. 1917).

176 For example, in *Patterson v. Colorado*, 205 U.S. 454 (1907), it sought unsuccessfully to undermine the common law "bad tendency" test. *Id.*

land gifts to sectarian institutions, Bible study in the public schools, and tax exemptions for church property.[177] Although it never won a significant victory in court,[178] the League pushed some Progressives to question whether a First Amendment trump on legislative will might occasionally serve useful ends.[179] Notably, it justified free speech by reference to personal autonomy as well as social utility and the greater good.[180]

For most Progressives, however, democratic citizenship was ultimately a collective endeavor, and society could not afford to countenance the selfish exercise of individual rights. "True liberty," according to one prominent Progressive theologian, "mean[t] the voluntary sacrifice of self for the common life."[181] Thus, the AUAM was hard pressed to square conscientious objection to war with the Progressive worldview. In its pamphlets and publications, the organization claimed that liberty of conscience was a means toward "social progress."[182] It subsequently explained that "[p]rogress begins with unpopular minorities, and we endanger society when we imprison heretics and agitators."[183] It endorsed an account by British economist John A. Hobson, who argued that state-enforced conformism would lead to "despotism" and encourage uncritical submission to arbitrary rule.[184] It also reprinted the work

---

177 Letter from Theodore Schroeder to Roger N. Baldwin (Dec. 4, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 1, Vol. 3; *see also* Letter from Theodore Schroeder to Roger N. Baldwin (Nov. 27, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 1, Vol. 3 ("[Y]our proposed inviting members suggest the possible narrowing of the issues to economic liberty with a maximum Pacifist leaning. This seems to me to involve a possible neglect of the more personal liberties which are being very much invaded."). On the League's activities, see RABBAN, *supra* note 5, at 64–175.

178 RABBAN, *supra* note 5, at 2, 25.

179 *Id.* at 76.

180 *Id.* at 23–25.

181 EISENACH, *supra* note 117, at 189 (quoting Samuel Zane Batten).

182 Letter from Norman Thomas & Roger N. Baldwin to the Conference Comm. on the Army, *supra* note 83.

183 NAT'L CIVIL LIBERTIES BUREAU, A SYMPATHETIC STRIKE IN PRISON (New York, undated) (on file with Swarthmore College Library, Swarthmore College Peace Collection, Records of American Civil Liberties Union, Box 1). A similar impulse motivated Norman Thomas's insistence in the *New Republic* that "[m]en who are sure that this is a war for democracy and that the conscientious objector is wrong cannot so distrust the people as to believe that the autocratic method of coercion of conscience is either necessary or defensible." Norman Thomas, *Conscientious Objector Replies*, NEW REPUBLIC, July 7, 1917, at 274, 275; *see also The Religion of Free Men*, NEW REPUBLIC, May 26, 1917, at 110 ("To keep alive genuine tolerance in war time is the greatest single achievement to which rationalists can dedicate themselves. . . . An excess of power permits certain anti-social men to wield with utter unscrupulousness the whole machinery of anti-humanism, of which by the sheer accident of circumstance they happen to be gaining possession at this critical time.").

184 John A. Hobson, *The World Safe for Democracy*, *reprinted from* SURVEY, June 29, 1918 (on file with Swarthmore College Library, Swarthmore College Peace Collection, Records of American Civil Liberties Union, Box 1).

of Norman Angell, whose essay *Why Freedom Matters* justified conscientious objection as an exercise in pluralism.[185] Angell urged the interrogation of all sacred institutions, including private property, and asked why wealth was protected when human life was "forfeit to the safety of the State."[186] Invoking "utility" rather than "any conception of abstract 'right'—*jus, droit, recht*," he enjoined the state to protect the "right of individual conscience to the expression of its convictions," the "right of the heretic to his heresy."[187] By exercising private judgment, Angell argued, citizens would also develop their public judgment.[188] Society as a whole would benefit by tolerating a diversity of beliefs.

At first, the AUAM found fertile ground for such arguments in some Progressive circles, which promoted tolerance on the basis of cultural pluralism as well as state security (unwilling soldiers, after all, were bad for morale and unreliable in battle). The president had assured Americans that the draft was "in no sense a conscription of the unwilling."[189] In that spirit, the *New Republic*—which, in Crystal Eastman's estimation, was practically "the administration's own organ"[190]—emphasized the "democratic purposes" underlying conscription.[191] The draft was intended to introduce efficiency into military organization, not to "coerc[e] unwilling minorities into the firing line"; "show[ing] every consideration to conscientious objectors" had never been more essential.[192] Within the War Department, some important officials agreed,[193] though it bears emphasis that they promoted tolerance as a matter of legislative or administrative accommodation, not a trump on democratic processes imposed by judicial decree.

To a considerable extent, "lenient administration of the Conscription Act" was what the AUAM was after.[194] It is no surprise, then, that the organization initially pursued a cooperative strategy. In an era when government lacked information about its citizens, many men—perhaps as many as three million—

---

185 *See* NORMAN ANGELL, WHY FREEDOM MATTERS (Nat'l Civil Liberties Bureau 1919) (1918).

186 *Id.* at 15.

187 *Id.* at 16.

188 *Id.* at 6.

189 President Woodrow Wilson, Proclamation 1370 (May 18, 1917), http://www.presidency.ucsb.edu/ws/?pid=65403; Letter from Crystal Eastman to the Exec. Comm., *supra* note 99.

190 Letter from Crystal Eastman to the Exec. Comm., *supra* note 99.

191 *The Success of Selective Service*, NEW REPUBLIC, June 9, 1917, at 148, 149.

192 *Id.*

193 Jeremy Kessler has connected this accommodationist strain among War Department officials to Progressives' endorsement of national self-determination. Kessler, *supra* note 8, at 1115.

194 Letter from Crystal Eastman to the Exec. Comm., *supra* note 99.

evaded the draft by declining to register.[195] Somewhat reluctantly, the AUAM advised objectors to take a different and riskier course: to register and to state their grounds for requesting exemption.[196] As one AUAM statement put it (somewhat ambivalently), "Obedience to law, to the utmost limit of conscience" was "the basis of good citizenship."[197] And according to the AUAM, conscientious objectors were model citizens. Few of them desired to save their own souls at the expense of national security, Norman Thomas emphasized.[198] Rather, the typical objector believed "that his religion or his social theory in the end can save what is precious in the world far better without than with this stupendously destructive war."[199]

To most Progressives, however, such judgments were properly assigned to representative government, not the vagaries of individual preferences or the dictates of sectarian scruples.[200] By June, the esteemed historian and philosopher Arthur O. Lovejoy expressed a view held by many Progressives when, writing in the *New Republic*, he ascribed to conscientious objectors an "anti-social attitude and mode of conduct."[201] One month later, John Dewey chose the same forum for his article *Conscience and Compulsion*, in which he indicted evangelical Protestantism for "locat[ing] morals in personal feelings instead of in the control of social situations."[202] Consistent with the Progressive attack on legal formalism, Dewey also blamed the American legal tradition, which had "bred the habit of attaching feelings to fixed rules and injunctions instead of to social conditions and consequences of action as these are revealed to the scrutiny of intelligence."[203] A "more social and less

---

195 CAPOZZOLA, *supra* note 7, at 30. These "slackers" were not captured within the small number of official conscientious objectors. On the ensuing "slacker raids," see *id.* at 41–53. According to the NCLB, only a "small proportion" of those who failed to register were motivated by "genuinely conscientious scruples against participation in war." NAT'L CIVIL LIBERTIES BUREAU, *supra* note 81, at 15.

196 Am. Union Against Militarism, Statement (May 23, 1917), *microformed on* AUAM Papers, *supra* note 42, Reel 10:1 (concluding "after consideration which has in some cases reversed original opinion," that "all conscientious objectors should register"). According to the NCLB, "No public statements advising men not to register were made by any except a few radical organizations in the middle west," all of which were subsequently prosecuted by federal authorities. NAT'L CIVIL LIBERTIES BUREAU, *supra* note 81, at 14.

197 Am. Union Against Militarism, *supra* note 196; Letter from Norman Thomas & Roger N. Baldwin to the Conference Comm. on the Army Bill, *supra* note 83.

198 Thomas, *supra* note 73, at 391.

199 *Id.*

200 Prominent Progressives such as Herbert Croly and Walter Lippmann rejected a role for religion in public life. SEHAT, *supra* note 166, at 208.

201 Arthur O. Lovejoy, *A Communication to Conscientious Objectors*, NEW REPUBLIC, June 16, 1917, at 187, 189. Lovejoy nevertheless counseled "toleration" for "genuinely 'conscientious' objectors." *Id.*

202 John Dewey, *Conscience and Compulsion*, NEW REPUBLIC, July 14, 1917, at 297, 298.

203 *Id.* at 298.

personal and evangelical method," he argued, would emphasize "objective facts" instead of the "inhibitions of inner consciousness."[204]

In an August 1917 article for the *Survey*,[205] Norman Thomas responded directly to Dewey's position. Where Dewey attributed to conscientious objectors a "merely personal morality," Thomas cast their moral stand in social terms. Compulsory service and war itself were more deeply "anti-social" than refusal to serve.[206] What conscientious objectors believed, according to Thomas, was "that the same course of action which keeps one's self 'unspotted . . . within'" (Dewey's words) would "ultimately prove the only safe means for establishing a worthy social system."[207] And yet, while some Progressives were willing to accept moderation as a "matter of expedience or of sound public policy," Thomas went too far when he insisted on "the recognition of conscientious objection as a matter of democratic right."[208] Dewey urged the authorities to assign conscientious objectors whatever work would "put the least heavy load possible upon their consciences,"[209] and he counseled humane treatment for those who were imprisoned.[210] Moreover, he criticized Columbia's dismissal of Professor James M. Cattell for, among other issues, advocating a bill to protect conscientious objectors.[211] But such concessions reflected policy concerns, not rights-balancing; even sympathetic Progressives declined to frame their appeals to government accommodation of conscientious objectors in the language of rights.

The AUAM's Civil Liberties Bureau, announced on July 2, 1917, was more palatable to the organization's Progressive constituency.[212] Eastman maintained that the organization's "attempt to have the conscription act administered with due regard to liberty of conscience" was no more antagonistic to the nation's war effort than its "attempt to save free speech, free press and assembly from the wholesale autocratic sweep which war-efficiency

---

204 *Id.*

205 Thomas, *supra* note 73.

206 *Id.* at 391, 394.

207 *Id.* at 391.

208 *Id.* at 394; *see, e.g.*, Lovejoy, *supra* note 201, at 189 ("From the conclusion that genuinely 'conscientious' objectors should be given non-combatant duties to perform, few, I take it, will dissent. Your number appears to be small; and of your scruples, the country may well be generously considerate.").

209 Dewey, *supra* note 202, at 297.

210 Kessler, *supra* note 8, at 1149.

211 STEVEN ROCKEFELLER, JOHN DEWEY: RELIGIOUS FAITH AND DEMOCRATIC HUMANISM 302 (1991).

212 Press Release, Am. Union Against Militarism (July 2, 1917), *microformed on* AUAM Papers, *supra* note 42, Reel 10:2.

dictates."[213] That she felt compelled to argue the point is a telling indication of its precariousness. In defending the rights of conscientious objectors, the AUAM demanded special dispensation from the ordinary operations of democratic laws. Expressive freedom, by contrast, was more easily reconcilable than conscientious objection to the Progressive vision of the public good.

To be sure, wartime enforcement of free speech proved almost as tepid in practice as freedom of conscience.[214] In debate over the Espionage Act, some legislators maintained that the best way to promote the public interest was to foster open discussion even for those with whom one disagreed.[215] The final bill neglected their concerns, and the Department of Justice and the federal courts adopted an expansive interpretation of its scope.[216] Postal censorship was particularly intrusive, and it revealed the dangers of administrative power.[217]

Nonetheless, free speech clearly enjoyed substantial support as a theoretical matter, even among advocates of the war.[218] In the early 1910s, a broad range of thinkers, advocates, and public officials had endorsed expressive freedom at the level of legislative drafting and executive enforcement, if not judicial review.[219] Progressives had long expressed their opposition to unjust laws, from local anti-picketing ordinances to the repressive court decisions that they associated with *Lochner*. Under peacetime conditions, they endorsed vigorous public discussion and encouraged public officials to tolerate advocacy for social and economic change.[220] After all, the Progressive Era experienced swift

---

213 Letter from Crystal Eastman to the Exec. Comm., *supra* note 99, at 5.

214 GRABER, *supra* note 5, at 51–52, 66–86; *see infra* note 341.

215 RABBAN, *supra* note 5, at 250–55; STONE, *supra* note 6, at 146–53; Geoffrey R. Stone, *The Origins of the Bad Tendency Test: Free Speech in Wartime*, 2002 SUP. CT. REV. 411.

216 MURPHY, *supra* note 7, at 179–247; STONE, *supra* note 6.

217 *See* MURPHY, *supra* note 7, at 98–103; HARRY N. SCHEIBER, THE WILSON ADMINISTRATION AND CIVIL LIBERTIES, 1917–1921 (1960).

218 *E.g.*, Letter from Austin Lewis to Roger N. Baldwin (July 9, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 5, Vol. 39 ("I am in favor of the war . . . . But I am dead against militarism, I am prepared to offer every resistance to the wanton interference by the military with the constitutional liberties, the right of criticism etc. and particularly am I opposed to the military forces being used to put down labor organizations and to endeavor to destroy the right of peaceable economic agitation."); Letter from Roger N. Baldwin to Austin Lewis (July 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 5, Vol. 39; Letter from Roger N. Baldwin to William Woerner, (Nov. 6, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 5, Vol. 39 ("[T]here are some among our supporters who are certainly for the war but yet who believe in the right of citizens and the right of minorities should be heard.").

219 RABBAN, *supra* note 5, at 77–175.

220 GRABER, *supra* note 5, at 87–95; RABBAN, *supra* note 5, at 90–92.

transformations in political, scientific, and cultural values.[221] Theories that were widely accepted in the 1910s had been marginal, if not repressed, a few decades earlier. Social progress turned on the formulation and expression of new ideas, and repression often served the interests of the established and empowered. A 1927 history of civil liberties commissioned by the ACLU identified a new openness to free speech during the Progressive period, arising "partly out of a new realization of its essential value in our complex industrial age; partly out of the common experiences of the social reformers; partly because of the increased number of cases in which liberty was sacrificed to the interests of powerful conservative groups."[222]

The AUAM leadership hoped to parlay that constellation of interests into support for its wartime program. "[I]n a war for democracy," it insisted in August 1917, "there is no more patriotic duty than to keep democracy alive at home."[223] True, many Progressives believed the time for public debate had passed once war was declared. Some emphasized the government's power to police interference with majority will.[224] "As units of democracy we are bound by the national decision," one correspondent advised Roger Baldwin.[225] Others, arguing that "the world will not be safe for free speech until it is safe

---

221 *See supra* note 113.

222 LEON WHIPPLE, THE STORY OF CIVIL LIBERTY IN THE UNITED STATES 327 (1927). Signs of increased interest in civil liberties, according to Whipple, included the incorporation of new guarantees into state constitutions, the organization of the American Association of University Professors, the formation of various groups for the protection of free speech, the focus of an annual meeting of the American Sociological Society on "Freedom of Discussion," and the attention devoted to free speech and assemblage by the Commission on Industrial Relations. *Id.* Notably, Whipple rejected John Stuart Mill's "harm principle" as inconsistent with modern social understandings. LEON WHIPPLE, OUR ANCIENT LIBERTIES: THE STORY OF THE ORIGIN AND MEANING OF CIVIL AND RELIGIOUS LIBERTY IN THE UNITED STATES 10 (1927). According to Whipple, Mill's notion that interference with the liberty of others could be justified only for "self protection" was incompatible with "the revelations of science and psychology," which had "proved how few acts there are that do not work at the expense of some one else, even if the someone is anonymous." *Id.* For Whipple, there was no such thing as an atomistic individual; all rights were relational. *Id.*

223 Letter from the Nat'l Civil Liberties Bureau to the Editor of the N.Y. Tribune (Aug. 28, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 3, Vol. 18.

224 Not all Progressives were majoritarian. In fact, many advocated the expansion of the regulatory state precisely because the efficiency and autonomy of administrative agencies were shielded from popular influence. For them, the postwar turn to civil liberties meant shifting their confidence from agencies—which, they discovered, were more prone to political influence than they had believed—to the courts. *See, e.g.*, Rodgers, *supra* note 113, at 122 (arguing that the Progressive appeal to "the People" was successful in part because it "allowed those who sincerely believed in a government serving the needs of 'the people' to camouflage from voters the acute distrust many of those same persons harbored of political egalitarianism").

225 Letter from Philip Willett to Roger N. Baldwin, Dir., Civil Liberties Bureau (Aug. 21, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 5, Vol. 35. Baldwin stubbornly responded that "public discussion should be unfettered." Letter from Roger N. Baldwin, Dir., Civil Liberties Bureau, to Philip Willett (Aug. 22, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 5, Vol. 35.

for democracy," believed the war effort justified extraordinary measures.[226] "It would be a good thing for all of us if we emphasized a little more our duties as citizens and were less concerned about insisting upon our 'rights,'" the general secretary of the American Prison Association wrote to Roger Baldwin.[227]

> Personally, I am perfectly willing to have the Government suspend whatever may be necessary of my own civil rights during the period of the war, if it will help win the war, and I have no fear whatever but that when Germany and her Allies have been licked to a frazzle that I shall be restored to the full enjoyment of all the civil rights I am capable of appreciating.[228]

Some Progressives, however, were less sanguine about the wartime suspension of civil liberties. To them, meaningful "social freedom" necessarily entailed "the right of propaganda by speech, press, and assemblage."[229] Thus, one eminent sociologist agreed to endorse a meeting on behalf of civil liberties if its goal was "to secure free and adequate public discussion of every public policy before a decision is reached on that policy."[230] By the same token, the *Nation* maintained that "the right to free speech must be upheld, throughout the country"—that "freedom of legitimate criticism" must not be denied."[231]

Perhaps most famously, John Dewey made a conflicted and belated plea for open debate in a series of essays for the *New Republic*.[232] In September 1917, Dewey played down the prospect of wartime repression of "liberty of thought and speech."[233] In fact, he reflected with amusement on the irony of "ultra-socialists rallying to the old banner of Elihu Root with its inscription to

---

226 Letter from William English Walling to L. Hollingsworth Wood (Jan. 7, 1918), *microformed on* ACLU Papers, *supra* note 24, Reel 1, Vol. 3.

227 Letter from Joseph Byers, General Sec'y, Am. Prison Ass'n, to Roger N. Baldwin (June 25, 1918), *microformed on* ACLU Papers, *supra* note 24, Reel 3, Vol. 26.

228 *Id.*

229 Floyd Hardin, Plea of a Christian Pacifist in Court, *microformed on* ACLU Papers, *supra* note 24, Reel 4, Vol. 29. Hardin added that a mere right to think without sharing one's views was "the true hell of individualism." *Id.*

230 Letter from Charles Ellwood, Univ. of Mo., to Roger N. Baldwin, Sec'y, Civil Liberties Bureau (Jan. 8, 1918), *microformed on* ACLU Papers, *supra* note 24, Reel 1, Vol. 3; *see also* ANGELL, *supra* note 185, at 28 ("By suppressing the free dissemination of unpopular ideas, we render ourselves incapable of governing ourselves to our own advantage and we shall perpetuate that condition of helplessness and slavery for the mass which all our history so far has shown.").

231 *The Case of Columbia Professors*, NATION, Oct. 11, 1917, at 388, 388.

232 *See, e.g.*, GRABER, *supra* note 5, at 98–99; RABBAN, *supra* note 5, at 243–45.

233 John Dewey, *Conscription of Thought*, NEW REPUBLIC, Sept. 1, 1917, at 128, 128–30. Dewey indicated in the essay that "some surrenders and abandonments of the liberties of peace time" were inevitable during the war. *Id.*

the sanctity of individual rights and constitutional guaranties."[234] To the extent he acknowledged the cost of patriotic conformity, he focused on the futility of repression as an instrument of "social solidarity."[235] Over the ensuing weeks, in the face of mounting national hysteria and the pointed criticism of his former student Randolph Bourne, Dewey acknowledged that he had misjudged the likelihood of broad-based censorship.[236] Like other speech-friendly Progressives, he promoted pluralism in social rather than individualist terms, and he resisted the notion that individual judgment should trump the democratic will.[237]

Such arguments bore a close kinship to Zechariah Chafee's iconic defense of expressive freedom in the aftermath of the war, which eventually justified a court-centered and countermajoritarian theory of free speech. According to Chafee, the First Amendment protected two distinct kinds of interests in expressive freedom.[238] The first was an individual interest, "the need of many men to express their opinions on matters vital to them if life is to be worth living." The second, by contrast, was "a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way.[239] In Chafee's view, judges mistakenly regarded free speech as "merely an individual interest," subject to curtailment whenever national security was at stake.[240] In fact, the social interest in expressive freedom was more important than its individual counterpart, especially in wartime, when courts credited it least.[241] The crucial thing, for Chafee, was to preserve open channels for democratic deliberation. In this, his position tracked that of the *New York Times*, which defended as "indubitable" the right of conscientious objectors "to disapprove," even while it prescribed imprisonment for those who persisted in their refusal to enter military service after failing to persuade Congress to "change the law."[242]

---

234 *Id.*

235 *Id.*

236 John Dewey, *In Explanation of Our Lapse*, NEW REPUBLIC, Nov. 3, 1917, at 17, 17. For discussion of Bourne's debate with Dewey, see, for example, KENNEDY, *supra* note 19, at 50–53, 90–92; ROBERT B. WESTBROOK, JOHN DEWEY AND AMERICAN DEMOCRACY 202–12 (1991).

237 *See* GRABER, *supra* note 5, at 98–103; RABBAN, *supra* note 5, at 243–45.

238 Chafee, *supra* note 1, at 958.

239 *Id.*

240 *Id.* at 959. Chafee concluded that the Espionage Act itself was probably constitutional, but he believed the First Amendment should guide its interpretation in the judiciary as well as the political branches. *Id.* at 960. By contrast, he doubted the constitutionality of the 1918 Sedition Act. *Id.* at 969.

241 *Id.*

242 *Topics of the Times*, N.Y. TIMES, July 28, 1917, at 5, 5.

As the parameters of Progressive tolerance became increasingly apparent, the Civil Liberties Bureau explored alternative avenues for pursuing its objectives. The organization's new methods borrowed heavily from the prewar tactics of Theodore Schroeder's Free Speech League, which had always been careful to separate its advocacy for expressive freedom from the goals of the groups it represented.[243] Like the League, the Civil Liberties Bureau defended civil liberties by reference to the Constitution as well as public policy. Like the League, it bucked Progressive preferences by pursuing civil liberties in the courts as well as the political branches.

By the beginning of the war, the Free Speech League was fading from public view.[244] Nonetheless, many of the League's most important members and allies played formative roles in the Civil Liberties Bureau. Theodore Schroeder sent background materials on free speech to the Bureau's Lawyers Advisory Council early on.[245] He also provided Baldwin with a complete set of the League's published pamphlets.[246] Gilbert Roe, a League lawyer who was a former law partner of Wisconsin Republican Robert La Follette, was actively involved in the new organization and provided frequent legal advice.[247]

Harry Weinberger, an attorney who had worked closely with the Free Speech League and would soon represent the defendant in *Abrams v. United States*, was especially influential.[248] Weinberger was a single-taxer, pacifist, and radical individualist who opposed all state interference with personal liberties.[249] He had fought against compulsory vaccination in the early 1900s, and he considered the Supreme Court's decision upholding the practice to be on a par with *Dred Scott*.[250] He had also defended Emma Goldman against charges of distributing birth control information in in 1916.[251]

---

243 RABBAN, *supra* note 5, at 63. Its abstract embrace of individual freedom gave the League credibility when it defended unpopular causes like labor radicalism—which many contemporaries regarded as less reputable than free love. *See* Theodore Schroeder, *On Suppressing the Advocacy of Crime*, MOTHER EARTH, Jan. 1907, at 7, 16 (criticizing supporters of the League's position on obscenity who countenanced the censorship of Anarchist literature). There were, however, marked boundaries of respectability. Christine Stansell notes that Progressive free speech sympathizers were alienated by the bohemian slippage from free speech to free love. CHRISTINE STANSELL, AMERICAN MODERNS: BOHEMIAN NEW YORK AND THE CREATION OF A NEW CENTURY 79–80 (2000).

244 RABBAN, *supra* note 5, at 309.

245 *Id.* at 307.

246 *Id.* at 307–08.

247 *Id.* at 308.

248 *See id.* at 72; POLENBERG, *supra* note 8, at 75–78; WALKER, *supra* note 9, at 22.

249 POLENBERG, *supra* note 8, at 77.

250 *Id.* at 78.

251 *Id.* at 79.

A stalwart opponent of the draft, Weinberger eagerly joined Goldman and Alexander Berkman's No-Conscription League, which was "formed for the purpose of encouraging conscientious objectors to affirm their liberty of conscience and to make their objection to human slaughter effective by refusing to participate in the killing of their fellow men."[252] Central to the League's mission was its opposition to state coercion, war-related or otherwise. Its members opposed conscription on grounds of internationalism, anti-militarism, and anti-capitalism.[253] "We will fight for what we choose to fight for; we will never fight simply because we are ordered to fight," its manifesto proclaimed.[254] As Goldman explained in a public address, her convictions as an anarchist likewise prevented her from advising draftees *not* to register, because she did "not believe in force morally or otherwise" to persuade them to betray their ideals.[255] One's own conscience, she insisted, was the "best guide in all the world."[256]

For Weinberger, freedom of conscience was part of a broader constellation of personal rights that merited protection during war. Early on, he sensed a need for a new organization to protect civil liberties. In April 1917, he shared with Roger Baldwin his idea for an American Legal Defense League to "fight all cases in the United States where free speech, free press or the right peaceably to assemble or to petition the government is invaded."[257] Baldwin had already expressed interest in civil liberties. On April 14, less than two weeks after the declaration of war, he had begun soliciting prominent signatories to request an official statement of Wilson's position on freedom of speech, press, and assemblage.[258] But he had not yet built an organizational apparatus for vindicating those freedoms.

Weinberger suggested that the AUAM could assist him with his plan for a legal defense organization by referring cases to him through its local branches, and he urged a constitutional test case of conscription.[259] He also offered his opinions on the constitutional status of dissenting speech for inclusion in an

---

252 Transcript of Record at 114, Ruthenberg v. United States, 245 U.S. 480 (1918) (No. 656) (quoting Manifesto of the No-Conscription League (May 25, 1917)).

253 *Id.*

254 *Id.*

255 *Id.* at 118.

256 *Id.* at 119.

257 Letter from Harry Weinberger to Roger N. Baldwin, Am. Union Against Militarism (Apr. 28, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 5, Vol. 35.

258 ROBERT C. COTTRELL, ROGER NASH BALDWIN 52 (2000).

259 Letter from Harry Weinberger to Roger N. Baldwin, *supra* note 257.

AUAM pamphlet.[260] He advised Baldwin that open disagreement with government and military practices, including the publication and distribution of pamphlets on the war, was protected by the First Amendment, and he was adamant that "any Espionage Bill Congress may pass cannot repeal the United States Constitution."[261] By May, he was outraged at the Administration's efforts to quash public opposition to military bills and concluded "that we must re-educate the people, that they have the right to discuss and the right to oppose conscription and ask for its repeal."[262] Advocacy of a change in law, he insisted, could not qualify as treasonable or seditious.[263]

Baldwin initially supported Weinberger's organizational aspirations. A pamphlet issued in May by the Bureau's short-lived Committee on Constitutional Rights did precisely what Weinberger advised. It declared that "[c]onstitutional rights are being seriously invaded throughout the United States under pressure of war," blaming the abuse on "petty officials who would compel conformity."[264] And it referred victims of this unconstitutional abuse to the American Legal Defense League.[265] The League, in turn, attracted substantial publicity in Progressive circles. Its notable members included Charles C. Burlingham, Theodore Schroeder, Gilbert Roe, Clarence Darrow, and New York Governor Charles S. Whitman, as well as several AUAM board members.[266] In May, the *New Republic* "gladly" printed an announcement of

---

260 Letter from Harry Weinberger to Roger N. Baldwin, Am. Union Against Militarism (Apr. 30, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 5, Vol. 35.

261 *Id.* Baldwin was more cautious. He told Weinberger,

> We will include your statement about the spy bill in relation to constitutional rights, but I am sure our friends will want a more explicit statement of the practical effects of this legislation later.
>
> Most of them don't want to go to jail or to suffer an expensive trial and they want advice as to how far they can go without getting into trouble with the Federal authorities.

Letter from Roger N. Baldwin to Harry Weinberger (May 3, 1918), *microformed on* ACLU Papers, *supra* note 24, Reel 5, Vol. 35.

262 Letter from Harry Weinberger to Joy Young, Am. Union Against Militarism (May 2, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 5, Vol. 35.

263 Letter from Harry Weinberger to Roger N. Baldwin, Am. Union Against Militarism (May 8, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 5, Vol. 35.

264 AM. UNION AGAINST MILITARISM, CONSTITUTIONAL RIGHTS IN WAR TIME 3 (1917), *microformed on* ACLU Papers, *supra* note 24, Reel 5, Vol. 44. The committee members were Amos Pinchot, Max Eastman, Agnes Leach, Stephen Wise, Herbert Bigelow, Scott Nearing, and William Cochran. *Id.* With respect to the pending Espionage Act, the committee advised that "much will depend on how such war-time legislation is administered. The administration at Washington professes a desire to be liberal, and it is to be hoped that the federal authorities who will enforce the provisions of this act, will not undertake seriously to interfere with established rights." *Id.* at 8.

265 *Id.*

266 *The American Legal Defense League*, NATION, May 31, 1917.

the new organization, which was "composed of public spirited citizens including both militarists and anti-militarists, who think it imperative that our American liberties of free speech, free press and the right peaceably to assemble be legally defended against any encroachment wherever made by any public official."[267] Even Newton Baker implied approval of the League's agenda. In a letter, he commended its opposition to vigilante interference with "the rights of assembly and free speech"—an endorsement that the League publicized to good effect.[268]

Given the substantial support for the American Legal Defense League, it is unsurprising that Roger Baldwin (known for his opportunism or organizational savvy, depending on one's perspective) quickly encroached on its agenda. On May 11, the Conscientious Objectors' Bureau convinced Weinberger to relinquish all cases involving conscientious objectors—a course that Weinberger accepted given that his advisory committee was interested only in the rights of speech, press, and assembly.[269] In addition, Baldwin secured Weinberger's agreement to cede any legal test of the Conscription or Espionage Acts to the AUAM.[270] In June, he pushed harder. With apologies "that the American Union was very poorly standing by you and the American Legal Defense League"—a fickleness that Baldwin blamed on dissension within the AUAM—he withdrew an earlier pledge of financial assistance.[271] More to the point, he advised Weinberger that the AUAM had "decided now to take hold of the work of organizing legal defense throughout the country under a bureau of the Union, and including conscientious objectors."[272] The new Civil Liberties Bureau appropriated the League's entire agenda. Its purpose, according to the AUAM's public announcement, was to coordinate all parties interested in preserving "constitutional liberties" against government incursion.[273] A second edition of the AUAM's pamphlet on constitutional

---

[267] *Defense of Free Speech*, NEW REPUBLIC, May 12, 1917, at 54, 54; *The American Legal Defense League*, NATION, May 31, 1917.

[268] *Secretary of War Denounces Military Rowdyism—Militarism the Same the World Over*, LOCOMOTIVE FIREMEN AND ENGINEMEN'S MAG., July 15, 1917, at 4 (quoting Letter from Newton Baker, Sec'y, U.S. Dep't of War, to Harry Weinberger, General Counsel, Am. Legal Def. League).

[269] Memorandum of Conference Between Roger N. Baldwin and Harry Weinberger (May 11, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 5, Vol. 35.

[270] *Id.*

[271] Letter from Roger N. Baldwin to Harry Weinberger (June 18, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 5, Vol. 35.

[272] *Id.*

[273] Press Release, *supra* note 212. The organization had already specified the sorts of violations it had in mind: prosecution for peaceful criticism of the government, interference with meetings and refusal of meeting halls, and confiscation of pamphlets and literature. AM. UNION AGAINST MILITARISM, *supra* note 264. Peaceful

rights, issued in July, omitted any mention of the American Legal Defense League.[274]

The Civil Liberties Bureau did not abandon tested Progressive tactics altogether. On the contrary, it pursued its program through all available means. For the duration of the war, its leadership drew on personal and professional connections with government officials.[275] When the Bureau organized an emergency conference on postal censorship of radical publications, its preferred, if unsuccessful, solution was to send a delegation of lawyers to discuss the matter with key figures in the Wilson Administration, including the president and the postmaster general.[276] Over the following months, the new bureau tried its hand at lobbying, propaganda, and grassroots organizing in addition to negotiation.[277] Still, its principal focus was constitutional litigation, just as Weinberger had proposed. The Bureau quickly established itself as a national clearinghouse for information and legal aid in the domain of constitutional rights.[278] Baldwin envisioned it as a means of helping dissenters to "get their legal rights before the courts."[279]

---

opposition to law, the Bureau insisted, was an inviolate constitutional right, and it deserved protection even when the nation was at war. *Id.*

274 NAT'L CIVIL LIBERTIES BUREAU, CONSTITUTIONAL RIGHTS IN WAR TIME (rev. ed. 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 5, Vol. 44.

275 For example, John Nevin Sayre, the brother of President Wilson's son-in-law. Baldwin hoped that Sayre's presence would "make things look a little more interesting to those public and private super-patriots who would tar us with the 'stick of pro-Germanism.'" Letter from Roger N. Baldwin to John S. Codman (May 7, 1918), *microformed on* ACLU Papers, *supra* note 24, Reel 3, Vol. 25.

276 Letter from Crystal Eastman, Exec. Sec'y, Am. Union Against Militarism, to Am. Union Against Militarism Members, Local Comms. and Affiliated Orgs. (July 13, 1917), *microformed on* AUAM Papers, *supra* note 42, Reel 10:2. Targeted publications included the *Masses*, the *International Socialist Review*, the *American Socialist*, and the *Milwaukee Leader*. *Id.* "If we accept this Prussian mandate on the part of the postal authorities peacefully," Eastman said, "it will be fastened upon us as a permanent war policy." *Id.* Immediate protest, by contrast, presented a possibility for "real freedom of the press in America, war or no war." *Id.*; *see also* JOHNSON, *supra* note 29, at 58–59.

277 WALKER, *supra* note 9, at 23–24.

278 NAT'L CIVIL LIBERTIES BUREAU, *supra* note 81, at 4.

279 Letter from Roger N. Baldwin, Civil Liberties Bureau, to John S. Codman (Oct. 11, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 3, Vol. 25. The NCLB would assist in four types of situation: first, and most important, constitutional test cases; second, unjust prosecutions in which defendants were unable to secure competent counsel; third, when publicity was necessary either in advance of trial or, afterwards, to call attention to miscarriage of justice; and fourth, assistance to underfunded local defense committees. Nat'l Civil Liberties Bureau, The Need of a National Defense Fund (Nov. 15, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 3, Vol. 26.

A handful of successful cases in the summer of 1917 encouraged the litigation strategy.[280] Within a few months, the Bureau claimed 120 cooperating attorneys throughout the United States.[281] At that time, a number of important prosecutions under the Espionage and Trading with the Enemy Acts were coming to the organization's attention as a result of the "activity of government agents," and its staff was assisting "test cases under the new legislation which must be carried to the higher courts for final decision on constitutional points."[282] Cases were proliferating at every level, from local to federal, and under local ordinances and state laws as well as federal statutes.[283] The Bureau was also handling trial publicity to "show up miscarriage of justice."[284] Although it operated primarily to redress repression after the fact, its long-term hope was to discourage unlawful interference in the first place by reminding officials that a national body was scrutinizing their actions.[285] The overarching purpose of the Civil Liberties Bureau was to "make sure that bureaucratic officials and mob-minded judges shall not, out of sheer war passion, trample upon the rights of free speech, free press and public assembly during war-time."[286]

III. CIVIL LIBERTIES IN PRACTICE

Despite its early achievements in the courts, the Civil Liberties Bureau failed to attain the respectability its founders desired. The comparatively tolerant climate of spring 1917 was rapidly eroding, and announcement of the Civil Liberties Bureau was met with public indignation. A July 4 editorial in the *New York Times* insisted that a line must be drawn between "liberty" and "license," and "just where it shall be drawn is and must be determined, in countries properly called free, by public sentiment as formally expressed by

---

280 Letter from Roger N. Baldwin to Mrs. Leo Simmons (Sept. 21, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 5, Vol. 36 ("In regard to the ordinance passed by your city council, the obvious thing to do is to get one of your folks to violate it so that you may take it into the courts as a test case. It is to my mind clearly unconstitutional. A similar ordinance in Indianapolis was passed last April, and tested in the courts at once. It was of course declared void.").

281 Nat'l Civil Liberties Bureau, Statement to Members of the American Union Against Militarism (Nov. 1, 1917), *microformed on* AUAM Papers, *supra* note 42, Reel 10:1 (stating that the organization was "in touch with practically all cases reported in the press, where the rights of citizens or organizations representing the movements for peace, the conscientious objector, against war and for the cause of labor are violated at the hands of officials acting under war hysteria").

282 Nat'l Civil Liberties Bureau, *supra* note 279.

283 *Id.*

284 *Id.*

285 Nat'l Civil Liberties Bureau, *supra* note 281.

286 *Civil Liberties Bureau*, N.Y. EVENING POST, Oct. 17, 1917.

majorities through their voluntarily chosen representatives."[287] It unequivocally denounced the "little group of malcontents who for present purposes have chosen to call themselves 'The National Civil Liberties Bureau,'" whose objective, it alleged, was to secure "for themselves immunity from the application of laws to which good citizens willingly submit as essential to the national existence and welfare."[288]

The Bureau's chilly reception exacerbated tensions within the AUAM. In large part, the schism stemmed from the diverging politics of the leadership. Much of the organization's inner circle openly supported radical causes, and in August, the board voted to send delegates to a conference organized by the People's Council of America for Democracy and Peace, a radical anti-war group to which many of its members belonged.[289] Lillian Wald worried that the decision to participate in the conference would destroy the AUAM's reputation and undermine its broader program. The AUAM had "stood before the public as a group of reflective liberals," she pleaded, unavailingly.[290] Its cooperation with the People's Council betrayed an "impulsive radicalism" instead.[291] Other members shared her concerns. Oswald Garrison Villard felt that the Administration's conscription policy had accommodated the AUAM's legitimate requests, and he wanted the organization to withdraw all objectionable materials from the mail, disband its Publicity Department and Washington office, and retreat from public view.[292]

In late summer, Wald threatened resignation, and Eastman responded with a proposal to sever the Civil Liberties Bureau from the AUAM—to cull the radicals and "leave the more conservative minority to continue the work of the organization."[293] On September 28, 1917, the board agreed (Wald left

---

287 *Topics of the Times: Freedom of Speech*, N.Y. TIMES, July 4, 1917, at 8, 8.

288 *Id.*

289 MARCHAND, *supra* note 41, at 256–68.

290 Letter from Lillian Wald to Crystal Eastman (Aug. 26, 1917), *microformed on* AUAM Papers, *supra* note 42, Reel 10:1. The board majority voted to send a delegation. Am. Union Against Militarism, Minutes (Aug. 30, 1917), *microformed on* AUAM Papers, *supra* note 42, Reel 10:1. Evidently, Wald and Mussey concurred in the vote with "deep regret." *Id.* As it turned out, Wood and Thomas were unable to attend. Am. Union Against Militarism, Minutes (Sept. 13, 1917), *microformed on* AUAM Papers, *supra* note 42, Reel 10:1. The People's Council did not meet in Minnesota as planned; the AFL-sponsored American Alliance for Labor and Democracy rented all available halls in Minneapolis, the Minnesota governor forbade any meeting of the council in the state, and the meeting was ultimately held in Chicago instead. MURPHY, *supra* note 7, at 145–46.

291 Letter from Lillian Wald to Crystal Eastman (Aug. 26, 1917), *microformed on* AUAM Papers, *supra* note 42, Reel 10:1.

292 Am. Union Against Militarism, Minutes (Sept. 13, 1917), *supra* note 290.

293 *Id.*

anyway), and the AUAM soon withered into obsolescence.[294] The Civil Liberties Bureau, by contrast, intensified its operations;[295] Norman Thomas explained that the kind of liberal organization advocated by Villard and Wald would "have to originate, if at all, with those who have not been so deeply tarred with uncompromising pacifism as all our present members."[296]

The leadership of the new National Civil Liberties Bureau assured members that its program would remain "exactly the same"[297]: the "maintenance in war time of the rights of free press, free speech, peaceful assembly, liberty of conscience, and freedom from unlawful search and seizure."[298] In reality, the NCLB leadership was especially concerned for the rights of radicals and organized labor. As Thomas put it, "capitalistic exploitation, militarism, [and] contempt of civil liberties" were entangled "aspects of the wrong basis of our social life."[299] According to Baldwin, the "underlying purpose" of the NCLB's attempt to maintain constitutional rights was to shield minorities in the "processes of progress," in which "labor of course must in the future play the biggest part."[300]

---

294 *See* Am. Union Against Militarism, Minutes (Sept. 28, 1917), *microformed on* AUAM Papers, *supra* note 42, Reel 10:1; Am. Union Against Militarism, Minutes (Oct. 29, 1917), *microformed on* AUAM Papers, *supra* note 42, Reel 10:1.

295 *Civil Liberties Bureau*, N.Y. EVENING POST, Oct. 17, 1917.

296 Letter from Norman Thomas to Crystal Eastman (Sept. 27, 1917), *microformed on* AUAM Papers, *supra* note 42, Reel 10:1.

297 Nat'l Civil Liberties Bureau, *supra* note 281. While the NCLB's statement to the press was much like a draft considered by the board, there were a few notable discrepancies. Missing from the final version was a general indictment of the war:

> We were not won over by the arguments of those liberals—in other opinions so much like us—who believed that this war was the great exception, the one last necessary war which should bring about world federation, disarmament and lasting peace. *Nor have we been won over to that view since April 3rd*, despite the terrific pressure of a nation's wartime psychology.

Am. Union Against Militarism, Proposed Announcement for Press (Sept. 24, 1917), *microformed on* AUAM Papers, *supra* note 42, Reel 10:1. In the same vein, the draft statement rightly reported that most Americans supported free speech only for those with whom they agreed—a sentiment that would long serve as the ACLU's justification for its viewpoint-blind defense of expression. *Id.* What followed, however, was not a plea for neutrality. "It is essential for leadership in the fight of civil liberty in war time to come from the heart of the minority itself," the draft statement boldly proclaimed. *Id.* "With rare exception the minority must depend upon itself and its own unaided efforts to maintain its right to exist." *Id.*

298 NCLB Letterhead, *in* Letter to Members of the Committee on the Meeting (Dec. 29, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 1, Vol. 3.

299 Letter from Norman Thomas to Crystal Eastman, *supra* note 296.

300 Letter from Roger N. Baldwin to Fay Lewis (Jan. 30, 1918), *microformed on* ACLU Papers, *supra* note 24, Reel 5, Vol. 39.

Still, the NCLB promised publicly to support the administration, which was "doing its best under the present law."[301] By exerting "quiet pressure" on government officials, it hoped to persuade them to exercise lenience in administering the Selective Service Act, among other provisions.[302] And to a modest yet surprising extent, the organization achieved that objective.

The negotiations between the NCLB and the War Department with respect to conscientious objectors are well documented.[303] The organization had strong ties to Frederick Keppel, the Third Assistant Secretary of War[304]—who, as secretary of the American Association for International Conciliation, had once said that "war and civilization can no longer go hand and hand."[305] In the spring of 1917, Baldwin assured Keppel that the Conscientious Objectors' Bureau would cooperate fully with his office, and Keppel graciously acknowledged the organization's collaborative posture.[306] Bureau members met with key personnel within and outside the War Department to urge moderation in administering conscription.[307] Felix Frankfurter, who was serving as a special assistant to the Secretary of War, was particularly receptive. Indeed, he authored an influential memorandum endorsing many of Baldwin's innovations and urging humane treatment, if not exemption, even of absolutists and political objectors.[308] Baker himself promised to give weight to Baldwin's recommendations in setting the Department's policy,[309] and he

---

[301] Letter from NCLB to Citizens Registered with the Nat'l Civil Liberties Bureau (Nov. 1, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 5, Vol. 44.

[302] Letter from Roger N. Baldwin to Scott Nearing, Chairman, People's Council (Oct. 13, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 3, Vol. 26.

[303] *See* COTTRELL, *supra* note 29, at 53–82; JOHNSON, *supra* note 29, at 30–36; WALKER, *supra* note 9, at 37–38; Kessler, *supra* note 8, at 1104–11.

[304] *See* Letter from Roger N. Baldwin to Frederick P. Keppel, Assistant Sec'y, U.S. Dep't of War (Apr. 8, 1918), *microformed on* ACLU Papers, *supra* note 24, Reel 2, Vol. 15. In congratulating him on his appointment, Baldwin thanked him for his "unfailing tolerance and understanding." *Id.*

[305] Frederick P. Keppel, *How to Interest the General Public in International Affairs*, *in* PROCEEDINGS OF SECOND NATIONAL CONFERENCE, AMERICAN SOCIETY FOR JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES 88 (1911).

[306] Letter from Frederick Keppel to Roger N. Baldwin, Assoc. Dir., Am. Union Against Militarism (May 24, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 6, Vol. 47.

[307] COTTRELL, *supra* note 29, at 54–55.

[308] *See* Kessler, *supra* note 8, at 1111–23.

[309] Letter from Newton Baker to Roger N. Baldwin (July 7, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 2, Vol. 15. Baldwin's proposed solution was to confine objectors who refused all service to detention for the duration of the war, and to assign those men willing to accept non-combatant service to such service without court-martial. Letter from Roger N. Baldwin to Newton Baker (July 13, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 2, vol. 15. It was crucial to Baldwin's approach that the War Department announce whatever policy it adopted in order to "promote a more orderly solution of the

eventually ordered leniency toward individuals whose "personal scruples," whether religious or political, informed their opposition to military service.[310]

In practice, however, objectors of all types, and especially the absolutists, often suffered in the individual cantonments.[311] The military was adamantly opposed to the AUAM's program, and it pushed back against sympathetic executive officials.[312] Baker's policy left immense discretion to the camp commanders, some of whom were subjecting objectors to brutal treatment and allowing other inductees to beat them.[313] Baldwin tried, but eventually failed, to position the Bureau as a watchdog group that would communicate with objectors and report abusive treatment to government officials.[314] He nonetheless remained reluctant to challenge the War Department head-on. In a September 1917 letter to Felix Frankfurter, Baldwin conveyed his concern that "the rumors that are coming from the cantonments [would] give rise to an unfortunate propaganda from several points in the country."[315] In other words, the NCLB would not itself generate publicity on behalf of the objectors, nor would it openly criticize the camps for known abuses.[316] Rather, Baldwin raised the specter of damaging propaganda as an incentive to temper abuses and formulate a more generous policy.[317] For a time, Baldwin had reason to

problem." *Id.* Baker, however, refused to publicize his orders for leniency. *See, e.g.*, CAPOZZOLA, *supra* note 7, at 71.

310 *E.g.*, DEP'T OF WAR, STATEMENT CONCERNING THE TREATMENT OF CONSCIENTIOUS OBJECTORS IN THE ARMY 40–41 (1919).

311 ROBERT H. ZIEGER, AMERICA'S GREAT WAR: WORLD WAR I AND THE AMERICAN EXPERIENCE 62 (2000).

312 Kessler, *supra* note 8, at 1108. The sole exception was John Henry Wigmore, who briefly expressed openness to a more vigorous accommodation of dissenters. *Id.* at 1108–09.

313 MURPHY, *supra* note 7, at 159; WALKER, *supra* note 9, at 24.

314 COTTRELL, *supra* note 29, at 64–65; MURPHY, *supra* note 7, at 158–59.

315 Letter from Roger N. Baldwin to Felix Frankfurter, U.S. Dep't of War (Sept. 29, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 2, Vol. 15.

316 *See, e.g.*, Letter from Roger N. Baldwin, Dir., Nat'l Civil Liberties Bureau, to Felix Frankfurter (Sept. 29, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 2, Vol. 15 ("I have been putting off all inquirers with my confident assertion that the War Department had the matter well in hand, and would doubtless arrive at some conclusion in a few days. We cannot hold out against that pressure very much longer."); Letter from Roger N. Baldwin, Dir., Nat'l Civil Liberties Bureau, to Gilson Gardner (Nov. 1, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 3, Vol. 18 ("Secretary Baker has made a special request of us not to give publicity to the matter of the conscientious objector now, for the sake of an orderly solution of the whole matter. The War Department is handling the problem so liberally and sympathetically, even though there are some cases of brutality, that we are of course complying with that request. Therefore, I will have to hold up the story I had hoped to send you last week . . . .").

317 COTTRELL, *supra* note 29, at 64.

believe his approach would yield results.[318] "We are getting much more liberal treatment from the War Department," he wrote, "than we could possibly expect by throwing the issue into the public press, and into the hands of the patriotic organizations who are anxious to shoot or export all the objectors."[319]

But by the spring of 1918, Baldwin's decision to tolerate the situation quietly seemed naïve. Baldwin knew that cruel punishments, including manacling and solitary confinement, were rampant in the cantonments.[320] Matters worsened when reports emerged that the Army was court-martialing political objectors and meting out excessive sentences.[321] Lenetta Cooper of the American Liberty Defense League, based in Chicago, had complied with Baldwin's earlier requests to refrain from publicity.[322] In March, she accused his organization of failure and, worse, of abandoning its constituency.[323] After ten months of work, the conscientious objector was "still considered a slacker by practically every one," she told him.[324] She reminded Baldwin that her own group had wanted "to appeal to the people to demand a liberal solution of the problem";[325] he had begged her not to act, claiming that publicity would precipitate a broad-based attack on pacifists by the press and would undercut their aims.[326] Cooper acknowledged that popular mobilization would have

---

[318] *E.g.*, Letter from Newton Baker, Sec'y, U.S. Dep't of War, to Roger N. Baldwin (Oct. 28, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 6, Vol. 47.

[319] Letter from Roger N. Baldwin to John S. Codman (Nov. 19, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 3, Vol. 25; *see also* Nat'l Civil Liberties Bureau, Confidential Bulletin on the Conscientious Objector (Jan. 16, 1918), *microformed on* AUAM Papers, *supra* note 42, Reel 10:1 ("We recognize that the Department can not change the law, and that at present it is inopportune to suggest amendments, providing a more liberal basis of recognition of conscience. It is rather as a practical problem on which we offer these recommendations, believing that it is the desire of the War Department to avoid the injustices which would make a controversial issue of liberty of conscience.").

[320] Letter from Roger N. Baldwin to Newton D. Baker, Sec'y, U.S. Dep't of War (Nov. 8, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 2, Vol. 15. Gradually, Baldwin began to lose patience. *See, e.g.*, *id.* ("It is perfectly obvious from the reports we are getting that there continues to be a serious misunderstanding of your orders in regard to conscientious objectors."); Letter from Roger N. Baldwin to Newton D. Baker, Sec'y, U.S. Dep't of War (Nov. 22, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 2, Vol. 15 ("The reports which we have been getting about the treatment of conscientious objectors at various cantonments show an alarming increase in the number of cases of brutality and injustice.").

[321] JOHNSON, *supra* note 29, at 33. One objector was sentenced to death, but his sentence was subsequently commuted. *Id.*

[322] Letter from Roger N. Baldwin to Lenetta Cooper, Am. Liberty Def. League (Dec. 17, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 3, Vol. 17.

[323] Letter from Lenetta Cooper, Am. Liberty Def. League, to Roger N. Baldwin (Mar. 12, 1918), *microformed on* ACLU Papers, *supra* note 24, Reel 4, Vol. 16.

[324] *Id.*

[325] *Id.*

[326] Letter from Roger N. Baldwin to Lenetta Cooper, *supra* note 322.

been slow, and open criticism of Baker futile, but she felt that behind-the-scenes negotiations stood no chance of success without broad popular support.[327] Even then, Baldwin stood his ground:

> I have felt right along that in the uncertainty of a definite policy by the government, the best thing we could do was to just bide our time, and make the whole issue clear when the government's policy is announced. That I understand from advices received today will be in the very near future.[328]

Sure enough, less than two weeks later President Wilson issued an executive order permitting objectors to elect alternative service under civilian command.[329] For a brief time, Baldwin felt vindicated.[330] The new policy, however, proved subject to widespread abuse, and Baldwin's initial enthusiasm quickly soured.[331] Despite a series of clarifying orders from Baker, critics complained that objectors who refused non-combatant service out of absolutist convictions were worse off than before.[332] Baker appointed a Board of Inquiry to examine the sincerity of objectors, and the AUAM was enthusiastic about its members: Major Walter G. Kellogg for the Army, Judge Julian W. Mack (an AUAM supporter before the war), and Columbia dean Harlan Fisk Stone.[333] Notwithstanding its promising personnel, however, the board habitually found political objectors "insincere."[334]

Although the NLCB stubbornly maintained its optimistic veneer, it is likely that its leaders understood the limits of administrative negotiation. They

---

327 Letter from Lenetta Cooper to Roger N. Baldwin, *supra* note 323.

328 Letter from Roger N. Baldwin to Lenetta Cooper (Mar. 14, 1918), *microformed on* ACLU Papers, *supra* note 24, Reel 3, Vol. 16.

329 Exec. Order (Mar. 20, 1918), *reprinted in* MESSAGES AND PAPERS OF THE PRESIDENTS COVERING THE SECOND TERM OF WOODROW WILSON 8475–77 (Supp. 1921).

330 Letter from John S. Codman to Roger N. Baldwin (Mar. 27, 1918), *microformed on* ACLU Papers, *supra* note 24, Reel 3, Vol. 25 ("If this is the result of your negotiations with the War Department, it certainly shows the wisdom of the policy which you have adopted of trusting to the Administration's liberality rather than trying to force anything through publicity."). In April 1918, the Adjutant General, on behalf of the Secretary of War, issued an order to all commanding officers that "no punitive hardship of any kind be imposed upon conscientious objectors who do not accept assignment to noncombatant service before their cases shall have been submitted to the Secretary of War." Letter from H.G. Leonard, Adjutant General of the Army, to the Commanding Generals of All Departments (Apr. 18, 1918), *microformed on* ACLU Papers, *supra* note 24, Reel 2, Vol. 15.

331 In fact, Baldwin asked Keppel to suspend the order in lieu of its implementation. Telegram from Roger N. Baldwin to Frederick Keppel (June 11, 1918), *microformed on* ACLU Papers, *supra* note 24, Reel 2, Vol. 15.

332 JOHNSON, *supra* note 29, at 35.

333 *Id.* at 39.

334 *Id.*

adhered to their promise to refrain from negative publicity, but they never entirely abandoned other avenues of change. In fact, even as the NCLB pledged unmitigated cooperation with the War Department, it pursued invalidation of the Selective Service Act on constitutional grounds.[335]

To be sure, the NCLB understood that its draft-act challenge was unlikely to succeed. The organization had secured a few reversals of convictions of anti-war dissenters, but the cases in which judges invalidated speech and assembly laws on constitutional grounds involved local ordinances, not federal statutes.[336] To the extent judges reviewed convictions under federal wartime legislation, they relied on statutory interpretation or procedural irregularities, not constitutional infirmities. Judge Learned Hand's celebrated decision in *Masses Publishing Co. v. Patten*[337] is the most familiar example. Denial of second-class mailing privileges to the *Masses*—a radical political magazine edited by Max Eastman, Crystal Eastman's brother—helped steer the NCLB toward civil liberties work when the Espionage Act first passed.[338] In late July, Judge Hand issued his decision: Congress had not authorized the kind of censorship at stake in the case, namely, the suppression of the *Masses* for its antiwar editorials and political cartoons.[339] Even Judge Hand's cautiously reasoned statutory analysis succumbed to patriotic fervor, however, and in early November, the Second Circuit reversed.[340] Similar cases followed throughout the country.[341]

---

335 AM. UNION AGAINST MILITARISM, SOME ASPECTS FOR THE CONSTITUTIONAL QUESTIONS INVOLVED IN THE DRAFT ACT (1917), *microformed on* ACLU Papers, *supra* note 24, Reel 5, Vol. 44.

336 *E.g.*, Letter from Roger N. Baldwin to Mrs. Leo Simmons, *supra* note 280 (describing invalidation of Indianapolis ordinance).

337 244 F. 535 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917).

338 *Id.* at 536.

339 *Masses Publ'g Co.*, 244 F. at 537. Judge Hand emphasized that he was not deciding whether Congress was constitutionally empowered to prohibit "any matter which tends to discourage the successful prosecution of the war" if it chose to do so; rather, at issue was "solely the question of how far Congress after much discussion has up to the present time seen fit to exercise a power which may extend to measures not yet even considered." *Id.* at 538. Nonetheless, Judge Hand's reasoning was later incorporated into the Supreme Court's constitutional analysis. Gerald Gunther, *Learned Hand and the Origins of the Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 722 (1975). On the *Masses* case, see generally GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (1994); Gunther, *supra*. Burleson's censorship practices were upheld by the Supreme Court in *Milwaukee Publishing Co. v. Burleson*. 255 U.S. 407 (1921).

340 *Masses Publ'g Co.*, 246 F. 24.

341 Some federal judges resisted the dominant trend, including George M. Borquin in the District of Montana and Charles Fremont Amidon in the Eighth Circuit (who would later head the ACLU's committee on anti-injunction laws). On the whole, however, judges capitulated to popular pressures. *See* MURPHY, *supra* note 7, at 179–247; STONE, *supra* note 6, at 415–19.

More to the point, the NCLB's sporadic judicial successes during the fall of 1917 involved claims to expressive freedom, not freedom of conscience. The NCLB's binders of press clippings bulged with reports of convictions for failure to register for the draft and of failed constitutional challenges to the Selective Service Act.[342] On one occasion, Judge Hand resisted the prevailing hysteria by admitting a conscientious objector to bail pending resolution of his constitutional challenge to conscription.[343] But bail, however controversial, was far from a victory. Two weeks after the indictment, a jury deliberated two minutes before returning a verdict of guilty, and Judge Martin T. Manton sentenced the defendant to prison at once.[344] Even as lower courts divided over the reach of administrative censorship, the drafters of the Selective Service Act were confident that "every possible legal contingency was cared for" and that no constitutional challenge to conscription could succeed.[345] In December 1917, the Supreme Court considered convictions under the Act in Minnesota, Ohio, Georgia, and New York.[346] The solicitor general deemed the claims "frivolous," and were it not for widespread press coverage, he would not have bothered to "appear and refute them."[347]

In the conformist climate of fall 1917, then, the NCLB's constitutional assault on conscription was largely a symbolic gesture. Still, it was an important marker of the NCLB's ambivalent relationship to state power, judicial review, and constitutional rights. Walter Nelles, the law partner of one of Baldwin's Harvard classmates, signed on as NCLB counsel after reading about the new organization in the *New York Times*.[348] In drafting the NCLB's

---

[342] *E.g.*, *Anti-Registration Pleas Are Ruled out by Tuttle*, July 11, 1917 (newspaper clipping), *microformed on* ACLU Papers, *supra* note 24, Reel 6, Vol. 46; *Broke Draft Law, Get Long Terms*, N.Y. WORLD, Dec. 18, 1917, *microformed on* ACLU Papers, *supra* note 24, Reel 6, Vol. 46; *Conscientious Objector Sent to County Jail*, HOBOKEN OBSERVER, Nov. 20, 1917, *microformed on* ACLU Papers, *supra* note 24, Reel 6, Vol. 46; *Detroit Socialist Given Year in Jail for Not Registering*, N.Y. CALL, Nov. 25, 1917, *microformed on* ACLU Papers, *supra* note 24, Reel 6, Vol. 46.

[343] *Federal Court Opens Way for Draft Act Test*, July 17, 1917 (newspaper clipping), *microformed on* ACLU Papers, *supra* note 24, Reel 5, Vol. 43.

[344] *Convicts Draft Slacker*, N.Y. TIMES, July 31, 1917.

[345] *Doubts Court Test of the Draft Law*, July 22, 1917 (newspaper clipping), *microformed on* ACLU Papers, *supra* note 24, Reel 5, Vol. 43.

[346] *Draft Cases in Supreme Court*, Dec. 13, 1917 (newspaper clipping), *microformed on* ACLU Papers, *supra* note 24, Reel 5, Vol. 43.

[347] *Argument Ended in Draft Appeals*, N.Y. TRIB., Dec. 14, 1917, *microformed on* ACLU Papers, *supra* note 24, Reel 5, Vol. 43.

[348] Letter from Walter R. Nelles to Nat'l Civil Liberties Bureau (July 3, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 3, Vol. 25. Baldwin told Nelles, "I feel we have only begun on a work of real usefulness, and I hope eventually of some political significance in our national life." Letter from Roger N. Baldwin to Walter R. Nelles (Oct. 24, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 3, Vol. 25.

amicus brief in the conscription case, Nelles was adamant that the organization focus its objection on liberty of conscience, not on the less controversial argument that Congress lacked power to raise a draft and compel service abroad.[349]

In that attitude, Nelles joined the company of Harry Weinberger, who had agreed to represent Emma Goldman and Alexander Berkman when they were indicted under the Selective Service Act in June.[350] In trial and on appeal, Weinberger argued that the narrow exemptions in the statute infringed religious liberty.[351] Defending one anarchist who refused to register out of opposition to "uniformed murder"—that is, war "waged by governments"[352]—he argued that the law's limited exemptions functionally impeded individual religious choice; it steered putative objectors to join a particular church "in order to get the protection of the Constitution which is guaranteed to all."[353] Moreover, he reasoned, by conferring special privileges on members of certain well-recognized organizations, the conscription statute ran afoul of the Establishment Clause.[354]

The NCLB's amicus brief echoed Weinberger's claims.[355] It recognized great variation in the convictions and worldviews of conscientious objectors. "Some base their beliefs and conduct upon their duty towards God; others

---

[349] AM. UNION AGAINST MILITARISM, *supra* note 335 (noting that the Judge Advocate General and Attorney General had issued opinions during the previous decades indicating that while service in the militia could be compelled, service abroad could not).

[350] Transcript of Record at 5, Arver v. United States, 245 U.S. 366 (1918) (No. 681).

[351] *E.g.*, *id.* He also argued that conscription constituted involuntary servitude under the Thirteenth Amendment, among other claims. *Id.* at 6 ("[I]t is a combination of Church and state, and so infringes the religious belief of the people of the United States.").

[352] *Id.* at 23.

[353] *Id.* at 34. Jacob Panken, the attorney in *United States v. Graubard*, similarly argued that the law violated the First Amendment because it discriminated against objectors who were not members of well-recognized sects. *Id.* at 11. According to Panken,

> [A] man may have a conscientious objection and not belong to that particular church. . . .
>
> . . . .
>
> . . . He may have the belief it is wrong to take life, and because of that he is a conscientious objector. He may disbelieve in war, and where a conscientious man objects to going to war, and does not belong to any religious party or organization, that is a discrimination; it is a discrimination against such persons, and it is a discrimination in favor of such religious organization.

Id.

[354] *Id.* at 34.

[355] Brief of Walter Nelles as Amicus Curiae, Ruthenberg v. United States, 245 U.S. 480 (1918) (No. 656) [hereinafter NCLB Amicus Brief].

upon their duty towards Man," Nelles explained.[356] But whatever their motivations, the nation's "fundamental law,"[357] including the First Amendment as well as the Ninth (which preserved the people's unenumerated "natural rights"[358]), extended them protection. Nelles conceded that in the eighteenth or early nineteenth centuries, when "[n]early every one's sacred beliefs had relation with a Deity," it might have been reasonable to limit exemptions to recognized religious sects.[359] In the twentieth, by contrast, organized religion was on the decline.[360] The Supreme Court had long since severed the connection between sect and conscience.[361] In recent decades, religion had altogether "escaped . . . from theology"; modernity had rent the ties between "right and wrong" and a "putative Maker."[362] Citing William James for the proposition that atheism, "psychologically considered, is indistinguishable from religious zeal,"[363] Nelles believed it was the "psychological fact, not its theological suit of clothes, which the First Amendment to the Constitution protects."[364]

Relying on *Ex Parte Milligan*,[365] Nelles rejected the principle, espoused by such legal luminaries as Elihu Root, that constitutional protections were subordinate to claims of necessity during times of national crisis.[366] To be sure, "the right to conform conduct to conscience" could occasionally be curtailed.[367] The Supreme Court's decision in *Reynolds v. United States*,[368]

---

356 *Id.* at 2.

357 *Id.*

358 *Id.* at 3.

359 *Id.*

360 *Id.* at 4.

361 *Id.* For that point, Nelles cited *Davis v. Beason*, 133 U.S. 333, 342 (1890) ("It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter. The first amendment . . . was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others . . . .").

362 NCLB Amicus Brief, *supra* note 355, at 5.

363 *Id.* at 6; WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE 35 (1902).

364 NCLB Amicus Brief, *supra* note 355, at 6.

365 71 U.S. 2 (1866).

366 NCLB Amicus Brief, *supra* note 355, at 9–10. "What is the effect of our entering upon this war? The effect is that we have surrendered, and are obliged to surrender, a great measure of that liberty which you and I have been asserting in court during all our lives—power over property, power over person. . . . You cannot have free democracy and successful war at the same moment." *Id.* (emphasis omitted) (quoting Elihu Root, Address to the Conference of Bar Associations). *See also To Hell with the Constitution, Says Elihu Root, Anarchist*, NEW AGE (Jan. 5, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 5, Vol. 43.

367 NCLB Amicus Brief, *supra* note 355, at 9.

which rejected Mormons' claim for constitutional exemption from the federal anti-bigamy law, had allowed for the regulation of conduct that, as Nelles put it, "outrage[d] the moral sense of the community."[369] On that score, however, the government lacked a leg to stand on. After all, it was death, not refusal to kill, that properly "shock[ed] that moral sense."[370]

Nelles's indictment of violence stood out in a brief otherwise notable for its pluralistic deference. Where others extolled expressive freedom for its propensity to expose the truth, Nelles thought truth was elusive, if it existed at all. "[S]ince everything human is fallible," he argued, "there is no authoritative criterion of the rightness of anything."[371] Indeed, "the blindest arbitrary assumption has at least the chance of being as right as reason."[372]

Unsurprisingly, Nelles's relativism failed to persuade the Supreme Court (whose Chief Justice had interrupted one attorney's oral argument to rebuke him for his "unpatriotic" insinuation that the war lacked popular support).[373] Like the government's brief, the Court all but ignored the objectors' appeal to liberty of conscience. Indeed, it "pass[ed] without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act," because it considered the "unsoundness" of the argument "too apparent to require" anything more.[374]

In upholding the Selective Service Act, the Court emphasized the expansive reach of federal power.[375] In so doing, it abandoned its solicitude for

---

368 98 U.S. 145 (1879).

369 NCLB Amicus Brief, *supra* note 355, at 9; *Reynolds*, 98 U.S. 145 (denying exemption from anti-bigamy laws on religious grounds). On *Reynolds*, see SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA (2002).

370 NCLB Amicus Brief, *supra* note 355, at 9.

371 *Id.* at 8.

372 *Id.*

373 *Arver v. United States*, 245 U.S. 366 (1918), upholding the Act, was decided on January 7, 1918. Chief Justice Edward Douglass White's reprimand of attorney J. Gordon Jones was reported in *Justice White Rebukes Lawyer Attacking Draft*, N.Y. TRIB., Dec. 13, 1917, *microformed on* ACLU Papers, *supra* note 24, Reel 5, Vol. 43.

374 *Arver*, 245 U.S. at 389–90; *see also* Government Brief at 82–83, Ruthenberg v. United States, 245 U.S. 480 (1918) (No. 656) ("This provision has nothing in it 'respecting an establishment of religion.' The law recognizes the right of every citizen to choose religious affiliations without restriction. It goes so far as to aid in the free exercise of those religions which forbid participation in war. Under section 4 also may be exempted 'those found to be physically or morally deficient' and those with dependents. It will not be argued that the law establishes a status of physical or moral deficiency, or of financial dependency; nor that freedom to change these conditions is prohibited.").

375 *Arver*, 245 U.S. at 389.

individual autonomy in cases involving property rights and freedom of contract. The inconsistency was particularly striking in light of the Court's notorious decision in *Hitchman Coal & Coke Co. v. Mitchell* just one month prior.[376] In that case, a six-Justice majority upheld an injunction against the United Mine Workers for attempting to recruit non-union workers, who had signed yellow-dog contracts in keeping with their "constitutional rights of personal liberty and private property." On December 22, 1917—after oral argument in the conscription cases, but before the Court's decision was handed down—the *New Republic* published an editorial on *Hitchman Cole & Coke*. "The decision," it mused, would "confirm the popular feeling . . . that a majority of the Supreme Court are endeavoring to enforce their own reactionary views of public policy, in direct opposition to the more enlightened views prevailing in legislatures and among the public."[377] It is no wonder that the NCLB's constitutional strategy in the draft-act challenge attracted little Progressive support.

As for conservatives, the American Bar Association and its corporate allies loudly decried the Administration's abridgement of "civil liberty" (a concept the *New York Times* had recently dismissed as an "obstacle to progress"[378]). In fact, the ABA celebrated the unique role of the judiciary in maintaining "constitutional safeguards to individual rights of property and liberty" and, by extension, forestalling socialist revolution.[379] And yet, the Illinois State Bar Association captured lawyers' dominant view when it passed a resolution deeming it "contrary to the ethics of the profession for members of the Bar to accept professional employment which will involve their appearance before the exemption boards . . . for the purpose of securing for individuals or classes, exemption from the selective draft for service during the war."[380] Conservatives were not yet concerned with preserving personal rights, and they were unwilling to insulate antiwar advocacy, let alone exemption from

---

376 245 U.S. 229, 251 (1917).

377 Opinion, *Breaking the Labor Truce*, NEW REPUBLIC, Dec. 22, 1917, at 197, 197.

378 *Dr. Frank J. Goodnow Examines and Compares the Constitutions of Leading Nations, with Interesting Results for Our Own Political System*, N.Y. TIMES, Aug. 13, 1916, at 28 (reviewing FRANK J. GOODNOW, PRINCIPLES OF CONSTITUTIONAL GOVERNMENT (1916)); *see also supra* note 172 and accompanying text.

379 Rome G. Brown et al., *Report of the Committee to Oppose Judicial Recall*, 3 A.B.A. J. 454, 457 (1917); *see also* Walter George Smith, *Civil Liberty in America, Address by Walter George Smith*, 4 A.B.A. J. 551 (1918).

380 *Addendum: Employment to Secure Exemption from Draft Unethical*, 3 A.B.A. J. 558 (1917).

conscription for political objectors.[381] It would take much longer, and stronger threats to conservative interests, for the ACLU to accomplish that goal.[382]

In elevating individual conscience over democratic consensus, the draft-act challenges threatened Progressive ideals; in serving socialist dissenters, they alienated judicial enthusiasts. In short, the defense of conscientious objectors in the courts had few advocates during the war. The NCLB's participation in the conscription cases impeded the organization's fundraising and recruitment efforts. Correspondents complained that "fighting the draft and attempting to repeal it merely discredits an organization which indulges in the pastime without doing the slightest good."[383] Even allies who shared the NCLB's concern for conscientious objectors rejected the organization's methods.[384] No less a civil libertarian than Zechariah Chafee accepted the legitimacy of conscription and chalked up the constitutional challenge to "extreme views."[385]

By the spring of 1918, exemptions for inductees were the least of the NCLB's concerns. The organization was resisting government repression on multiple fronts, including the federal prosecution of the entire leadership of the Industrial Workers of the World.[386] As sympathetic officials proved willing to accommodate individual objectors with religious convictions, the NCLB's particular allegiance to political objectors became increasingly evident.[387] Perhaps if the NCLB had remained within the AUAM and maintained a more moderate posture, it might have extracted more concessions from administration officials. Perhaps the government's lackluster attitude drove the

---

381 *Id.*; *see also* WEINRIB, *supra* note 31.

382 WEINRIB, *supra* note 31.

383 Letter from Lawrence G. Brooks to Roger N. Baldwin (Sept. 21, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 4, Vol. 32.

384 *E.g.*, Letter from John S. Codman to Roger N. Baldwin (Oct. 25, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 3, Vol. 25 ("I have no doubt that I agree with your attitude as to the conscientious objector and the question would, therefore, come on the draft. What I shall want to know sooner or later is to what extent your Committee intends to push the question of the constitutionality because I doubt the expediency of doing this and would not want to be connected with it.").

385 Chafee, *supra* note 1, at 937. Chafee reasoned, "The provisions of the Bill of Rights cannot be applied with absolute literalness but are subject to exceptions. For instance, the prohibition of involuntary servitude in the Thirteenth Amendment does not prevent military conscription, or the enforcement of a 'work or fight' statute." *Id.* Chafee evidently considered the Thirteenth Amendment to fall within the Bill of Rights. On the ambiguous nature of that term prior to World War II, see Gerard N. Magliocca, *How Did the Bill of Rights Become the Bill of Rights* (Ind. Univ. Sch. Law, Research Paper No. 2015-30), http://ssrn.com/abstract=2617811.

386 *See* WALKER, *supra* note 9, at 37.

387 Letter from Frederick Keppel, Third Assistant Sec'y, U.S. Dep't of War, to L. Hollingsworth Wood et al. (Oct. 2, 1918), *microformed on* ACLU Papers, *supra* note 24, Reel 6, Vol. 47.

NCLB to more radical methods. Either way, the NCLB's efforts yielded fewer and fewer practical results.

Early in 1918, official dealings with the NCLB became a liability for the War Department.[388] Colonel R.H. Van Deman, chief of the Intelligence Section of the War College in Washington, D.C., had launched an investigation of Baldwin in December 1917.[389] By the spring of 1918, the NCLB was under close observation.[390] Keppel told Baldwin in late February that many of Newton Baker's "military associates" believed that the NCLB was flirting with "direct conflict with the government."[391] In response, Baldwin wrote to Major Nicholas Biddle, an intelligence officer, and—attaching all of the organization's printed materials, as well as its mailing list—requested that an inquiry be made into the NCLB's activity to clear the organization's name.[392] Baldwin insisted that the NCLB was not doing anything to embarrass the government's recruitment effort, and he wrote Van Deman directly with a promise to cease all potentially objectionable activities.[393] Van Deman nonetheless advised prosecution of Baldwin under the Sedition Act, and although the NCLB's activity was eventually deemed lawful, the War Department severed communications with the group.[394]

Even then, the NCLB sought desperately to salvage the relationship. In correspondence with Keppel, Baldwin emphasized that the NCLB was "acting wholly within the letter of the law and within the spirit of the Secretary's

---

388 Letter from Frederick Keppel to Roger N. Baldwin (Feb. 26, 1918), *microformed on* ACLU Papers, *supra* note 24, Reel 2, Vol. 15.

389 COTTRELL, *supra* note 29, at 66.

390 *Id.* at 66–67; ROY TALBERT, JR., NEGATIVE INTELLIGENCE: THE ARMY AND THE AMERICAN LEFT, 1917–1941, at 78–81 (1991).

391 Letter from Frederick Keppel to Roger N. Baldwin, *supra* note 388. Baldwin assumed that the principal objection was to the conscientious objector work, since the organization's legal defense work was "directly communicated to the Department of Justice." Letter from Roger N. Baldwin to Frederick Keppel, Third Assistant Sec'y, U.S. Dep't of War (Mar. 1, 1918), *microformed on* ACLU Papers, *supra* note 24, Reel 2, Vol. 15.

392 Letter from Roger N. Baldwin, Dir., Nat'l Civil Liberties Bureau, to Major Nicholas Biddle (Mar. 8, 1918), *microformed on* ACLU Papers, *supra* note 24, Reel 2, Vol. 15.

393 Letter from Colonel Ralph H. Van Deman, Chief, Military Intelligence Branch, U.S. Dep't of War, to Frederick Keppel, Third Assistant Sec'y, U.S. Dep't of War (Mar. 9, 1918), *microformed on* ACLU Papers, *supra* note 24, Reel 2, Vol. 15.

394 COTTRELL, *supra* note 29, at 75. L. Hollingsworth Wood, a personal friend of Keppel's, met with him for an hour and commented that Keppel "seemed a good deal wrought up over the situation." Memorandum of Conference with Third Assistant Sec'y of War Keppel (Aug. 14, 1918), *microformed on* AUAM Papers, *supra* note 42, Reel 10:1; Letter from Frederick Keppel to Roger N. Baldwin (May 19, 1918), *microformed on* ACLU Papers, *supra* note 24, Reel 2, Vol. 15.

policy."[395] He professed the organization's willingness "to discontinue any practices" that the War Department deemed objectionable.[396] Shut out of the inner circles of the War Department, Baldwin grew increasingly frustrated. To the last, he assured the War Department that he stood ready "now, as at any time, to discontinue efforts which the Secretary of War may not think to be helpful"—lest the breakdown in communication "throw the whole matter into the field of public controversy and . . . undo much of the quiet and effective work toward a satisfactory solution."[397] And yet, he grew "thoroughly disgusted with the folks at Washington who have given us such hearty assurances."[398] Those assurances, he complained, did not translate into tolerant policy, and "the indictments go on merrily."[399]

Ultimately, the space between the NCLB's position and the War Department's with respect to conscientious objectors was insurmountable. The Wilson Administration proved willing to do much to accommodate objectors who were unequivocally opposed to participation in war and who were willing to accept alternative service, even if they were motivated by moral rather than religious scruples. But the Bureau's special concern for political objectors, who were willing to "take part in some wars, as for example social revolutions," bears emphasis.[400] From the beginning, the NCLB leadership was particularly concerned with those few stalwart radicals whose class-consciousness motivated their resistance to a *capitalist* war, and who were therefore adjudged insincere.[401]

---

395 Letter from Roger N. Baldwin to Major Nicholas Biddle, *supra* note 392.

396 Letter from Roger N. Baldwin to Frederick Keppel (Mar. 13, 1918), *microformed on* ACLU Papers, *supra* note 24, Reel 2, Vol. 15; Letter from Roger N. Baldwin to Major Nicholas Biddle, *supra* note 392; Letter from Roger N. Baldwin to Frederick Keppel, *supra* note 391.

397 Letter from Roger N. Baldwin to Colonel Ralph Van Deman, Chief, Military Intelligence Branch, U.S. Dep't of War (Aug. 17, 1918), *microformed on* ACLU Papers, *supra* note 24, Reel 2, Vol. 15.

398 Letter from Roger N. Baldwin to Edmund Evans (Mar. 16, 1918), *microformed on* ACLU Papers, *supra* note 24, Reel 3, Vol. 25.

399 *Id.*

400 Letter from L. Hollingsworth Wood et al., Nat'l Civil Liberties Bureau, to Newton Baker, Sec'y, U.S. Dep't of War (Sept. 14, 1918), *microformed on* ACLU Papers, *supra* note 24, Reel 5, Vol. 44; *see also* Letter from Roger N. Baldwin to Newton Baker (June 30, 1917), *microformed on* ACLU Papers, *supra* note 24, Reel 2, Vol. 15 (noting undue limitation of religious exemption).

401 EDWARD M. COFFMANN, THE WAR TO END ALL WARS: THE AMERICAN MILITARY EXPERIENCE IN WORLD WAR I 76 (1968) ("A major criterion for sincerity was whether or not the man objected only to this particular war."); Press Release, Nat'l Civil Liberties Bureau (Jan. 23, 1919), *microformed on* AUAM Papers, *supra* note 42, Reel 10:1 ("The Board had found that their objection to *all* war which alone entitled objectors to farm furlough was not sincere or well founded.").

This was a step that the Wilson Administration was patently unwilling to make. As Harlan Fiske Stone observed, reflecting after the war on his service for the Board of Inquiry, it was "conceivable that one might have a moral and conscientious aversion to participating in the late war with Germany, although such conscientious objection would not prevent his participating in a war to exterminate the capitalist and the bourgeois."[402] But the Board was spared the task of assessing such "casuistic arguments."[403] It was the War Department's policy that conscientious objectors be accommodated only if they opposed "all war on principle."[404] In correspondence with the NCLB, Newton Baker explained that the appropriate place for political objectors was the "Disciplinary Barracks."[405] Baker distinguished sharply "between the man whose fundamental difficulty is the taking of human life, and the man who stands merely in political opposition to the program which our government is now carrying out."[406]

In the run-up to November's Armistice, the NLCB leadership conveyed its frustration in forthright terms. The NCLB faulted the government for its stubborn insensitivity to the plight of absolutist objectors, who refused alternative service, and especially to those "political objectors" who were willing to "take part in some wars, as for example social revolutions."[407] Echoing Norman Angell, its representatives emphasized in a September 1918 letter the "value of minorities in social process" (after all, the "minority of today may be the majority of tomorrow") and society's "incalculable debt to its heretics."[408] They also emphasized the horrors of war, which "right-thinking men" would consider justifiable only in legitimate cases of "social necessity."[409] And they stressed that conscientious objectors would remain a small minority of eligible men, given the tremendous social pressure to serve.[410] But above all, they celebrated conscience as a purely individual decision "whether a particular course of action under particular conditions is

---

402 Harlan F. Stone, *The Conscientious Objector*, 21 COLUM. UNIV. Q. 253, 267 (1919).

403 *Id.*

404 *Id.*

405 Letter from Newton Baker, Sec'y, U.S. Dep't of War, to L. Hollingsworth Wood, Chairman, Nat'l Civil Liberties Bureau (July 15, 1918), *microformed on* ACLU Papers, *supra* note 24, Reel 6, Vol. 47.

406 *Id.*

407 Letter from L. Hollingsworth Wood et al. to Newton Baker, *supra* note 400.

408 *Id.*

409 *Id.* ("For a man to fight in a war that to him seems unnecessary or unjust may be as keen a torment to his conscience as for a Quaker, who disbelieves in force for any purpose, to fight in a war he considers wholly just.").

410 *Id.*

morally *right* or *wrong*."[411] That the War Department believed the political objectors were mistaken was irrelevant; the important point was that they were sincere. Emphasis on "the value of the individual" distinguished American democracy from the "Prussian doctrine of the total subordination of the individual to the state."[412]

Answering for the War Department, Keppel balked. The suggestion that political objectors merited exemption, he explained, revealed a "profound misapprehension" of the principle on which the administration's policy toward conscientious objectors was based[413]—namely, "respect for the scruples of those who cannot conscientiously *take human life*."[414] In his letter, Keppel succinctly elucidated the War Department's rationale for excluding political objectors. "The very root and essence of the whole matter is conscientious aversion to destroying human life," he explained.[415] "The man who is willing to take human life if, in his judgment, the occasion is sufficiently compelling, obviously does not come within the shadow of this principle."[416]

From the War Department's perspective, the NCLB's attitude was more than merely misguided. "To admit such an exemption as that for which you contend would be to admit the right of every man to set himself up as judge of the wisdom of our Government in engaging in the present war," Keppel continued.[417] "[I]t would be to acknowledge that the Selective Service Law is binding upon the drafted man only so far as he sees fit to obey it."[418] Newton Baker had made the same point in explaining why no exemption could be extended to men of "enemy extraction."[419] Excusing military service on that basis would open the floodgates to a broad range of exemption claims, from tax evasion to respecting others' right to life.[420] Any such outcome stood in direct contrast to Progressive ideals.

According to Keppel, War Department officials had prescribed tolerance for conscientious objectors only because of the unmistakable moral gravity of inflicting death. "It has no broader basis, and can have none, as long as

411 *Id.*
412 *Id.*
413 Letter from Frederick Keppel to L. Hollingsworth Wood et al., *supra* note 387.
414 *Id.*
415 *Id.*
416 *Id.*
417 *Id.*
418 *Id.*
419 *Id.*
420 *Id.* (quoting Letter from Newton Baker to the Judge Advocate General (June 9, 1918)).

organized government is to endure," he added.[421] The NCLB's proposal amounted to "the negation of law, of authority, of government when the individual is prepared to assert that these collide with his conscience."[422] Following the path the NCLB advocated would undermine the "safety of the United States."[423]

As the end of the war approached, the Wilson Administration worried that the NCLB itself, not just its clients, threatened state security. The Post Office deemed fourteen of the organization's pamphlets non-mailable, despite doubting that they violated the Espionage Act (Judge Augustus Hand eventually held them deliverable).[424] In late August, government agents began investigating Baldwin's activities on behalf of the IWW.[425] Nicholas Biddle, now a lieutenant colonel in the Office of Military Intelligence, dispatched agents to the NCLB offices to gather evidence for an Espionage Act prosecution.[426] Walter Nelles linked the raid to patrioteering groups and the IWW trial, as well as the organization's work on behalf of conscientious objectors.[427] Despite demands for an indictment, the NCLB's highly placed connections (especially John Nevin Sayre, brother of President Wilson's son-in-law), discouraged the Department of Justice from prosecuting.[428]

One member of the NCLB leadership, however, was soon to face prosecution, albeit on different charges. In August 1918, the draft age was raised from thirty to forty-five, and the thirty-four-year-old Roger Baldwin

---

421 *Id.*

422 *Id.*

423 *Id.* Although the letter was not actually written by Keppel, it evidently captured his attitude. Letter from Frederick Keppel to L. Hollingsworth Wood (Oct. 9, 1918), *microformed on* ACLU Papers, *supra* note 24, Reel 6, Vol. 47; *see also* Letter from Newton Baker to L. Hollingsworth Wood, *supra* note 405 ("I make a sharp distinction in my mind between the man whose fundamental difficulty is the taking of human life, and the man who stands merely in political opposition to the program which our government is now carrying out.").

424 JOHNSON, *supra* note 29, at 74–75; Press Release, Nat'l Civil Liberties Bureau (Oct. 17, 1918) (on file with Swarthmore College Library, Swarthmore College Peace Collection, Records of American Civil Liberties Union, Box 1, Folder 1918).

425 COTTRELL, *supra* note 29, at 80–81.

426 *Id.*

427 Letter from L. Hollingsworth Wood to Friends of the Bureau (Sept. 17, 1918), *microformed on* AUAM Papers, *supra* note 42, Reel 10:1 ("No change whatever in the operation of the Bureau is contemplated, regardless of the results of the examination of our papers.").

428 COTTRELL, *supra* note 29, at 82; JOHNSON, *supra* note 29, at 76–77; Letter from John Nevin Sayre to Albert DeSilver (Oct. 18, 1918), *microformed on* ACLU Papers, *supra* note 24, Reel 6, Vol. 47 (noting that he had telephoned his brother, President Wilson's son-in-law, who had agreed to write to Newton Baker to "put in a good word").

became eligible for conscription.[429] Baldwin pledged to resign as director of the NCLB in order to take a "personal stand."[430] In mid-September, he failed to appear for his physical examination and filed a statement refusing to "perform any service under compulsion regardless of its character."[431] In October, he was arrested upon his own request and indicted for violation of the Selective Service Act.[432]

On October 30, 1918, Roger Baldwin appeared before Judge Julius Mayer in the Southern District of New York[433]—the same judge who had presided over the July 1917 convictions of Emma Goldman and Alexander Berkman for conspiracy to interfere with the draft.[434] In his statement, Baldwin eschewed arguments about pluralism and the public interest and instead emphasized his uncompromising commitment to "individual freedom."[435] At the beginning of the war, Baldwin had tackled the problem of conscientious objectors with the techniques and enthusiasm of a veteran Progressive reformer. As the NCLB came under investigation and its clients languished in jail, he grew disenchanted with state-centered reform. Indeed, he lost faith in the state altogether.[436]

In his statement to the court, Baldwin declared himself unequivocally opposed to war and, consequently, to conscription.[437] But his refusal to perform military service was part of a larger program. He informed the court that he would resist any attempt by government to control his "choice of service and ideals."[438] He claimed an absolute right of individual conscience—a right that superseded national allegiance and trumped government power.[439]

---

429 Pub. L. No. 210 (1917), *in* SELECTIVE SERVICE REGULATIONS 357 (2d ed. 1918).

430 Letter from Roger N. Baldwin to the Directing Comm. (Aug. 10, 1918), *microformed on* ACLU Papers, *supra* note 24, Reel 3, Vol. 25. He initially intended to refuse to register, but the raid on the NCLB offices prompted him to delay action until the "critical period" had passed. COTTRELL, *supra* note 29, at 81.

431 *Id.* (quoting Roger Baldwin).

432 THE INDIVIDUAL AND THE STATE: THE PROBLEM AS PRESENTED BY THE SENTENCING OF ROGER N. BALDWIN 6 (1918). He refused bail and helped the Department of Justice to organize the NCLB's confiscated files. COTTRELL, *supra* note 29, at 86.

433 THE INDIVIDUAL AND THE STATE, *supra* note 432, at 3.

434 *Convict Berkman and Miss Goldman: Both off to Prison*, N.Y. TIMES, July 10, 1917.

435 THE INDIVIDUAL AND THE STATE, *supra* note 432, at 6.

436 His about-face stemmed in large part from his intimate involvement in the IWW defense, described in WEINRIB, *supra* note 31.

437 THE INDIVIDUAL AND THE STATE, *supra* note 432, at 6.

438 *Id.*

439 *Id.* Baldwin did not except class war from his statement.

Baldwin was explicit about his rejection of Progressive ideals. He recounted his childhood and education, as well as his work in St. Louis as a social worker and reformer.[440] He attributed his departure from St. Louis to his disillusionment with incremental change.[441] For the past six years, he had "felt [himself] heart and soul with the world-wide radical movements for industrial and political freedom—wherever and however expressed—and more and more impatient with reform."[442] Echoing the claims of the radical libertarians and anarchists of the prior decade and, more prominently of John Stuart Mill, he called for a "social order without any external restraints upon the individual, save through public opinion and the opinion of friends and neighbors."[443] Although he was espousing a minority position, he believed himself to be part of a "great revolt surging up from the people—the struggle of the masses against the rule of the world."[444] And the movement he had joined was a fight against the "political state itself."[445]

To Judge Mayer, Baldwin's beliefs were incompatible with the very republican liberties he invoked.[446] He advised Baldwin that "the freest discussion" should be allowed and encouraged "in the processes that lead up to the enactment of a statute."[447] Once a law was passed, he added, the people were free to debate "the methods of [its] administration."[448] But democracy was incompatible with individual disregard for duly enacted laws.[449] Although he was impressed with Baldwin's sincerity, Judge Mayer sentenced him to one year in prison, the maximum provided by law—an outcome that Baldwin accepted with a "friendly smile."[450]

Over the coming months, Baldwin's friends and allies sought to secure him an executive pardon, but Baldwin refused to leave jail except under a general

---

440 *Id.* at 9.
441 *Id.* at 10.
442 *Id.* at 9.
443 *Id.*
444 *Id.*
445 *Id.* at 10.
446 *Id.* at 12.
447 *Id.* at 13.
448 *Id.*
449 *Id.*
450 *Baldwin Gets Year for Draft Act Defiance*, N.Y. CALL, Oct. 31, 1918, *microformed on* ACLU Papers, *supra* note 24, Reel 6, Vol. 46. Baldwin later recalled that a wide range of groups commended him for his stand, including the American Association for Organized Charities, the National Municipal League, the Society for Prevention of Cruelty to Animals, the Liberal Club of Harvard, and the League for Democratic Control. LAMSON, *supra* note 29, at 111.

amnesty.[451] He reiterated his opposition to state authority and affirmed his commitment to a "social principle more precious . . . than personal freedom," namely, the right to follow the dictates of one's God and conscience, which he linked to an "ancient principle of individual liberty."[452] In Baldwin's view, only a "clean-ought, straight-out recognition of the principle of individual conscience" would satisfy the demands of "sound public policy."[453] To Baldwin, in contrast to his Progressive sometime allies, the state was "not a sacred institution."[454] Baldwin rejected the romantic notion that state policy reflected a "determined majority opinion." Rather, the nation's small cadre of elected officials represented "the controlling economic interests of the country."[455] What Baldwin wanted was a "new order of society, freed of the compulsion and arbitrary restraints of an all supreme State."[456]

Baldwin vowed not to leave prison through political favors while hundreds of his fellow objectors continued to "drag out long, lifeless days behind bars."[457] In any case, his own time in jail was tolerable, even "profitable."[458] As he told the *New York Call*, he left prison "more of a radical than [he] went in."[459] He intended to decline participation in any civic institution—including voting and jury duty—and to join the "revolutionary labor movement," since the world had "passed so-called political democracy" by.[460] He acted on his ideals by joining the IWW, the organization whose opposition to political action influenced Baldwin's own anti-statism most profoundly.[461] He spent

---

451 Press Release, Nat'l Civil Liberties Bureau (Mar. 7, 1919), *microformed on* ACLU Papers, *supra* note 24, Reel 5, Vol. 44.

452 Letter from Roger N. Baldwin, Dir., Nat'l Civil Liberties Bureau, to Albert DeSilver (Mar. 5, 1919), *microformed on* ACLU Papers, *supra* note 24, Reel 5, Vol. 44.

453 *Id.* Consistent with his evolving class concerns, he added, "We want it understood that military conscription against which our imprisonment is our protest is not far removed from industrial conscription, which in various sinister forms, the great commercial interests are endeavoring to secure in order to crush the growing power of labor." *Id.*

454 *Id.*

455 *Id.*

456 *Id.*

457 *Id.*

458 *Roger Baldwin Free from Jail, Urges Amnesty for Politicals*, N.Y. CALL, July 20, 1919, *microformed on* ACLU Papers, *supra* note 24, Reel 6, Vol. 45. *See generally* COTTRELL, *supra* note 29, at 94–97. Baldwin was released on July 19, 1919. *Id.*

459 *Roger Baldwin Free from Jail, Urges Amnesty for Politicals*, *supra* note 458. The *New York Call* reported that due to his disdain for "representative government," he would not join the Socialist Party. *Id.*; *see also* Clipping, N.Y. TELEGRAM, July 20, 1919, *microformed on* ACLU Papers, *supra* note 24, Reel 6, Vol. 45.

460 Clipping, *supra* note 459.

461 COTTRELL, *supra* note 29, at 73. Bill Haywood sponsored him for membership, despite his reservations about Baldwin's greater utility as an advocate. *Id.*

several months traveling the country as an itinerant worker before returning to New York to found the ACLU.[462]

IV. THE LEGACY OF CONSCIENCE

The emergence of contemporary First Amendment doctrine in the wake of World War I is an often told, if often oversimplified, story. In the conventional account, the unprecedented scale of wartime suppression produced a new coalition of Progressives and liberal lawyers on behalf of expressive freedom.[463] Rather than making the world safe for democracy, the end of hostilities abroad unleashed a new wave of repression at home.[464] Unsettled by the scale of postwar intolerance, the new civil liberties movement retooled free speech to protect the public interest and defuse social conflict.[465] Judges and academics allegedly rallied to a marketplace of ideas, where the best ideas would eventually prevail.[466] The same aversion to enforced conformity carried over to religious freedom, albeit more slowly, and over the ensuing decades, the reach of the First Amendment's religion clauses expanded as well.[467]

This conventional story is partly true. Clearly, the war and the ensuing Red Scare prompted reevaluation of the importance of the First Amendment.[468] Organization and advocacy on behalf of civil liberties were in shambles at the close of the war, but as the wartime exigencies dissipated and repression continued, many Americans within and outside the political and legal establishments began to espouse greater tolerance for difference, and stronger

---

462 *Id.* at 108–11.

463 For a summary of this "mainstay of scholarly popular culture, handed down from author to author with little reexamination of the original sources," see GRABER, *supra* note 5, at 4–6. *See also* MURPHY, *supra* note 7, at 29–30.

464 GRABER, *supra* note 5, at 4.

465 *Id.*

466 The notion of the "marketplace of ideas" is ordinarily ascribed to Justice Holmes's dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market."). Legal scholars have long critiqued the marketplace model. *E.g.*, C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 974–78 (1978); Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 6–13.

467 *See, e.g.*, 12 WIECEK, *supra* note 12, at 213, 220 (concluding that between the Supreme Court's 1940 incorporation of the Free Exercise Clause (which marked its entry into religious freedom cases) and 1953, the Court "usually chose religious freedom").

468 MURPHY, *supra* note 7, at 15–18 (describing the notable efforts by contemporary critics to grapple with the wartime repression).

adherence to the rule of law.[469] In the history of civil liberties, World War I is an undeniable flashpoint.

What the most familiar interwar figures demanded in the realm of personal rights was, however, little more than a return to normalcy. The proponents of free speech during and immediately after the war drew from tropes and tactics developed by Progressives over the past two decades. Of course, they reassessed the priority of expressive freedom vis-à-vis other Progressive values; official lawlessness and vigilante violence, among other concerning developments, had revealed the high cost of conformist propaganda.[470] Many interwar civil liberties advocates responded to institutional developments, including the dramatic expansion of administrative power.[471] Above all, a few judges and Justices—including some very important ones, like Oliver Wendell Holmes, Jr. and Louis Brandeis—came to recognize a role for the judiciary in insulating free speech from democratic overreaching (though they remained dissenters throughout the 1920s).[472] Nonetheless, the most prominent theories of civil liberties in 1920 borrowed heavily from their prewar precursors.

The ACLU's vision of civil liberties was an exception. If there was a single salient feature of its founders' wartime experience, it was the pervasiveness of failure. To varying degrees, every office of government succumbed to patriotic fervor.[473] More than anything, the war shattered the confidence of the ACLU leadership in administrative expertise and centralized state power, rendering the courts no worse (that is, equally poor) a candidate for civil liberties enforcement than the tainted political branches. When it was founded in 1920, the ACLU rejected all three as tools of civil liberties enforcement, opting

---

469 Perhaps the best-known example is the *Report on the Illegal Practices of the United States Department of Justice*, signed by twelve prominent lawyers and scholars, including Felix Frankfurter, Zechariah Chafee, Ernst Freund, and Roscoe Pound. R.G. BROWN ET. AL., NAT'L. POPULAR GOV'T LEAGUE, TO THE AMERICAN PEOPLE: REPORT UPON THE ILLEGAL PRACTICES OF THE UNITED STATES DEPARTMENT OF JUSTICE (1921).

470 On the relationship between official lawlessness, vigilante violence, and civil liberties, see generally CAPOZZOLA, *supra* note 7.

471 *Id.* at 210. On interwar efforts to grapple with the expansion of administrative power, see DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940 (2014); Daniel R. Ernst, *Ernst Freund, Felix Frankfurter and the American Rechtsstaat: A Transatlantic Shipwreck, 1894–1932*, 23 STUD. AM. POL. DEV. 171 (2009).

472 Gitlow v. New York, 268 U.S. 652 (1925); Pierce v. United States, 252 U.S. 239 (1920); Schaefer v. United States, 251 U.S. 466 (1920); Abrams v. United States, 250 U.S. 616 (1919). On Justice Holmes's conversion, see HEALY, *supra* note 7; POLENBERG, *supra* note 8; RABBAN, *supra* note 5, at 346–54; STONE, *supra* note 5, at 198–211.

473 WALKER, *supra* note 9, at 24–25.

instead for the direct action tactics of the IWW and its other wartime clients.[474] That is, it folded both expressive and religious freedom into a new, state-skeptical civil liberties agenda, which sought to insulate the labor struggle—including labor's most powerful economic weapons, the boycott and strike—against government intervention.[475] "We realize that these standards of civil liberty cannot be attained as abstract principles or as constitutional guarantees," it explained in an early statement.[476] "Economic or political power is necessary to assert and maintain all 'rights.' In the midst of any conflict they are not granted by the side holding the economic . . . power."[477] More to the point, "the property interests of the country [were] so completely in control of our political life as to establish what [was] in effect a class government—a government by and for business."[478] The ACLU was disinclined to trust in state power when it believed that "[p]olitical democracy," outside of a handful of communities, "[did] not exist."[479]

World War I taught the ACLU that unpopular minorities could not rely on state moderation even when their friends occupied positions of power. But the NCLB leadership learned another important lesson, as well. It learned that claims for expressive freedom (as well as procedural rights) were more acceptable than claims for exemption on the basis of conscience. Both had yielded, of course, to the exigencies of war. But the two types of failure were different in kind. Judges and public officials who were sympathetic to free speech rejected exemption claims not only as a function of wartime interest balancing, but also as a fundamental threat to Progressive values.[480] Simply put, Progressives considered claims for expressive freedom—even court-centered and constitutional ones—to be more palatable than conscience-based carve-outs from generally applicable laws.

The modern vision of civil liberties emerged slowly and haltingly, and the ACLU that engineered it bore little resemblance to its wartime precursor or to its present-day heir. Between the great coal and steel strikes of 1919 and the

---

474 WEINRIB, *supra* note 31. It also emphasized grass-roots agitation. *See, e.g.*, AM. CIVIL LIBERTIES UNION, THE FIGHT FOR FREE SPEECH 28 (1921) ("We are confronted with a situation throughout the country in which we must depend more and more upon publicity and less upon contests in the courts.").

475 AM. CIVIL LIBERTIES UNION, *supra* note 474, at 16 ("The right of workers to organize . . . and to strike, should never be infringed by law.").

476 *Id.* at 18.

477 *Id.*

478 *Id.* at 4.

479 *Id.*

480 *See supra* notes 446–50.

early New Deal, when labor militancy was at a relative low, the organization engaged in its most influential work. Working in comparatively uncontroversial fields (like academic freedom and sex education) and through less threatening methods (including legal defenses based on sufficiency of the evidence), it grafted a state-skeptical defense of labor's right to organize and strike onto a conservative model of judicial enforcement.[481] That is, the modern First Amendment was not Zechariah Chafee's First Amendment alone. It drew support both from judicial enthusiasts skeptical of radical speech and from Progressive pluralists otherwise antagonistic toward the federal courts.[482]

In the domain of conscience, however, the old Progressive hostility toward individual rights endured, and consensus proved harder to attain. During the 1920s, conservatives decried the expanding reach of state power, a phenomenon it associated with Prohibition almost as much as restrictive economic laws.[483] Some explicitly analogized to religious freedom. Shortly after the Volstead Act took effect, Columbia president Nicholas Murray Butler cautioned that

> [t]he use of the power of the state to enforce some particular rule of conduct, which those to whom it appeals describe as moral, may easily differ only in form and not in fact from the long since abandoned use of the power of the state to enforce conformity in religious belief and worship.[484]

Incensed by the intrusion, he cast "[p]rivate morals and private conduct" as "matters for the conscience of the individual" rather than majoritarian regulation.[485] A few years later, he lamented a "spineless corporate opinion which . . . aims to reduce all individuality, whether of mind or character, to a gelatinous and wobbling mass."[486]

Apprehensions of this type fueled conservative support for the ACLU's early forays into religious freedom. In its 1923 decision in *Meyer v. Nebraska*, the Supreme Court invalidated a state law restricting foreign-language

---

481 *See* WEINRIB, *supra* note 31.

482 *Id.*

483 *E.g.*, A. Vernon Thomas, *Giddings for Freedom!*, UNITY, Oct. 9, 1919, at 83, 88 ("Thousands of American citizens . . . consented to the involuntary dispatch of their fellows to the European charnel-house and now whine piteously, mouthing such scared words as 'freedom of conscience,' because they, in turn, are the victims of coercion in regard to the consumption of alcoholic drinks.").

484 Nicholas Murray Butler, *The Changing Foundations of Government*, 8 A.B.A. J. 7, 10 (1922).

485 *Id.* at 10–11.

486 *Butler Denounces "New Barbarians,"* N.Y. TIMES, June 4, 1925, at 3.

instruction in the schools.[487] In an opinion which presumed that substantive due process encompassed the right "to worship God according to the dictates of one's conscience," the majority identified education as a matter of "supreme importance" and deemed the law an unconstitutional abridgement of "rights long freely enjoyed."[488] In a striking contrast to the Court's free speech cases, it was Justice Holmes who dissented—reluctant, as in cases involving property rights—to substitute the Court's judgment for the state of Nebraska's.[489]

When *Meyer* was decided, the ACLU considered it an "unimportant" case.[490] Still, the organization's leadership appreciated its prospective importance as a litigation tool. Indeed, the ACLU criticized the compulsory education statute at issue in *Pierce v. Society of Sisters*,[491] an Oregon initiative measure partly justified by Progressive confidence in equality through acculturation.[492] William S. U'Ren, an eminent Oregon Progressive, assured the ACLU's executive committee that Oregon's governor was a "liberal" and that the law posed no threat to "civil or religious liberty";[493] on the contrary, it would raise the quality of public education for all Oregon children.[494] The ACLU was unconvinced. Like the Court (this time, unanimous), it rejected the "power of the State to standardize its children."[495] Although its principal motivation was class consciousness rather than cultural or religious pluralism, it cast the Oregon act as incompatible with "the right to worship according to the dictates of one's conscience."[496]

In the mid-1920s, the ACLU became embroiled in the battle over evolution, most famously in Dayton, Tennessee, where it defended John Thomas Scopes in a test case of the state's prohibition on teaching evolution in

---

487 262 U.S. 390, 401 (1923).

488 *Id.* at 399, 400, 403.

489 *Pierce*, 268 U.S. at 534.

490 AM. CIVIL LIBERTIES UNION, THE RECORD OF THE FIGHT FOR FREE SPEECH IN 1923, at 5 (1924).

491 268 U.S. 510.

492 The Oregon law reflected a cooperative campaign between Progressives committed to public education and anti-Catholics associated with the Ku Klux Klan. *See generally* PAULA ABRAMS, CROSS PURPOSES: *PIERCE V. SOCIETY OF SISTERS* AND THE STRUGGLE OVER COMPULSORY PUBLIC EDUCATION (2009).

493 Letter from Roger N. Baldwin to William S. U'Ren (Jan. 4, 1923), *microformed on* ACLU Papers, *supra* note 24, Reel 34, Vol. 245.

494 Letter from William S. U'Ren to Roger N. Baldwin (Dec. 6, 1922), *microformed on* ACLU Papers, *supra* note 24, Reel 34, Vol. 245

495 Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

496 Letter from Roger N. Baldwin to William S. U'Ren, *supra* note 493. The ACLU initially became interested in *Pierce* and other academic-freedom cases because of the Lusk Committee's attack on radical teachers and on the socialist Rand School of Social Science in New York. *See* WEINRIB, *supra* note 31.

state-funded schools.[497] The ACLU raised a litany of claims under the state and federal constitutions, including an argument that the law established Christianity in general and Evangelism in particular.[498] As the state framed it, however, the central issue in the trial was whether a popular majority could dictate the curriculum in the public schools. The law's defenders described that authority as "fundamentally legislative" and insisted the courts could not cabin it.[499] To the ACLU, by contrast, the police power did not extend to standardizing thought. The anti-evolution laws were of a piece with compulsory Bible reading and with attacks on radical teachers. "All of them," it insisted, "involve precisely the same issues as the laws punishing opinion passed during the war," and with the anti-syndicalism laws that followed it. That is, all of them reflected a growing attempt "to regulate public opinion and to penalize minority and heretical views"—which, in the ACLU's opinion, justified invalidation on constitutional grounds.[500]

The ACLU's position found adherents among respected public officials. The former Progressive governor and future Supreme Court Justice Charles Evans Hughes conveyed a similar sense of the limits of legislative authority in a 1925 address as president of the American Bar Association.[501] Hughes regarded regulation as necessary to social progress and trusted the state to protect its citizens from disease, unhealthy economic practices (equivocally defined), and careless drivers.[502] At the same time, he endorsed the freedom "to worship God according to the dictates of [one's] own conscience,"[503] and he proclaimed "the immunity of the domain of conscience" from government control.[504] The Tennessee evolution law crossed the line because it constrained "the pursuit of knowledge . . . [by] aiming at the protection of creed or

---

497 Scopes v. State, 278 S.W. 57 (Tenn. 1925). On the *Scopes* trial, see RAY GINGER, SIX DAYS OR FOREVER: *TENNESSEE V. JOHN THOMAS SCOPES* (1958); EDWARD J. LARSON, SUMMER FOR THE GODS: THE SCOPES TRIAL AND AMERICA'S CONTINUING DEBATE OVER SCIENCE AND RELIGION (1997).

498 Statement of Facts, Assignment of Errors, Brief and Argument in Behalf of John Thomas Scopes, *Scopes*, 278 S.W. 57 (No. 2) [hereinfter Scopes Supreme Court Brief], *microformed on* ACLU Papers, *supra* note 24, Reel 38, Vol. 274.

499 Reply Brief and Argument for the State of Tennessee at 15, *Scopes*, 278 S.W. 57 (No. 2). The Tennessee court upheld the law but reversed Scopes's conviction on a technicality, foreclosing review by the U.S. Supreme Court. Scopes v. State, 278 S.W. 57, 58 (Tenn. 1925)

500 AM. CIVIL LIBERTIES UNION, THE TENNESSEE EVOLUTION CASE (1925), *microformed on* ACLU Papers, *supra* note 24, Reel 44, Vol. 299.

501 Charles E. Hughes, *Liberty and Law*, 11 A.B.A. J. 563, 564 (1925).

502 *Id.* at 563, 564.

503 *Id.* at 565.

504 *Id.* at 567.

dogma."[505] Like the ACLU, Hughes framed cases like *Meyer*, *Pierce*, and *Scopes* in relation to "freedom of learning" as the "vital breath of democracy and progress."[506] It is no wonder that the organization had hoped to have Hughes, rather than Clarence Darrow, argue the *Scopes* case on appeal.[507]

In short, as the ACLU built its civil liberties coalition, it occasionally invoked individual conscience and religious freedom as motivating principles. The laws it challenged, however, involved deliberate efforts by majorities to enforce uniformity of thought, not neutral regulations that burdened idiosyncratic beliefs.[508] That distinction mattered to commentators. One article in the *American Bar Association Journal* impugned the constitutionality of the Tennessee anti-evolution law on Establishment Clause grounds. Indeed, it went so far as to imply a right for an instructor "who conscientiously believes in evolution" to teach "what he believes to be true."[509] But the limits of the article's analysis are as telling as its surprising sweep. The author took for granted that the liberty of conscience protected by the Constitution did not "give a right to a Jew to refuse to testify in court on Saturday, or the right to work on Sunday, or to a Quaker the right to stay home from the war, or to a teacher the right to teach Pacifism in the schools."[510] After all, he reasoned, "[t]he state must protect itself, administer justice, and conserve the public health."[511] The Tennessee law was suspect only because its purpose was to preserve religion rather than "public safety."[512] Americans could not insulate their ordinary conduct from government regulation by investing it with religious meaning, let alone by invoking moral or political opposition to its goals.

Moreover, for many potential ACLU supporters, even the most egregious orthodoxies were insufficient to warrant judicial intervention, as opposed to legislative toleration or administrative moderation. Among the skeptics—

---

505 *Id.*

506 *Id.* at 566.

507 Letter from Forrest Bailey to Clarence Darrow (Sept. 14, 1925), *microformed on* ACLU Papers, *supra* note 24, Reel 38, Vol. 274.

508 In addition to these examples, the ACLU opposed compulsory flag salutes (discussed below); compulsory Bible reading in the schools, AM. CIVIL LIBERTIES UNION, FREE SPEECH 1925–1926: THE WORK OF THE AMERICAN CIVIL LIBERTIES UNION 21 (1926) [hereinafter FREE SPEECH 1925–1926]; blasphemy, AM. CIVIL LIBERTIES UNION, THE FIGHT FOR CIVIL LIBERTY: THE STORY OF THE ACTIVITIES OF THE AMERICAN CIVIL LIBERTIES UNION, 1928–29, at 10–11 (1929); and laws barring atheists from testimony, *id.* at 10.

509 Blewett Lee, *Anti-Evolution Laws Unconstitutional*, 11 A.B.A. J. 417, 419 (1925).

510 *Id.*

511 *Id.*

512 *Id.* at 419–20.

despite its sympathy for academic freedom and its distaste for the Tennessee evolution law—was that old Progressive outlet the *New Republic*. "Why should the Civil Liberties Union have consented to charge the State of Tennessee with disobeying the Constitution in order legally to exonerate Mr. Scopes?" one article poignantly asked. "They should have participated in the case, if at all, for the purpose of fastening the responsibility for vindicating Mr. Scopes, not on the Supreme Court of the United States, but on the legislature and people of Tennessee."[513] Scopes had "intentionally violate[d] a foolish law"; the appropriate course was to publicize the injustice of conviction under the statute, not to challenge its constitutionality. It was one thing to invite prosecution to promote democratic debate and repeal of undesirable statutes. But "[t]o invoke the ultimate magic and majesty of the Supreme Court in order to enable Mr. Scopes to escape punishment [was] merely to confuse the issue in the popular mind."[514]

The implausibility of a broader program for judicial accommodation of conscience was evident in the ACLU's interwar challenges to a series of decisions refusing citizenship to alien pacifists. In 1929, the Supreme Court handed down a decision denying citizenship to Rosika Schwimmer, a fifty-year-old atheist, on the basis of her stated refusal to bear arms. According to the ACLU, which paid Schimmer's legal expenses,[515] no Supreme Court case since the war had "violate[d] the old traditions more squarely" than *Schwimmer v. United States*."[516] Although Schwimmer's lawyer emphasized statutory interpretation and the Court did not contemplate a Free Exercise claim, the ACLU clearly understood the case as an heir to its wartime attack on the draft. The United States was "founded on principles of religious freedom and liberty of conscience," an ACLU pamphlet insisted.[517] In fact, the government's generous accommodation of conscientious objectors during World War I had recognized as much.[518]

To the Court, by contrast, the wartime experience cut the opposite way. In refusing to comply with the laws of the United States, pacifists and conscientious objectors had evinced a "lack of attachment to the principles of

---

513 *The Conduct of the Scopes Trial*, NEW REPUBLIC, Aug. 19, 1925, at 331, 332.

514 *Id.*

515 *See* AM. CIVIL LIBERTIES UNION, THE CASE OF ROSIKA SCHWIMMER: ALIEN PACIFISTS NOT WANTED! 4 (1929).

516 *Id.* at 1.

517 *Id.* ("Our law recognized that in a conflict between a citizen's duty to his God and his duty to his State, God should prevail.").

518 *Id.*

the Constitution," which the Naturalization Act required as a condition of citizenship. Schwimmer was an outspoken pacifist, and Justice Pierce Butler noted for the majority that she was "disposed to exert her power to influence others."[519] It was that aspect of that case that most troubled Justice Holmes, who (along with Justices Brandeis and Edward Terry Sanford) dissented.[520] Some of Schwimmer's beliefs "might excite popular prejudice," he acknowledged, "but[,] if there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought that we hate."[521]

The ACLU regarded the *Schwimmer* decision as a call to action.[522] In Congress, it unsuccessfully pursued legislation to admit pacifists to citizenship.[523] Meanwhile, it sought test cases involving "members of religious sects historically opposed to war, and individual religious objectors," in order to raise squarely the religious freedom question that was muted in *Schwimmer*.[524] Two years later, two cases made their way to the Supreme Court, both involving would-be citizens whose qualms about bearing arms were religious in nature.[525] This time, the briefs expressly argued that "the constitutional protection of religious freedom does embrace conscientious scruples against bearing arms in a war."[526] In *United States v. Macintosh* and *United States v. Bland*, five-Justice majorities upheld the denial of citizenship.

---

519 *Id.* at 3; *see also* Transcript of Record at 11–13, United States v. Schwimmer, 279 U.S. 644 (1929) (No. 484) ("I am an uncompromising pacifist for whom even Jane Addams is not enough of a pacifist. I am an absolute atheist. . . . I am always ready to tell anyone who wants to hear it that I am an uncompromising pacifist and will not fight.").

520 *Id.* at 654 (Holmes, J., dissenting).

521 *Id.* at 654–55.

522 AM. CIVIL LIBERTIES UNION, *supra* note 515, at 3.

523 AM. CIVIL LIBERTIES UNION, THE FIGHT FOR CIVIL LIBERTY, 1930–1931, at 12 (1931).

524 AM. CIVIL LIBERTIES UNION, THE STORY OF CIVIL LIBERTY, 1929–1930, at 9 (1930).

525 United States v. Bland, 283 U.S. 636, 636 (1931); United States v. Macintosh, 283 U.S. 605, 623 (1931).

526 Brief for Respondent at 34–35, *Macintosh*, 283 U.S. 605 (No. 504), 1931 WL 32245. The brief invoked the First and Ninth Amendments. *Id.* at 26. The applicant in *Macintosh*, Douglas Clyde Macintosh, was Dwight Professor of Theology at Yale. *Id.* at 4. A Canadian by birth, he indicated that he would bear arms only if he believed it to be morally justified. *Id.* at 5. John W. Davis (of the law firm now known as Davis Polk & Wardwell), who served as Solicitor General during the Woodrow Wilson Administration and ran against Calvin Coolidge as the 1924 Democratic presidential nominee, represented Macintosh without fee. *Id.* In *United States v. Bland*, the Second Circuit (reversing the District Court) had held that Marie Averil Bland was entitled to be admitted to citizenship. Petition for Writ of Certiorari at 7, *Bland*, 283 U.S. 636 (No. 505), 1930 WL 30012. Bland, also Canadian, had indicated that she would refuse to bear arms under any circumstances. *Id.* at 1.

The close margins mask substantial agreement on the limits of conscience-based exemptions.

Writing for the majority in *Macintosh*, Justice George Sutherland cast Americans as a "Christian people" even while he insisted that "submission and obedience to the laws of the land" were consistent with the "will of God."[527] Sutherland rejected as "astonishing" the notion of a constitutional right not to bear arms.[528] "Of course, there is no such principle of the Constitution," he wrote. "The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied, but because, and only because, it has accorded with the policy of Congress thus to relieve him."[529]

Indeed, for the dissent as well as the majority, the relevant question was whether Congress had been as forbearing in its naturalization laws as it was in imposing conscription. Justice Hughes wrote the dissenting opinion, which bore traces of his 1925 statement to the ABA. He began by clarifying the narrowness of the issue before the Court. The case did not involve the power of Congress to compel military service, nor to specify conditions for naturalization, even onerous ones. The question, rather, was whether Congress had in fact elected to condition naturalization on a promise to bear arms.[530] And it mattered to Hughes that no statute had expressly done so.[531] Hughes declined to infer intent to exclude conscientious objectors from the general words of the Naturalization Act because he believed such a construction was "directly opposed to the spirit of our institutions and to the historic practice of

---

527 *Macintosh*, 283 U.S. at 625.

528 *Id.* at 623.

529 *Id.*

530 *Id.* at 627 (Hughes, J., dissenting).

531 The Naturalization Act of 1906, §§ 3–4, ch. 3592, 34 Stat. 596 (codified at 8 U.S.C. § 372), specified the conditions for admission to citizenship and conferred jurisdiction to naturalize aliens on the district courts of the United States. Section 4 required the applicant to

> declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and adjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.

Id. § 4.

the Congress."[532] The Court's decision amounted to a usurpation by "judicial decision" of a "legislative function."[533]

To be sure, what troubled Hughes was more than specious statutory interpretation, and he acknowledged that the scope of freedom of conscience was a function of constitutional law was well as legislative policy.[534] The naturalization cases turned on an applicant's willingness to swear an oath, which necessarily implicated the dictates of conscience[535]—and "in the forum of conscience, duty to a moral power higher than the state ha[d] always been maintained."[536] To extract an oath conflicting with religious scruples was a grave undertaking. Congress had wisely interpreted the oath of office in a manner that accommodated conscientious objectors to war, and there was every reason to extend that tolerant spirit to the requirements for naturalization.[537] At the same time, "within the domain of power," government was free to "enforce obedience to laws regardless of scruples."[538] In short, Hughes's dissent was hardly an endorsement of exemptions from neutral laws.

In an amicus brief in *Macintosh*,[539] the American Friends Service Committee echoed Norman Thomas's wartime efforts to extend the Progressive theory of free speech to religious freedom.[540] The notion that the United States "demands unqualified subjection, so that the 'majority' of the 'people' shall rule in all spheres and on all issues" was tantamount to the "Prussian philosophy of the State," it argued.[541] The more "liberal" approach promoted by conscientious objectors would enhance the legitimacy of the state,

---

532 *Macintosh*, 283 U.S. at 627–28 (Hughes, J., dissenting).

533 *Id.* at 628.

534 *Id.* at 634.

535 In 1926, Roger Baldwin himself secured a commitment from the State Department to issue him a passport subject to a qualified oath pledging to defend the United States against its enemies "as far as [his] conscience [would] allow." Letter from M. Huddle, Chief, Passport Division, U.S. Dep't of State, to Roger N. Baldwin, Am. Civil Liberties Union (Oct. 22, 1926), *reproduced in* Brief on Behalf of Petitioner-Appellee at 19–29, United States v. Bland, 283 U.S. 636 (1931) (No. 505), 1930 WL 30012.

536 *Macintosh*, 283 U.S. at 633 (Hughes, J., dissenting).

537 *Id.* at 631.

538 *Id.* at 633.

539 Brief on Behalf of American Friends Service Committee, *Macintosh*, 283 U.S. 605 (No. 504), 1931 WL 32245.

540 GRABER, *supra* note 5, at 122–64.

541 Brief on Behalf of American Friends Service Committee at 8–9, *Macintosh*, 283 U.S. 605 (No. 504), 1931 WL 32245; Thomas, *supra* note 73, at 394 ("It is the essence of democracy to believe that the state exists for the wellbeing of individuals; it is the essence of Prussianism to believe that individuals exist for the service of some unreal metaphysical entity called the state.").

not undermine its power.[542] Hughes was deeply sympathetic to this Progressive defense of First Amendment freedoms. Within weeks of the Court's decision in *United States v. Macintosh*, he authored majority opinions in two iconic First Amendment cases upholding expressive freedom.[543] He nonetheless maintained that "[w]hen one's belief collides with the power of the state, the latter is supreme within its sphere, and submission or punishment follows."[544]

Over the course of the 1920s, the limitations of the ACLU's assault on state authority became increasingly evident. In 1929, the executive committee asked the national committee to approve an expansion of the organization's activity.[545] Since its founding, it recounted in a letter, the ACLU had defended freedom of speech, press, and assembly, and it had "used the phrase 'civil liberties' as expressive of those three rights."[546] Conspicuously missing from the description of the organization's program was any mention of freedom of conscience, which had figured so prominently in the wartime agenda of the NCLB.[547]

In its letter to the national committee, the ACLU's leadership proposed several areas of increased activity, including assistance to racial minorities, immigrants, criminal defendants, and religious minorities.[548] Among the controversial suggestions was one of special significance: "Aid in the campaign against compulsory military training."[549] One of its most forceful opponents was Karl Llewellyn, who thought it unduly entangled the ACLU in radical causes and interfered with "a matter rather of policy in governmental organization than of liberties of the citizen."[550] Felix Frankfurter, too, initially

---

[542] Brief on Behalf of American Friends Service Committee at 12, *Macintosh*, 283 U.S. 605 (No. 504), 1931 WL 32245.

[543] Near v. Minnesota, 283 U.S. 697 (1931); Stromberg v. California, 283 U.S. 359 (1931).

[544] *Macintosh*, 283 U.S. at 633.

[545] Letter from Roger N. Baldwin, Am. Civil Liberties Union, to the Members of the Nat'l Comm. (Feb. 14, 1929), *microformed on* ACLU Papers, *supra* note 24, Reel 63, Vol. 360.

[546] *Id.* It added the right against unreasonable searches and seizures, though "only incidentally." *Id.*

[547] *See id.*

[548] *Id.*

[549] *Id.*

[550] Letter from Karl Llewellyn, Professor, Colum. Univ. Sch. of Law, to the Am. Civil Liberties Union (Apr. 15, 1929), *microformed on* ACLU Papers, *supra* note 24, Reel 63, Vol. 360 ("The proposed extension of the activities of the Union seems to me highly desirable, *with the exception of Item 7*."). Baldwin responded that opposition to compulsory military training followed from liberty of conscience and was "in line with our general conception of civil liberty." Letter from Roger N. Baldwin to Karl Llewellyn (Apr. 18, 1929), *microformed on* ACLU Papers, *supra* note 24, Reel 63, Vol. 360. He noted that the ACLU had previously offered "to defend anybody in the courts who, on conscientious grounds, refuses to take the military training" in colleges where military training was mandatory. *Id.*

resisted the proposal, though he eventually backed down.[551] In a statement that reveals the interwar reconfiguration of the organization's ambitions, Frankfurter told Baldwin that he was

> emphatically against assuming responsibility for the protection of negroes, the promotion of pacific ideals, the resistance of economic penetration in Latin-America, etc., etc., etc., *except in so far as activities or opinions in regard to the foregoing or any other item, like birth control, raise questions of freedom of speech, press and assembly*.[552]

In other words, a civil liberties organization properly pursued full and open discussion of appropriate state policy, not particular policy ends, let alone exemptions from those policies once they were enacted.

In response to a flood of criticism of this sort, the executive committee resolved not to take on "opposition to compulsory military training as a violation of liberty of conscience, instead of as now, opposition only to interference with agitation against it."[553] In 1934, the Supreme Court unanimously rejected a challenge to a California law requiring University of California students to participate in military training.[554] John Beardsley, longtime chairman of the ACLU's Southern California Branch, argued the case in the Supreme Court.[555] According to the national office, the Court's decision "end[ed] the campaign to secure legal exemption for conscientious objectors where either law or college regulations require it."[556] When Congress enacted a peacetime draft in 1940, the ACLU declined to oppose it, though it did

---

[551] Letter from Felix Frankfurter to Roger N. Baldwin (Feb. 16, 1929), *microformed on* ACLU Papers, *supra* note 24, Reel 63, Vol. 360 ("I should like to express dissent, and vigorously so, from the proposed extension."). After correspondence with Baldwin, however, he accepted the ACLU's proposal to oppose compulsory military training if it made "explicit the 'ground of liberty of conscience.'" Letter from Felix Frankfurter to Roger N. Baldwin (Mar. 5, 1929), *microformed on* ACLU Papers, *supra* note 24, Reel 63, Vol. 360.

[552] Letter from Felix Frankfurter to Roger N. Baldwin (Feb. 21, 1929), *microformed on* ACLU Papers, *supra* note 24, Reel 63, Vol. 360.

[553] Letter from Roger N. Baldwin, on behalf of the Exec. Comm., to the Nat'l Comm. (Apr. 5, 1929), *microformed on* ACLU Papers, *supra* note 24, Reel 63, Vol. 360 (referencing sedition bills and legislative proposals for universal conscription).

[554] Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 265 (1934). While that case also involved freedom of the schools, the principal purpose of compulsory military training was to promote national readiness, not conformity with patriotic ideals. *Id.* at 260. On Hamilton, see Case, *supra* note 10, at 478–80.

[555] AM. CIVIL LIBERTIES UNION, LAND OF THE FREE: THE STORY OF THE FIGHT FOR CIVIL LIBERTY, 1934–35, at 50 (1935).

[556] *Id.* at 11.

advocate broad statutory exemptions for conscientious objectors.[557] Two years later the organization took the unlikely step of backing the administration's proposal to conscript all adults into compulsory civilian service.[558]

A final ACLU enterprise of the interwar period clarifies the organization's underlying concerns. Beginning in the mid-1920s, the ACLU actively defended Jehovah's Witnesses in their refusal to salute the American flag.[559] Like oaths of allegiance, the flag salute implicated ideological orthodoxy, not the economy or public health. Although the ACLU described the flag salute cases in terms of "religious liberty," the organization pursued them out of concern for "freedom in the schools" (the same interest that informed its positions in *Meyer*, *Pierce*, and *Scopes*) as much as, if not more than, "freedom of conscience."[560] Even in that limited domain, the courts that considered the issue prior to the Supreme Court's decision in *Minersville School District v. Gobitis*[561] typically rejected the notion that a religious conviction could "interfere with the state's enactments for its safety, preservation or welfare."[562]

As for advocates and scholars, many believed the children's scruples should be balanced against state interests, and the flag salute cases squarely raised the question whether courts or legislatures should do the balancing.[563] Despite his sympathy for liberty of conscience as a policy matter, Felix Frankfurter famously allocated that responsibility to the political branches as a newly appointed Justice of the Supreme Court.[564]

---

557 Walker, *supra* note 9, at 149–50. The organization did, however, advocate for broad exemptions. *Id.*

558 *Id.* at 152. The ACLU's support for the administration on these issues must, however, be read in the context of its strong anti-fascism, as well as its strong political ties to Roosevelt. *Id.* at 139.

559 FREE SPEECH 1925–1926, *supra* note 508, at 22–23. For discussion of the flag-salute cases (including the pledge of allegiance), see SARAH BARRINGER GORDON, THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA 15–55 (2010); NUSSBAUM, *supra* note 21, at 199–214; Leah Weinryb-Grohsgal, *Reinventing Civil Liberties: Religious Groups, Organized Litigation, and the Rights Revolution* (2011) (Ph.D. dissertation, Emory University).

560 AM. CIVIL LIBERTIES UNION, HOW GOES THE BILL OF RIGHTS: THE STORY OF THE FIGHT FOR CIVIL LIBERTY, 1935–1936, at 39 (1936); AM. CIVIL LIBERTIES UNION, ETERNAL VIGILANCE! THE STORY OF CIVIL LIBERTY, 1937–1938, at 61 (1938). In fact, the 1939 Annual Report listed flag salute cases under "Freedom in Schools and Colleges" rather than "Religious Freedom." AM. CIVIL LIBERTIES UNION, THE BILL OF RIGHTS 150 YEARS AFTER: THE STORY OF CIVIL LIBERTY, 1938–1939, at 34, 46 (1939) [hereinafter 150 YEARS AFTER].

561 310 U.S. 586, 591 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 626 (1943).

562 150 YEARS AFTER, *supra* note 560, at 46 (quoting New York court).

563 *See, e.g.*, Louis Lusky, *The Compulsory Flag Salute in the Supreme Court*, BULL, June 15, 1940 (on file with Dartmouth College Library, Rauner Special Collection Library, Papers of Grenville Clark, Box 86, Folder 4).

564 *Gobitis*, 310 U.S. at 595.

By the late 1930s, the ACLU had helped to engineer a new understanding of the First Amendment speech clauses—one that insulated some conduct (including, for a time, labor picketing and strikes) as well as more conventional expression.[565] The new vision bore a strong connection to the property rights and contractual freedom the AUAM's leadership had so strongly decried. Businesses employed the revised First Amendment to dismantle New Deal regulatory constraints, sometimes with the ACLU's approval.[566] In a 1936 article, John Dewey—by then, a member of the ACLU—described the competing justifications that were often intermingled in a theoretical morass of civil liberties claims.[567] On one account, civil liberties were valued for their "contribution . . . to the welfare of the community."[568] The "dominant philosophy," by contrast, had "sprung from fear of government and of organized control."[569] Under that model, freedom of conscience was a natural right, prior to and independent of the state.[570]

And yet, liberals and conservatives alike stopped short of the NCLB's wartime appeals to conscience as a license for exemption from ordinary laws. At the ACLU's urging, the newly formed Committee on the Bill of Rights of the American Bar Association filed an amicus brief in the *Gobitis* case.[571] After much agonizing, the committee opposed the law as an unconstitutional measure, as committee chair Grenville Clark put it, "to induce loyalty by *coercion*."[572] At the same time, there was a general unwillingness on the committee to "permit every crack-pot to exercise untrammeled his definition of freedom of conscience," lest liberty degenerate into "anarchy."[573] In Clark's formulation,

---

565 I develop this argument in Laura Weinrib, The Liberal Compromise: Civil Liberties, Labor, and the Limits of State Power, 1917–1940 (2011) (Ph.D. dissertation, Princeton University); WEINRIB, *supra* note 31.

566 For example, after agonized debate, the ACLU defended the asserted First Amendment right of employers to distribute anti-union literature to their employees. *See* NLRB v. Ford Motor Co., 114 F.2d 905 (6th Cir. 1940); WEINRIB, *supra* note 31 .

567 John Dewey, *Liberalism and Civil Liberties*, 2 SOC. FRONTIER 137, 137 (1936).

568 *Id.*

569 *Id.*

570 Dewey favored the former, and he considered it inevitable in modern society that "*merely* individual claims [would] be forced to give way in practice to social claims." *Id.*

571 Brief for Am. Civil Liberties Union as Amicus Curiae Supporting Respondents, Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940) (No. 690), 1940 WL 71209.

572 Letter from Grenville Clark to George I. Haight (Mar. 25, 1940), *in* Clark Papers, *supra* note 563, Box 79, Folder 32.

573 Letter from George Haight to Grenville Clark (Mar. 26, 1939) (on file with Dartmouth College Library, Rauner Special Collection Library, Papers of Grenville Clark, Box 79, Folder 32); Letter from Grenville Clark to George I. Haight, *supra* note 572 ("I have no more sympathy than you have with permitting 'every crackpot to exercise untrammeled his definition of freedom of conscience.'").

> Neither an assertion of religious scruples nor a general claim of "individual liberty" should avail to nullify a statute requiring vaccination (this is a matter of public health) or perhaps, in the future, the fingerprinting of children or the whole population, if it becomes reasonably apparent that this would materially aid the reduction of crime (this involves internal safety and order); or again to nullify laws prohibiting acts against the prevailing public morals, such as free love or plural marriages (this involves the public morals); or again to nullify laws for national service in case of war or domestic emergency, such as conscription or universal military training (these may well become essential to the national existence as they may already be necessary in England).[574]

For the time being, the domain in which conscience operated to authorize exemptions was vanishingly small. Indeed, it was practically coextensive with the right of free speech—a development that explains why so many formative religious freedom cases involved religious proselytizing and literature distribution, beginning with the first case incorporating the Free Exercise Clause of the First Amendment into the Due Process Clause of the Fourteenth.[575]

As war again occupied the national stage, even critics of the Court's decision in *Gobitis* did not mean "to suggest that conscientious scruples can stand against all compulsion to do positive acts"; where the "public need for coerced and insincere saluting of the flag by little children" appeared to be trivial, Thomas Reed Powell pointedly explained, the "public need for armed defense may well be regarded as the most pressing public need of all."[576] That the contemporaneous law-review literature overwhelmingly regarded *Gobitis* as wrongly decided reflects the nature of compulsory flag salutes as unabashed attempts to enforce conformity. It is no accident that the Supreme Court's decision in *West Virginia State Board of Education v. Barnette* (overruling *Gobitis*) relied on a theory of compelled speech—forbidding the state from

---

[574] Letter from Grenville Clark to Douglas Arant (Mar. 31, 1939) (on file with Dartmouth College Library, Rauner Special Collection Library, Papers of Grenville Clark, Box 77, Folder 8).

[575] Cantwell v. Connecticut, 310 U.S. 296 (1940). For analysis of the relationship between free exercise and free speech, see William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983).

[576] Thomas Reed Powell, *Conscience and the Constitution*, *in* DEMOCRACY AND NATIONAL UNITY 29 (William T. Hutchinson ed., 1941). Administration of conscription during World War II provoked tensions among conservatives and within the Roosevelt administration between emerging support for judicial enforcement of civil liberties and deference to the expanding national security state. *See* Jeremy K. Kessler, From the New Deal to the Next Draft: Conscription, Conscientious Objection, and the Decline of Administrative Autonomy (unpublished manuscript) (on file with author).

prescribing "what shall be orthodox in politics, nationalism, or other matter of opinion"—as opposed to freedom of conscience.[577] Even Harlan Fisk Stone, twenty-five years after serving on the War Department's Board of Inquiry during World War I, believed that in an "organized society, the majority must rule, and that consequently I must obey some laws of which I do not approve."[578] No wonder, then, that he based his lonely dissent in *Gobitis* on the "freedom of the individual from compulsion as to what he shall think and what he shall say," not what he shall do.[579]

CONCLUSION

By the 1940s, liberty of conscience was firmly ensconced as a constitutional value—indeed, President Franklin D. Roosevelt considered it part of "our national birthright"[580]—but its reach was modest and its meaning far less controversial than the capacious shield against state power the NCLB had once endorsed. Liberty did not encompass an individual right to forswear state compulsion. As Attorney General Frank Murphy explained, it meant "that little group of Mennonites or Mormons or Quakers worshipping in their own churches in the way that their consciences tell them is right."[581] Even Norman Thomas reframed his longstanding commitment to "freedom of conscience" as a right to "argue freely according to conscience."[582]

In the universe of possible claims for exemption from neutrally applicable laws, it is difficult to imagine one less palatable than the NCLB's. At the height of national fervor for the First World War, the fledgling organization asserted a right to avoid compulsory military service on the basis of political opposition to a particular war—a war declared by Congress, endorsed by popular majorities, and justified as serving democratic ends. What is most

---

577 319 U.S. 624, 642 (1943).

578 CAPOZOLLA, *supra* note 7, at 82.

579 Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 604 (1940) (Stone, J., dissenting), *overruled by Barnette*, 319 U.S. at 642.

580 FRANK MURPHY, IN DEFENSE OF DEMOCRACY (quoting Letter from Franklin D. Roosevelt, President of the U.S., to the Am. Council on Public Affairs (Dec. 21, 1939)) (on file with Dartmouth College Library, Rauner Special Collection Library, Papers of Grenville Clark, Box 80, Folder 112).

581 MURPHY, *supra* note 580.

582 Norman Thomas, Remarks at Journal Square Meeting, Free Speech in Jersey City (June 12, 1930), *microformed on* ACLU Papers, *supra* note 24, Reel 177, Vol. 2134. In this he echoed John Milton who, in his famous free speech tract the *Areopagatica*, valued the "liberty . . . to argue freely according to conscience, above all liberty." JOHN MILTON, COMPLETE POEMS AND MAJOR PROSE 746 (Merritt Y. Hughes ed., 1957).

surprising about the NLCB's wartime exertions is that they attained any traction at all.

Perhaps if civil liberties advocates had begun with claims to free speech and gradually worked toward freedom of conscience, their justification for exemptions might have taken root. Similarly, one might imagine that a more modest claim (in an area less tied to military necessity, or on behalf of more sympathetic claimants) could have succeeded where the NCLB's ambitious program failed. The audacity of the NCLB's approach is neatly captured in Judge Julius Mayer's statement upon sentencing Roger Baldwin for failure to yield to the draft. "I cannot emphasize too strongly that in my view . . . this war [could] not have been successful and in a self-respecting way carried on by the United States Government if such an attitude as yours had prevailed," he told Baldwin, in a nod to the vital government interests at stake.[583]

Half a century elapsed—and massive social and cultural transformations reshaped American attitudes toward war, civil liberties, and the state—before arguments of the kind the NCLB espoused persuaded a majority of the Court. In *United Sates v. Seeger* and *Welsh v. United States*, as Americans again were drafted into military service and deployed overseas, the Supreme Court expanded the grounds for conscientious objection to encompass ethical and moral beliefs, albeit as a matter of statutory interpretation rather than constitutional law.[584] The ACLU was unabashedly activist in its opposition to Vietnam,[585] and it is no wonder that Roger Baldwin celebrated the Court's concession to conscience.[586]

For a time, the Court was also receptive to claims for exemption on First Amendment grounds. Its 1963 decision in *Sherbert v. Verner* extended to the Free Exercise Clause of the First Amendment the same "compelling state

---

583 THE INDIVIDUAL AND THE STATE, *supra* note 432, at 14.

584 Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965). For a discussion of the expansion of religious exemption in these cases, see NUSSBAUM, *supra* note 21, at 171–72. Antecedents of these developments were already evident at the administrative level and within the lower courts during World War II. *See* Kessler, *supra* note 576.

585 *See* JUDY KUTULAS, THE AMERICAN CIVIL LIBERTIES UNION & THE MAKING OF MODERN LIBERALISM, 1930–1960, at 215–16 (2006).

586 Roger Baldwin, *Introduction* to AM. CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION ANNUAL REPORTS v (1970) ("Refusal to serve in unjust wars like Vietnam on grounds of conscience helps expand the right of conscience.").

interest" requirement it had fashioned for free speech.[587] Nine years later, in *Wisconsin v. Yoder*, the Court offered its most expansive reading of the Free Exercise Clause of the First Amendment.[588] Even in *Yoder*, it declined to extend the constitutional protection of freedom of conscience to political or moral claims; it cautiously clarified that "[a] way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation . . . if it is based on purely secular considerations."[589] Still, the Court declared that "[o]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[590]

Despite *Yoder*'s lofty language, constitutional claims for exemptions rarely succeeded in practice.[591] The few successful cases generally involved denial of

---

[587] 374 U.S. 398, 406 (1963) (holding that South Carolina's denial of unemployment benefits to a Seventh Day Adventist whose employment was terminated due to her refusal to work on Saturdays violated the First Amendment's Free Exercise Clause).

[588] 406 U.S. 205, 207 (1972) (unanimously exempting Amish children from compulsory school attendance law). For an overview of scholarship on *Yoder*, see Josh Chafetz, *Social Reproduction and Religious Reproduction: A Democratic-Communitarian Analysis of the* Yoder *Problem*, 15 WM. & MARY BILL RTS. J. 263 (2006).

[589] *Yoder*, 406 U.S. at 215; *see also* Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 833–34 (1989); Marsh v. Chambers, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting) (noting that under the Free Exercise Clause, "religiously motivated claims of conscience may give rise to constitutional rights that other strongly-held beliefs do not"). The Religious Freedom Restoration Act likewise extends only to laws that burden "a person's exercise of religion," defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb–2, 2000cc–5 (2012). By contrast, many specific statutory exemptions extend to non-religious moral exemptions. *E.g.*, 42 U.S.C. § 300a-7(b) (providing exemption for health care workers otherwise obligated to perform abortion or sterilization procedures on the basis of "religious beliefs or moral convictions"); 42 U.S.C. §§ 1395w-22(j)(3)(B), 1396u-2(b)(3)(B) (providing exemption for managed care providers from obligation to provide counseling or referrals in cases of moral or religious objection); 18 U.S.C. § 3597(b) (providing exemption from participation in executions "if such participation is contrary to the moral or religious convictions of the employee"). For a recent overview and analysis of statutory exemptions, see NeJaime & Siegel, *supra* note 10, at 2533–65.

[590] *Yoder*, 406 U.S. at 215.

[591] *See* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1246 (1994) ("[O]nly in one case outside of *Sherbert v. Verner* and its unemployment benefits progeny had the Court actually appeared to act on that principle: in *Wisconsin v. Yoder*, it held that Wisconsin's stake in requiring all children to pursue a recognized program of education until the age of sixteen was not sufficient to justify the state's interference with the religiously motivated commitment of the Amish to integrate children into their working society at the age of fourteen. Everywhere else there were strong indications that the Court could not in fact live with the broad dictum of *Sherbert*."); Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756 (1992) ("[E]xcept for *Wisconsin v. Yoder* and a quirky string of unemployment compensation cases, the government always prevailed in these cases.").

unemployment benefits under circumstances very similar to *Sherbert*.[592] *Yoder* itself—as in *Meyer*, *Pierce*, and *Scopes* half a century earlier—involved a state's effort to control childhood education, a domain in which the dangers of enforced conformity and the erasure of competing cultural values appeared particularly acute. And in 1990, the Court officially abandoned the so-called *Sherbert–Yoder* test.[593] In his majority opinion in *Employment Division v. Smith*,[594] Justice Antonin Scalia explicitly repudiated the analogy with expressive freedom that had purportedly justified the Court's exacting scrutiny. The two contexts, he explained, were "not remotely comparable."[595] On the contrary, to recognize "a private right to ignore generally applicable laws" would create a "constitutional anomaly."[596]

Whatever its doctrinal status, however, freedom of conscience was firmly ensconced in American constitutional culture by the time *Smith* was decided. Advocates, politicians, and many academics decried the Court's decision.[597] Congress responded with the Religious Freedom Restoration Act,[598] a legislative effort "to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder*."[599] Congressional support for RFRA was practically unanimous, and President Bill Clinton—"voic[ing] wonder" at the unusual "alliance of forces that are often at odds across religious or ideological lines"—enthusiastically signed the law.[600] Among the bill's

---

[592] Lupu, *supra* note 591, at 756. To the extent these cases constrained states' abilities to control children's education, they recognized the rights of parents as opposed to children's rights. *See* Emily Buss, *What Does Frieda Yoder Believe?*, 2 U. PA. J. CONST. L. 53 (1999).

[593] Emp't Div. v. Smith, 494 U.S. 872, 881 (1990).

[594] *Id.*

[595] *Id.* at 886.

[596] *Id.* The holding in *Smith* did not, however, render the Free Exercise Clause inapplicable to laws targeting particular religious practices, as in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

[597] Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 440 (1994) ("Academics, civil rights lawyers, and politicians excoriated *Smith*. Denunciations came from both the left and the right. A spate of law review articles attacked the majority and sympathized with the dissents.").

[598] Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to bb-4), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997). In *City of Boerne v. Flores*, 521 U.S. 507, the Supreme Court held that RFRA exceeded Congress' enforcement power under the Fourteenth Amendment insofar as it constrained the states. In 2000, Congress enacted the Religious Land Use and Institutionalized Persons Act, which prohibits a state or local government from regulating land use in a way that imposes a substantial burden on religious exercise in the absence of a compelling government interest. Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. §§ 1988, 2000CC to 2000cc-5 (2012)).

[599] 42 U.S.C. § 2000bb(b)(1).

[600] Peter Steinfels, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES (Nov. 17, 1993), http://www.nytimes.com/1993/11/17/us/clinton-signs-law-protecting-religious-practices.html.

staunchest supporters was the ACLU, whose president, testifying before Congress, criticized the Court for "departing so dramatically from traditional constitutional principles"[601] and celebrated RFRA for "restor[ing] religious liberty to its rightful place as a preferred value and a fundamental right within the American constitutional system."[602]

The ACLU's euphoric moment was, however, short-lived. At the end of the twentieth century, the changing nature of demands for exemptions under RFRA and its state counterparts began to trouble the organization.[603] An escalation in the rhetoric of religious freedom and liberty of conscience corresponded with a proliferation of claims related to same-sex marriage and reproductive rights.[604] RFRA, the ACLU complained, was "used as a sword to discriminate against women, gay and transgender people and others."[605]

In recent years, individuals and organizations hostile to the contraception mandate of the Patient Protection and Affordable Care Act have demanded sweeping exemptions on the basis of religious beliefs[606] and, in some cases, "moral" opposition as well.[607] Vendors have asserted religious objections to state and local anti-discrimination laws,[608] and a county clerk famously defied a federal court order requiring her to issue marriage licenses to same-sex couples following the Supreme Court's decision in *Obergefell v. Hodges*.[609] The ACLU has criticized the newest set of challenges to the ACA's contraception mandate for endeavoring to deprive women of "a benefit

---

601 *Religious Freedom Restoration Act of 1991: Hearing on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102nd Cong. 63 (1991) (statement of Nadine Strossen, President, National Board of Directors, American Civil Liberties Union).

602 *Id.* at 65.

603 Louise Melling, Opinion, *ACLU: Why We Can No Longer Support the Federal 'Religious Freedom' Law*, WASH. POST (June 25, 2015), https://www.washingtonpost.com/opinions/congress-should-amend-the-abused-religious-freedom-restoration-act/2015/06/25/ee6aaa46-19d8-11e5-ab92-c75ae6ab94b5_story.html.

604 *See supra* note 10.

605 Melling, *supra* note 603.

606 *E.g.*, Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751 (2014). This Term, the Supreme Court will decide a set of cases involving religious nonprofits claiming exemption from the contraception mandate under the Religious Freedom Restoration Act. Zubik v. Burwell, 136 S. Ct. 444 (2015) (mem.) (granting certiorari).

607 Complaint, March for Life v. Burwell, No. 1:14-CV-01149 (U.S. July 7, 2014); March for Life v. Burwell, No. 1:14-CV-01149 (RJL), 2015 WL 5139099, at *6 (D.D.C. Aug. 31, 2015) (recognizing a right to exemption asserted by a non-religious, pro-life organization "whose employees share in, and advocate for, a particular moral philosophy").

608 *See* NeJaime & Siegel, *supra* note 10, at 2519.

609 135 S. Ct. 2584 (2015). On Kim Davis, see, for example, Alan Blinder & Tamar Lewin, *Clerk in Kentucky Chooses Jail over Deal on Same-Sex Marriage*, N.Y. TIMES (Sept. 3, 2015), http://www.nytimes.com/2015/09/04/us/kim-davis-same-sex-marriage.html.

guaranteed by law."[610] Although proponents of exemptions link their campaign to a "long and rich tradition of religious freedom,"[611] critics have hastened to emphasize the distance between current claims and their historical antecedents.[612]

In his introduction to a bound volume of the ACLU's annual reports released in 1970, the same year that *Welsh v. United States* was decided, Roger Baldwin celebrated the disruptive capacity of conscientious objection. "In the name of liberty, we support disobedience to laws we think unconstitutional or contrary to our principles," he wrote.[613] "The history of civil liberties is marked by the acts of courageous men and women who put moral claims of conscience ahead of obedience to law, and who by their acts, often at the price of their freedom, helped win legal recognition of their claims."[614] Baldwin's certitude echoes today in a generalized First Amendment attack on the regulatory state.[615] In an irony that would have bemused the labor advocates of the NCLB, the Supreme Court this Term divided evenly over a constitutional challenge to public-sector agency fee arrangements, which require non-members of a union to contribute to the costs of collective bargaining and

---

610 *Supreme Court Accepts Challenges to Affordable Care Act's Contraceptive Coverage Requirement*, ACLU (Nov. 6, 2015), https://www.aclu.org/news/supreme-court-accepts-challenges-affordable-care-acts-contraceptive-coverage-requirement.

611 Letter from Robin Fretwell Wilson et al. to F. Gary Simpson, State Senator, Del. (May 1, 2013), http://mirrorofjustice.blogs.com/files/delaware-letter.pdf (cited and discussed in Case, *supra* note 10, at 464 n.2, 476 n.49); *cf.* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 2 (arguing that Smith "is probably wrong as a matter of original intent"). For an analysis of the role of history in interpretation of the religion clauses, see Hans Leaman, *History and Its Role in Supreme Court Decision Making on Religion*, *in* 2 ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 766–68 (Paul Finkelman ed., 2006).

612 *E.g.*, NeJaime & Siegel, *supra* note 10, at 2521 (distinguishing complicity-based conscience claims from the "[c]onscience claims [that] have long played a crucial role in our ethical, political, and religious lives"); Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby's Wake*, 82 U. CHI. L. REV. 1897, 1903 (2015) (attributing to the Supreme Court's *Hobby Lobby* decision an "unprecedented reverence for religious freedom").

613 Baldwin, *supra* note 586, at v.

614 *Id.*

615 Scholarship on the "Lochnerization" of the First Amendment's Speech Clause stretches back decades. *See, e.g.*, J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 384; Morton Horwitz, *Foreword: The Constitution of Change, Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 109 (1993) (discussing "The Lochnerization of the First Amendment"). On a similar trend in religious freedom cases, see Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015). Elsewhere, I argue that the roots of First Amendment Lochnerism were laid in the late 1930s, as judicial review of personal liberties emerged as an alternative to freedom of contract and property rights. WEINRIB, *supra* note 31; Weinrib, supra note 38.

thereby—according to the California public school teacher for whom the case was named—render them "troubled in their conscience."[616]

The NCLB, of course, could not have anticipated the world of RFRA, the Affordable Care Act, and *Obergefell v. Hodges*. It would not have worried, as the ACLU does today, that exemptions from generally applicable laws might be made "to force employees to pay a price for their employer's faith."[617] After all, at the height of the *Lochner* era, employers' constitutional and common law property rights ensured that employers could hire, fire, and allocate or deny benefits with almost perfect impunity. Liberty of contract was constitutionally secure, and there was little reason to worry that businesses would discriminate on the basis of religious freedom instead.

And yet, for those Progressives who had confronted the costs of countermajoritarian constitutionalism head on, there was ample reason to interrogate an extension of individual rights. It is a neat historical accident that in 1905, as attorney general of New York, Julius M. Mayer had unsuccessfully defended the maximum-hours law at issue in *Lochner v. New York* before the Supreme Court.[618] Perhaps it is unsurprising, then, that Judge Mayer proved unreceptive to Baldwin's uncompromising insistence on individual autonomy. To Mayer, Baldwin's refusal to submit to state power threatened the very basis of democratic government. "I think such an attitude would have led inevitably to disorder and finally to the destruction of a Government, which with all of the imperfections that may attach to human government, has proved itself, as I view it, to be a real people's Government," Judge Mayer reflected.[619] The success of American democracy was "evidenced by the millions upon millions of men who voluntarily obey the laws—and some of them requiring great sacrifice—which, as enacted by the legislature, embody the judgment of the people at large."[620]

---

[616] Friedrichs v. Cal. Teachers Ass'n, No. 14-915, 2016 WL 1191684 (U.S. Mar. 29, 2016) (per curiam) (affirming by an equally divided court); Emma Brown, *Two Teachers Explain Why They Want to Take Down Their Union*, WASH. POST (Aug. 11, 2015), https://www.washingtonpost.com/news/education/wp/2015/08/11/two-teachers-explain-why-they-want-to-take-down-their-union/.

[617] Melling, *supra* note 603.

[618] Mayer's cursory brief has prompted speculation that he considered *Lochner* to be either an easy case or a relatively unimportant case (in contrast to the Franchise Tax Cases, on which he was working at the same time). BERNSTEIN, *supra* note 133, at 32. It is also possible that he was unenthusiastic about defending New York's law. PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF *LOCHNER V. NEW YORK* 112 (1990).

[619] THE INDIVIDUAL AND THE STATE, *supra* note 432, at 14.

[620] *Id.*

At the dawn of the modern First Amendment, claims for exemption by conscientious objectors found few defenders among even the staunchest supporters of free speech. As the ACLU embarked on its interwar project of promoting labor's rights, a growing cadre of lawyers, scholars, public officials, and judges proved receptive to the organization's appeal to expressive freedom. Most nonetheless maintained, with Judge Mayer, that to countenance exemption from democratic laws was to endanger democracy itself.