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FREEDOM OF CONSCIENCE IN WAR TIME:
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Laura M. Weinrib

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This Article examines the relationship between expressive freedom and freedom of conscience in the formative years of the modern First Amendment. 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 hostile to individual rights. Although some accepted a limited role for judicial enforcement of the First Amendment’s speech clause, most declined to endorse a court-centered and constitutional right to exemption from generally applicable laws.

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

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

² *Id.*

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 stem 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 counter-majoritarian constitutionalism in the domain of free speech.⁶ Although it would take another decade for a Supreme Court majority to overturn a conviction on First Amendment grounds, the path forward was clear: henceforth, 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

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, 1870–1920 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 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.").

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 disobedience or counseling legislative restraint.⁹ Nor does the expansive literature on demands for exemptions from

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. 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. Finally, it argues that the accommodationist approach flowed from a Progressive Era preference for democratic deliberation and administrative tolerance far removed from the court-centered alternative identified with civil liberties today. *See also* 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); CAPOZZOLA, *supra* note 7, at 55–82, 81 (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.”). 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.*, U.S. Selective Service System, *Conscientious Objection* (Special Monograph No. 11, 1950); 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 AND GILBERT C. FITE, *OPPONENTS OF WAR, 1917–1918* (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).

⁹ For example, Samuel Walker attributes “[t]he idea of personally confronting government power through nonviolent direct action” to the efforts of conscientious

generally applicable laws—an issue that has recently assumed increased significance¹⁰—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

objectors during the Second, rather than First, World War. SAMUEL WALKER, IN *DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU* 151 (2nd 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 (1878), the 1878 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, *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* 28 (2006), 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.” 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., WILLIAM WIECEK, *THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953* 213, 220 (concluding that the Supreme Court “hand[ed] down no significant religion-clause cases before 1940”).

¹³ STONE, *supra* note 6, at 170–82.

after the Armistice.¹⁴ But the 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 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 Zechariah 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

¹⁴ *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

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

¹⁶ *Gitlow v. New York*, 268 U.S. 652 (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 press clause was incorporated in *Near v. Minnesota*, 283 U.S. 697 (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 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 1492–1503. 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 generally Philip Hamburger, *The Constitutional Right of Religious Exemption*, 60 GEO. WASH. L. REV. 915 (1992); see also MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S*

sometimes defended both radical expression and incursions on conscience by reference to the United States 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 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 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 advocates of expressive freedom were only one component of an

TRADITION OF RELIGIOUS EQUALITY 120–26, 125 (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 many people, as implicit in the notion of religious liberty”).

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), in *American Civil Liberties Union Records, The Roger Baldwin Years (1917–1950)*, Seeley G. Mudd Manuscript Library, Public Policy Papers, Princeton University, Princeton, N.J. [hereinafter *ACLU Papers*], reel 1, vol. 3.

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.

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 their 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 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

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: A PORTRAIT (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.”)

³¹ LAURA M. WEINRIB, THE TAMING OF FREE SPEECH, chapters 2–3 (forthcoming 2016).

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 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 underscores the limits 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 counter-majoritarian First Amendment extended only to the latter was a

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

³³ *E.g.*, ROBERT COTTRELL, ROGER NASH BALDWIN AND THE AMERICAN CIVIL LIBERTIES UNION 49 (2000) (“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.”).

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

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

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

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 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, at chapter 4.

³⁸ *Id.*, chapters 5–7; see also Laura Weinrib, *Civil Liberties Outside the Courts*, 2014 SUP. CT. REV. 297 (2015).

³⁹ *Infra* Part IV.

⁴⁰ Increasingly, proponents of accommodations have linked their project to the First

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

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 his earlier commitment to 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

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* 223–25 (1973).

⁴² AM. UNION AGAINST MILITARISM, PAMPHLET, *in* American Union Against Militarism Records (1915–1922), Swarthmore College Peace Collection, Swarthmore, Penn. [hereinafter AUAM Papers], reel 10-1.

⁴³ JOHNSON, *supra* note 29, at 5.

⁴⁴ JOHNSON, *supra* note 29, at 5–6.

⁴⁵ *Id.* at 5.

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

⁴⁷ JOHNSON, *supra* note 29, at 7.

⁴⁸ *Id.* at 7.

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

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 adopted 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

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 7.

⁵¹ National Defense Act of 1916, Pub. L. No. 64–85, 39 Stat. 166.

⁵² JOHNSON, *supra* note 29, at 7.

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

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.*, AUAM Minutes (Feb. 20, 1917), AUAM Papers, reel 10-1 (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 Executive Committee, AUAM (Feb. 10, 1917), AUAM Papers, reel 10-1.

⁵⁸ *Id.*

⁵⁹ AUAM Minutes (Feb. 27, 1917), AUAM Papers, reel 10-1.

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 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, he 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

⁶⁰ AUAM Minutes (Feb. 27, 1917), AUAM Papers, reel 10-1.

⁶¹ WITT, *supra* note 7, at 197.

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

⁶³ COTTRELL, *supra* note 29, at 48–49.

⁶⁴ *Id.* at 31.

⁶⁵ *Id.* at 44–45.

⁶⁶ *Id.* at 44.

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

⁶⁸ Announcement of Anti-Militarism Committee, AUAM Papers, 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.

wartime goals. Working with Norman Thomas,⁷⁰ Baldwin 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, “especially if their own normal or voluntary employment is socially valuable.”⁷⁸

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

⁷¹ *Id.* at 49.

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

⁷³ Norman Thomas, *War’s Heretics*, SURVEY, August 4, 1917, at 391–94, 391. 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, and Norman Thomas to Hon. Newton Baker (Apr. 12, 1917), ACLU Papers, reel 3, vol. 16.

⁷⁷ Suggestions for Dealing with Men of Conscription Age Who Are Conscientious Objectors to War, June 28, 1917, ACLU Papers, reel 3, vol. 16.

⁷⁸ Letter from Lillian Wald, Jane Addams, and Norman Thomas to Hon. Newton Baker

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 non-sectarian 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 regard as wrong."⁸⁸ The second and larger category of nonsectarian objector comprised

(Apr. 12, 1917), ACLU Papers, reel 3, vol. 16.

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, 40 Stat. 76, 78–80, *repealed by* Act of June 15, 1917, ch. 29, § 4, 40 Stat. 217, 217.

⁸¹ CAPOZOLLA, *supra* note 7, at 55–56 ("With few exceptions, Americans actively opposed draft exemptions for conscientious objectors."). See also ACLU, 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 and Roger Baldwin to the Conference Committee on the Army Bill (May 1, 1917), ACLU Papers, reel 3, vol. 16.

⁸⁴ *Id.*

⁸⁵ Memorandum from Roger Baldwin to Professor Clarence M. Case (Apr. 1921), ACLU Papers, reel 23, vol. 163.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

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 LaFollette 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 prevented them from registering for the draft.⁹⁵ Its board attracted radical pacifists like Quaker activist L.

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 Baldwin to Jane Addams (Apr. 27, 1917), ACLU Papers, reel 3, vol. 16. At Baldwin's request, Addams sent Baker a telegram urging him to act. Letter from Jane Addams to Roger Baldwin (May 5, 1917), ACLU Papers, 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 Letter from Norman Thomas).

⁹² Letter from Roger Baldwin to the Senate and House Conferees on the Army Bill May 2, 1917, ACLU Papers, 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 the Members of the Executive Committee (May 6, 1917), ACLU Papers, reel 3, vol. 16, p. 284.

⁹⁴ Selective Service Act of 1917, 40 Stat. 76 (1917). 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.

⁹⁵ MARCHAND, *supra* note 41, at 254.

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 rapidly replacing *Progressive* as the favored label for reformers¹⁰¹), not "extreme radical."¹⁰² She believed the president had signaled a similarly liberal attitude toward

⁹⁶ *Id.* at 254, 320.

⁹⁷ Minutes of the Special Meeting (June 1, 1917), AUAM Papers, reel 10-1.

⁹⁸ Meeting, June 4, 1917, AUAM Papers, reel 10-1

⁹⁹ Letter from Crystal Eastman to the Executive Committee (June 14, 1917), AUAM Papers, 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* 299 (1986) (defining "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 then 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 Executive Committee 2 (June 14, 1917), AUAM Papers, reel 10-1.

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 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

¹⁰³ Letter from Crystal Eastman to the Executive Committee 3 (June 14, 1917), AUAM Papers, reel 10-1.

¹⁰⁴ *Id.* at 5.

¹⁰⁵ *Id.* at 6.

¹⁰⁶ Eastman acknowledged her feeling 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 break-up of the union. *Id.* "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.* at 4.

¹⁰⁷ *Id.* at 6.

¹⁰⁸ *Id.* at 6.

¹⁰⁹ *Id.*

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 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 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

¹¹⁰ Am. Union Against Militarism, Proposed Announcement for Press (Sept. 24, 1917), AUAM Papers, reel 10-1.

¹¹¹ Letter from Crystal Eastman to the Executive Committee (June 14, 1917), AUAM Papers, reel 10-1. 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, *Am. Civil Liberties Union v. Casey*, ACLU Papers, 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*, 10 *REVIEWS IN AM. HIST.* 113 (1982).

¹¹⁴ Rodgers, *supra* note 113, at 124 (describing 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").

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

For the AUAM leadership and many other Progressives, aversion to rights-based individualism was fundamentally bound up with the struggle between labor and capital. 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 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

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 DAVID 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”).

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* 90 (1958). The Woodrow Wilson administration was somewhat more accommodating.

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.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 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,

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 M. 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* 15–16 (1997).

¹²⁴ *Report of Basil M. Manly*, [hereinafter Manly Report], in UNITED STATES COMMISSION ON INDUSTRIAL RELATIONS, *FINAL REPORT AND TESTIMONY SUBMITTED TO CONGRESS BY THE COMMISSION ON INDUSTRIAL RELATIONS* (1916) [hereinafter CIR].

¹²⁵ *See* Weinrib, *supra* note 31, chapter 1.

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 CIR, *supra* note 124, at vol. 11, 10782. Eastman appeared in her capacity as an executive board member of the Congressional Union for Woman’s Suffrage. *Id.* at 10781. 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, November 8, 1931, at 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.*, 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).

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 121, at 165–90. On the Commission on Industrial Relations, see generally ADAMS, JR., *supra* note 126.

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 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-

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* 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 (Nick Salvatore, ed., 1984). For discussion of the deep ties between President Wilson and the Democratic Party, see DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865-1925* 363-69 (1987); Salvatore, *supra* note 132, 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, 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 ERNST, *LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM* (1995); WILLIAM E. FORBATH, *LAW AND THE SHAPING OF*

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*,¹⁴⁰ the United States 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 infringement on

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.*, *Gompers v. Buck's Stove* (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 *Strikes and Boycotts*, Note, 34 HARV. L. REV. 880 (1921).

¹³⁸ FORBATH, *supra* note 135, at 59.

¹³⁹ *Id.* at 99, 193.

¹⁴⁰ *Gompers v. Buck's Stove*, 221 U.S. 418 (1911).

¹⁴¹ *Id.* at 438–39.

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, her¹⁴⁵) labor blinked the reality of the modern labor market. By resting on merely formal rights, classical legalism exacerbated social tensions.¹⁴⁶ The problem with the *Lochner*-era judiciary, as Roscoe Pound explained, was its propensity to “exaggerate private right at the expense of public interest,”¹⁴⁷ without taking social circumstances into account. The Progressives believed that “the strong social interest in the moral and social life of the individual” outweighed the cost to autonomy of an aggressively interventionist judicial system.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

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 right 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 *Ethics*, John Dewey and James Hayden Tufts explained: “It 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 AND JAMES H. TUFTS, *ETHICS* 439 (1908).

¹⁴⁷ Roscoe Pound, *Liberty of Contract*, 18 *YALE L. J.* 454, 461 (1909).

¹⁴⁸ Roscoe Pound, *The Administration of Justice in the Modern City*, 26 *HARV. L. REV.* 302, 315 (1913).

¹⁴⁹ LOUISE W. KNIGHT, *CITIZEN: JANE ADDAMS AND THE STRUGGLE FOR DEMOCRACY* 213

Addams) helped to found the Women's 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.

(2005).

¹⁵⁰ On the Women's Trade Union League, see, e.g., 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* 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. South Buffalo Railway Company*, 94 N.E. 431, 439 (N.Y. 1911). New York subsequently amended its constitution to authorize workers compensation.

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 individual rights 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 explained¹⁶²). 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

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

¹⁵⁶ “Past Programmes of the American Union Against Militarism (for reference),” AUAM Papers, reel 10-1.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Laura Weinrib, *supra* note 31; Laura Weinrib, *From Left to Rights: Civil Liberties Lawyering Between the Wars*, LAW, CULTURE AND THE HUMANITIES (forthcoming 2016); 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); Laura 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), AUAM Papers, reel 10-2.

¹⁶³ *Id.*

¹⁶⁴ ACLU, *supra* note 81, at 3.

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

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

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

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

¹⁶⁸ Hamburger, *supra* note 21, at 929–30 n.65.

¹⁶⁹ JOHN WITTE, JR., *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 1492–1503. 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. 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, “Liberty 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. 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

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 invoked *civil liberty*—as they did often during the war—they worried about property (specifically, the judicial policing of property rights) rather than personal freedom.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 routinely 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 1920s, 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, land gifts to sectarian institutions, bible study in the public schools, and tax exemptions for church property.¹⁷⁷ Although it

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 PENN. L. REV 307, 313, 372 (2014).

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

¹⁷² See Weinrib, *supra* note 31, chapter 2. For example, they denounced the government’s wartime excesses by reference to “fixing hours of labor and rates of wages” as opposed to imposing the draft. 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” The of 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*, 99 Misc. *1, *7 (N.Y. Misc. 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.*

¹⁷⁷ Letter from Theodore Schroeder to Roger Baldwin (Dec. 4, 1917), ACLU Papers, reel 1, vol. 3, p. 173; see also Letter from Theodore Schroeder to Roger Baldwin (Nov. 27, 1917), ACLU Papers, reel 1, vol. 3, p. 171 (“[Y]our proposed inviting members suggest

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 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 of Norman Angell, whose essay “Why Freedom Matters” justified conscientious objection as an exercise in pluralism.¹⁸⁵ Angell

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 RABBAN, *supra* note 5, at 23–25

¹⁸¹ EISENACH, *supra* note 118, at 189 (quoting Samuel Zane Batten).

¹⁸² Letter from Norman Thomas and Roger Baldwin to the Conference Committee on the Army Bill (May 1, 1917), ACLU Papers, reel 3, vol. 16.

¹⁸³ NAT’L CIVIL LIBERTIES BUREAU, A SYMPATHETIC STRIKE IN PRISON (New York, undated), Records of American Civil Liberties Union, Swarthmore College Peace Collection, Swarthmore, Penn. [hereinafter Swarthmore ACLU Papers], 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 275; see also *A Communication: 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* (New York: NCLB, undated), reprinted from SURVEY, June 29, 1918, Swarthmore ACLU Papers, box 1.

¹⁸⁵ See NORMAN ANGELL, NATIONAL COUNCIL FOR CIVIL LIBERTIES, WHY FREEDOM MATTERS (1918); see also NORMAN ANGELL, WHY FREEDOM MATTERS (Nat’l Civil Liberties Bureau 1919) (1918).

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—evaded the draft by declining to register.¹⁹⁵ Somewhat reluctantly, the AUAM advised objectors to take a different and

¹⁸⁶ ANGELL, NATIONAL COUNCIL FOR CIVIL LIBERTIES, *supra* note 185, at 27; ANGELL, *supra* note 185.

¹⁸⁷ ANGELL, NATIONAL COUNCIL FOR CIVIL LIBERTIES, *supra* note 185.

¹⁸⁸ ANGELL, *supra* note 185, at 19.

¹⁸⁹ President Woodrow Wilson, Proclamation 1370 (May 18, 1917); Letter from Crystal Eastman to the Executive Committee (June 14, 1917), AUAM Papers, reel 10-1.

¹⁹⁰ Letter from Crystal Eastman to the Executive Committee (June 14, 1917), AUAM Papers, Reel 10-1.

¹⁹¹ *The Success of Selective Service*, NEW REPUBLIC, June 9, 1917, at 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 Executive Committee (June 14, 1917), AUAM Papers, Reel 10-1.

¹⁹⁵ CAPOZOLLA, *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 ACLU, only a “small proportion” of those who failed to register were motivated by “genuinely conscientious scruples against participation

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 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

in war.” ACLU, *supra* note 81, at 15.

¹⁹⁶ AUAM Statement (May 23, 1917), AUAM Papers, reel 10-1 (concluding “after consideration which has in some cases reversed original opinion,” that “all conscientious objectors should register”). According to the ACLU, “No public statements advising men not to register were made by any except a few radial organizations in the middle west,” all of which were subsequently prosecuted by federal authorities. ACLU, *supra* note 81, at 14.

¹⁹⁷ AUAM Statement (May 23, 1917), AUAM Papers, reel 10-1; Letter from Norman Thomas and Roger Baldwin to the Conference Committee on the Army Bill (May 1, 1917), ACLU Papers, reel 3, vol. 16.

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 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.

²⁰⁴ *Id.*

²⁰⁵ Thomas, *supra* note 73.

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 he declined to endorse a broad right to exemption of the kind that Thomas promoted.

The AUAM’s Civil Liberties Bureau, announced on July 2, 1917, was at once more palatable to the organization’s Progressive constituency and less beholden to traditional Progressive practices.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 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

²⁰⁶ Thomas, *supra* note 73, 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 AUAM Press Release (July 2, 1917), AUAM Papers, reel 10-2.

²¹³ Letter from Crystal Eastman to the Executive Committee (June 14, 1917), AUAM Papers, reel 10-1.

²¹⁴ *Infra* note 342; Graber, *supra* note 5, at 51–52, 66–86.

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 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

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, 411–53.

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

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

²¹⁸ *E.g.*, Letter from Austin Lewis to Roger Baldwin (July 9, 1917), ACLU Papers, 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 Baldwin to Austin Lewis (July 1917), ACLU Papers, reel 5, vol. 39; Letter from Roger Baldwin to William Woerner, (Nov. 6, 1917), ACLU Papers, 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 chapters 2–3.

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

²²¹ See sources cited *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

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 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

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), ACLU Papers, 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 Baldwin (Aug. 21, 1917), ACLU Papers, reel 5, vol. 35. Baldwin stubbornly responded that “public discussion should be unfettered.” Letter from Roger Baldwin to Philip Willett (Aug. 22, 1917), ACLU Papers, reel 5, vol. 35.

²²⁶ Letter from William English Walling to L. Hollingsworth Wood (Jan. 7, 1918), ACLU Papers, reel 1, vol. 3.

²²⁷ Letter from Joseph Byers to Roger Baldwin (June 25, 1918), ACLU Papers, reel 3, vol. 26, p. 151.

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 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

²²⁸ *Id.*

²²⁹ Floyd Hardin, Plea of a Christian Pacifist in Court, ACLU Papers, 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 to Roger Baldwin (Jan. 8, 1918), ACLU Papers, reel 1, vol. 3; see also ANGELL, *supra* note 186, at 27 (“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.

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 128–30, 129. Dewey indicated in the essay that “some surrenders and abandonments of the liberties of peace time” were inevitable during the war. *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

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

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

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 serve after failing to persuade Congress to "change the law."²⁴²

As the parameters of Progressive tolerance became increasingly apparent, the Civil Liberties Bureau explored alternative avenues for pursuing its goals. 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

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.

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* 1, 16 (1907) (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.

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 1910s, 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 in 1916.²⁵¹

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 Core 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

²⁴⁵ RABBAN, *supra* note 5, at 307 (citing NCLB Minutes (July 20, 1917)).

²⁴⁶ *Id.* at 307–08.

²⁴⁷ RABBAN, *supra* note 5, at 308.

²⁴⁸ See RABBAN, *supra* note 5, at 72; WALKER, *supra* note 9, at 22; POLENBERG, *supra* note 8, at 75–78.

²⁴⁹ POLENBERG, *supra* note 8, at 77.

²⁵⁰ *Id.* at 78.

²⁵¹ *Id.* at 79.

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

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 118.

²⁵⁶ *Id.* at 119.

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 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 “constitutional 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

²⁵⁷ Letter from Harry Weinberger to Roger Baldwin (Apr. 28, 1917), ACLU Papers, reel 5, vol. 35.

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

²⁵⁹ Letter from Harry Weinberger to Roger Baldwin (Apr. 28, 1917), ACLU Papers, reel 5, vol. 35.

²⁶⁰ Letter from Harry Weinberger to Roger Baldwin (Apr. 30, 1917), ACLU Papers, 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 Baldwin to Harry Weinberger (May 3, 1918), ACLU Papers, reel 5, vol. 35.

²⁶² Letter from Harry Weinberger to Joy Young, AUAM (May 2, 1917), ACLU Papers, reel 5, vol. 35.

²⁶³ Letter from Harry Weinberger to Roger Baldwin (May 1917), ACLU Papers, reel 5, vol. 35.

²⁶⁴ AM. UNION AGAINST MILITARISM, *CONSTITUTIONAL RIGHTS IN WAR TIME* (1917),

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 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

ACLU Papers, 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.

²⁶⁷ *Defense of Free Speech*, NEW REPUBLIC, May 12, 1917, at 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’S MAGAZINE, July 15, 1917, at 4 (quoting Letter from Newton Baker to Harry Weinberger).

²⁶⁹ Memo of Conference between Roger Baldwin and Harry Weinberger (May 11, 1917), ACLU Papers, reel 5, vol. 35, p. 194.

²⁷⁰ *Id.*

²⁷¹ Letter from Roger Baldwin to Harry Weinberger (June 18, 1917), ACLU Papers, reel 5, vol. 35.

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 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 first line of attack 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

²⁷² *Id.*

²⁷³ AUAM Press Release (July 2, 1917), AUAM Papers, reel 10-2. 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 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), in ACLU Papers, 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 Baldwin to John Codman (May 7, 1918), ACLU Papers, reel 3, vol. 25.

²⁷⁶ Letter from Crystal Eastman to American Union Against Militarism Members, Local Committees and Affiliated Organizations (July 13, 1917), AUAM Papers, 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 ACLU, *supra* note 81, at 4.

²⁷⁹ Letter from Roger Baldwin to John Codman (Oct. 11, 1917), ACLU Papers, 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

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 met with public indignation. A July 4 editorial in the *New York Times* insisted that a line must

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), ACLU Papers, reel 3, vol. 26.

²⁸⁰ Letter from Roger Baldwin to Mrs. Leo Simmons (Sept. 21, 1917), ACLU Papers, 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 AUAM* (Nov. 1, 1917), AUAM Papers, 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, *The Need of a National Defense Fund* (Nov. 15, 1917), ACLU Papers, reel 3, vol. 26.

²⁸³ *Id.*

²⁸⁴ Nat'l Civil Liberties Bureau, *supra* note 282.

²⁸⁵ Nat'l Civil Liberties Bureau, *Statement to Members of the AUAM* (Nov. 1, 1917), AUAM Papers, reel 10-1.

²⁸⁶ *Civil Liberties Bureau*, NEW YORK EVENING POST, Oct. 17, 1917.

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 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 Union’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 The board agreed (Wald left anyway), and the AUAM soon withered into obsolescence.²⁹⁴ The Civil Liberties Bureau, by contrast, intensified its operations;²⁹⁵ Norman Thomas

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

²⁸⁸ *Id.*

²⁸⁹ MARCHAND, *supra* note 41, at 256–68 (1972).

²⁹⁰ Letter from Lillian Wald to Crystal Eastman (Aug. 26, 1917), AUAM Papers, reel 10-1. The board majority voted to send a delegation. AUAM Minutes (Aug. 30, 1917), AUAM Papers, 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. AUAM Minutes (Sept. 13, 1917), AUAM Papers, 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), AUAM Papers, reel 10-1.

²⁹² AUAM Minutes (Sept. 13, 1917), AUAM Papers, reel 10-1.

²⁹³ *Id.*

²⁹⁴ See AUAM Minutes (Sept. 28, 1917), AUAM Papers, reel 10-1; AUAM Minutes (Oct. 29, 1917), AUAM Papers, reel 10-1.

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

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

On October 17, the new National Civil Liberties Bureau opened its doors.²⁹⁷ The leadership assured members that its program would remain “exactly the same”²⁹⁸: 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.”²⁹⁹ 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.”³⁰⁰ 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.”³⁰¹

²⁹⁶ Letter from Norman Thomas to Crystal Eastman (Sept. 27, 1917), AUAM Papers, reel 10-1.

²⁹⁷ Nat’l Civil Liberties Bureau, Statement to Members of the AUAM (Nov 1., 1917), ACLU Papers, reel 5, vol. 44.

²⁹⁸ *Id.* 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), AUAM Papers, 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.*

²⁹⁹ NCLB letterhead, *in* Letter to Members of the Committee on the Meeting (29 Dec. 29, 1917), ACLU Papers, reel 1, vol. 3.

³⁰⁰ Letter from Norman Thomas to Crystal Eastman (Sept. 27, 1917), AUAM Papers, reel 10-1.

³⁰¹ Letter from Roger Baldwin to Fay Lewis (Jan. 30, 1918), ACLU Papers, reel 5, vol. 39.

Still, the NCLB promised publicly to support the administration, which was “doing its best under the present law.”³⁰² By exerting “quiet pressure” on government officials, it hoped to persuade them to exercise lenience in administering the Selective Service Act, among other provisions.³⁰³ 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.³⁰⁴ The organization had strong ties to Frederick Keppel, the Third Assistant Secretary of War³⁰⁵—who, as secretary of the American Association for International Conciliation, had once said that “war and civilization can no longer go hand and hand.”³⁰⁶ 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.³⁰⁷ Bureau members met with key personnel within and outside the War Department to urge moderation in administering conscription.³⁰⁸ 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.³⁰⁹ Baker himself promised to give weight to Baldwin’s recommendations in setting the Department’s policy,³¹⁰ and he eventually ordered leniency toward individuals whose

³⁰² Letter from NCLB to citizens registered with the National Civil Liberties Bureau (Nov. 1, 1917), ACLU Papers, reel 5, vol. 44.

³⁰³ Letter from Roger Baldwin to Scott Nearing, Chairman, People’s Council (Oct. 13, 1917), ACLU Papers, reel 3, vol. 26.

³⁰⁴ 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.

³⁰⁵ See Letter from Roger Baldwin to Frederick Keppel (Apr. 8, 1918), ACLU Papers, reel 2, vol. 15. In congratulating him on his appointment, Baldwin thanked him for his “unfailing tolerance and understanding.” *Id.*

³⁰⁶ 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, 88 (1911).

³⁰⁷ Letter from Frederick Keppel to Roger Baldwin (May 24, 1917), ACLU Papers, reel 6, vol. 47.

³⁰⁸ COTTRELL, *supra* note 29, at 54–55.

³⁰⁹ See Kessler, *supra* note 8, at 1111–23.

³¹⁰ Letter from Newton Baker to Roger Baldwin (July 7, 1917), ACLU Papers, reel 2, vol. 15. Baldwin’s proposed solution was to confine objectors who refused all service to detention for the duration of the war; those men willing to accept non-combatant service should be assigned to such service without court-martial. Letter from Roger Baldwin to Newton Baker (July 13, 1917), ACLU Papers, 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 problem.” *Id.* Baker, however, refused to publicize his orders for leniency. See, e.g., CAPOZZOLA, *supra* note 7, at 71.

“personal scruples,” whether religious or political, informed their opposition to military service.³¹¹

In practice, however, objectors of all types, and especially the absolutists, often suffered in the individual cantonments.³¹² The military was adamantly opposed to the AUAM’s program, and it pushed back against sympathetic executive officials.³¹³ 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.³¹⁴ 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.³¹⁵ 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.”³¹⁶ 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.³¹⁷ Rather, Baldwin raised the specter of damaging propaganda as an incentive to temper abuses and formulate a more generous policy.³¹⁸ For a time, Baldwin had reason to believe his approach would yield results.³¹⁹ “We are getting much more liberal treatment from the War Department,” he wrote, “than we could possibly expect by

³¹¹ *E.g.* DEPARTMENT OF WAR, STATEMENT CONCERNING THE TREATMENT OF CONSCIENTIOUS OBJECTORS IN THE ARMY 40–41 (1919).

³¹² ROBERT ZIEGER, AMERICA’S GREAT WAR: WORLD WAR I AND THE AMERICAN EXPERIENCE 62 (2000).

³¹³ 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.

³¹⁴ MURPHY, *supra* note 7, at 159; WALKER, *supra* note 9, at 24.

³¹⁵ COTTRELL, *supra* note 29, at 64–65; MURPHY, *supra* note 7, at 158–59.

³¹⁶ Letter from Roger Baldwin to Felix Frankfurter (Sept. 29 1917), ACLU Papers, reel 2, vol. 15.

³¹⁷ *See, e.g.*, Letter from Roger Baldwin to Gilson Gardner (Nov. 1, 1917), ACLU Papers, 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 . . .”); Letter from Roger Baldwin to Felix Frankfurter (Sept. 29, 1917), ACLU Papers, 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.”).

³¹⁸ COTTRELL, *supra* note 29, at 64.

³¹⁹ *E.g.*, Letter from Newton Baker to Roger Baldwin (Oct. 28, 1917), ACLU Papers, reel 6, vol. 47.

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.”³²⁰

But by the spring of 1918, Baldwin’s decision to tolerate the situation quietly seemed naïve. Baldwin knew that cruel punishments, including manacled and solitary confinement, were rampant in the cantonments.³²¹ Matters worsened when reports emerged that the army was court-martialing political objectors and meting out excessive sentences.³²² Lenetta Cooper of the American Liberty Defense League, based in Chicago, had complied with Baldwin’s earlier requests to refrain from publicity.³²³ In March, she accused his organization of failure and, worse, of abandoning its constituency.³²⁴ After ten months of work, the conscientious objector was “still considered a slacker by practically every one,” she told him.³²⁵ She reminded Baldwin that her own group had wanted “to appeal to the people to demand a liberal solution of the problem;”³²⁶ 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.³²⁷ Cooper acknowledged that popular mobilization would have 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.³²⁸ Even then, Baldwin stood his ground:

³²⁰ Letter from Roger Baldwin to John Codman (Nov. 19, 1917), ACLU Papers, reel 3, vol. 25; *see also* Nat’l Civil Liberties Bureau, Confidential Bulletin on the Conscientious Objector (Jan. 16, 1918), AUAM Papers, 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.”).

³²¹ Letter from Roger Baldwin to Newton Baker (Nov. 8, 1917), ACLU Papers, 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 Baldwin to Newton Baker (Nov. 22, 1917), ACLU Papers, 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.”).

³²² JOHNSON, *supra* note 29, at 33. One objector was sentenced to death, but his sentence was subsequently commuted. *Id.*

³²³ Letter from Roger Baldwin to Lenetta Cooper (Dec. 17, 1917), ACLU Papers, reel 3, vol. 17.

³²⁴ Letter from Lenetta Cooper to Roger Baldwin (Mar. 12, 1918), ACLU Papers, reel 4, vol. 16.

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ Letter from Roger Baldwin to Lenetta Cooper (Dec. 17, 1917), ACLU Papers, reel 3, vol. 17.

³²⁸ Letter from Lenetta Cooper to Roger Baldwin (Mar. 12, 1918), ACLU Papers, reel 4,

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.³²⁹

Sure enough, less than two weeks later President Wilson issued an executive order permitting objectors to elect non-combatant service.³³⁰ For a brief time, Baldwin felt vindicated.³³¹ The new policy, however, proved subject to widespread abuse, and Baldwin's initial enthusiasm quickly soured.³³² Despite a series of clarifying orders from Baker, objectors who refused non-combatant service out of absolutist convictions were worse off than before.³³³ 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 M. Mack (an AUAM supporter before the war), and Columbia dean Harlan Fisk Stone.³³⁴ Notwithstanding its promising personnel, however, the board habitually found political objectors "insincere."³³⁵

Although the NLCB stubbornly maintained its optimistic veneer, it is likely that its leaders understood the limits of administrative negotiation. They 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.³³⁶

vol. 16.

³²⁹ Letter from Roger Baldwin to Lenetta Cooper (Mar. 14, 1918), ACLU Papers, reel 3, vol. 16.

³³⁰ Exec. Order (Mar. 20, 1918), *reprinted in* MESSAGES AND PAPERS OF THE PRESIDENTS COVERING THE SECOND TERM OF WOODROW WILSON 8475-77 (Supp. 1921).

³³¹ Letter from John Codman to Roger Baldwin (Mar. 27, 1918), ACLU Papers, 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 to Commanding Generals of All Departments (Apr. 18, 1918), ACLU Papers, reel 2, vol. 15.

³³² In fact, Baldwin asked Keppel to suspend the order in lieu of its implementation. Telegram from Roger Baldwin to Frederick Keppel (Jun. 11, 1918), ACLU Papers, reel 2, vol. 15.

³³³ JOHNSON, *supra* note 29, at 35.

³³⁴ *Id.* at 39.

³³⁵ *Id.*

³³⁶ AM. UNION AGAINST MILITARISM, SOME ASPECTS FOR THE CONSTITUTIONAL QUESTIONS INVOLVED IN THE DRAFT ACT (1917), ACLU Papers, reel 5, vol. 44.

To be sure, the NCLB's objective in its draft act challenge was always a long shot. The organization had attained a few successes contesting 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.³³⁷ 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*³³⁸ 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.³³⁹ 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.³⁴⁰ Even Judge Hand's cautiously reasoned statutory analysis succumbed to patriotic fervor, however, and in early November, the Second Circuit reversed.³⁴¹ Similar cases followed throughout the country.³⁴²

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.³⁴³ On one occasion,

³³⁷ E.g., Letter from Roger Baldwin to Mrs. Leo Simmons (Sept. 21, 1917), ACLU Papers, reel 5, vol. 36 (describing invalidation of Indianapolis ordinance).

³³⁸ 244 F. 535 (S.D.N.Y. 1917).

³³⁹ *Id.* at 536.

³⁴⁰ *Masses Publ'g Co. v. Patten*, 244 F. 535, 537 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917). 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, 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 *id.*; GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* (1994). Burleson's censorship practices were upheld by the Supreme Court in *Milwaukee Publishing Co. v. Burleson*, 255 U.S. 407 (1921).

³⁴¹ *Masses Publ'g Co. v. Patten*, 246 F. 24 (2d Cir. 1917).

³⁴² Some federal judges resisted the dominant trend, including George M. Borquin in the District of Montana and Charles Fremont Amidon in the Eighth Circuit Court of Appeals (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.

³⁴³ E.g., *Anti-Registration Pleas Are Ruled out by Tuttle* (clipping), Jul. 11, 1917, ACLU Papers, reel 6, vol. 46; *Detroit Socialist Given Year in Jail for Not Registering*, N.Y. CALL, Nov. 25, 1917, ACLU Papers, reel 6, vol. 46; *Broke Draft Law, Get Long Terms*,

Judge Hand resisted the prevailing hysteria by admitting a conscientious objector to bail pending resolution of his constitutional challenge to conscription.³⁴⁴ 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.³⁴⁵ 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.³⁴⁶ In December 1917, the Supreme Court considered convictions under the Selective Service Act in Minnesota, Ohio, Georgia, and New York.³⁴⁷ 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.”³⁴⁸

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*.³⁴⁹ In drafting the NCLB’s amicus brief in the conscription case, Nelles was adamant that the organization center its objection on liberty of conscience, not on the less controversial argument that Congress lacked power to raise a draft and compel service abroad.³⁵⁰

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

N.Y. WORLD, Dec. 18, 1917, ACLU Papers, reel 6, vol. 46; *Conscientious Objector Sent to County Jail*, HOBOKEN OBSERVER, Nov. 20, 1917, ACLU Papers, reel 6, vol. 46.

³⁴⁴ *Federal Court Opens Way for Draft Act Test* (clipping), ACLU Papers, reel 5, vol. 43.

³⁴⁵ *Convicts Draft Slacker*, N.Y. TIMES, Jul. 31, 1917.

³⁴⁶ *Doubts Court Test of the Draft Law* (clipping), Jul. 22, 1917, ACLU Papers, reel 5, vol. 43.

³⁴⁷ *Draft Cases in Supreme Court* (clipping), Dec. 13, 1917, ACLU Papers, reel 5, vol. 43.

³⁴⁸ *Argument Ended in Draft Appeals*, N.Y. TRIB., Dec. 14, 1917, ACLU Papers, reel 5, vol. 43.

³⁴⁹ Letter from Walter Nelles to Nat’l Civil Liberties Bureau (Jul. 3, 1917), ACLU Papers, 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 Baldwin to Walter Nelles (Oct. 24, 1918), ACLU Papers, reel 3, vol. 25.

³⁵⁰ AM. UNION AGAINST MILITARISM, SOME ASPECTS FOR THE CONSTITUTIONAL QUESTIONS INVOLVED IN THE DRAFT ACT (1917), ACLU Papers, reel 5, vol. 34 (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).

Selective Service Act in June.³⁵¹ In trial and on appeal, Weinberger argued that the narrow exemptions in the statute infringed religious liberty.³⁵² Defending one anarchist who refused to register out of opposition to “uniformed murder”—that is, war “waged by governments”³⁵³—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.”³⁵⁴ Moreover, by conferring special privileges on members of certain well-recognized organizations, the conscription act ran afoul of the Establishment Clause.³⁵⁵

The NCLB’s amicus brief echoed Weinberger’s claims.³⁵⁶ It recognized great variation in the convictions and worldviews of conscientious objectors. “Some base their beliefs and conduct upon their duty towards God; others upon their duty towards Man,” Nelles explained.³⁵⁷ But whatever their motivations, the nation’s “fundamental law,”³⁵⁸ including the First Amendment as well as the Ninth (which preserved the people’s unenumerated “natural rights”³⁵⁹), 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

³⁵¹ Transcript of Record at 5, *Arver v. United States*, 245 U.S. 366 (1918) (No. 681).

³⁵² *E.g.*, Transcript of Record, Defendant’s Bill of Exceptions at 5, *Arver v. United States*, 245 U.S. 366 (1918). 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.”).

³⁵³ Transcript of Record at 23, *Arver*, 245 U.S. 366 (No. 681).

³⁵⁴ Transcript of Record, Assignments of Error, at 34, *Arver*, 245 U.S. 366 (No. 681). 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. Transcript of Record at 11, *Arver*, 245 U.S. 366 (No. 769). 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.

³⁵⁵ *Id.*

³⁵⁶ Brief of Walter Nelles, Counsel for Plaintiffs in Error in Conscription Act cases not advanced, and for the Nat’l Civil Liberties Bureau as Amicus Curiae, *Ruthenberg v. United States*, 245 U.S. 480 (1918) [hereinafter NCLB amicus brief].

³⁵⁷ *Id.* at 2.

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 3.

religious sects.³⁶⁰ In the twentieth, by contrast, organized religion was on the decline.³⁶¹ The Supreme Court had long since severed the connection between sect and conscience.³⁶² In recent decades, religion had altogether “escaped . . . from theology;” modernity had rent the ties between “right and wrong” and a “putative Maker.”³⁶³ Citing William James for the proposition that atheism, “psychologically considered, is indistinguishable from religious zeal,”³⁶⁴ Nelles believed it was the “psychological fact, not its theological suit of clothes, which the First Amendment to the Constitution protects.”³⁶⁵

Relying on *Ex Parte Milligan*,³⁶⁶ 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.³⁶⁷ To be sure, “the right to conform conduct to conscience” could occasionally be curtailed.³⁶⁸ The Supreme Court’s decision in *Reynolds v. United States*,³⁶⁹ 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.”³⁷⁰ On that score,

³⁶⁰ *Id.*

³⁶¹ *Id.* at 4.

³⁶² *Id.* at 4. 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 . . .”).

³⁶³ *Id.* at 5.

³⁶⁴ *Id.* at 6; WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE* 35 (1902).

³⁶⁵ NCLB amicus brief, *supra* note 356, at 6.

³⁶⁶ 71 U.S. 2 (1866).

³⁶⁷ *Id.* at 9–10 (quoting Elihu Root, Address to the Conference of Bar Associations) (“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.”); *see also* Opinion, *To Hell with the Constitution, Says Elihu Root*, *THE NEW AGE* (Jan. 5, 1917), ACLU Papers, reel 5, vol. 43.

³⁶⁸ NCLB amicus brief, *supra* note 356, at 9.

³⁶⁹ 98 U.S. 145 (1878).

³⁷⁰ NCLB amicus brief, *supra* note 356, at 9; *Reynolds*, 98 U.S. 145 (1878) (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).

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.”³⁷¹

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.”³⁷² Indeed, “the blindest arbitrary assumption has at least the chance of being as right as reason.”³⁷³

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).³⁷⁴ 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.³⁷⁵

In upholding the Selective Service Act, the Court emphasized the expansive reach of federal power.³⁷⁶ In so doing, it abandoned its solicitude for 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 Company v. Mitchell* just one month prior.³⁷⁷ 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,

³⁷¹ NCLB amicus brief, *supra* note 356, at 9.

³⁷² *Id.* at 8.

³⁷³ *Id.*

³⁷⁴ *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*, NEW YORK TRIBUNE, Dec. 13, 1917, ACLU Papers, reel 5, vol. 43.

³⁷⁵ *Arver*, 245 U.S. at 389–90; *see also* Government Brief at 82–83, *Ruthenberg v. United States*, 245 U.S. 480 (1918) (“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.”).

³⁷⁶ *Arver*, 245 U.S. at 389.

³⁷⁷ *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 251 (1917).

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.”³⁷⁸ 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”³⁷⁹). 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.³⁸⁰ 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.”³⁸¹ Conservatives were not yet concerned with preserving personal rights, and they were unwilling to insulate antiwar advocacy, let alone exemption from conscription for political objectors.³⁸² It would take much longer, and stronger threats to conservative interests, for the ACLU to accomplish that goal.³⁸³

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 political and absolutist objectors 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.”³⁸⁴ Even allies who shared the NCLB’s concern for conscientious objectors hesitated to impugn the constitutionality of the draft.³⁸⁵ No less a civil libertarian than Zechariah Chafee accepted the legitimacy of conscription and chalked up the constitutional challenge to “extreme views.”³⁸⁶

³⁷⁸ *Breaking the Labor Truce*, NEW REPUBLIC, Dec. 22, 1917, at 197.

³⁷⁹ *Dr. Frank J. Goodnow Examines and Compares the Constitutions of Leading Nations, with Interesting Results for Our Own Political System*, Book Review (Principles of Constitutional Government), N.Y. TIMES, August 13, 1916, at 28.

³⁸⁰ 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*, 4 A.B.A. J. 551 (1918).

³⁸¹ *Addendum: Employment to Secure Exemption from Draft Unethical*, 3 A.B.A. J. 558 (1917).

³⁸² *Id.*; see also Weinrib, *supra* note 31, at chapters 1–2.

³⁸³ Weinrib, *supra* note 31, at chapter 6.

³⁸⁴ Letter from Lawrence Brooks to Roger Baldwin (Sept. 21, 1918), ACLU Papers, reel 4, vol. 32.

³⁸⁵ *E.g.*, Letter from John Codman to Roger Baldwin (Oct. 25, 1917), ACLU Papers, reel

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.³⁸⁷ As sympathetic officials proved willing to accommodate individual objectors with religious convictions, the NCLB's particular allegiance to political objectors became increasingly evident.³⁸⁸ 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 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.³⁸⁹ 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 1917.³⁹⁰ By the spring of 1918, the NCLB was under close observation.³⁹¹ 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."³⁹² 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

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.").

³⁸⁶ 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>.

³⁸⁷ See WALKER, *supra* note 9, at 37.

³⁸⁸ Letter from Frederick Keppel to L. Hollingsworth Wood, Norman Thomas, John Haynes Holmes, and John Lovejoy Elliott (Oct. 2, 1918), ACLU Papers, reel 6, vol. 47.

³⁸⁹ Letter from Frederick Keppel to Roger Baldwin (Feb. 26, 1918), ACLU Papers, reel 2, vol. 15).

³⁹⁰ COTTRELL, *supra* note 29, at 66.

³⁹¹ *Id.* at 66–67; ROY TALBERT, JR., *NEGATIVE INTELLIGENCE: THE ARMY AND THE AMERICAN LEFT, 1917-1941* 78–81 (1991).

³⁹² Letter from Frederick Keppel to Roger Baldwin (Feb. 26, 1918), ACLU Papers, reel 2, vol. 15. 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 Baldwin to Frederick Keppel (Mar. 1, 1918) ACLU Papers, reel 2, vol. 15.

be made into the NCLB's activity to clear the organization's name.³⁹³ 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.³⁹⁴ 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.³⁹⁵

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 policy."³⁹⁶ He professed the organization's willingness "to discontinue any practices" that the War Department deemed objectionable.³⁹⁷ 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."³⁹⁸ And yet, he grew "thoroughly disgusted with the folks at Washington who have given us such hearty assurances."³⁹⁹ Those assurances, he complained, did not translate into tolerant policy, and "the indictments go on merrily."⁴⁰⁰

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

³⁹³ Letter from Roger Baldwin to Major Nicholas Biddle (Mar. 8, 1918), ACLU Papers, reel 2, vol. 15.

³⁹⁴ Letter from Colonel Ralph H. Van Deman to Frederick Keppel (Mar. 9, 1918), ACLU Papers, reel 2, vol. 15.

³⁹⁵ 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 Asst. Secretary of War Keppel (Aug. 14, 1918), AUAM Papers, reel 10-1; Letter from Frederick Keppel to Roger Baldwin (May 19, 1918), ACLU Papers, reel 2, vol. 15.

³⁹⁶ Letter from Roger Baldwin to Nicholas Biddle (Mar. 8, 1918), ACLU Papers, reel 2, vol. 15, p 316–17.

³⁹⁷ Letter from Roger Baldwin to Frederick Keppel (Mar. 13, 1918), ACLU papers, reel 2, vol. 15; Letter from Roger Baldwin to Nicholas Biddle (Mar. 8, 1918), ACLU Papers, reel 2, vol. 15; Letter from Roger Baldwin to Frederick Keppel (Mar. 1, 1918), ACLU Papers, reel 2, vol. 15.

³⁹⁸ Letter from Roger Baldwin to Colonel R. Van Deman, Military Intelligence Branch, War Department, (Aug. 17, 1918), ACLU Papers, reel 2, vol. 15.

³⁹⁹ Letter from Roger Baldwin to Edmund Evans (Mar. 16, 1918), ACLU Papers, reel 3, vol. 25.

⁴⁰⁰ Letter from Roger Baldwin to Edmund Evans (Mar. 16, 1918), ACLU Papers, reel 3, vol. 25.

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.⁴⁰¹ 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.⁴⁰²

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."⁴⁰³ But the Board was spared the task of assessing such "casuistic arguments."⁴⁰⁴ It was the War Department's policy that conscientious objectors be accommodated only if they opposed "all war on principle."⁴⁰⁵ In correspondence with the NCLB, Newton Baker explained that the appropriate place for political objectors was the "Disciplinary Barracks."⁴⁰⁶ 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."⁴⁰⁷

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."⁴⁰⁸ Echoing Norman Angell, its representatives emphasized in a September 1918 letter the "value of minorities in social process" (after

⁴⁰¹ Letter from L. Hollingsworth Wood, Norman Thomas, John Haynes Holmes, and John Lovejoy Elliott to Newton Baker (Sept. 14, 1918), ACLU Papers, reel 5, vol. 44; *see also* Letter from Roger Baldwin to Newton Baker (June 30, 1917), ACLU Papers, reel 2, vol. 15 (noting undue limitation of religious exemption).

⁴⁰² 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), AUAM Papers, 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.").

⁴⁰³ Harlan Fiske Stone, *The Conscientious Objector*, 21 *COLUM. UNIV. QUARTERLY* 253, 267 (1919).

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ Letter from Newton Baker to L. Hollingsworth Wood (Jul. 15, 1918), ACLU Papers, reel 6, vol. 47.

⁴⁰⁷ *Id.*

⁴⁰⁸ Letter from L. Hollingsworth Wood, Norman Thomas, John Haynes Holmes, and John Lovejoy Elliott to Newton Baker (Sept. 14, 1918), ACLU Papers, reel 6, vol. 47.

all, the “minority of today may be the majority of tomorrow”) and society’s “incalculable debt to its heretics.”⁴⁰⁹ They also emphasized the horrors of war, which “right-thinking men” would consider justifiable only in legitimate cases of “social necessity.”⁴¹⁰ And they stressed that conscientious objectors would remain a small minority of eligible men, given the tremendous social pressure to serve.⁴¹¹ But above all, they celebrated conscience as a purely individual decision “whether a particular course of action under particular conditions is morally *right* or *wrong*.”⁴¹² 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.”⁴¹³

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 based⁴¹⁴—namely, “respect for the scruples of those who cannot conscientiously *take human life*.”⁴¹⁵ 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.⁴¹⁶ “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.”⁴¹⁷

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.⁴¹⁸ “[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 object it.”⁴¹⁹ Newton Baker had made the same point in explaining why no exemption could be extended to men of “enemy extraction.”⁴²⁰ Excusing military service on that basis would open the floodgates to a broad range of exemption claims,

⁴⁰⁹ *Id.*

⁴¹⁰ *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.”).

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ Letter from Frederick Keppel to L. Hollingsworth Wood, Norman Thomas, John Haynes Holmes, and John Lovejoy Elliott (Oct. 2, 1918), ACLU Papers, reel 6, vol. 47.

⁴¹⁵ *Id.* (emphasis in original).

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

from tax evasion to respecting others' right to life.⁴²¹ Any such outcome stood in direct contrast to Progressive ideals.

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 organized government is to endure," Keppel added.⁴²² 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."⁴²³ Following the path the NCLB advocated would undermine the "safety of the United States."⁴²⁴

As the end of the war approached, the NCLB's erstwhile allies in the 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).⁴²⁵ In late August, government agents began investigating Baldwin's activities on behalf of the IWW.⁴²⁶ 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.⁴²⁷ Walter Nelles linked the raid to patrioteering groups and the IWW trial, as well as the organization's work on behalf of conscientious objectors.⁴²⁸ 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.⁴²⁹

⁴²¹ *Id.* (quoting letter from Newton Baker to Judge Advocate General, June 9, 1918).

⁴²² *Id.*

⁴²³ *Id.*

⁴²⁴ *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), ACLU Papers, reel 6, vol. 47; *see also* Letter from Newton Baker to L. Hollingsworth Wood (Jul. 15, 1918), ACLU Papers, reel 6, vol. 47 ("I make a sharp distinction in my mind between the men 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.").

⁴²⁵ JOHNSON, *supra* note 29, at 74–75; Press Release, Nat'l Civil Liberties Bureau (Oct. 17, 1918), Swarthmore ACLU Papers, box 1, folder 1918.

⁴²⁶ COTTRELL, *supra* note 29, at 80–81.

⁴²⁷ *Id.*

⁴²⁸ Letter from L. Hollingsworth Wood to Friends of the Bureau (Sept. 17, 1918), AUAM Papers, reel 10-1 ("No change whatever in the operation of the Bureau is contemplated, regardless of the results of the examination of our papers.").

⁴²⁹ COTTRELL, *supra* note 29, at 82; JOHNSON, *supra* note 29, at 76–77; Letter from John Nevin Sayre to Albert DeSilver (Oct. 18, 1918), ACLU Papers, 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").

One member of the NCLB leadership, however, was soon to stand trial, 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 became eligible for conscription.⁴³⁰ Baldwin pledged to resign as director of the NCLB in order to take a “personal stand.”⁴³¹ 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.”⁴³² In October, he was arrested upon his own request and (after various government officials earnestly tried to change his mind) indicted for violation of the Selective Service Act.⁴³³

On October 30, 1918, Roger Baldwin appeared before Judge Julius Mayer in the Southern District of New York⁴³⁴—the same judge who had presided over the July 1917 convictions of Emma Goldman and Alexander Berkman for conspiracy to interfere with the draft.⁴³⁵ In his statement, Baldwin eschewed arguments about pluralism and the public interest and instead emphasized his uncompromising commitment to “individual freedom.”⁴³⁶ 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.⁴³⁷

In his statement to the court, Baldwin declared himself unequivocally opposed to war and, consequently, to conscription.⁴³⁸ 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.”⁴³⁹ He claimed an absolute right of individual conscience—a right that superseded national allegiance and trumped government power.⁴⁴⁰

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

⁴³⁰ Pub. L. No. 210 (1917), in *SELECTIVE SERVICE REGULATIONS* 357 (2d. ed. 1918).

⁴³¹ Letter from Roger Baldwin to the Directing Committee (Aug. 10, 1918), *ACLU Papers*, 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.

⁴³² *COTTRELL*, *supra* note 29, at 81 (quoting Roger Baldwin).

⁴³³ *THE INDIVIDUAL AND THE STATE: THE PROBLEM AS PRESENTED BY THE SENTENCING OF ROGER N. BALDWIN* 6 (1918). He refused bail and, while awaiting trial, helped the Department of Justice to organize the NCLB’s confiscated files. *COTTRELL*, *supra* note 29, at 86.

⁴³⁴ *THE INDIVIDUAL AND THE STATE*, *supra* note 433, at 3.

⁴³⁵ *Convict Berkman and Miss Goldman*, *N. Y. TIMES*, Jul. 10, 1917.

⁴³⁶ *THE INDIVIDUAL AND THE STATE*, *supra* note 433, at 6.

⁴³⁷ His about-face stemmed in large part from his intimate involvement in the IWW defense, described in Weinrib, *supra* note 31, chapter 3.

⁴³⁸ *THE INDIVIDUAL AND THE STATE*, *supra* note 433, at 6.

⁴³⁹ *Id.*

⁴⁴⁰ *Id.* Baldwin did not except class war from his statement.

reformer.⁴⁴¹ He attributed his departure from St. Louis to his disillusionment with incremental change.⁴⁴² 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.”⁴⁴³ 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.”⁴⁴⁴ 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.”⁴⁴⁵ And the movement he had joined was a fight against the “political state itself.”⁴⁴⁶

To Judge Mayer, Baldwin’s beliefs were incompatible with the very republican liberties he invoked.⁴⁴⁷ He advised Baldwin that “the freest discussion” should be allowed and encouraged “in the processes that lead up to the enactment of a statute.”⁴⁴⁸ Once a law was passed, he added, the people were free to debate “the methods of [its] administration.”⁴⁴⁹ But democracy was incompatible with individual disregard for duly enacted laws.⁴⁵⁰ 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.”⁴⁵¹

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 amnesty.⁴⁵² 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.”⁴⁵³ In Baldwin’s view, only a “clean-ought, straight-out recognition of

⁴⁴¹ *Id.* at 9.

⁴⁴² *Id.* at 10.

⁴⁴³ *Id.* at 9.

⁴⁴⁴ *Id.* at 9.

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.* at 10.

⁴⁴⁷ *Id.* at 12.

⁴⁴⁸ *Id.* at 13.

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.*

⁴⁵¹ *Baldwin Gets Year for Draft Act Defiance*, N.Y. CALL, Oct. 31, 1918, ACLU Papers, 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.

⁴⁵² Press Release, Nat’l Civil Liberties Bureau (Mar. 7, 1919), ACLU Papers, reel 5, vol. 44.

⁴⁵³ Letter from Roger Baldwin to Albert DeSilver (Mar. 5, 1919), ACLU Papers, reel 5,

the principle of individual conscience” would satisfy the demands of “sound public policy.”⁴⁵⁴ To Baldwin, in contrast to his Progressive sometime allies, the state was “not a sacred institution.”⁴⁵⁵ 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.”⁴⁵⁶ What Baldwin wanted was a “new order of society, freed of the compulsion and arbitrary restraints of an all supreme State.”⁴⁵⁷

Baldwin vowed not to leave prison through political favors while hundreds of his fellow objectors continued to “drag out long, lifeless days behind bars.”⁴⁵⁸ In any case, his own time in jail was tolerable, even “profitable.”⁴⁵⁹ As he told the *New York Call*, he left prison “more of a radical than [he] went in.”⁴⁶⁰ 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.⁴⁶¹ He acted on his ideals by joining the IWW, the organization whose opposition to political action influenced Baldwin’s own anti-statism most profoundly.⁴⁶² He spent several months traveling the country as an itinerant worker before returning to New York to found the ACLU.⁴⁶³

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

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⁴⁵⁴ *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.*

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.*

⁴⁵⁷ Letter from Roger Baldwin to Albert DeSilver (Mar. 5, 1919).

⁴⁵⁸ Letter from Roger Baldwin to Albert DeSilver (Mar. 5, 1919), ACLU Papers, reel 5, vol. 44.

⁴⁵⁹ *Roger Baldwin Free from Jail, Urges Amnesty*, NEW YORK CALL, July 20, 1919, ACLU Papers, reel 6, vol. 45. See generally COTTRELL, *supra* note 29, at 94–97. Baldwin was released on July 19, 1919—almost three months early due to a clerical error. *Id.*

⁴⁶⁰ *Roger Baldwin Free from Jail, Urges Amnesty*, N.Y. CALL, July 20, 1919, ACLU Papers, reel 6, vol. 45. The *New York Call* reported that due to his disdain for “representative government,” he would not join the Socialist Party. *Id.*; see also Clipping, NEW YORK TELEGRAM, July 20, 1919, ACLU Papers, reel 6, vol. 45.

⁴⁶¹ Clipping, NEW YORK TELEGRAM, July 20, 1919, ACLU Papers, reel 6, vol. 45.

⁴⁶² COTTRELL, *supra* note 29, at 73. Bill Haywood sponsored him for membership, despite his reservations about Baldwin’s greater utility as an advocate. *Id.*

⁴⁶³ *Id.*

and liberal lawyers on behalf of expressive freedom.⁴⁶⁴ Rather than making the world safe for democracy, the end of hostilities abroad unleashed a new wave of repression at home.⁴⁶⁵ Unsettled by the scale of postwar intolerance, the new civil liberties movement retooled free speech to protect the public interest and defuse social conflict.⁴⁶⁶ Judges and academics allegedly rallied to a marketplace of ideas, where the best ideas would eventually prevail.⁴⁶⁷ 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.⁴⁶⁸

This conventional story is partly true. Clearly, the war and the ensuing Red Scare prompted reevaluation of the importance of the First Amendment.⁴⁶⁹ 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 adherence to the rule of law.⁴⁷⁰ 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

⁴⁶⁴ 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.

⁴⁶⁵ GRABER, *supra* note 5, at 4.

⁴⁶⁶ *Id.*

⁴⁶⁷ 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 criticized the marketplace model. *E.g.*, C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 974–978 (1978); Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 6–13 (2004).

⁴⁶⁸ *See, e.g.*, 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").

⁴⁶⁹ MURPHY, *supra* note 7, at 15–18 (describing the notable efforts by contemporary critics to grapple with the wartime repression).

⁴⁷⁰ 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., REPORT UPON THE ILLEGAL PRACTICES OF THE UNITED STATES DEPARTMENT OF JUSTICE (Am. Civil Liberties Union 1920), Swarthmore ACLU collection, box 1, folder 1920.

vis-à-vis other Progressive values; official lawlessness and vigilante violence, among other concerning developments, had revealed the high cost of conformist propaganda.⁴⁷¹ Many interwar civil liberties advocates responded to institutional developments, including the dramatic expansion of administrative power.⁴⁷² Above all, a few judges—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).⁴⁷³ 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.⁴⁷⁴ 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 instead for the direct action tactics of the IWW and its other wartime clients.⁴⁷⁵ 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. "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

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

⁴⁷¹ On the relationship between official lawlessness, vigilante violence, and civil liberties, see generally CAPOZZOLA, *supra* note 7.

⁴⁷² CAPOZZOLA, *supra* note 7, 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).

⁴⁷³ *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.

⁴⁷⁴ WALKER, *supra* note 9, at 24-25.

⁴⁷⁵ Weinrib, *supra* note 31, at chapter 4.

⁴⁷⁶ AM. CIV. LIBERTIES UNION, *THE FIGHT FOR FREE SPEECH* 18 (1921).

⁴⁷⁷ *Id.*

freedom (as well as procedural rights) were more acceptable to Progressives 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.⁴⁷⁸ Simply put, claims for expressive freedom—even court-centered and constitutional ones—were more palatable to Progressives 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 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.⁴⁷⁹ 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.⁴⁸⁰

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.⁴⁸¹ 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.⁴⁸²

Incensed by the intrusion, he cast “[p]rivate morals and private conduct” as “matters for the conscience of the individual” rather than majoritarian regulation.⁴⁸³ A few years later,

⁴⁷⁸ See *supra* notes 447–451.

⁴⁷⁹ See WEINRIB, *supra* note 31, chapters 4–6.

⁴⁸⁰ *Id.* at chapter 4.

⁴⁸¹ E.g., A. Vernon Thomas, *Giddings for Freedom!*, 84 UNITY 83, 88 (1919) (“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.”).

⁴⁸² Nicholas Murray Butler, *The Changing Foundations of Government*, 8 A.B.A. J. 7, 10 (1922).

⁴⁸³ *Id.* at 11.

he lamented a “spineless corporate opinion which . . . aims to reduce all individuality, whether of mind or character, to a gelatinous and wobbling mass.”⁴⁸⁴

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 instruction in the schools.⁴⁸⁵ 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.”⁴⁸⁶ 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.⁴⁸⁷

When *Meyer* was decided, the ACLU considered it an “unimportant” case.⁴⁸⁸ 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*,⁴⁸⁹ an Oregon initiative measure partly justified by Progressive confidence in equality through acculturation.⁴⁹⁰ William S. U’Ren, an eminent Oregon Progressive, assured the executive committee that Oregon’s governor was a “liberal” and that the law posed no threat to “civil or religious liberty;” on the contrary, it would raise the quality of public education for all Oregon children.⁴⁹¹ The ACLU was unconvinced. Like the Court (this time, unanimous), it rejected the “power of the State to standardize its children.”⁴⁹² 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.”⁴⁹³

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

⁴⁸⁴ *Butler Denounces “New Barbarians,”* N. Y. TIMES, June 4, 1925, at 3.

⁴⁸⁵ *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).

⁴⁸⁶ *Id.* at 400.

⁴⁸⁷ *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925).

⁴⁸⁸ ACLU, THE RECORD OF THE FIGHT FOR FREE SPEECH IN 1923 5 (1924).

⁴⁸⁹ 268 U.S. 510 (1925).

⁴⁹⁰ 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).

⁴⁹¹ Letter from William S. U’Ren (Dec. 6, 1922), ACLU Papers, reel 34, vol. 245

⁴⁹² *Pierce*, 268 U.S. at 535.

⁴⁹³ Letter from Roger Baldwin to William S. U’Ren (Jan. 4, 1923), ACLU Papers, reel 34, vol. 245. The ACLU initially became interested in *Pierce* and other academic freedom cases because of the Lusk Committee’s attack on radical teachers and the socialist Rand School of Social Science in New York. See Weinrib, *supra* note 31, chapter 5.

the state's prohibition on teaching evolution in state-funded schools.⁴⁹⁴ 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.⁴⁹⁵ 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.⁴⁹⁶ 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.⁴⁹⁷

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.⁴⁹⁸ 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.⁴⁹⁹ At the same time, he endorsed the freedom "to worship God according to the dictates of [one's] own conscience,"⁵⁰⁰ and he proclaimed "the immunity of the domain of conscience" from government control.⁵⁰¹ The Tennessee evolution law crossed the line because it constrained "the pursuit of knowledge ... [by] aiming at the protection of creed or dogma."⁵⁰² 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."⁵⁰³ It is

⁴⁹⁴ *Scopes v. State*, 278 S.W. 57 (Tenn. 1925). On the *Scopes* trial, see EDWARD J. LARSON, *SUMMER FOR THE GODS: THE SCOPES TRIAL AND AMERICA'S CONTINUING DEBATE OVER SCIENCE AND RELIGION* (1997); RAY GINGER, *SIX DAYS OR FOREVER: TENNESSEE V. JOHN THOMAS SCOPES* (1958).

⁴⁹⁵ Brief to Supreme Court of Tennessee, John Thomas Scopes vs. State of Tennessee, No. 2. Rhea County Criminal Docket, September Term, 1925 (hereafter *Scopes* Supreme Court Brief), ACLU Papers, reel 38, vol. 274.

⁴⁹⁶ Reply Brief and Argument for the State of Tennessee, *Scopes v. State*, 278 S.W. 57 (Tenn. 1925) at 15 (emphasis in original). The Tennessee court upheld the law but reversed Scopes's conviction on a technicality, foreclosing review by the United States Supreme Court.

⁴⁹⁷ ACLU, *THE TENNESSEE EVOLUTION CASE* (1925), ACLU Papers, reel 44, vol. 299.

⁴⁹⁸ Charles E. Hughes, *Liberty and Law*, 11 A.B.A. J. 563, 564 (1925).

⁴⁹⁹ *Id.* at 567.

⁵⁰⁰ *Id.* at 565.

⁵⁰¹ *Id.* at 567.

⁵⁰² *Id.*

⁵⁰³ *Id.* at 566.

no wonder that the organization had hoped to have Hughes, rather than Clarence Darrow, argue the *Scopes* case on appeal.⁵⁰⁴

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.⁵⁰⁵ 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.”⁵⁰⁶ 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.”⁵⁰⁷ After all, he reasoned, “The state must protect itself, administer justice, and conserve the public health.”⁵⁰⁸ The Tennessee law was suspect only because its purpose was to preserve religion rather than “public safety.”⁵⁰⁹ 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—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.”⁵¹⁰

⁵⁰⁴ Forrest Bailey to Clarence Darrow, 14 September 1925, ACLU Papers, reel 38, vol. 274.

⁵⁰⁵ In addition to these examples, the ACLU opposed compulsory flag salutes (discussed below); compulsory Bible reading in the schools, ACLU, *FREE SPEECH 1925–1926: THE WORK OF THE AMERICAN CIVIL LIBERTIES UNION* 21 (1926); blasphemy, ACLU, *THE FIGHT FOR CIVIL LIBERTY: THE STORY OF THE ACTIVITIES OF THE AMERICAN CIVIL LIBERTIES UNION 1928–1929* 10–11 (1929); and laws barring atheists from testimony, *id* at 10.

⁵⁰⁶ Blewett Lee, *Anti-Evolution Laws Unconstitutional*, 11 A.B.A. J. 417, 419 (1925).

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.*

⁵⁰⁹ *Id.* at 419–20.

⁵¹⁰ *The Conduct of the Scopes Trial*, *NEW REPUBLIC*, Aug. 19, 1925, at 332.

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 Schwimmer's legal expenses,⁵¹¹ no Supreme Court case since the war had "violate[d] the old traditions more squarely" than *Schwimmer v. United States*.⁵¹² 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.⁵¹³ In fact, the government's generous accommodation of conscientious objectors during World War I had recognized as much.⁵¹⁴

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 the Constitution," which the Naturalization Act required as a condition of citizenship. Schwimmer was an outspoken pacifist, and Justice Butler noted for the majority that she was "disposed to exert her power to influence others."⁵¹⁵ It was that aspect of that case that most troubled Justice Holmes, who (along with Justices Brandeis and Sanford) dissented.⁵¹⁶ 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."⁵¹⁷

The ACLU regarded the *Schwimmer* decision as a call to action.⁵¹⁸ In Congress, it unsuccessfully pursued legislation to admit pacifists to citizenship.⁵¹⁹ 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*.⁵²⁰ Two years later, two cases made their way to the

⁵¹¹ See ACLU, THE CASE OF ROSIKA SCHWIMMER: ALIEN PACIFISTS NOT WANTED! 4 (1929).

⁵¹² *Id.* at 1.

⁵¹³ *Id.* at 1 ("Our law recognized that in a conflict between a citizen's duty to his God and his duty to his State, God should prevail.").

⁵¹⁴ *Id.*

⁵¹⁵ *Id.* at 3; See also Transcript of Record at 11–13, *United States v. Schwimmer*, 279 U.S. 644 (1929) ("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.").

⁵¹⁶ *Id.* at 654 (Holmes, J., dissenting).

⁵¹⁷ *Id.* at 654–55.

⁵¹⁸ ACLU, *supra* note 511, at 3.

⁵¹⁹ ACLU, THE FIGHT FOR CIVIL LIBERTY 1930–31 12 (1931).

⁵²⁰ ACLU, THE STORY OF CIVIL LIBERTY 1929–1930 9 (1930).

Supreme Court, both involving would-be citizens whose qualms about bearing arms were religious in nature.⁵²¹ This time, the briefs expressly argued that “the constitutional protection of religious freedom does embrace conscientious scruples against bearing arms in a war.”⁵²² In *United States v. Macintosh* and *United States v. Bland*, five-justice majorities upheld the denial of citizenship. The close margins mask significant agreement on the limits of conscience-based exemptions.

Writing for the majority in *Macintosh*, Justice 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.”⁵²³ Sutherland rejected as “astonishing” the notion of a constitutional right not to bear arms.⁵²⁴ “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.”⁵²⁵

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.⁵²⁶ And it mattered to Hughes that no statute had expressly done so.⁵²⁷ Hughes

⁵²¹ *United States v. Macintosh*, 283 U.S. 605, 623 (1931); *United States v. Bland*, 283 U.S. 636 (1931).

⁵²² Brief for Respondent, *United States v. Macintosh*, 283 U.S. 605 (1931), at 34–35. 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. A Canadian by birth, he indicated that he would bear arms only if he believed it to be morally justified. 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, United States v. Bland*, 283 U.S. 636 (1931), at 7. Bland, also Canadian, had indicated that she would refuse to bear arms under any circumstances. *Id.* at 1.

⁵²³ *Id.* at 625.

⁵²⁴ *United States v. Macintosh*, 283 U.S. 605, 623 (1931).

⁵²⁵ *Id.*

⁵²⁶ *Macintosh*, 283 U.S. at 627 (Hughes, J., dissenting).

⁵²⁷ The Naturalization Act, § 3–4, c. 3592, 34 Stat. 596 (U.S.C. Title 8, § 372 et seq.), 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

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 the Congress.”⁵²⁸ The Court’s decision amounted to a usurpation by “judicial decision” of a “legislative function.”⁵²⁹

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 as well as legislative policy.⁵³⁰ The naturalization cases turned on an applicant’s willingness to swear an oath, which necessarily implicated the dictates of conscience⁵³¹—and “in the forum of conscience, duty to a moral power higher than the state ha[d] always been maintained.”⁵³² 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.⁵³³ At the same time, “within the domain of power,” government was free to “enforce obedience to laws regardless of scruples.”⁵³⁴ In short, Hughes’s dissent was hardly an endorsement of exemptions from neutral laws.

In an amicus brief in *Macintosh*,⁵³⁵ the American Friends Service Committee echoed Norman Thomas’s wartime efforts to extend the Progressive theory of free speech to religious freedom.⁵³⁶ 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”

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.”

⁵²⁸ *Macintosh*, 283 U.S. at 627–28 (Hughes, J., dissenting).

⁵²⁹ *Id.* at 628.

⁵³⁰ *Id.* at 634.

⁵³¹ 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, Department of State) to Roger Baldwin, Oct. 22, 1926, reproduced in Brief on Behalf of Petitioner-Appellee, *United States v. Bland*, 283 U.S. 636 (1931), at 19–29.

⁵³² *Id.*

⁵³³ *Id.* at 631.

⁵³⁴ *Id.* at 633.

⁵³⁵ Brief in Behalf of American Friends Service Committee, *Macintosh v. United States*, 283 U.S. 605 (1931).

⁵³⁶ GRABER, *supra* note 5, at 122–64.

was tantamount to the “Prussian philosophy of the State,” it argued.⁵³⁷ The more “liberal” approach promoted by conscientious objectors would enhance the legitimacy of the state, not undermine its power.⁵³⁸ 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.⁵³⁹ 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.”⁵⁴⁰

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.⁵⁴¹ 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.”⁵⁴² 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.⁵⁴³

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.⁵⁴⁴ Among the controversial suggestions was one of special significance: “Aid in the campaign against compulsory military training.”⁵⁴⁵ 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.”⁵⁴⁶ Felix Frankfurter, too, initially resisted the

⁵³⁷ Brief, *supra* note 535, at 8. Cf. Thomas, *supra* note 73, at 393 (“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.”).

⁵³⁸ *Id.* at 12.

⁵³⁹ *Near v. Minnesota*, 283 U.S. 697 (1931); *Stromberg v. California*, 283 U.S. 359 (1931).

⁵⁴⁰ *Macintosh*, 283 U.S. at 633.

⁵⁴¹ Letter from Roger Baldwin to the Members of the Nat’l Comm. (Feb. 14, 1929), ACLU Papers, reel 63, vol. 360.

⁵⁴² *Id.* It added the right against unreasonable searches and seizures, though “only incidentally.” *Id.*

⁵⁴³ *See id.*

⁵⁴⁴ *Id.*

⁵⁴⁵ *Id.*

⁵⁴⁶ Letter from Karl Llewellyn to the Am. Civil Liberties Union (Apr. 15, 1929), ACLU Papers, 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 Baldwin to Karl Llewellyn

proposal, though he eventually backed down.⁵⁴⁷ 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.*⁵⁴⁸

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."⁵⁴⁹ In 1934, the Supreme Court unanimously rejected a challenge to a California law requiring University of California students to participate in military training.⁵⁵⁰ John Beardsley, longtime chairman of the ACLU's Southern California Branch, argued the case in the Supreme Court.⁵⁵¹ 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."⁵⁵² When Congress enacted a peacetime draft in 1940, the ACLU declined to oppose it, though it did advocate broad statutory exemptions for conscientious objectors.⁵⁵³ Two years later the organization took the unlikely step of

(Apr. 18, 1929), ACLU Papers, 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.*

⁵⁴⁷ Letter from Felix Frankfurter to Roger Baldwin (Feb. 16, 1929), ACLU Papers, 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 Baldwin (March 5, 1929), ACLU Papers, reel 63, vol. 360.

⁵⁴⁸ Letter from Felix Frankfurter to Roger Baldwin (Feb. 21, 1929), ACLU Papers, reel 63, vol. 360.

⁵⁴⁹ Letter from Roger Baldwin, on behalf of the Executive Committee, to the National Committee (Apr. 5, 1929), ACLU Papers, reel 63, vol. 360 (referencing sedition bills and legislative proposals for universal conscription).

⁵⁵⁰ *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.* On *Hamilton*, see Case, *supra* note 10, at 478–80.

⁵⁵¹ ACLU, *LAND OF THE FREE: THE STORY OF THE FIGHT FOR CIVIL LIBERTY 1934–35* 50 (1935).

⁵⁵² *Id.* at 11.

⁵⁵³ Walker, *supra* note 9, at 149–50. The organization did, however, advocate for

backing the administration's proposal to conscript all adults into compulsory civilian service.⁵⁵⁴

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.⁵⁵⁵ 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."⁵⁵⁶ Even in that limited domain, the courts that considered the issue prior to the Supreme Court's decision in *Minersville School District v. Gobitis*⁵⁵⁷ typically rejected the notion that a religious conviction could "interfere with the state's enactments for its safety, preservation or welfare."⁵⁵⁸

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.⁵⁵⁹ 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.⁵⁶⁰

broad exemptions

⁵⁵⁴ *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 their strong political ties to Roosevelt. *Id.* at 139.

⁵⁵⁵ ACLU, FREE SPEECH 1925–1926: THE WORK OF THE AMERICAN CIVIL LIBERTIES UNION 22–23 (1926). 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); Leah Weinryb-Grohsgal, *Reinventing Civil Liberties: Religious Groups, Organized Litigation, and the Rights Revolution* (2011) (Ph.D. dissertation, Emory University); Nussbaum, *supra* note 21, at 199–214.

⁵⁵⁶ AM. CIV. LIBERTIES UNION, HOW GOES THE BILL OF RIGHTS: THE STORY OF THE FIGHT FOR CIVIL LIBERTY, 1935–1936 39 (1936); AM. CIV. LIBERTIES UNION, ETERNAL VIGILANCE! THE STORY OF CIVIL LIBERTY, 1937–1938 61 (1938). In fact, the 1939 Annual Report listed flag salute cases under "Freedom in Schools and Colleges" rather than "Religious Freedom." AM. CIV. LIBERTIES UNION, THE BILL OF RIGHTS 150 YEARS AFTER: THE STORY OF CIVIL LIBERTY 1938–1939 34, 46 (1939).

⁵⁵⁷ 310 U.S. 586, 591 (1940).

⁵⁵⁸ AM. CIV. LIBERTIES UNION, THE BILL OF RIGHTS 150 YEARS AFTER: THE STORY OF CIVIL LIBERTY 1938–39, *supra* note 556, at 46 (quoting New York court).

⁵⁵⁹ See, e.g., Louis Lusky, *The Compulsory Flag Salute in the Supreme Court*, BULL., June 15, 1940, in the Papers of Grenville Clark in the Dartmouth College Library, ML–7, Rauner Special Collection Library, Hanover, NH [hereinafter Clark Papers], box 86, folder 4.

⁵⁶⁰ *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 591 (1940) (Frankfurter, J.).

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.⁵⁶¹ 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.⁵⁶² 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.⁵⁶³ On one account, civil liberties were valued for their “contribution to the welfare of the community.”⁵⁶⁴ The “dominant philosophy,” by contrast, had “sprung from fear of government and of organized control.”⁵⁶⁵ Under that model, freedom of conscience was a natural right, prior to and independent of the state.⁵⁶⁶

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.⁵⁶⁷ After much agonizing, the committee opposed the law as an unconstitutional measure, as committee chair Grenville Clark put it, “to induce loyalty by coercion.”⁵⁶⁸ At the same time, there was a general unwillingness on the committee to “permit every crack-pot to exercise untrammelled his definition of freedom of conscience,” lest liberty degenerate into “anarchy.”⁵⁶⁹ In Clark’s formulation:

Neither an assertion of religious scruples nor a general claim of ‘individual liberty’ should avail to nullify a statute requiring vaccination

⁵⁶¹ 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, chapters 6–8.

⁵⁶² For example, after agonized debate, the ACLU defended the asserted First Amendment right of employers to distribute anti-union literature to their employees. *See Nat’l Labor Relations Board v. Ford Motor Co.*, 114 F.2d 905 (6th Cir. 1940); Weinrib, *supra* note 31, at chapter 8.

⁵⁶³ John Dewey, *Liberalism and Civil Liberties*, *SOC. FRONTIER* (1936), at 187.

⁵⁶⁴ *Id.*

⁵⁶⁵ *Id.*

⁵⁶⁶ 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.*

⁵⁶⁷ Brief for Am. Civil Liberties Union as Amicus Curiae Supporting Respondents, *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940).

⁵⁶⁸ Letter from Grenville Clark to George I. Haight (Mar. 25, 1940), Clark Papers, box 79, folder 32.

⁵⁶⁹ Letter from George Haight to Grenville Clark (Mar. 26, 1939), Clark Papers, box 79, folder 32; Letter from Grenville Clark to George I. Haight (Mar. 25, 1940), Clark Papers, box 79, folder 32 (“I have no more sympathy than you have with permitting ‘every crackpot to exercise untrammelled his definition of freedom of conscience.’”).

(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).⁵⁷⁰

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.⁵⁷¹

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.”⁵⁷² 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 v. Barnette* (overruling *Gobitis*) relied on a theory of compelled speech—prohibiting the state from prescribing “what shall be orthodox in politics, nationalism, or other matter of opinion”—as opposed to freedom of conscience.⁵⁷³ 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.”⁵⁷⁴ 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.⁵⁷⁵

⁵⁷⁰ Letter from Grenville Clark to George I. Haight (Mar. 25, 1940), Clark Papers, box 79, folder 32.

⁵⁷¹ *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).

⁵⁷² Thomas Reed Powell, *Conscience and the Constitution*, in DEMOCRACY AND NATIONAL UNITY 29 (William Thomas Hutchinson, ed. 1941).

⁵⁷³ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

⁵⁷⁴ Quoted in CAPOZOLLA, *supra* note 7, at 82.

⁵⁷⁵ *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 604 (1940) (Stone, J., dissenting).

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”⁵⁷⁶—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.”⁵⁷⁷ Even Norman Thomas reframed his longstanding commitment to “freedom of conscience” as a right to “argue freely according to conscience.”⁵⁷⁸

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 surprising about the NCLB’s exertions on behalf of conscientious objectors 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 lest 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.⁵⁷⁹

Half a century elapsed—and massive social and cultural transformations reshaped American attitudes toward war, civil liberties, and the state—before arguments

⁵⁷⁶ Letter from Franklin D. Roosevelt, President of the United States, to the American Council on Public Affairs (Dec. 21, 1939), *quoted in preface to* FRANK MURPHY, ATTORNEY GENERAL OF THE UNITED STATES, IN DEFENSE OF DEMOCRACY, Clark Papers, box 80, folder 112.

⁵⁷⁷ FRANK MURPHY, ATTORNEY GENERAL OF THE UNITED STATES, IN DEFENSE OF DEMOCRACY, Clark Papers, Box 80, Folder 112.

⁵⁷⁸ Statement by Norman Thomas at Journal Square Meeting: Free Speech in Jersey City (June 12, 1930), ACLU Papers, 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 (Merritt Y. Hughes, ed.) 746 (1957).

⁵⁷⁹ THE INDIVIDUAL AND THE STATE, *supra* note 433, at 14.

of the kind the NCLB espoused persuaded a majority of the Court. In *United States 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.⁵⁸⁰ The ACLU was unabashedly activist in its opposition to Vietnam,⁵⁸¹ and it is no wonder that Roger Baldwin celebrated the Court's concession to conscience.⁵⁸²

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 interest" requirement it had fashioned for free speech.⁵⁸³ Nine years later, in *Wisconsin v. Yoder*, the Court offered its most expansive reading of the free exercise clause of the First Amendment.⁵⁸⁴ 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 a barrier to reasonable state regulation . . . if it is based on purely secular considerations."⁵⁸⁵ Still, the Court declared

⁵⁸⁰ *United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 US 333 (1970). For a discussion of the expansion of religious exemption in these cases, see NUSSBAUM, *supra* note 21, at 171–72.

⁵⁸¹ See JUDY KUTULAS, *THE AMERICAN CIVIL LIBERTIES UNION AND THE MAKING OF MODERN LIBERALISM, 1930-1960* 215–16 (2006).

⁵⁸² Roger Baldwin, *Introduction* to AM. CIV. 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.").

⁵⁸³ *Sherbert v. Verner*, 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).

⁵⁸⁴ *Wisconsin v. Yoder*, 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).

⁵⁸⁵ *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 (2006); 42 U.S.C. § 2000cc–5 (2006). By contrast, many specific statutory exemptions extend to non-religious moral exemptions. *E.g.*, Church Amendment, 42 U.S.C. § 300a-7(b) (2006) (providing exemption for health care workers otherwise obligated to perform abortion or sterilization procedures on the basis of "religious beliefs or moral convictions"); 42

that “[o]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”⁵⁸⁶

Despite *Yoder*’s lofty language, constitutional claims for exemptions rarely succeeded in practice.⁵⁸⁷ The few successful cases generally involved denial of unemployment benefits under circumstances very similar to *Sherbert*.⁵⁸⁸ *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.⁵⁸⁹ In his majority opinion in *Employment Division v. Smith*,⁵⁹⁰ Justice 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.”⁵⁹¹ On the contrary, to recognize “a private right to ignore generally applicable laws” would create a “constitutional anomaly.”⁵⁹²

U.S.C. §§ 1395w-22(j)(3)(B), 1396u-2(b)(3)(B) (2006) (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) (2006) (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.

⁵⁸⁶ *Yoder*, 406 U.S. at 215.

⁵⁸⁷ See Christopher L. Eisgruber and 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.”).

⁵⁸⁸ *Id.* 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).

⁵⁸⁹ 494 U.S. 872, 881 (1990).

⁵⁹⁰ *Id.*

⁵⁹¹ *Id.* at 886.

⁵⁹² *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. v. Hialeah*, 508 U.S. 520 (1993).

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.⁵⁹³ Congress responded with the Religious Freedom Restoration Act,⁵⁹⁴ a legislative effort “to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder*.”⁵⁹⁵ Congressional support for RFRA was practically unanimous, and 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.⁵⁹⁶ Among the bill’s staunchest supporters was the ACLU, whose president, testifying before Congress, criticized the Court for “departing so dramatically from traditional constitutional principles”⁵⁹⁷ 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.”⁵⁹⁸

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.⁵⁹⁹ 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.⁶⁰⁰ RFRA, the ACLU complained,

⁵⁹³ 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.”).

⁵⁹⁴ 107 Stat. 1488 (1993). In *City of Boerne v. Flores*, 521 U.S. 507 (1997), 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 way that imposes a substantial burden on religious exercise in the absence of a compelling government interest. In 2003, RFRA was amended to apply only to the federal government.

⁵⁹⁵ 42 U.S.C. s 2000bb(b)(1).

⁵⁹⁶ Peter Steinfelds, *Clinton Signs Law Protecting Religious Practices*, N. Y. TIMES, Nov. 17, 1993.

⁵⁹⁷ Statement of Nadine Strossen, President, National Board of Directors, American Civil Liberties Union, in Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, on H.R. 2797 (Religious Freedom Restoration Act of 1991), Serial No. 99, 63.

⁵⁹⁸ Prepared Statement of Nadine Strossen, President, and Robert S. Peck, Legislative Counsel, American Civil Liberties Union, *id.*, 65.

⁵⁹⁹ Louise Melling, *ACLU: Why We Can No Longer Support the Federal ‘Religious Freedom’ Law* (Opinions), WASH. POST, June 25, 2015.

⁶⁰⁰ *See supra* note 10.

was “used as a sword to discriminate against women, gay and transgender people and others.”⁶⁰¹

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 beliefs⁶⁰² and, in some cases, “moral” opposition as well.⁶⁰³ Vendors have asserted religious objections to state and local anti-discrimination laws,⁶⁰⁴ 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*.⁶⁰⁵ The ACLU has criticized the newest set of challenges to the ACA’s contraception mandate for endeavoring to deprive women “of a benefit guaranteed by law.”⁶⁰⁶ Although proponents of exemptions link their campaign to a “long and rich tradition of religious freedom,”⁶⁰⁷ critics have hastened to emphasize the distance between current claims and their historical antecedents.⁶⁰⁸

⁶⁰¹ Melling, *supra* note 599.

⁶⁰² E.g., *Burwell v. Hobby Lobby Stores*, 573 U.S. ___ (2014). This term, the Supreme Court will decide a set of cases involving religious non-profits claiming exemption from the contraception mandate under the Religious Freedom Restoration Act. *Zubik v. Burwell*, No. 14-1418.

⁶⁰³ Complaint, *March for Life v. Burwell*, available at https://www.aclu.org/sites/default/files/field_document/07.07.14_complaint.pdf; *March for Life v. Burwell*, 2015 U.S. Dist. LEXIS 115483 (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”).

⁶⁰⁴ See NeJaime & Siegel, *supra* note 10, at 2519.

⁶⁰⁵ 135 S. Ct. 2584 (2015).

⁶⁰⁶ ACLU, *Supreme Court Accepts Challenges to Affordable Care Act’s Contraceptive Coverage Requirement*, Nov. 6, 2015, available at <https://www.aclu.org/news/supreme-court-accepts-challenges-affordable-care-acts-contraceptive-coverage-requirement>.

⁶⁰⁷ Letter from Professors Robin Fretwell Wilson, Thomas C. Berg, Richard W. Garnett, Carl H. Esbeck & Edward McGlynn Gaffney, Jr. to State Senator F. Gary Simpson, Delaware, Religious Liberty Implications of Legalizing Same-Sex Marriage, House Bill No. 75 [Delaware] (May 1, 2013), <http://mirrorofjustice.blogs.com/files/delaware-letter.pdf> (cited and discussed in Case, *supra* note 10, at 464 n. 2 and 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).

⁶⁰⁸ 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 after Hobby Lobby*, 82 U. CHI.

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.⁶⁰⁹ “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.”⁶¹⁰ Baldwin’s certitude echoes today in a generalized First Amendment attack on the regulatory state.⁶¹¹ In an irony that would have bemused the labor advocates of the NCLB, the Supreme Court this term will consider 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 thereby—according to the California public school teacher for whom the case is named—render them “troubled in their conscience.”⁶¹²

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.”⁶¹³ 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 counter-majoritarian constitutionalism head on, there was ample reason to interrogate an extension of individual rights. 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*

L. REV. (forthcoming) (attributing to the Supreme Court’s *Hobby Lobby* decision an “unprecedented reverence for religious freedom”).

⁶⁰⁹ Baldwin, *supra* note 582, at v.

⁶¹⁰ *Id.*

⁶¹¹ Scholarship on the “*Lochnerization*” of the First Amendment’s speech clause stretches back decades. See, e.g., See J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 384; Morton Horowitz, *Foreword: The Constitution of Change*, 107 HARV. L. REV. 30, 109 (1993) (section on “The *Lochnerization* of the First Amendment”). On a similar trend in religious freedom cases, see Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUMBIA 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.

⁶¹² Emma Brown, *Two Teachers Explain Why They Want To Take Down Their Union*, WASH. POST, Aug. 11, 2015.

⁶¹³ Melling, *supra* note 599.

before the Supreme Court.⁶¹⁴ 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.⁶¹⁵ 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."⁶¹⁶

At the dawn of the modern First Amendment, concern for democratic openness and pluralistic tolerance did not inevitably entail accommodation of individual belief. 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.

⁶¹⁴ 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).

⁶¹⁵ THE INDIVIDUAL AND THE STATE, *supra* note 433, at 14.

⁶¹⁶ *Id.*

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