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Cases of Conscience: The Supreme Court and Conscientious Objectors to Military Service During the Post World War II Era

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CASES OF CONSCIENCE: THE SUPREME COURT AND CONSCIENTIOUS OBJECTORS TO MILITARY SERVICE DURING THE POST WORLD WAR II ERA

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This thesis examines the history of American conscientious objectors to military service during the aftermath of World War II. It describes why conscientious objectors were viewed with distrust and suspicion for their refusal to bear arms in defense of the nation and considers how groups such as the American Legion and the Veterans of Foreign Wars attempted to prevent COs from enjoying key benefits of U.S. citizenship by demanding that conscientious objectors be excluded from public employment and denied most forms of government assistance. This thesis focuses on decisions of the United States Supreme Court following World War II that defined and extended the rights of conscientious objectors. Some of those decisions reflected and continued a debate over the protection of speech and claims of conscience that developed among the Justices on the Supreme Court following the end of World War I. This paper explores and evaluates the connections between the World War I era cases and decisions that followed the end of World War II. Analysis of the post World War II decisions reveals how the Supreme Court moved away from ideological debates over the protection of conscience towards the imposition of procedural rules designed to insure that administrative and judicial hearings involving COs met due process standards. The contests over the rights of conscientious objectors that followed the end of World War II displayed the expanding role the Supreme Court assumed in protecting the civil liberties of all Americans. The Supreme Court cases concerning conscientious objectors discussed here also showed how judicial protection of claims of conscience were influenced by Cold War fears that the philosophy of COs might undermine the ability of the nation to defend itself.

Contents

Introduction:

Is Encouraging Someone to follow his or her Conscience a Crime?

On September 10, 1948, Charles Ray Rickert, a Mennonite divinity student at Bluffton College, went to the Selective Service office in Toledo, Ohio. He told the draft board members that he was conscientiously opposed to military service and therefore would not register for the draft as required by the Selective Service Act of 1948. A board member spoke to Rickert and tried to change his mind. Rickert refused to capitulate and left the office. On November 8, 1948, FBI agents arrived at Bluffton College to arrest Rickert for failing to register. The college's dean of men, Larry Gara, a Quaker who had served three years in prison during World War II for opposing the draft, accompanied the FBI agents to Rickert's dorm room, where, in the presence of the agents, Gara encouraged Rickert to follow his conscience and not allow anyone to coerce him into changing his mind. After the FBI agents took Rickert away, Gara and his wife wrote to the Toledo district attorney expressing their opposition to the draft and their support for young men like Rickert who refused to register. Mailed the same day the FBI arrested Rickert, the letter said:

> We have just learned of the arrest of Charles Rickert, a student at Bluffton College who, as a conscientious objector to war and conscription has refused to register for the draft. We have been very much concerned about the imprisonment of young war objectors. It especially concerns us since we would also refuse to register for the draft if we were asked to do so. We have openly urged young men to take this position and shall do all in our power to further the cause of civil disobedience to conscription in this country. If men like Charles are guilty then we, too, are guilty for we have advocated disobedience to the law and have supported men who take this position.[1]

[1] *Gara v. United States*, 178 Federal 2d. 38 (1949)., aff'd. 340 United States 857 (1950). The Garas sent similar letters to the Attorney General of the United States and to the District Attorney in Chicago. Gara also signed a pledge in 1948 agreeing to "in every way possible assist and support Non-registrants."

Two months later, federal agents arrested Larry Gara and prosecuted him for "counseling, aiding and abetting" the violation of the Selective Service Act of 1948. The Toledo Federal District Court convicted Gara, and the judge sentenced him to eighteen months in jail—the same prison term imposed on Rickert. The Federal Court of Appeals for the Sixth Circuit and the United States Supreme Court both subsequently upheld his conviction.[2] The theologically liberal Protestant magazine *Christian Century* summarized the concerns of pacifists, conscientious objectors, and their supporters about the *Gara* case and its outcome by asking, "Does the decision, made in Toledo, mean that such advice to follow one's conscientious conviction is now a crime in the United States?"[3]

The arrest and prosecution of Larry Gara and the outcry those events engendered illuminated a fundamental conflict in American society and government—the struggle between the rights of individual conscience and the power and authority of the government. Two questions encapsulated the controversy: When and to what extent could the government force individuals to act in a manner contrary to their consciences in order to further the needs or protection of the state? And, when could the government prohibit and punish the expression of ideas or beliefs that challenged the power or policies of the state? Claims of conscience struck at the core of American democracy by suggesting that because of their moral beliefs some individuals might openly disobey laws enacted by the democratic majority. One had to look no further than the United States Constitution and its protections against government encroachment on the freedoms

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[2] Ibid.

[3] "Prison Sentence to Adviser of C.O.," *Christian Century* 66 (1949): 645.

of speech and religion to find the source of this controversy. Unless those rights of the individual were interpreted either as meaningless and subject to government encroachment, or, as absolute and never subject to infringement or curtailment despite the danger ideas and their expression might pose to the country or its citizens, a balance had to be struck between the rights of conscience and the authority of the nation to maintain order and defend itself. Since the end of World War I, members of the United States Supreme Court have debated how and where to mark the boundaries between claims of conscience and state power, frequently in cases involving opposition to war and military conscription. Defining those boundaries proved to be a difficult, contentious task, one requiring constant reappraisal and adjustment, and though the military draft ended over forty years ago, the effort to strike a balance between conscience and the state continues today over other issues such as same-sex marriage and mandatory medical insurance coverage for contraceptive services.[4] The *Gara* case and the experiences of conscientious objectors following World War II took place in the context of that continuing struggle to define the boundaries between government power and the rights of conscience.

This thesis explores the protection of conscience from the perspective of conscientious objectors, their supporters, and their opponents during the post World War II era by considering the status of COs in American society at that time and by analyzing relevant judicial decisions of the United States Supreme Court. Conscientious objectors

[4] Proponents of same-sex marriage have sued certain business owners, including bakers and photographers, for refusing to provide their services to same-sex couples. The business owners contend that forcing them to participate in same-sex weddings would violate their religious principles. Robert Barnes, "Supreme Court Declines Case of Photographer Who Denied Service to Gay Couple," *Washington Post*, April 7, 2014. In another recent case, the owners of a privately-owned family business sued the United States government. The owners of the business argued that the Affordable Health Care Act violated their religious freedom by forcing them to provide their female employees with access to contraceptive services like the morning-after pill. See *Barwell v. Hobby Lobby*, 573 United States ____ (2014).

often found themselves distrusted and ostracized for their refusal to bear arms. At the same time, the Supreme Court continued a slow and sometimes inconsistent march towards affording greater judicial oversight and protection for claims of conscience. Embedded within the controversy over the ideology of conscientious objectors and pacifists was a fundamental issue about the way in which Americans defined and contested the privileges and obligations of U. S. citizenship during the post World War II era.[5] The debate focused on the obligations and benefits of citizenship. Were individuals who refused to fight in defense of the nation entitled to the increasing rewards and opportunities provided by American society? Were individuals who placed obedience to their conscience above duty to their country true Americans? Those questions drove the debate over the rights and treatment of conscientious objectors.

Reviewing the cases dealing with pacifists and COs shows that the Supreme Court spoke hesitantly and at times inconsistently on the issue of conscience during the post World War II era. Some decisions voiced strong support for conscience while others reflected the distrust and fear of COs that permeated much of society. Though an ideological debate initiated thirty years earlier by Justices Oliver Wendell Holmes and Louis D. Brandeis over the reasons claims of conscience should be tolerated continued, no durable consensus emerged as to why and how the Court should draw the line between

[5] The historiography of conscientious objection and peace studies includes no standard definitions distinguishing a conscientious objector from a pacifist. The term "conscientious objector" is often used to identify those individuals whose religious or moral beliefs require that they refuse to participate in military service. The term is frequently associated with formal procedures provided by the United States government for individuals to secure recognition as conscientious objectors and thereby secure exemption from military conscription. Since they generally object to all wars, pacifists are often referred to as conscientious objectors, whether or not they have sought formal exemption from the draft. But since they may oppose only specific wars or conflicts, not all conscientious objectors are pacifists. In this paper, I use the term "conscientious objector" in its broadest sense, using it to designate all forms of opposition to military service and conscription, whether those objections emanate from religious or moral beliefs and whether those objections prohibit participation in all wars or only in specific conflicts.

the sanctity of personal beliefs and opinions on the one hand and the right of the government to maintain order and defend itself on the other. The Court did, however, eventually expand, rather than diminish, its role in safeguarding claims of conscience by strictly enforcing procedural rules governing the classification and treatment of COs.

Chapter one of this thesis examines the status of conscientious objectors in American society at the end of World War II. Few in number, unpopular, and united only by their common opposition to war, they constituted a group that Justice Harlan Stone referred to as a "discrete and insular minority."[6] They often found themselves the targets of actions by the American Legion and the Veterans of Foreign Wars, organizations that sought to exclude COs from public employment and other benefits and protections of U.S. citizenship. Chapter one shows why conscientious objectors, possessing little or no political power, were forced to look to the courts for vindication of their rights.

Chapter two steps back and examines the competing rationales for the protection of conscience that emerged from the post World War I cases involving free speech and opposition to conscription. The beginning of the Court's earnest concern for minority views and claims of conscience lay in the free speech and draft opposition cases that arose from World War I. Those cases showed that different views arose on the Court with respect to how and why the expression of ideas and maintenance of beliefs should be protected. Justice Holmes viewed the unfettered exchange of ideas as a means of advancing state power and legitimacy, while Justice Louis D. Brandeis focused on the importance of speech and conscience to the individual and to the fulfillment of the

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[6] *United States v. Carolene Products Co.,* 304 United States 144 (1938). Footnote 4.

privileges and immunities guaranteed all American citizens by the Constitution of the United States. These competing perspectives on why conscience deserved protection continued to appear in post World War II cases as part of debates among the Supreme Court Justices over the appropriateness of the Court scrutinizing any legislation encroaching on the fundamental constitutional rights of U.S. citizens and over the amount of deference the Court should exhibit towards Congressional and administrative decisions pertaining to conscientious objectors.

Chapter three then considers how the post World War II decisions of the Supreme Court regarding conscientious objection reflected and were influenced by the judicial debates in the post World War I cases. The post World War II era cases involving COs demonstrated how the Supreme Court extended its purview over claims of conscience by eventually leaving behind the intellectual disputes over how and to what extent beliefs and their expression should be protected and by focusing instead on enforcement of technical details in the conscription process that protected the due process rights of objectors. Most notably, proponents of the preferred freedoms doctrine, such as Justices William O. Douglas and Hugo Black agreed with the champion of judicial restraint, Justice Felix Frankfurter, on rules designed to safeguard the due process rights of COs in administrative hearings before the Selective Service Board.[7] The alliance yielded procedural requirements that assured conscientious objectors of their right to discover and address evidence concerning the legitimacy of their claims without requiring that the

[7] The preferred freedoms doctrine held that the Court would exercise a heightened level of judicial scrutiny when reviewing any governmental action impinging on the personal freedoms embodied in the Bill of Rights, especially those rights contained in the First Amendment. C. Herman Pritchett, *Civil Liberties and the Vinson Court* (Chicago: University of Chicago Press, 1954), 33. The preferred freedoms doctrine is discussed in Chapter two.

justices reach an ideological consensus concerning why claims of conscience mattered and which branch of the government should protect them.

Chapter four discusses one the most significant judicial victories achieved by conscientious objectors during the post World War II era—the Court's ruling in *Girouard v. United States* (1946) that foreign CO's were eligible to become U.S. citizens.[8] The case exhibited the continuing debate over the protection of individual liberty and conscience, as well as the growing willingness of the Court to recognize claims of objectors. The decision was hailed by COs and their supporters as a major victory for the protection of conscience.

Finally, Chapter five returns to the Gara case and evaluates why it proved to be such a bitter disappointment for conscientious objectors and their supporters and how it related to the other decisions of that era concerning the protection of conscience and the expression of unpopular beliefs. In contrast to *Girouard*, the result of the Gara prosecution marked a step backwards for the protection of conscience.

This paper contributes to the historiography of civil liberties during the post World War II period. Historians have noted the general trend of the Supreme Court in the twentieth century to assume a greater role in the protection of civil liberties and in the protection of minorities or other groups espousing unpopular ideas. That trend began in the 1920's when Justices Holmes and Brandeis invigorated the First Amendment freedoms of speech and conscience.[9] But the Court at times retreated from its expanded role, and historians have characterized the years following World War II as some of the

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[8] *Girouard v. United States*, 328 United States 61 (1946).

[9] J. Woodford Howard Jr., *Mr. Justice Murphy: A Political Biography* (Princeton: Princeton University Press, 1968), 231-34.

most restrictive in American history for civil liberties.[10] This account generally is in accord with those views, as it demonstrates how conscientious objectors and pacifists, who remained objects of distrust and discrimination following the end of the War, found only limited protection in the courts. The Gara case, for example, alarmed COs and their supporters by suggesting that the a new assault against claims of conscience might be underway. Other developments, however, proved more encouraging and suggested that the march towards greater protection of conscience might continue over the long run. The Supreme Court's ruling in *Girouard v.United States* (1946) stands out as a significant victory for proponents of the protection of conscience.[11] The Court also expressed concern for the protection of conscience in post World War II cases by insisting that hearings before the Selective Service Board concerning the draft status of COs must at least comply with due process requirements. Those cases involving conscientious objectors reflected how the Supreme Court expanded its role as the protector of civil liberties by shifting its focus from ideological debates to procedural details.[12]

This paper also builds on the work of other historians who have written on the connection between military service and U.S. citizenship. In *Warfare State*, James T.

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[10] See Paul L. Murphy, *The Constitution in Crisis Times, 1918-1969*, [1st ed.]. ed. (New York: New York, Harper & Row, 1971), 280; See Geoffrey R. Stone, *Perilous Times : Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (New York: W.W. Norton & Co., 2004). See also Woodford Howard Jr., *Mr. Justice Murphy*, 321.

[11] *Girouard v. United States*. 328 United States 61 (1946)

[12] Historian Mark Tushnet has described how the Warren Court exhibited this shift in focus from ideology to procedural details. According to Tushnet, the Warren Court displayed more concern for the result in a given case than it did for developing legal doctrines protecting civil liberties. To accomplish the outcome desired by the Court, the justices often fashioned detailed procedural rules limiting state action that interfered with constitutional rights. The extensive procedures governing police interrogations adopted by the Court in *Miranda v. Arizona* 384 United States 436 (1966) exemplified this new approach employed by the Court for the protection of individual liberty. Mark Tushnet, "The Warren Court as History," in *The Warren Court in Historical and Political Perspective*, ed. Mark Tushnet (Charlottesville and London: University Press of Virginia, 1993), 10, 16, 22.

Sparrow examines how the benefits and security the United States government promised its citizens—equal opportunity; job security; and the protection of civil liberties—were linked to compulsory military service.[13] Sparrow shows how American soldiers earned those privileges of citizenship through their military service during World War II and how the government adopted the *GI Bill* to fulfill the nation's obligations to its veterans.[14] Margot Canady, on the other hand, looks at citizenship from the perspective of gay men denied the benefits of the GI Bill because of their sexual preference. Those men, argues Canaday, were denied recognition as American citizens despite having met their obligation to serve in the armed forces.[15] The history of conscientious objectors adds another voice and additional perspective to this literature of contested citizenship. While COs also were often denied the sense of financial security and protection other Americans—especially those who fought in the War—expected and claimed as rightfully theirs, they were excluded from those benefits of citizenship not because of immutable characteristics—such as ethnicity or sexual orientation—but rather because they rejected the premise that individuals could not follow their consciences and at the same time be loyal citizens.

This thesis joins a large body of historical literature concerning conscientious objectors and pacifists that has not thoroughly addressed and evaluated the experiences of COs during the years immediately following World War II. By focusing on the debate over the legal rights and status of conscientious objectors as citizens that occurred in various public forums, especially in the courts, this study offers new perspectives on the

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[13] James T. Sparrow, *Warfare State : World War II Americans and the Age of Big Government* (Oxford ; New York: Oxford University Press, 2011), 4, 44.
[14] Ibid., 256.
[15] Margot Canaday, "Building a Straight State: Sexuality and Social Citizenship under the 1944 G.I. Bill," *The Journal of American History* 90, no. 3 (2003): 940.

extent to which American society tolerated and protected claims of conscience during an era of increasing Cold War fears. Examining the struggles and status of COs in American society as World War II ended and the Cold War began reveals what was at stake in the political and judicial contests of that era, not just for conscientious objectors, but for the civil liberties of all Americans.[16]

[16] Examining the public debate over conscientious objection also adds depth and complexity to accounts of the peace movement during this period. Historians often see the post World War II era as one of retreat for peace activists due to Cold War anxiety. See Lawrence S. Wittner, *Rebels Against War; The American Peace Movement, 1941-1960* (New York,: Columbia University Press, 1969). See also Scott H. Bennett, *Radical Pacifism : The War Resisters League and Gandhian Nonviolence in America, 1915-1963* (Syracuse: Syracuse University Press, 2003).

Chapter 1

More Dangerous than Murderers and Traitors: Conscientious Objectors in Post World War II America

As Gara sat in jail waiting for the Court of Appeals to hear his case (the trial judge refused to release Gara on bail while his appeal was pending), Gara's supporters rallied to his aid. In July of 1949, four hundred clergymen from across the country, including Reinhold Niebuhr, signed a letter to President Truman in which they defended Gara's actions and demanded his release.[1] Members of prominent peace organizations, such as the Fellowship of Reconciliation and the Women's International League for Peace and Freedom, picketed the White House in support of Gara.[2] The Protestant theologically liberal magazine *Christian Century* observed that the trial court had convicted Gara for words of encouragement to Rickert, "words, such as any Christian might utter to any man anywhere and at any time who was attempting to follow the guidance of conscience."[3] From his pulpit at the Community Church of New York, minister Donald Harrington condemned the prosecution of Gara and acknowledged having himself counseled young men concerned about the draft to follow their consciences wherever they led. If Gara was guilty, said Harrington, so was he. Regarding Gara's sentence, Harrington observed that, "Forgers are granted parole, murderers and traitors are granted bail, but a pacifist like Larry Gara seems to be regarded as more dangerous than them all."[4]

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[1] "400 Assail Jailing of Draft Objector," *New York Times,* , July 25, 1949, 16.
[2] "60 Pickets at White House," *The Washington Post,* , July 26, 1949, 10.
[3] "Gara Conviction Should be Appealed," *Christian Century* 66 (1949): 388.
[4] "Preacher Invites Pacifist Penalty," *New York Times,* August 8, 1949, 13. Harrington was not alone in asserting that COs were treated more harshly than some dangerous criminals. According to the Central Committee for Conscientious Objectors, COs Generally received longer sentences than other individuals

Some Americans saw things differently, viewing Gara as a villain, not as a victim. The *New York Times* condemned Harrington's support of Gara, claiming that Gara and Harrington were setting a dubious example. Laws, said the *Times,* expressed the collective conscience of the people. Allowing everyone to choose which laws he intended to follow and which ones he preferred to disobey would inevitably lead to chaos. In an extreme case, a man might feel entitled to commit murder. The vast majority of Americans, observed the *Times,* believed that maintaining military strength offered the best way to preserve the peace. The *Times* editorial concluded with the hope that Harrington "will mark a wiser course in the future" and stop supporting men who refused to register.[5] A weekly news magazine *Time* captured the frustration and anger conscientious objectors could engender among their critics when a Truman administration official asked to comment about the Gara case responded by saying, "These conchies give you nothing but grief and trouble. They won't even apply for parole—they just sit there in jail making martyrs of themselves and stirring up trouble."[6]

These conflicting views about Larry Gara and his actions mirrored a broader debate that occurred in American society in the aftermath of World War II about the status of conscientious objectors as citizens and the extent to which the government should protect the expression of their ideas. The experiences of pacifists and conscientious objectors like Larry Gara reflected the ways in which Americans defined and contested the privileges and obligations of U. S. citizenship during the post World

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convicted of crimes. The average CO sentence for refusing to comply with the Selective Service Act was 35.8 months, while the 1951 Annual Report for the Bureau of Prisons listed the average sentence for forgery as 20.6 months, liquor law violations 10.5 months, narcotic violations 26.4 months, motor vehicle theft 26.4 months, theft of other property 17.6 months. The average of all sentences was 20.5 months. Central Committee for Conscientious Objectors, "Handbook for Conscientious Objectors," (1952), 43.

[5] "Mr. Harrington's Defiance," *New York Times* August 9, 1949, 24.

[6] "Inner Voice," *Time* Vol. 54 (1949): 55.

War II era. The debate focused on fundamental questions about the obligations and benefits of citizenship: Were individuals who refused to fight in defense of the nation entitled to the increasing rewards and opportunities provided by American society? Were individuals who placed obedience to their conscience above duty to their country true Americans? As the Cold War intensified, supporters and opponents of objectors and pacifists clashed over the extent to which men who refused to bear arms in defense of the nation were entitled to claim and enjoy the advantages and protections of U.S. citizenship. They disagreed over whether conscientious objectors were brave men adhering to their principles, or cowards who spread dangerous ideas against which the country and its citizens must be protected. They argued over whether COs were qualified to hold public jobs, over whether the president should restore the civil rights of objectors convicted of violating the draft laws, and over whether foreigners opposed to military service should be admitted as U.S. citizens. Supporters and critics of conscientious objectors debated these issues in Congress, at school board meetings, at immigration hearings, and eventually in the United States Supreme Court. The conflict pitted two of the nation's oldest and most fundamental values against each other: the duty of citizens to defend the country by force, if necessary, in times of peril; and the freedom of conscience embodied in the First Amendment to the Constitution of the United States.

This chapter recounts some of these events and debates that shaped the experience of conscientious objectors following World War II. The Supreme Court issued the post World War II decisions concerning COs amidst this controversy over the status of COs as citizens. Examining the status of conscientious objectors in American society at that time

helps explain the Court's attempts to protect minority points of view without undermining the nation's ability to defend itself.

Conscientious objectors found themselves at a distinct disadvantage as they sought to assert and protect their rights and privileges as American citizens following World War II. COs were, in Chief Justice Harlan Fiske Stone's telling phrase, a "discrete and insular minority."[7] Few in number, they adhered to principles and ideals that separated them from the rest of society. During World War II, 50 million men registered for the draft, and 16 million men were inducted into the military. Historians estimate that at most 50,000 men filed claims as conscientious objectors. Of those 50,000 objectors, one-half (25,000) accepted non-combatant roles in the military, often serving as medics or ambulance drivers. Another 12,000 objectors worked in the Civilian Public Service.[8] Many of the remaining applicants were ruled exempt from service on other grounds; excused because of family obligations or physical disability, their claims as conscientious objectors were never formally resolved. The government prosecuted approximately 15,000 men during World War II for failing to comply with the Selective Service Act of 1940. Most of those men failed to register or to report for induction. About one-third of

[7] The Supreme Court had indicated in *Carolene Products v. United States* (1938) that it would carefully scrutinize legislation that infringed on the rights of a discrete and insular minority." *United States v. Carolene Products Co.* Footnote 4. That statement in *Carolene Products* and its relationship to the Preferred Freedoms doctrine are discussed in Chapter 2.

[8] Mulford Q. and Jacob Sibley, Philip D., *Conscription of Conscience; the American State and the Conscientious Objector, 1940-1947* (Ithaca: Cornell University Press, 1952), 83. Under the Civilian Public Service (CPS) program, local draft boards assigned conscientious objectors to work camps throughout the United States. Traditional peace churches, such as the Mennonites and Quakers, financed and administered the camps. Objectors and their supporters severely criticized CPS. Objectors often found themselves forced to perform menial work, and even when the assigned tasks were more challenging—working in a hospital or building a road—the objectors received no pay. Unable to provide for their families, COs and their supporters viewed CPS as a system of slave labor.

that group (5,800 men) refused to cooperate with the draft because they conscientiously opposed military service. The rest tried to avoid serving for other reasons.[9]

Conscientious objectors lacked a cohesive philosophy and organizational structure beyond their common opposition to military service. They adhered to markedly different religious beliefs and practices. Conscientious objectors included members of the historic peace churches, such as the Quakers, Mennonites, and Brethren, whose religious convictions prohibited them from serving in the military. Some Protestants from denominations outside of the traditional peace churches also claimed conscientious objector status, as did some Roman Catholics. Seventh Day Adventists and Jehovah's Witnesses sought exemption from military service based on their religious beliefs as well. Refusing to cooperate in any manner with the selective service system, Jehovah's Witnesses comprised many of the objectors in prison. Some objectors claimed no religious affiliation, opposing conscription solely on moral or political grounds. A number of these so-called "secular" objectors were also socialists. Many objectors were pacifists who opposed all use of force. Whether their opposition to war was based on religious teachings or on secular moral values, they saw violence, not fascism or communism, as the central problem of the twentieth century.[10]

In contrast, the organizations, such as the American Legion and the Veterans of Foreign Wars, who opposed conscientious objectors and contested their exercise and enjoyment of the same rights and privileges as other Americans, were well organized and powerful. The debate over the meaning of citizenship that occurred in the aftermath of

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[9] Central Committee for Conscientious Objectors, "News Notes of the Central Committee of Conscientious Objectors," 1949. Vol. 1, No. 4, p.6.

[10] Joseph Kip Kosek, *Acts of Conscience: Christian Nonviolence and Modern Democracy* (New York: Columbia University Press, 2009), 5.

World War II between conscientious objectors and their opponents demonstrated the growing power and ability of special interest groups, such as the American Legion and the Veterans of Foreign Wars, to define and enforce their own vision of who was entitled to enjoy the benefits and privileges of U.S. citizenship. It showed how those organizations could marginalize members of smaller, less-organized groups and reduce them to second-class citizenship, as the Legion and VFW campaigned to remove COs from public jobs and to deny them welfare and other benefits created by the nation's growing bureaucratic state.

New fears over national security gripped the nation after World War II and fueled anger and suspicion about conscientious objectors and their beliefs. Concerns over nuclear weapons and conflicts with the Soviet Union generated a sense of vulnerability among Americans. U.S. citizens no longer felt strategically or geographically isolated from the dangers of international conflict.[11] Those fears generated heightened concern about patriotism and loyalty. National unity became synonymous with national strength.[12] In such an environment, many saw objectors as an existential threat to the nation. For them, the refusal of COs to bear arms in defense of the country struck at the heart of what it meant to be an American, and therefore, they argued, objectors should not enjoy the same rights and privileges as the millions of men who had put their lives on hold and gone overseas to defend their country. Critics of conscientious objectors saw pacifist ideology as dangerous and subversive, and they sought to protect impressionable Americans from its influence. Conscientious objectors struggled to assert and protect their rights of conscience against a wave of political support for guarding the nation

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[11] Ira Katznelson, *Fear Itself : The New Deal and the Origins of Our Time* (New York: Liveright Publishing Corporation, 2013), 416, 83.
[12] Ibid., 483.

against the expression of ideas that might interfere with national defense. The experiences of conscientious objectors in the aftermath of World War II mirrored those of other individuals who saw their constitutional rights threatened as a result of allegations that they were disloyal.

Conscientious objectors encountered distrust and discrimination during and after World War II because they challenged a fundamental concept of American society—that an individual's ability to demand recognition by the state of his economic rights and civil liberties was premised on his willingness to provide military service to the state when the nation's interests were threatened. As the United States drifted towards involvement in World War II, President Franklin D. Roosevelt reminded Americans of this reciprocal relationship that provided the foundation of U.S. citizenship. In message to Congress on January 6, 1941, Roosevelt identified Four Freedoms that served as the pillars of American society. They were freedom of speech, freedom of worship, freedom from want, and freedom from fear.[13] According to Roosevelt, the nation's commitment to those four freedoms established that U.S. citizens were entitled to certain basic privileges and protections, including equal opportunity, the right to work, and the protection of their civil liberties.[14] If forced to do so, Americans would fight to protect those rights and freedoms from the enemies of democracy menacing Europe.[15] Roosevelt's address contained an implicit quid pro quo. Americans could claim the benefits flowing from the Four Freedoms only if they were willing to fight to defend them.

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[13] Sparrow, *Warfare State,* 43.
[14] Ibid., 44.
[15] Ibid.

Since the Revolutionary War, Americans had linked citizenship with the obligation to bear arms in defense of the nation.[16] The involvement of the United States in World War II further strengthened that connection between military service and citizenship. Sixteen million men and women served in the United States military during World War II. They helped liberate Europe from Hitler and defeated the Japanese forces in the Pacific. They stormed the beaches at Normandy on D-day. They fought to reclaim one island after another in the Pacific. Some witnessed first hand the horrors of the concentration camps. They fought and won the "Good War." After World War II, most Americans experienced none of the doubts about the nation's military actions that had plagued the nation after World War I. For most, it had been a battle worth fighting. The men who were drafted and sent to fight it returned as heroes who had established their right to demand all the benefits and protections Roosevelt had enumerated in his speech on the Four Freedoms.[17]

During the post World War II years, two national veterans' organizations, the American Legion and the Veterans of Foreign Wars emerged as the most vocal and powerful proponents of the link between citizenship and military service. For male members of those organizations, the two were inextricably linked. The Legion and VFW were powerful lobbying organizations that commanded the attention of Congress. Each year, the minutes of the VFW's annual meetings (called an encampment) were sent to the House Armed Services Committee. The minutes from the Legion's annual meetings were referred to the House Committee on Veteran's Affairs. The United States Government Printing Office printed and distributed the minutes from both meetings. The documents

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[16] Meyer Kestnbaum, "Citizenship and Compulsory Military Service: The Revolutionary Origins of Conscription in the United States," *Armed Forces & Society* 27, no. 1 (2000): 10.
[17] Sparrow, *Warfare State*, 256.

consisted of hundreds of pages of proposals, reports and resolutions that expressed opinions on a variety of issues of national importance. The preamble to a resolution the Legion sent to Congress in 1951 calling for harsher treatment of conscientious objectors exemplified the connection between citizenship and military service at the heart of Legion and VFW philosophy. The Legion quoted President George Washington: "It may be laid down as a primary position that every citizen who enjoys the protection of a free government owes not only a proportion of his property, but his personal services to its defense, and consequently that the citizens of America be accustomed to the use of arms and to be employed whenever it may become necessary in the service of their country."[18]

The ranks and prestige of the Legion and VFW soared following World War II as American soldiers returned home. In 1946, the Legion had 3.3 million members, and membership in the VFW stood at 1.5 million.[19] The Legion and VFW counted presidents and senators among their members. The two organizations shared a common agenda. They both sought better care and treatment for wounded veterans. They lobbied for the payment of bonuses to veterans, for pensions, and for health care.[20] Both organizations were integrally involved in the passage of the *Servicemen's Readjustment Act of 1944*, known as the *GI Bill*.[21] The broad terms of the *GI Bill* and its support of American veterans testified to the legislative influence wielded by the Legion and by the VFW as well as to the gratitude Americans felt toward the individuals who had protected the

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[18] American Legion and House U. S. Congress, "Proceedings of the 33d National Convention of the American Legion. Miami, Fla., October 15, 16, 17, and 18, 1951. January 8, 1952. -- Referred to the Committee on Veterans' Affairs and Ordered to Be Printed, with illustrations," (1952), 77.

[19] Herbert Molloy Mason Jr., *VFW: Our First Century* (Lenexa, Kansas: Addax Publishing Group, 1999), 142.

[20] Raymond Moley Jr., *The American Legion* (New York: Duell, Sloan and Pearce, 1966), 284.

[21] Roscoe Baker, *The American Legion and American Foreign Policy* (New York: Bookman Associates, 1954), 14-15.

nation during an international crisis of the greatest magnitude. Under the *GI Bill*, the federal government paid college tuition for returning veterans, guaranteed loans that allowed veterans to start businesses and buy homes, offered job-placement services, and improved Veterans Administration hospitals and healthcare services.[22] Through the *GI Bill*, the nation extended a multitude of economic benefits and opportunities to the soldiers who had fought on its behalf.[23]

Since conscientious objectors refused to fight on behalf of the nation, the Legion and VFW contended that COs were not entitled to the benefits of citizenship enjoyed by other Americans. The two veterans' organizations sought to deny objectors equal opportunity for economic security and protection of civil rights Roosevelt identified as hallmarks of citizenship in his Four Freedoms address to Congress. Proposals the Legion and VFW sent to Congress reflected the sentiments of the veterans' organizations on this issue. At its meeting in 1945, the VFW adopted a resolution that expressed the organization's strong support for "not releasing any of the said so-called conscientious objectors [from the CPS camps] until all of our fighting men have been returned home and discharged from military service."[24] Since the government did not pay the objectors in CPS camps for their labor, the VFW proposal was aimed not only at the civil liberties of COs but at their economic rights as well.

Other proposals made by the Legion and VFW were more ominous and punitive. The VFW annual meeting in 1945 generated a proposal that all conscientious objectors employed in state and federal institutions be "restricted and visibly identified on and off

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[22] Mason Jr., *VFW: Our First Century*, 107.

[23] Sparrow, *Warfare State*, 256.

[24] Veterans of Foreign Wars of the United States and U. S. Congress. House, "Proceedings of the 46th National Encampment of the Veterans of Foreign Wars of the United States. Chicago, Illinois. October 2 to 4, 1945. April 30, 1946.," 137.

duty."[25] The VFW did not specify what degree of restraint and identification its members had in mind when they drafted the resolution. The VFW also recommended "that conscientious objectors be denied employment with the federal government, that federal aid be withheld from any program or project on which any conscientious objectors are employed or listed on the pay roll, and that all federal aid and relief for the needy be withheld from conscientious objectors and their families."[26] In 1950, the Legion bemoaned the fact that no action had been taken on its resolution passed in 1946, urging "Congress and state legislatures to enact suitable legislation to prevent employment in a Civil Service job of the federal, state or local subdivisions of the government of the United States of any person or persons, excluding those whose service was in the noncombatant branches of the armed forces, who was or is a conscientious objector or who refused to serve his country in the defense thereof."[27] Much to the consternation of the Legion, Congress had not adopted any policy prohibiting the employment of conscientious objectors, and government agencies were considering such individuals for civil service jobs.[28] Though not enacted, resolutions like these were designed to stigmatize conscientious objectors and separate them from the rest of society. They were also aimed at denying COs the economic benefits and financial security the expanding federal government promised to the nation's citizens. According the Legion and VFW, objectors had forfeited those privileges of citizenship by following their consciences instead of fighting to defend the country.

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[25] Ibid.

[26] Ibid., 191.

[27] American Legion and U. S. Congress. House, "Proceedings of the 32d National Convention of the American Legion, Los Angeles, Calif., October 9, 10, 11, 12, 1950. February 12, 1951.," 202.

[28] Ibid.

Objectors and their supporters fought back as best they could by presenting a positive image of COs. A network of diverse organizations assisted conscientious objectors and promoted their interests. Those groups included the Mennonite and Quaker churches. Members of those denominations lobbied Congress whenever draft legislation was under consideration and promoted inclusion of language excusing members of their churches from military service. They also counseled church members about the draft law and about how to secure recognition as conscientious objectors. The Seventh Day Adventist Church supported its members who refused to fight by publishing articles about their courage and bravery. The Adventist publication, *The Advent Review and Sabbath Herald*, maintained that young men who refused to fight displayed the same level of commitment and resolve as American soldiers. It was "shallow thinking," said *The Review and Herald*, that mistook conviction for cowardice.[29] *The Review and Herald* extolled the bravery of conscientious objectors serving in the medical corp.[30] When Private Desmond Doss received the Congressional Medal of Honor in October 1945 for his treatment and evacuation of American soldiers during the battle for Okinawa, the national news media covered the event.[31] A similar story received national attention in 1953, when Alvin Joyner, a CO serving as a medic in Korea, led a group of wounded men to safety.[32] Conscientious objectors and their supporters presented these stories as

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[29] "Moral Versus Physical Courage," *The Advent Review and Sabbath Herald,* February 15, 1945, 6.

[30] "Medical Corpsmen "the Bravest"," *Advent Review and Sabbath Herald,* March 22, 1951, 15. "Conscientious Objector, Medical Aid-Man, Awarded Medal of Honor," *The Advent Review and Sabbath Herald,* November 1, 1945, 1.

[31] "Medical Corpsmen "the Bravest"," 12. "CO Hero," *Time* 45 (May 25, 1945): 72. "Pacifist Hero Wins Highest Valor Award," *Los Angeles Times,* October 9,1945, 27.

[32] Carlyle B. Haynes, "Valorous Conduct of Adventist Medic at Korean Battle Front," *The Advent Review and Sabbath Herald* February 9, 1953.

proof that an individual could follow his conscience and still be a loyal, valuable, and courageous citizen.

The battle over conscience and citizenship was not simply a rhetorical contest waged in the media and in the halls of Congress. It was also fought in council hearings, school board meetings and other venues where Legion and VFW members spearheaded actions to remove conscientious objectors from public jobs. Those direct actions against conscientious objectors began during World War II and continued after it ended. The actions of the Legion and VFW usually targeted conscientious objectors working as schoolteachers or as playground supervisors. The veterans' groups alleged that COs working with children might exert undue influence over their young charges and convert them to their pacifist ideology. But the vigor with which the Legion and the VFW pursued the termination of objectors holding public jobs suggested that more was at stake. By refusing to fight, conscientious objectors had broken a sacred covenant of citizenship. The veterans subsequently saw objectors being rewarded with public jobs. In the eyes of veterans, the soldiers who fought World War II, not COs, had earned the security those jobs provided. The income and security of public employment represented the benefits of citizenship Roosevelt had promised to the nation's defenders in the Four Freedoms address. Fears that conscientious objectors spread ideas detrimental to the nation's security fueled the turmoil over the public employment of COs, but so did an acrimonious debate over who did and did not deserve the rewards of citizenship. Hoping to insure that their views and interests would prevail, veterans campaigned to end the public employment of objectors.

The American Legion's efforts in Los Angeles, California illustrated how demands that a municipal agency fire a single objector could ignite public outrage against the employment of all COs. On March 1, 1944, L.F. Olson, a regional commander of the American Legion, appeared before the Los Angeles City Counsel and accused the City of hiring conscientious objectors. Olson identified Edward D. Simon as one of the objectors employed by the City. A graduate of Occidental College, Simon had participated in various peace organizations before World War II. When the war broke out, he failed to report for induction into the army. Prosecuted for draft evasion, Simon pled guilty. The court paroled him on the condition that he enter a CPS camp. After Simon was released from the camp, the City of Los Angeles hired him as the recreation director for the Verdugo Playground in Eagle Rock and as director of the Eagle Rock Little Theater.[33]

Standing before the Los Angeles City Counsel, Commander Olson expressed outrage over the employment of Simon. He asserted that Simon's position gave him the opportunity to impose his dangerous ideas on children.[34] "The American Legion," Olsen asserted, "believes that this man, or others of his ilk, should never be employed to supervise the children of Americans who are fighting and dying in the South Pacific, the beach head at Anzio and on countless other fighting fronts all over the world."[35] Olsen asked, "should such a man be placed in the position where he can tell these children that their fathers were mistaken fools to defend their country?"[36]

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[33] "Legion Charge Brings Ouster of City Worker," *Los Angeles Times,* March 2, 1944, 1. Simon suffered from a serious health condition that rendered him nearly blind in his left eye. The *Times* article suggests that condition played a role in his parole and subsequent release from the CPS camp.
[34] Ibid.
[35] Ibid.
[36] Ibid., 2.

Simon denied using his position to impose his pacifist ideology on children, but to no avail. The City fired him a few hours after Olson's appearance before the council.[37] The matter did not end there. Delamore R. McCloskey, a member of the Los Angeles City Council, alleged that "there are other similar instances of this in city service." McCloskey demanded further investigation and warned that, "if it is found to be true, the Civil Service Department should be brought to strict account."[38] The All City Employees Association went on the record as well, stating its bitter opposition "to the employment of conscientious objectors."[39] The Legion's attack against Simon proved wildly successful. Not only did the City fire Simon, but the employment of all objectors by the City was loudly condemned. However, a proposed ordinance banning the employment of all conscientious objectors failed when the city attorney's office advised the council that such a measure would violate the city's charter.[40]

An American Legion Post in Virginia initiated a similar action against COs. In September 1944, the Legion Post adopted resolutions opposing the employment of conscientious objectors at the College of William and Mary. The resolutions were based on a report from a committee at the Post alleging that two conscientious objectors were then employed at the College. The Legion demanded that the College immediately fire the two men, even if no replacements were immediately available to fill their spots on the faculty. In the Legion's view, William and Mary's hiring of conscientious objectors "was not in keeping with the great record of that institution in all former wars in which this

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[37] Ibid.
[38] Ibid., 1-2.
[39] "Move to Keep Objectors From City Jobs Pressed," *Los Angeles Times,* March 3, 1944, 16.
[40] Sibley, *Conscription of Conscience*, 451.

State and Nation have participated."[41] On October 7, 1944, the College's Board met to discuss the Legion's demands but took no further action at that time.[42]

The Legion's actions against conscientious objectors and pacifist ideals took place during an era of hyper-patriotism. Individuals who encouraged claims of conscience in such an environment put their jobs at risk. For example, in 1945, a Chicago schoolteacher, Rose K. Royce, lost her job for writing a letter to a former student who refused to register for the draft. She congratulated her former student on "his courageous and idealistic stand."[43] At a school board hearing to determine her fate, nine of her former students testified that on the day following the attack on Pearl Harbor Ms. Royce said, "we got what was coming to us." But an equal number of her former pupils denied that she made such a statement. The Illinois Court of Appeals upheld her termination.[44] The Royce case foreshadowed the prosecution of Larry Gara three years later for advising Rickert not to abandon his beliefs. During the war and after, opponents and critics of conscientious objectors continued to see them as disloyal purveyors of dangerous ideas and exhibited little compunction over abridging the civil liberties of COs.

An editorial that appeared in *The Los Angeles Times* on June 12, 1945 exemplified the precarious political and economic position of conscientious objectors as World War II drew to a close. The editorial praised the decision of the United States Supreme Court in *In re. Summers* (1945). Summers had applied for admission to the Illinois State Bar. The Bar had denied his application because Summers was a

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41 "Employment Of 'Objectors' Under Fire," *The Washington Post,* September 20, 1944, 7.
42 "Legion Protest Studied By W. and M. College," *The Washington Post,* October 9 1944, 9.
43 "Court Upholds School Ouster of Draft Critic," *Chicago Daily Tribune,* April 3, 1945, 16.
44 Ibid.

conscientious objector. The Supreme Court upheld the decision.[45] The *Times* cheered. "Those who will not agree to defend a state or the nation are certainly not entitled to claim favors from either. . . .The conchies ought not to be able to eat their cake and have it. If we grant them exemption from bearing arms we are to be excused if we expect them to pay for the exemption in some ways." The *Times* concluded by opining that: "As a special group of our citizens, the conchies already have been favored too much as it is."[46] The *Times*, like other critics of conscientious objectors, felt COs had severed their connection with nation by refusing to fight. Accordingly, they could not expect to enjoy the same rights and privileges other Americans did.

The Legion and VFW continued their actions against conscientious objectors after the end of World War II. Though the end of hostilities against Germany and Japan may have reduced some of the rancor that grew between opponents and supporters of COs during the War, the veterans' organizations continued their campaigns to restrict the rights and privileges of objectors. Two of the most acrimonious encounters occurred in Virginia. In September 1946, the Smyth County American Legion Post adopted a resolution calling for the resignation of a High School teacher in Marion, Evan Hollingsworth, because of his conscientious objection to participation in World War II. Both Hollingsworth and his wife resigned their teaching posts.[47] The Staunton-Augusta Post of the VFW then passed a similar resolution in October 1946. The resolution said that the VFW Post objected to the public employment of "any conscientious objector who refused to wear the uniform of the armed forces of the United States." The resolution

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[45] *In re. Summers*, 325 U.S. 561 (1945).

[46] "Court Holds State Can Deny Privileges to Conchies," *Los Angeles Times,* June 12, 1945, A4.

[47] "Marion School Board Head Quits in Row Over 'Objector'," *The Washington Post,* September 14, 1946, M2.

singled out Wayne Guthrie, who like Hollingsworth had been a conscientious objector during World War II. Referring to Guthrie's employment as a teacher, the VFW claimed, "that it does not serve the interests of the future generations when such a man is in a position of influence and responsibility when said man had the temerity to refuse to defend or aid the military effort of his country in time of war. We feel that this situation is intolerable and is a disgrace to our system of government."[48] After reviewing the VFW's resolution, the school superintendent, A. Crawford Gilkeson, had a "frank" discussion with Guthrie. Gilkeson told Guthrie that "it might not be too pleasant for him to remain" and that "it might not be too good for the school if he remained." Guthrie also resigned.[49]

The actions against Hollingsworth and Guthrie in Virginia did not go as smoothly as the termination of Simon in Los Angeles. The Virginia cases garnered negative national publicity, and questions arose about infringement on the sanctity of conscience. The protests began in Virginia when B.L. Dickson, the mayor of Marion, quit his position as chairman of the school board in protest over the treatment of Hollingsworth. Dickson questioned the legality of cancelling a teacher's contract "on the sole ground of the teacher's conscientious objection."[50] More importantly, he implied that the Legion had resorted to more than hyperbolic rhetoric to secure Hollingsworth's resignation. Dickenson wrote that, "I cannot and will not enter into a political fight against the leaders of the veterans' organizations and I have no practicable way of combatting the physical attack on the teacher in question who is being openly threatened by members of the

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[48] "VFW Protests, 'Objector' Quits As Va. Teacher," *The Washington Post,* October 1, 1946, 2.
[49] Ibid.
[50] Ibid.

veterans' organizations: I have therefore turned in my resignation from the school board."[51]

Virginia's Lieutenant Governor, Lewis Collins also suggested that violence, or at least the threat of violence, lurked in Marion. Defending his role in drafting the Legion resolution that led to the resignation of Hollingsworth, Collins said that, "the town was ablaze over the whole matter. Some parents already had taken their children out of school. The Veterans of Foreign Wars had passed a strong resolution on the subject. Anything could have happened. The situation just couldn't continue. Something had to be done."[52]

More debate about the Legion's action in Marion followed. The Virginia Council of Churches questioned the propriety of Lieutenant Governor Collins' involvement in the matter. The Council of Churches accused Collins of placing a "stigma upon the reputation of this State."[53] Referring to the Legion's encroachment on his freedom of conscience, Hollingsworth wondered why someone with Collins' political and legal experience would sign a resolution "which is in direct opposition to the Virginia ordinance of religious freedom."[54] The *New York Times* noted the turmoil in Virginia and observed that the Virginia press had been "virtually unanimous in condemning the veterans for their attitude." According to the *New York Times*, the Virginia Press had expressed particular concern "because these things occurred in the State which gave to the world George Mason's Bill of Rights and Thomas Jefferson's Declaration of

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51 "Marion School Board Head Quits in Row Over 'Objector'," M2.
52 "Lieut. Gov. Collins Defends Role in Legion Resolution," *The Washington Post,* September 24, 1946, 9.
53 Ibid.
54 Ibid.

Independence."[55] On the other hand, the *Kingsport News* in Tennessee supported the results of the Legion's and VFW's efforts, if not their reasoning. The *News* assumed that a majority of Americans agreed with the proposition that an individual must bear arms to defend his country. The average American, said the *News*, does "not want his children to get contrary ideas in his head; the average American citizen has a right to say what his child shall be taught and not taught." According to the *Kingsport News*, the issue was whether parents had a right to fear that a teacher who was a conscientious objector was more likely to make his students sympathetic to his pacifist ideology. The paper thought they did. Since most Americans opposed the views of conscientious objectors, COs did not belong in the classrooms of public schools.[56]

Labeling the ideals of COs as dangerous, the Legion and the VFW sought to limit objectors' freedom of expression by demanding that they be fired from positions that might allow them to preach their pacifist philosophy to others. As the resolutions submitted to Congress by the Legion and VFW disclosed, however, the veterans' organizations also insisted that COs be banned from all city, state, and federal employment, not just from positions where they might influence others. The dubious logic about stopping the spread of ideas that might have a negative impact on the national defense was at best only part of the story. The Legion and VFW intended to punish conscientious objectors and to deny them the right a sense of financial—and even physical—security. The firings in Virginia added a new element—the threat of violence. Like other marginalized groups, such as blacks in the Jim Crow South, conscientious

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[55] Virginius Dabney, "The Upper South: Ouster of Teachers as War Objectors Stirs Fight," *New York Times,* October 8, 1946, E6.
[56] "CO's Out of Place as School Teachers," *Kingsport News,* September 16, 1946.

objectors targeted by their opponents could not be confident of either their economic or physical security.

It was, however, the quest to win amnesty for conscientious objectors convicted of violating the draft laws that best illustrated the political impotence of COs and the clout of their opponents. It also reminded objectors of the continuing price they paid for following their conscience and that powerful groups like the Legion and VFW wanted to relegate them to a form of second-class citizenship. The push for amnesty began shortly after the end of World War II. In a letter to the *New York Times* published on July 14, 1946, the Committee for Amnesty urged President Harry Truman to release all conscientious objectors still in prison. The committee also beseeched him to grant amnesty to all conscientious objectors who had been convicted of violating the draft laws and thereby restore their civil rights, since state and federal laws prohibited convicts from voting, serving on juries, and holding certain government jobs. The committee noted the long tradition of extending presidential pardons to individuals who had opposed the government over issues of conscience, citing the pardon granted by President George Washington to participants in the Whiskey Rebellion in 1795. The Committee argued that conscientious objectors had acted "from the highest motives, and their continued punishment violates our precious heritage of freedom of conscience and religion and speaks ill of the state of civil liberties after a war fought in the name of the Four Freedoms."[57] Conscientious Objectors did not belong in jail, said the Committee, and they deserved to have their civil rights restored.

[57] Dorothy Canfield Fisher, et.al., "Letters to The Times," *New York Times,* July 14, 1946, 72.

The pro-amnesty forces seemed to have momentum on their side. A number of churches and peace organizations joined the movement. Members of those groups protested in front of the White House and outside prisons where conscientious objectors were held. Some jailed conscientious objectors initiated hunger strikes to call attention to their plight.[58] The imprisoned COs seemed to have the support of the public in their camp as well. A Gallup Poll published in 1947 found that 69% of Americans queried about the subject favored releasing from prison men who had refused "to serve in the any way in the armed forces" during World War II.[59] Individuals expressing support for the release of imprisoned COs included 73% of all women who responded to the survey, 65% of all male respondents, and 63% of World War II veterans asked about the issue.[60] At the same time, Americans remained concerned about defense of the nation. Another poll conducted in January 1947 found that 72% of all Americans favored mandatory military training of one year for all able-bodied young men, and in July 1947, 53% of survey respondents agreed that the United States would be involved in another war within the next five years.[61] Given the strong support for military training and fears of impending conflict, the survey results did not necessarily reflect lessening public suspicion of conscientious objectors or reduced concern about the dangers posed by their pacifist ideology. The results might have reflected no more than a general feeling that COs who refused to serve in any capacity had been punished enough. A poll conducted in December 1940 had found that 55% of Americans felt incarceration for one year was an

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[58] For a detailed account of the different groups that participated in the amnesty movement see Sibley, *Conscription of Conscience*, 388-97.

[59] American Institute of Public Opinion By George Gallup Director, "Public Sympathetic to Idea Of Freeing Jailed 'Objectors'," *The Washington Post,* January 25, 1947, 2.

[60] George Gallup, *The Gallup Poll; Public Opinion, 1935-1971*, 1st ed., 3 vols. (New York,: Random House, 1972), 622.

[61] Ibid., 626, 64.

appropriate penalty for a group of divinity students who refused to register for the draft.[62] By the time the amnesty movement coalesced, many objectors had languished in prison for much longer.[63]

President Truman created an amnesty board to study the issue. The board consisted of former Supreme Court Justice Owen J. Roberts, former President of the American Bar Association Willis Smith, and James F. O'Neil, police chief of Manchester, New Hampshire, and former Vice Chairman of the American Legion Americanization Committee.[64] Truman's appointment of O'Neil to the board must have troubled supporters of the amnesty petition, since the Legion and VFW steadfastly opposed the early release of conscientious objectors from prison and all proposals for amnesty. The VFW made its position known in the minutes of its annual meeting in 1945. The VFW went on record as being "strongly opposed to the release of any of those persons sentenced to prison for violation of the selective service laws until they have served their sentence in full."[65] The Legion raised its voice in opposition as well. In May 1946, the Legion's Sixth District passed a resolution opposing any action to grant amnesty to conscientious objectors. [66]

Conscientious objectors and the pro-amnesty forces waited one year for the board to submit its recommendations to President Truman. The Presidential order Truman issued based on the report fully adopted all of the board's findings and recommendations. The order released only three objectors from prison and pardoned only 1500 of all

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[62] Ibid., 254.

[63] Sibley, *Conscription of Conscience*, 346.

[64] "Truman Names Draft Violator Amnesty Unit," *The Washington Post,* December 24,1946, 7.

[65] "Proceedings of the 46th National Encampment of the Veterans of Foreign Wars of the United States. Chicago, Illinois. October 2 to 4, 1945. April 30, 1946.," 137.

[66] "Legion District Opposes Moves To Aid Objectors," *The Washington Post,* May 20, 1946, 2.

conscientious objectors convicted of violating the draft law. The President pardoned only those objectors who had refused to serve based on religious training and conviction. The board specifically rejected the applications of all Jehovah's Witnesses. The board also refused to release or grant pardons to any secular conscientious objectors, criticizing those individuals for having "set themselves up as wiser and more competent than society to determine their duty to come to the defense of the nation."[67] Most important, there was no general amnesty restoring the civil rights of the thousands of objectors already released from prison[68]

Truman's order disheartened and angered COs and their allies. The decisions of the Board struck the *Christian Century* as being capricious. The magazine quoted from examples offered by A.J. Muste, the famous pacifist and chairman of the Committee for Amnesty: "Two boys grew up together and went to prison together; one is listed [as eligible for a pardon] and the other is not. Eight theological students at Union Seminary refused to register in 1940. . . .Two are included; why not the other six? A Brethren minister who refused to serve in C.P.S. is granted pardon, but not Methodists, Presbyterians and others who took the same position."[69] In light of these inequities, the *Christian Century* urged COs and their supporters to continue their quest to secure a general amnesty restoring the civil rights of all conscientious objectors.[70] They did, commencing another campaign in December 1949.[71] To attract attention to their cause during the holiday season, supporters of COs dressed as Santa Claus and picketed the

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[67] Anthony Leviero, "President Grants Pardons to 1,523 Who Escape Draft," *New York Times,* December 24, 1947, 1.
[68] Sibley, *Conscription of Conscience*, 506-07.
[69] "Amnesty denied to most objectors," *Christian Century* 65 (1948): 3.
[70] Ibid.
[71] "Christmas Amnesty again Sought," *Christian Century* 66 (1949): 1475.

White House.[72] The pro-amnesty forces continued their efforts into the 1950s. When protesters again appeared at the White House in 1955, it marked the tenth year of the movement to vindicate the rights of COs.[73] They never succeeded. In the absence of a general amnesty, individuals who had followed their conscience continued to be stigmatized and punished for the rest of their lives. Rights enjoyed by other citizens lay beyond their grasp.

The failure of conscientious objectors to secure a general amnesty restoring their rights as citizens underscored the power of their opponents. Though the majority of Americans had apparently favored at least releasing objectors from prison, the agenda of the Legion and the VFW had prevailed. Well-organized and having earned their political legitimacy through military service, the veterans' organizations possessed sufficient political power and influence to develop and enforce their own definition of U.S. citizenship and, apparently, to override public opinion if necessary.

Other events also reminded objectors and pacifists of their vulnerability and exclusion from opportunities enjoyed by other Americans. In April 1946, the head of the Veterans' Administration, General Omar N. Bradley, prohibited the employment of draft law evaders, including conscientious objectors, by V.A. hospitals. The American Legion had informed the Veterans Administration that conscientious objectors were working at the V.A. Hospital in Los Angeles. A federal judge had sent conscientious objectors there to alleviate a staffing shortage.[74] In another incident, four travellers from abroad were

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[72] " Santas Picket White House; Ask Pardons," *Chicago Daily Tribune,* December 25, 1949, 2.

[73] " Pickets at White House," *New York Times,* December 11, 1955, 58.

[74] "Bradley Bans Hiring of Draft Act Violators," *Los Angeles Times* April 24, 1946, 1. As part of the CPS program, conscientious objectors worked at hospitals and mental institutions during World War II. Historians have noted the high-level of care and compassion they provided to their patients. COs

detained at Ellis Island in July of 1950. The detainees hoped to attend a meeting of Jehovah's Witnesses in New York. The District Immigration Director reported that the group was being "investigated as aliens who may hold pacifist views dangerous to the United States."[75] Opponents and critics of COs continued spreading their message that conscientious objectors threatened the nation's security.

In this atmosphere of anger and suspicion about conscientious objectors and their ideas, a number of cases addressing the rights and privileges of COs reached the United States Supreme Court following World War II. Many of those cases involved procedural questions concerning the interactions between draft boards and conscientious objectors, such as the ability of a draftee to challenge in court the refusal of his draft board to recognize him as a CO, the procedures draft boards had to follow to insure that a CO applicant received a fair hearing, and the criteria courts should employ when reviewing draft board decisions. Other cases, like *Girouard v. United States* considered whether foreigners who were conscientiously opposed to military service were eligible for United States citizenship.[76] Larry Gara's case reached the Court as well, testing the limits of free speech and the right of COs to encourage others to follow their consciences. Those cases involved, in one way or another, concern with the protection of conscience, and in those decisions, members of the Court argued about why the protection of conscience mattered and who—the court or the legislature—should extend that protection. These were not new questions. Rather, Supreme Court Justices Oliver Wendell Holmes and Louis D.

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often protested the deplorable conditions of the mental institutions to which they were assigned. See *Conscription of Conscience*, 134-40.

75 "Hold Four as Pacifists," *Chicago Daily Tribune,* July 19, 1950, 21.

76 *Girouard v. United States*. 328 United States 61 (1946). Chapter Four discusses the decision of the Court in *Girouard,* in addition to other Supreme Court rulings on admitting conscientious objectors as U.S. citizens.

Brandeis had raised the same issues thirty years earlier in a number of famous cases generated by World War I. Those previous cases had also posed questions about the protection of conscience, and the debate over why and how conscience should be accommodated had started there. Evaluating the post World War II cases involving conscientious objectors therefore must start with an examination of those World War I era decisions.

Chapter Two

Conscience becomes an Issue: World War I and The Judicial Debate over the Protection of Beliefs

Thirty years before the prosecution of Larry Gara, cases involving conscientious objectors, pacifists, and other opponents of the draft and military service provided a forum in which some of the twentieth century's greatest legal minds debated the extent to which the First Amendment to the United States Constitution protected the right of the individual to express his ideals and beliefs, even if those ideals and beliefs criticized or threatened the government or its policies. Those cases, which included *Schenk v. United States, Frohwerk v. United States, Debs v. United States, Abrams v. United States,* and *Gilbert v. Minnesota* involved individuals who in one way or another challenged the ability of the United States government to wage war and who in the eyes of many therefore threatened and undermined the nation's existence.[1] Those cases demanded that the Supreme Court determine when and to what extent the expression of one's conscience through the exercise of his or her right of free speech must yield to the state's right to maintain order and protect itself and its citizens. Those cases also forced the justices of the Supreme Court to articulate when and why speech, even if seditious, should be protected. The World War I cases involving opposition to war and military conscription presented fundamental questions about the nature of democratic government, such as the degree of protection the Constitution afforded unpopular points of view and the role freedom of expression played in a democratic society. Those cases challenged the Court to define the role it would play in striking a balance between the protection of speech and

[1] *Schenck v. United States*, 249 United States 47 (1919). *Frohwerk v. United States*, 249 United States 204 (1919). *Debs v. United States*, 249 United States 211 (1919). *Abrams v. United States*, 250 United States 616 (1919). *Gilbert v. Minnesota*, 254 U.S. 325 (1920).

conscience on the one hand and the interests of the government in maintaining order and security on the other. In those post World War I cases, the Court's most prominent members stuggled to create a framework for answering the troubling, central question of the Gara case: Could the government punish an individual for encouraging others to follow their consciences?

The cases involving draft and war resistance that arose from World War I demonstrated how the Court sought to define the boundaries between government power and the protection of speech and conscience. Following the lead of Justice Oliver Wendell Holmes, the Court developed the "clear and present danger test" as a means of determining when the government could abridge the right of free speech. First articulated by Holmes in *Schenck v. United States*, the clear and present danger test allowed the suppression of speech that created an immediate and proximate threat of harm.[2] Even after Holmes eloquently introduced the clear and present danger rule in *Schenck*, however, the parameters of the new standard and its limits were not initially apparent. In subsequent decisions, many of which were written in dissent, Holmes and then Justice Louis D. Brandeis each developed his own rationale for why the government should protect the expression of ideas, and by doing so, they won recognition as the leading protectors of conscience.

For Holmes, freedom of speech benefited the state by creating a marketplace of ideas that competed against each other; the best ideas prevailed and propelled society forward. Brandeis, on the other hand, emphasized the benefits of free speech to the individual and saw the right to hold and express one's beliefs on matters of national

[2] *Schenck v. United States,* 52.

importance as one the most important and cherished rights of citizenship. A third powerful voice eventually joined the debate as well. Building on Holmes' theories about the benefit of speech to society and its relation to state power, a future Supreme Court Justice, Felix Frankfurter, contended that the state, not the courts, should determine the limits of protections for civil liberties. Frankfurter argued that in determining the limits of speech and conscience the courts should defer to the judgment of legislatures and administrative agencies.

This chapter traces the development of these different rationales for the protection of speech and conscience in cases involving The Espionage Act and The Sedition Act that the Supreme Court heard in the years after World War I. Those cases provided a basis for analysis of subsequent judicial decisions involving conscientious objectors. Some of the reasons first developed by Holmes and Brandeis for protecting speech appeared in later cases extending the legal protection afforded objectors. Other cases, like Gara, demonstrated the judicial restraint and deference to legislative and administrative decisions that Frankfurter advocated. Those subsequent decisions will be the subject of the following chapters.

World War I marked a turning point in the history of constitutional protection of speech and conscience. Before a number of cases generated by opposition to conscription and World War I reached the Court, the constitutional law concerning the freedom of speech remained largely undefined. In fact, based on the Supreme Court's ruling in *Patterson v. Colorado* (1907), the First Amendment appeared to do no more than prohibit the prior restraint of speech.[3]

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[3] *Patterson v. Colorado* 205 United States 454 (1907) 462. Holmes opinion in *Schenck v. United States* overruled *Patterson* on this point, establishing in a subtle, backhanded manner that the First

The government's campaign to stamp out opposition to World War I through the prosecution of dissenters under the Espionage Act of 1917 and the Sedition Act 1918 worried some legal scholars at that time, most particularly Zechariah Chafee Jr. A professor at Harvard Law School who gained recognition as the most influential and perceptive of the postwar World War I commentators on the struggle to define civil liberties law, Chafee corresponded with prominent judges like Supreme Court Justice Oliver Wendell Holmes and Learned Hand, a federal district court judge and later the chief judge of the U.S. Court of Appeals for the Second Circuit. A preeminent jurist and legal philosopher whose opinions were often quoted by the Supreme Court, Hand shared Chafee's concerns about the law governing civil liberties. Chafee's letters to Hand and Holmes focused on what Chafee saw as the most important constitutional issue of the era—the protection of ideas and speech.[4] Chafee shuddered at the ease with which most federal district court judges had convicted individuals charged with obstructing the war effort for doing no more than expressing their political beliefs, and he lamented the deleterious effect of the wartime prosecutions on civil liberties.[5] Chafee believed that the government could legitimately suppress speech when necessary to protect order and

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Amendment did more than protect speech against prior restraints. Holmes wrote, "It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in *Patterson v. Colorado." Schenck v. United States, 52*.

[4] Paul L. Murphy, *World War I and the Origin of Civil Liberties in the United States* (New York: Norton, 1979), 17.

[5] Zechariah Chafee, *Free Speech in the United States* (Cambridge: Harvard University Press, 1941), 51. On page 106, Chafee observed, "Undoubtedly some utterances had too be suppressed. We were passing through a period of danger, and reasonably supposed the danger to be greater than it actually was, but the prosecutions in Great Britain during a similar period of peril in the French Revolution have not since been regarded with pride. Action in proportion to the emergency was justified, but we censored and punished speech which was very far from direct and dangerous interference with the conduct of the war. The chief responsibility for this must rest, not with Congress which was content for a long period with the moderate language of the Espionage Act of 1917, but upon the officials of the Department of Justice and the Post Office, who turned that statute into a drag-net for pacifists, and upon the judges who upheld and approved this distortion of law."

security. But Chafee maintained that government suppression of speech had far exceeded what was legitimate or wise. Chafee advocated the establishment of clear judicial guidelines governing prosecutions of speech—standards that would apply in times of peace as well as war. Chafee saw the law governing speech and dissent as too vague and amorphous. Consist with traditional principles of common law, Chafee contended that the courts must clarify the legal doctrine governing the expression of ideas so that individuals could conform their behavior to the law.[6]

Chafee identified two reasons for protecting speech. "There is an individual interest," he said, "the need of many men to express their opinions on matters vital to them if life is to be worth living, and 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."[7] As this passage demonstrates, Chafee posited a private or individual basis, as well as a public one, for the First Amendment's protection of the expression of ideas. Chafee saw the protection of speech as a cherished liberty that individuals valued for giving meaning to their lives. But he identified a public component as well. Debate benefited society because it led to the discovery of truth. Discourse challenged traditional notions, which might be discarded if found to be inadequate. Chafee maintained that debate produced new and better concepts and policies, and he therefore saw it as a crucial element of democracy. In *Free Speech in the United States*, Chafee wrote that: "One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited

[6] Ibid., 157.
[7] Ibid., 33.

discussion."[8] The exchange of ideas, including criticism of the government, remained important during war, said Chafee. In his view, allowing only supporters of the war to criticize the government was a grievous error.[9]

Chafee watched as the United States Supreme Court issued a number of opinions in the aftermath of World War I that began to define the limits of the freedom of speech. Justice Holmes took the lead, upholding the conviction of draft opponents in *Schenck, Frohwerk, and Debs*, finding in all three cases that, through their words and opposition to conscription, the defendants had created "a clear and present danger" to the war effort and to the nation's security.[10] In *Schenck, Frohwerk,* and *Debs*, the clear and present danger test did little more than provide a justification for conviction of the defendants in spite of their First Amendment rights. In all three opinions, Holmes did not analyze whether or not the defendants' actions actually interfered with the draft or threatened to impede the war effort. In fact, Holmes opinion in *Debs* upheld the conviction of the famous socialist despite instructions by the trial judge to the jury that they should convict Debs if his speech exhibited the "bad tendency" of encouraging disorder or disobedience of the law. The "bad tendency' test for the punishment of speech, which the clear and present danger test was designed to replace, alarmed Chafee, who lobbied hard against it. Chafee described the difference between the "bad tendency" and the "clear and present danger" test as "whether the state can punish words which have some tendency, however remote, to bring about acts in violation of law, or only words which directly incite to acts

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[8] Ibid., 31.

[9] Ibid.

[10] Thomas Healy, *The Great Dissent : How Oliver Wendell Holmes Changed His Mind--and Changed the History of Free Speech in America* (New York: Metropolitan Books, Henry Holt and Company, 2013), 103. *Schenck v. United States*, 52. *Frohwerk v. United States*, 210. *Debs v. United States*, 215-16.

in violation of law."[11] Since Holmes made no serious attempt to determine either the proximity or degree of harm threatened by the defendants' actions in these three cases, legal scholars have noted that Holmes seemed at that point to have intended to do no more by his use of clear and present danger than to "create a clever turn of phrase."[12]

Then, Holmes famously, and brilliantly, switched direction with a dissenting opinion in *Abrams v. United States* (1919). Legal scholars credit Chafee and Hand with convincing Holmes to reconsider the importance of tolerating unpopular opinions, and Holmes responded by transforming the clear and present danger test from a rationale for the punishment of speech in to a bar against its curtailment.[13] Justice Brandeis joined Holmes' dissenting opinion in *Abrams* and then began his own body of work on the subject in *Gilbert v. Minnesota* (1920).[14] In a series of decisions, many of which found Holmes and Brandeis dissenting, the two justices established themselves as protectors of speech and conscience. Each, however, approached the protection of speech and conscience from a different perspective; each chose one of the reasons discussed by Chafee for the protection of speech—private versus public interests—as the main focus of his argument.

In *Abrams*, Holmes argued that protecting speech and conscience benefited society.[15] The defendants in Abrams, who were Russian citizens sympathetic to the Bolshevik Revolution, had been convicted under the Sedition Act of 1918 for tossing

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[11] Chafee, *Free Speech in the United States*, 23.

[12] Healy, *The Great Dissent*, 105.

[13] For discussion of the Chafee's and Hand's communication with Holmes about the protection of speech see: Richard Polenberg, *Fighting Faiths : The Abrams Case, the Supreme Court, and Free Speech* (New York: Penguin Books, 1989), 240; Healy, *The Great Dissent*, 203.

[14] *Gilbert v. Minnesota*. 254 United States 325 (1920)

[15] There are a number of excellent accounts of the *Abrams* case, including Healy, *The Great Dissent*. See also Polenberg, *Fighting Faiths*.

handbills critical of Woodrow Wilson and the U.S. Government from a rooftop in New York City.[16] The handbills objected to U.S. intervention against the Bolsheviks in Russia and urged workers of the world to come to the aid of the fledgling Soviet state. In the handbills, the defendants called for a general strike by all industrial workers as a means of protesting American involvement in the Russian Revolution. The majority of the Supreme Court Justices wasted little time upholding the convictions, citing Holmes' opinions in *Schenck, Frohwerk,* and *Debs* in support of their conclusion that the actions of the *Abrams* defendants were not protected by the First Amendment because they had created a clear and present danger to the nation's war efforts. The majority reasoned that the exhortations of the *Abrams'* defendants, though directed against U.S. involvement in Russia, not against the war with Germany, nonetheless violated the Sedition Act. The defendants had encouraged factory workers to curtail production, the natural and foreseeable consequence of which was to hinder the war effort against Germany.

Holmes responded in *Abrams* with his famous dissent defending the free expression of ideas, even during wartime. He disagreed with the majority's position that the defendants had intended to hinder the nation's war efforts against Germany (a prerequisite in Holmes' mind to their prosecution) and belittled the majority's contention that the defendants created a clear and present danger by their actions. Holmes described the defendants as a small group of misguided individuals whose silly ideas posed no threat to national security. Characterizing their actions as futile, Holmes argued that the pamphlets they distributed created no clear and present danger. Accordingly, the government violated their constitutional rights of free speech by prosecuting them under

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[16] Since the defendants in *Abrams* did not expressly challenge the legality of the draft, they were prosecuted under the Sedition Act, which prohibited nearly all speech critical of the government. Healy, *The Great Dissent*, 176.

the Sedition Act. Disclosing both his desire to invigorate the clear and present danger test and his supercilious view of the defendants' attempts to foment revolution, Holmes wrote that:

> As against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so.[17]

In *Abrams*, Holmes provided a cogent and compelling argument for the protection of speech and conscience under the First Amendment. He did so by grounding the protection of ideas and their expression in the benefits that tolerance of unpopular views provided to society. Holmes contended that speech and the freedom of conscience drove a constant search for knowledge and improvement. Those who failed to recognize their own fallibility often sought to limit dissent by suppressing speech. Holmes observed that, "persecution for the expression of opinions seems to me perfectly logical if you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition."[18] But the danger posed by censorship became apparent, said Holmes, when society acknowledged that new ideas constantly competed with and replaced old ones. Holmes wrote that:

> When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only

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[17] *Abrams v. United States*, 628.

[18] Ibid., 630.

> ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[19]

In his dissent in *Abrams*, Holmes described ideas as competing with each other in a constant search for truth. Society could not be certain, noted Holmes, that current policies and actions were correct. New ideas replaced old ones. Evaluating Holmes' dissent in *Abrams*, the historian Thomas Healy characterized it as an acknowledgement "based on experience, that human judgment is fallible; a recognition, thanks to Mill, that free speech is the necessary predicate on which our bets about the universe must be based; and a conviction, inherited from Smith, about the power of free trade and competition to promote the greater good."[20]

Holmes later elaborated on his theory for the protection of speech in *Gitlow v. New York* (1925) .[21] *Gitlow* involved a New York statute prohibiting speech aimed at overthrowing the government. As in *Abrams*, Holmes believed that dissemination by the defendants of a pamphlet arguing that communism would eventually triumph and encouraging workers to unite and revolt created no clear and present danger, and he objected to the majority's conclusion that the statute constituted a reasonable exercise of the state's police power. Dissenting from the Court's ruling that the statute had been constitutionally applied to convict the defendants because the pamphlet they distributed contained "incendiary" language, Holmes responded by noting that:

> Every idea is an incitement. It offers itself for belief, and, if believed, it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the

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[19] Ibid.

[20] Healy, *The Great Dissent*, 206.

[21] *Gitlow v. People of New York*, 268 United States 652 (1925).

> speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration. If, in the long run, the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.[22]

Holmes argument was a practical one. As Chafee noted, the suppression of radical speech more often than not served only to strengthen the speaker's resolve and call attention to his cause. The restriction and punishment of speech inflamed tensions and increased the danger to the state, as frustrated individuals denied the opportunity to express their views often worked tirelessly to undermine the government that silenced them and punished them for their beliefs. In Holmes view, freedom of expression and conscience helped diffuse radicalism by eliminating the anger censorship generated. In addition, public discussion would often expose the unpopularity of most radical doctrines. As Chafee observed, Holmes recognized that it was often more expedient to allow incendiary ideas to be expressed so that they might spark out of their own accord.[23]

Holmes's dissent in *Abrams* responded to Chafee's criticism that the opinions written by Holmes in *Schenck, Frohwerk,* and *Debs* had not adequately considered the public interest in the free exchange of ideas.[24] Having corrected that error, Holmes concluded his dissent in *Abrams* by warning against the suppression of unpopular points of view, suggesting "that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so

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[22] Ibid., 673.
[23] Ibid., 273.
[24] Healy, *The Great Dissent*, 203.

imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."[25]

Brandeis joined Holmes' dissent in *Abrams*. Based on subsequent decisions, it appears that Brandeis may have taken the clear and present danger restrictions on government action more seriously than did Holmes, and scholars credit Brandeis with further clarifying the doctrine and expanding the protection of speech and conscience.[26] As with Holmes, the prosecution of conscientious objectors, pacifists, and other individuals opposed to military service presented the opportunity for Brandeis to develop his ideas about the scope of the First Amendment and to establish himself as a champion of the protection of conscience. In his opinions on the subject, Brandeis expanded on the reasons offered by Holmes for the protection of unpopular ideas. While Holmes emphasized that a free society benefited from rigorous debate and the constant testing of ideas against each other, Brandeis added a second element that Chafee had also identified—the interest of the individual in being allowed to express his ideas and beliefs. Brandeis's opinion in *Gilbert v. Minnesota* (1920) showed the development of his thinking on this issue and his concern for the protection of conscience.

Gilbert v. Minnesota involved objection to military service, conscientious objection, pacifism, and free speech. The State of Minnesota prosecuted Gilbert for making a speech against U.S. participation in World War I. Gilbert had told his audience that:

> We are going over to Europe to make the world safe for democracy, but I tell you we had better make America safe for democracy first. You say, what is the matter with our democracy? I tell you what is the matter with

[25] *Abrams v. United States*. 630

[26] Samuel Joseph Konefsky, *The Legacy of Holmes and Brandeis; A Study in the Influence of Ideas* (New York: Macmillan, 1956), 202.

> it. Have you had anything to say as to who should be President? Have you had anything to say as to who should be Governor of this state? Have you had anything to say as to whether we would go into this war? You know you have not. If this is such a good democracy, for Heaven's sake, why should we not vote on conscription of men? We were stampeded into this war by newspaper out to pull England's chestnuts out of the fire for her. I tell you if they conscripted wealth like they have conscripted men, this war would not last over forty-eight hours. . . .[27]

Minnesota law prohibited discouraging or interfering with the enlistment of men in the U.S. military. The law also forbid public speech against the draft. At an assembly of five or more people, no one could "advocate or teach, by word of mouth or otherwise, that men should not enlist in the military or naval forces of the United States or the State of Minnesota." The statute also made it illegal for any person "to teach or advocate by any written or printed matter whatsoever, or by oral speech, that the citizens of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States."[28]

The Court affirmed Gilbert's conviction and upheld the constitutionality of Minnesota's statute. Writing for the majority, Justice McKenna found that the law did not improperly encroach on the power of the United States Congress to make war or on Gilbert's right of free speech. In addition, McKenna cited *Schenck, Frohwerk, Debs,* and *Abrams* as establishing the ability of the government during wartime to abridge the right of free speech, especially speech deemed false and malicious or designed to interfere with recruitment for the armed forces. Referring to Gilbert's speech, McKenna wrote that, "every word that he uttered in denunciation of the war was false, was deliberate misrepresentation of the motives which impelled it and the objects for which it was prosecuted. He could have had no purpose other than that of which he was charged. It

[27] *Gilbert v. Minnesota*, 327.
[28] Ibid. 326-327

would be a travesty on the constitutional privilege he invokes to assign him its protection."[29]

Brandeis dissented in *Gilbert*, contending that the Minnesota law infringed both on the exclusive war-making authority of Congress and on the defendant's constitutional rights. In his view, Congress possessed exclusive power and authority to determine if the curtailment of speech opposing military service was warranted or desirable. Echoing Holmes' sentiments about the benefits a free exchange of ideas offers a democratic society, Brandeis argued that Congress might encourage open and vigorous debate about the merits of military service as the best and most efficient means of defending the country.[30] Congress could reasonably determine that soldiers who were fully apprised of the arguments for and against military service would prove most reliable. By outlawing debate about military service, the state of Minnesota denied Congress the opportunity to pursue such a course.[31]

It was, however, in those portions of his dissent in which Brandeis developed how the Minnesota law infringed on the personal rights and privileges guaranteed by the Constitution that he expanded the rationale for the protection of speech and conscience beyond Holmes' argument in *Abrams* to include the interests of the individual. Brandeis began by noting that the prohibitions in the Minnesota statute against criticizing or questioning military service applied in all circumstances, whether or not the nation was at war and whether or not the defendant's actions created any clear and present danger.

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[29] Ibid., 333.

[30] Brandeis often referred to how the free exchange of ideas benefitted society. His dissent in *Gilbert* includes this passage: "Like the course of the heavenly bodies, harmony in national life is a resultant of the struggle between contending forces. In frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action, and in suppression lies ordinarily the greatest peril." Ibid., 338.

[31] Ibid., 336-37.

Brandeis concluded, therefore, that the Minnesota statute targeted beliefs, not actions, by making it illegal to teach or advocate that individuals should not make war. Brandeis also pointed out that "the statute invades the privacy and freedom of the home. Father and mother may not follow the promptings of religious belief, of conscience, or of conviction, and teach son or daughter the doctrine of pacifism. If they do, any police officer may summarily arrest them."[32] Thus, Brandeis argued that the statute improperly abridged the individual's right of free speech. Furthermore, he noted that the law "affects rights, privileges, and immunities of one who is a citizen of the United States, and it deprives him of an important part of his liberty. These are rights which are guaranteed protection by the federal Constitution, and they are invaded by the statute in question."[33] Emphasizing the importance of these rights, Brandeis wrote that, "the right to speak freely concerning functions of the federal government is a privilege or immunity of every citizen of the United States which, even before the adoption of the Fourteenth Amendment, a state was powerless to curtail."[34] He continued, observing that, "the right of a citizen of the United States to take part, for his own or the country's benefit, in the making of federal laws and in the conduct of the government necessarily includes the right to speak or write about them, to endeavor to make his own opinion concerning laws existing or contemplated prevail, and, to this end, to teach the truth as he sees it."[35] Since, in his opinion, the Minnesota law interfered with the exclusive war-making authority of Congress, Brandeis did not feel compelled to decide if the statute also violated the Fourteenth Amendment by restricting the rights of speech and conscience,

[32]Ibid., 335.
[33]Ibid., 336.
[34]Ibid., 337.
[35]Ibid.

though he made clear that he thought it did.[36] In closing, Brandeis remarked that he found it difficult to believe that the Fourteenth Amendment "does not include liberty to teach, either in the privacy of the home or publicly, the doctrine of pacifism, so long, at least, as Congress has not declared that the public safety demands its suppression. I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property."[37]

In his dissent in *Gilbert*, Brandeis argued for the defense of conscience and speech based on the importance of those rights to the individual. According to Brandeis, the right to hold and express his own beliefs allowed the individual to participate meaningfully in democratic debates. This imparted dignity and meaning to the individual. Brandeis regarded the protection of speech and conscience as being closely aligned with the right of privacy. He made clear in *Gilbert* that an individual should be free to maintain and promote his own ideas unless doing so created an immediate danger to others. He saw the mind and the realm of personal beliefs as a protected area, similar to one's home, where the government might not intrude unless absolutely necessary. Brandeis acknowledged that protection of the First Amendment freedoms benefited society as well. He believed in and often espoused the value to society of the marketplace of ideas. At the same time, he identified the importance of the First Amendment freedoms to the individual, and in doing so, Brandeis paved the way for

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[36] Five years later, *Gitlow v. New York* (1925) established that the First Amendment prohibition against the infringement of speech applied to the states via the Fourteenth Amendment. The Court held that: "For present purposes, we may and do assume that freedom of speech and of the press which are protected by the First Amendment from abridgment by Congress are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Gitlow v. People of New York*. 666. See also Pritchett, *Civil Liberties and the Vinson Court,* 26.

[37] *Gilbert v. Minnesota*. 343.

future decisions that would finally afford speech and conscience the degree of protection he believed they deserved.

Holmes separately noted his concurrence with McKenna's majority decision in *Gilbert*, but did not write an opinion. Consequently, his thoughts about the case remain a mystery. Even though McKenna made no attempt to gauge either the degree or proximity of the danger created by Gilbert's speech, perhaps Holmes thought that the government had made a sufficient showing that a clear and present danger existed. Lacking Brandeis's concern for the rights of individuals confronted by the power of the state, Holmes voted to affirm Gilbert's conviction. Consequently, *Gilbert* illustrated the significance of the differences between the justifications offered by Holmes and Brandeis for the protection of ideas and beliefs and the divergent results that followed from them. Holmes, concerned primarily with the interests of society as a whole and the power of the state, did not find the Minnesota statute objectionable. Brandeis, on the other hand, viewed the law as an unwarranted intrusion into the protected private sphere of the individual's conscience, and he therefore maintained that the Minnesota statute was unconstitutional.

Two other dissenting opinions authored by Brandeis in cases arising from the suppression of radicalism during World War I manifested his concern for personal liberty. Those cases, *Pierce v. United States* and *Schaeffer v. United States*, both decided in 1920, involved prosecutions under the Espionage Act of 1917.[38] In each case, the government charged the defendants with attempting to undermine the morale of the United States military. The defendants in *Schaefer* published a German-language

[38] *Pierce v. United States,* 252 United States 239 (1920). *Schaefer v. United States,* 251 United States 466 (1920).

newspaper in which they reprinted war stories from other sources. The government alleged they altered those stories in ways that derided America's war effort. In *Pierce,* the defendants distributed a pamphlet titled *The Price We Pay* that criticized the war and promoted socialism. The Supreme Court upheld the convictions of the defendants in both cases, and in both cases, Brandeis, joined by Holmes, dissented. Brandeis saw no clear and present danger generated by the defendants' actions in either *Pierce or Schaefer*. He described the statements in *The Price We Pay* as no more than the expression of opinions, the accuracy of which could not be determined, and even if untruthful, the changes to news stories made by the *Schaefer* defendants were, in Brandeis' view, minor and inconsequential. Of the defendants' actions in *Pierce*, Brandeis wrote: "A verdict should have been directed for the defendants on these counts also because the leaflet was not distributed under such circumstances, nor was it of such a nature, as to create a clear and present danger of causing either insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces."[39] As Holmes had done in *Abrams*, Brandeis characterized the actions of the defendants in *Pierce* and *Schaefer* as silly and futile. Brandeis observed in *Pierce* that: "Insubordination, disloyalty, mutiny, and refusal of duty in the military or naval forces are very serious crimes. It is not conceivable that any man of ordinary intelligence and normal judgment would be induced by anything in the leaflet to commit them, and thereby risk the severe punishment prescribed for such offenses. Certainly there was no clear and present danger that such would be the result."[40]

Brandeis concluded his dissents in *Pierce* and *Schaefer* by expressing his concern about the potential impact on civil liberties of the prosecutions in those cases. In *Pierce*,

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[39] *Pierce v. United States,* 273.
[40] Ibid.

Brandeis commented that, "the fundamental right of free men to strive for better conditions through new legislation and new institutions will not be preserved if efforts to secure it by argument to fellow citizens may be construed as criminal incitement to disobey the existing law—merely because the argument presented seems to those exercising judicial power to be unfair in its portrayal of existing evils, mistaken in its assumptions, unsound in reasoning, or intemperate in language. No objections more serious than these can, in my opinion, reasonably be made to the arguments presented in "'The Price We Pay'."[41] Brandeis ended his dissent in *Schaefer* by stressing the importance of freedom of conscience and objecting to governmental intrusion into the thoughts and beliefs of the individual. Brandeis wrote that, "the jury which found men guilty for publishing news items or editorials like those here in question must have supposed it to be within their province to condemn men not merely for disloyal acts, but for a disloyal heart, provided only that the disloyal heart was evidenced by some utterance."[42] Convinced that the government had prosecuted the defendants for their beliefs, not because of any danger they created through their actions, Brandeis noted that, "to hold that such harmless additions to or omissions from news items, and such impotent expressions of editorial opinion, as were shown here, can afford the basis even of a prosecution, will doubtless discourage criticism of the policies of the government" and create new threats to constitutional liberties.[43] Brandeis ended his dissent in *Schaefer* with this warning: "Men may differ widely as to what loyalty to our country demands, and an intolerant majority, swayed by passion or by fear, may be prone in the future, as it

[41] Ibid.
[42] *Schaefer v. United States*, 493.
[43] Ibid., 493-94.

has often been in the past, to stamp as disloyal opinions with which it disagrees. Convictions such as these, besides abridging freedom of speech, threaten freedom of thought and of belief."[44] As he did in *Gilbert,* Brandeis in *Pierce* and *Schaefer* stressed his concern for the protection of individual thought and expression against the power of the state.

The dissents he wrote in *Pierce* and *Schaefer* revealed Brandeis's commitment to the clear and present danger test as a tool for protecting personal liberty, and Brandeis clarified and strengthened that doctrine in subsequent opinions. Concurring in *Whitney v. California* (1927), Brandeis developed the connection between the benefits of free speech and the clear and present danger standard. Government suppression of speech, said Brandeis, required that the speaker's words create an imminent threat of serious evil. He wrote that, "it is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech, there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one."[45] Brandeis believed that if the threat of harm from speech was not imminent, the remedy for the danger was more debate, not the suppression of speech. Brandeis continued in *Whitney* by explaining that:

> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through

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[44] Ibid., 495.

[45] *Whitney v. California*, 274 U.S. 357, 377 (1927).

> discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.[46]

Despite their common support for the clear and present danger rule, significant differences existed between Holmes and Brandeis over the protection of individual rights. Holmes was less concerned about protecting individual rights against state power than was Brandeis; in fact, Holmes viewed such rights with suspicion and disdain. Holmes dissented in Progressive era cases like *Lochner v. New York* because he objected to the Court's interference with state power, not out of concern for individual liberty or a desire to reform society.[47] The idea that enforcement of individual rights might limit the power of government troubled Holmes.[48] In struggles between the state and the individual, the needs and will of the state, according to Holmes, had, of necessity, to prevail. If the state needed soldiers, he argued, it would conscript men and march them off to war, at bayonet point if necessary.[49] While Holmes and Brandeis often voted together in dissent against decisions infringing the freedom of expression, they did so from different perspectives. Holmes lamented the harm to the state that resulted from the suppression of dissenting views. Such actions destroyed the marketplace of ideas on which a democratic society depended. Holmes, who saw the courts more as dispassionate arbitrators between competing interests, did not see the courts as champions of individual rights against the

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[46] Ibid.

[47] In *Lochner*, the Court invalidated a New York statute limiting the number of hours bakers could work each day. The Court held that by limiting the number of hours bakers could contract to work the New York law violated their due process rights under the Fourteenth Amendment. *Lochner v. New York,* 198 United States 45 (1905).

[48] Healy, *The Great Dissent*, 6.

[49] Polenberg, *Fighting Faiths*. 208-209.

authority and power of society. Holmes maintained that the will of the majority should, and in the end, inevitably would, prevail.[50]

This difference in perspectives between Holmes and Brandeis had important ramifications for conscientious objectors whose cases came before the Court, as it had the potential to lead to different conclusions about who should determine the extent of the protection extended to rights of conscience—the legislature or the courts. Felix Frankfurter, Dean of Harvard Law School and later Justice of the Supreme Court, joined this debate and exerted significant influence over it. Frankfurter and Holmes were part of the same social and academic circles, and as he did with Chafee and Hand, Holmes corresponded with Frankfurter and valued his opinion. Like Holmes, Frankfurter distrusted and disliked judicial intervention and rule making. Seeing the judiciary as the branch of government least responsive to the will of the people, he advocated judicial restraint. Even when legislative action infringed on the freedom of speech or privacy, Frankfurter deferred to legislative initiative, believing that Congress and state legislatures should remain free to define and pursue their own objectives without judicial interference. Accordingly, he rejected the clear and present danger rule as being too restrictive of government action. In Frankfurter's view, legislatures required more leeway to determine what forms of speech were dangerous and how to respond to expressions of opinion that jeopardized the state's interests.[51]

Frankfurter supported the protection of conscience, but unlike Brandeis, he did not believe that it fell to the Courts to determine the nature or extent of that protection. For example, Frankfurter saw it as the role of the strong, national state that emerged

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[50] Sheldon M. Novick, *Honorable Justice : The Life of Oliver Wendell Holmes*, 1st ed.. ed. (Boston: Boston : Little, Brown, 1989). 272.
[51] Pritchett, *Civil Liberties and the Vinson Court*. 65, 74.

during World War I to define who would be excused from bearing arms and how they would be treated. Jeremy Kessler explored this issue in "The Administrative Origins of Modern Civil Liberties Law."[52] Kessler argued that as a secretary in the War Department during World War I Frankfurter promoted both a strong federal state and the lenient treatment of conscientious objectors. According to Kessler, Frankfurter saw the two as inextricably linked, with the government's accommodation of conscience legitimizing its expanding power. Kessler maintained that Frankfurter sought to increase civil rights protections for conscientious objectors as a means of strengthening, rather than checking, the government's administrative power.[53] Frankfurter pursued these goals by convincing Secretary of War Newton Baker to issue an executive order expanding the definition of conscientious objectors beyond the limits imposed by Congress in the conscription statute.[54] As enacted by Congress, the law excused from bearing arms only members of historic peace churches. The statute, therefore, recognized only Quakers, Mennonites, and members of the other recognized "peace" churches as conscientious objectors. Frankfurter argued that this congressional exemption was far too narrow and would not quell the strong opposition to the draft confronting the administration.[55] His solution involved expanding the definition of conscientious objection to include secular objectors

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[52] Jeremy K. Kessler, "The Administrative Origins of Modern Civil Liberties Law," *Columbia Law Review* 114, no. 5 (2014).

[53] Ibid. 1085.

[54] Kessler described the success of Frankfurter's efforts to establish a new category of conscientious objector beyond the limits authorized by Congress. "The Secretary of War directed all camp commanders 'that until further instructions on the subject are issued "personal scruples against war" should be considered as constituting "conscientious objections" and such persons should be treated in the same manner as other "conscientious objectors" under the instructions contained in confidential letter from this office dated October 10, 1917.' This order identified a new category of legitimate objector, marked by the religion-neutral and non-organizational language of 'personal scruples against war.' Now, any individual professing such personal scruples—regardless of his spiritual or political pedigree—would be entitled to special treatment from his commanding officers.' On March 8, 1918, President Wilson issued an executive order making the new category of objectors permanent. Ibid., 1126-29.

[55] Ibid., 1088.

who refused to fight solely on moral grounds and for the War Department to establish a Board of Inquiry to evaluate the sincerity of each objector. In his War Department memorandum, Frankfurter asserted that the treatment of conscientious objectors undermined the nation's democratic values. Frankfurter worried, said Kessler, that "by treating [conscientious objectors] who refused to fight on religious, moral, or political grounds as disobedient soldiers, the Act risked undermining their experience of self-determination. Categorized as subordinates who refused an order, not as citizens with dissenting views about the common good, conscientious objectors would be shut out of deliberation altogether; they would lack both the opportunity to express their normative visions and the opportunity to have those visions subjected to reasoned correction."[56] Kessler described how Frankfurter hoped to balance concern for the protection of conscience with his state-building goals by implementing a "novel administrative process capable of acknowledging the individual conscientious objector's views. In such a scheme, rights of individual conscience functioned as occasions for the collective construction of a pluralistic state."[57]

As described by Kessler, Frankfurter's vision of the relationship between civil liberties and state power contained elements of both Brandeis' and Holmes' arguments for the protection of ideas and speech. Brandeis's emphasis on personal liberty was evident in Frankfurter's concern for protecting the right of individuals to formulate and assert their own beliefs. So, too, was Holmes's focus on state power and on the importance of open debate and evaluation of ideas. Like Holmes, Frankfurter saw protection of conscience as a means of legitimizing the government and promoting its

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[56] Ibid., 1118.
[57] Ibid.

growth and power. By expanding government protection and recognition of conscientious objectors, he hoped to limit resistance to expanding federal power that generated opposition to the war and conscription. Frankfurter shared the optimism of Brandeis, Chafee, and Holmes, in his belief that the free exchange of ideas would lead to correction or abandonment of erroneous ones and produce a more educated populace. These goals drove Frankfurter's policy decisions concerning conscientious objectors.

Frankfurter, however, maintained that the state, not the courts, should stand as the protectors of conscience. During World War I, Frankfurter thrust the War Department forward as both a builder of a powerful wartime state and as the protector of conscientious objectors.[58] Years later, as a member of the judiciary, Frankfurter argued for judicial restraint in overturning actions by legislatures or administrative agencies. As Kessler explained, Frankfurter was instrumental in promoting a theory for the protection of civil liberties quite different from the one espoused by Brandeis. Instead of finding protection of conscience in the language of the First and Fourteenth Amendments, Frankfurter contended that the limits of such protection were properly determined by the state and that the courts should not interfere with that determination except in cases where legislative or executive action lacked any reasonable basis. He rejected the clear and present danger rule and the heightened scrutiny it applied to actions by the government. Pointing to Holmes's promotion of state power over individual rights and

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[58] In Kessler's view, Frankfurter and his supporters in the War Department "hoped that the administrative recognition of the right of individual conscience would imbue the draft apparatus with these norms and, in doing so, help to stabilize and legitimate it. In a surprising series of turns then, a strikingly modern theory of democratic self-government and individual rights was articulated in the name of executive authority and at the expense of congressional policy. The modern administrative state had arrived, cloaked in the language of individual rights; at the same time, a modern theory of individual rights for minorities and dissenters had arrived, cloaked in the language of administrative state building." Ibid., 1143.

civil liberties, Frankfurter maintained that Holmes had not intended to rewrite the law concerning speech in his famous World War I era opinions and dissents.[59]

By the 1930s, other members of the Court, sharing Brandeis's commitment to individual rights, disagreed with Frankfurter's interpretation of Holmes's clear and present danger rule and pushed for rigorous judicial review of state action that impinged on the basic rights and liberties contained in the first ten amendments to the United States Constitution. Developing this philosophy, referred to as "Preferred Freedoms" or "Preferred Position" doctrine, supporters argued that, in *Abrams* and its prodigy, Holmes deliberately identified cases involving the freedoms of speech and conscience as proper subjects for enhanced judicial scrutiny.[60] Justice Benjamin Cardozo began shaping the boundaries of the preferred freedoms doctrine in *Palko v. Connecticut* (1937).[61] In *Palko,* Cardozo identified certain basic freedoms recognized by the Bill of Rights and considered so fundamental to "the very essence of a scheme of ordered liberty" that they were also protected by the Fourteenth Amendment against infringement by the states. Those rights included, said Cardoza, the freedoms of speech and thought guaranteed by the First Amendment.[62] "The belief that neither liberty nor Justice would exist if they were sacrificed" required that those rights be incorporated in the Fourteenth Amendment.[63]

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[59] Pritchett, *Civil Liberties and the Vinson Court*, 29.
[60] Ibid., 32-36.
[61] *Palko v Connecticut*, 302 United States 319 (1937).
[62] Ibid., 326.
[63] Ibid.

In footnote four of the Court's decision in *United States v. Carolene Products Co.* (1938), Justice Stone further described the shape of the preferred freedoms doctrine.[64] The case involved a challenge to the regulatory power of Congress over the milk industry. Upholding the power of Congress to ban certain products from the market, the Court, adhering to Justice Frankfurter's doctrine of judicial restraint and deference to legislative decision-making, upheld the legislation in question without questioning the motives or wisdom of Congress in adopting it. Stone, however, warned that the Court would not so warmly receive legislation impinging on the fundamental rights identified by Cardozo in *Palko*. Stone suggested that legislation impinging on the right to vote or on the freedoms of speech and assembly would be "subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."[65] Stone also indicated that legislation targeting specific religious or ethnic groups—what he referred to as "discrete and insular minorities"—should also be subject to a heightened level of judicial inquiry and review.[66]

In *Thomas v. Collins* (1945), a case involving the state's ability to limit speech and assembly, Justice Rutledge described the Court's application of the preferred freedoms doctrine as follows: "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now, as always, delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable, democratic freedoms secured by the First

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[64] *United States v. Carolene Products Co.*Footnote 4

[65] Ibid.

[66] Ibid.

Amendment."[67] Asserting the vibrancy of the preferred freedoms doctrine and the clear and present danger test as stated by Holmes and developed by Brandeis, Rutledge wrote that:

> For these reasons, any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which, in other contexts, might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly.[68]

The Preferred Freedoms doctrine attracted powerful supporters, including Justices Hugo Black, William O. Douglas, and Frank Murphy, who would build on Brandeis' legacy of concern for individual rights. During the post World War II era, Douglas and Murphy would author some of the Court's strongest pronouncements in favor of the protection of conscience. Their opinions and dissents in support of conscience and the free expression of ideas often disclosed the same concern with and sympathy for personal rights and dignity Justice Brandeis had expressed thirty years before. With Frankfurter and his commitment to judicial restraint framing the other side of the issue, the debate over the Court's role in protecting claims of conscience continued into the post War period and beyond. As World War II ended and the Cold War began, individuals conscientiously opposed to participation in war, such as Larry Gara, would again find themselves before the Court in cases defining the degree of protection the nation would

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[67] *Thomas v. Collins*, 323 United States 516, 529-30 (1945).
[68] Ibid.

afford to claims of conscience. In those post World War II cases, the Supreme Court asserted itself as the primary protector of conscience. It did so by the justices forming alliances on procedural issues that extended greater due process rights to COs. Notably absent from those decisions was a consensus on the overarching ideological question of why the protection of conscience mattered.

Chapter 3

Becoming the Protector of Conscience: The Supreme Court and Cases involving Conscientious Objectors following World War II

The Selective Service Act of 1940 led to the drafting of ten million men into the armed forces of the United States during World War II.[1] After the War ended, Congress enacted a new conscription statute—the Universal Military Training and Selective Service Act of 1948—to strength the nation's defenses in light of fears that the Cold War might soon turn hot. The Selective Service Act of 1948 inspired a new round of opposition to the draft. While Larry Gara sat in jail waiting for his next court date, the federal government was prosecuting approximately 100 other individuals for violating that law. Most of the defendants in those cases were young men who openly refused to register, mainly for religious reasons, though approximately ten-percent of this group claimed no religious affiliation and objected to military service solely on ethical grounds.[2] The government pursued not only the young men refusing to register but also those who supported and encouraged them. The Central Committee for Conscientious Objectors reported that in Puerto Rico the government arrested members of the pacifist Fellowship of Reconciliation for carrying signs encouraging young men not to register.[3] In Kansas, the government filed charges against a physician, Warren A. Wirt, for advising his son not to sign-up for the draft. Like Gara, the Kansas doctor informed federal authorities of his actions by writing to the local United States Attorney. In his letter, Dr. Wirt expressed his opposition to the draft and his intention to encourage young

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1 George Q. Flynn, *The Draft, 1940-1973* (Lawrence: University Press of Kansas, 1993).

2 Central Committee of Conscientious Objectors, "News Notes of the Central Committee of Conscientious Objectors," 1949, Vol. 1, No. 1, p. 1.

3 Ibid., Vol. 1, No. 1, p. 2.

men like his son to disobey the law. Despite his father's advice, Dr. Wirt's son registered with the Selective Service. The government, however, continued its prosecution of Dr. Wirt. The court convicted him of encouraging and aiding disobedience of the draft laws and sentenced him to two years in jail.[4]

The prosecutions under the Selective Service Acts of 1940 and 1948 of individuals conscientiously opposed to military service generated a number of judicial proceedings, some of which found their way to the United States Supreme Court. Many of those cases involved procedural questions, such as how and when an individual could challenge the decision of a local draft board that he did not meet the criteria for classification as a conscientious objector. The cases also raised questions about the due process rights of conscientious objectors and whether the procedures followed by draft boards and the courts adequately protected those rights. The cases pitted the constitutional claims of COs against the government's need to populate the ranks of the armed forces rapidly and efficiently.

These cases involving conscientious objectors, most of which were decided in the decade following World War II, forced the Supreme Court to strike a balance between the protection of conscience and the right of the nation to defend itself. In doing so, members of the Court echoed arguments for the protection of speech and conscience developed previously by Justices Holmes and Brandeis in the World War I era cases. In the decisions on conscientious objection that followed World War II, some of the Justices, particularly Justice Frank Murphy, displayed the same concern with the protection of individual rights and dignity that Justice Brandeis had written about in

[4] Ibid. Vol. 1, No. 3, p. 1.

Gilbert, Schaefer, and *Whitney*.[5] Meanwhile, Justice Frankfurter continued to advocate judicial restraint and objected to the Court's creation of new rules and procedures that he thought circumvented the conscription rules and procedures adopted by Congress. Frankfurter maintained that Congress and the Selective Service System, not the Court, should decide how and to what extent the nation protected claims of conscience. At the same time, however, Justice Frankfurter displayed the same strong commitment to the protection of conscience he had exhibited as a member of the Department of War during World War I. In the tradition of Justice Holmes, Justice Frankfurter asserted that the recognition and fair treatment of conscientious objectors legitimized state power and thereby enhanced national security. These different perspectives merged in the post World War II cases involving conscientious objectors. As with the World War I era cases concerning the prosecutions of opponents of the draft under the Espionage and Sedition Acts, these ideas were often developed in dissenting or concurring opinions. As also happened in the World War I era cases, some of those minority opinions eventually took hold and led to greater protection for claims of conscience.

This expansion of the protection afforded to claims of conscience occurred primarily through the Court manipulating procedural rules that applied to COs, rather than through the Court changing the substantive law governing exemption from military service. For example, the Court in these cases did not question the premises underlying the clear and present danger rule or its application. The Court continued to recognize that when the nation's security was threatened Congress possessed the power to adopt laws designed to quickly and efficiently populate the ranks of the military. Adopting

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[5] *Gilbert v. Minnesota*; *Whitney v. California*; *Schaefer v. United States.*

legislation for that purpose, Congress, said the Court, could infringe on claims of conscience by limiting who qualified as a conscientious objector and by decreeing that draft boards, not the courts, would determine if an individual should be classified as a CO. The Court acknowledged that the clear and present danger rule allowed Congress to restrict freedom of conscience during wartime in the same way it allowed restriction of speech. While not questioning the limits Congress placed on claims of conscience, the Court in the post World War II cases insisted, however, that decisions over who did and who did not qualify as a conscientious objector comply with certain minimum standards of due process. The Court articulated procedures for draft board hearings and ruled that the results of those hearings were subject to judicial review. These procedural rules imposed by the Court following World War II increased judicial protection of claims of conscience, and they paved the way for later Supreme Court decisions that expanded the substantive rights of COs as well.[6]

Most of the cases involving conscientious objectors that reached the Supreme Court following World War II involved the statutory and administrative procedures COs were forced to follow to secure exemption from military service. A conscientious objector seeking exemption from military service faced a difficult path. Employing basically the same definition of a conscientious objector as the 1940 statute, the Selective Service Act of 1948 provided that "no person who, 'by reason of religious training and belief, is conscientiously opposed to participation in war in any form,' shall be required

[6] Those cases expanding the substantive rights of COs include the Court's decision that Jehovah's Witnesses qualified as conscientious objectors. See *Sicurella v. United States*, 348 United States 385 (1955). The Court also eventually determined that individuals who objected to participation in the military solely on moral grounds that were not based on traditional religious beliefs also qualified as conscientious objectors. See *United States v. Seeger*, 380 United States 163 (1965).

to undergo combatant training or service in the armed forces."[7] Consequently, draftees seeking classification as conscientious objectors had to prove two things: that religious training, not moral or secular beliefs, provided the basis for their objection; and that they opposed all wars. These two requirements drew criticism from objectors and their supporters since their adoption at the outset of World War I, because they offered no protection or recourse to secular objectors.[8] Individuals opposed to war solely on moral grounds were forced to choose between service in the military and prison. Jehovah's Witnesses, on the other hand, found themselves ensnared by the second requirement—that they oppose all war. While refusing to participate in all armed conflicts between men, Jehovah's Witnesses proclaimed their willingness to fight on God's side in the battle of Armageddon.[9] The idiosyncratic views of Jehovah's Witnesses about participation in warfare coupled with their unique assertion that each male member of their church was a minister and therefore exempt from conscription resulted in the government prosecuting members of that sect for evading the draft. Many of the reported decisions on conscientious objection involved Jehovah's Witnesses.

A CO applicant had to convince his local draft board of his sincerity. If the local board ruled against him, he could appeal. The Justice Department and FBI would then investigate the applicant's background and submit a recommendation to the appeals board. The appeals board provided the applicant with a summary of the FBI report so that he could respond. The CO applicant, however, was not entitled to review the reports

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[7] *Witmer v. United States*, 348 United States 375, 376-77 (1955).

[8] The Selective Service Act of 1917 also required that conscientious objectors belong to one of the traditional peace churches, such as Mennonite or Quaker congregations. Congress deleted that provision from the 1940 conscription statute and did not include it in the 1948 law. Congress did, however, retain the religious training requirement in the laws of 1940 and 1948.

[9] *Sicurella v. United States*. 348 United States 385 (1955).

from the Justice Department and the FBI, nor could he obtain the names of anyone who provided information adverse to his claim.[10] If the appeals board sustained the draft board's decision, the applicant confronted additional procedural difficulties. Judicial opinions conflicted on some key issues. Basic questions, such as whether or not the federal courts possessed jurisdiction to review the actions of draft boards at all, remained unsettled. Many federal courts of appeal viewed draft board classifications as final and not subject to judicial review. Even if some level of federal judicial review were available, most federal courts held that an erroneous draft board ruling did not excuse the draftee from reporting to the military for induction. Once he did so, the objector was subject to military discipline and control. At that point, petitioning the appropriate federal court for a writ of habeas corpus offered the only potential means of challenging the board's action.

The Supreme Court addressed these rules and procedures in the aftermath of World War II. In cases dealing with conscientious objectors, the Supreme Court Justices faced competing claims between protecting the nation and protecting conscience. Limiting or eliminating judicial review of draft board decisions provided the best means of quickly supplying soldiers to the military. A lack of judicial oversight concerning the classification process, however, threatened to erode the nation's long-standing commitment to the protection of conscience. Where should the balance between the protection of conscience and military preparedness be struck? And who should determine that balance? These questions confronted the Court in the cases involving COs. Though some of the procedural issues might have seemed trivial or mundane, they

[10] *United States v. Nugent,* 346 United States 1 (1953).

were not. They involved fundamental questions about the constitutional guarantees the nation ostensibly extended to all of its citizens, as well as its commitment to protecting the views of minority groups like conscientious objectors. The protection of conscience for all Americans was the underlying issue at stake in the cases addressing the procedures of the Selective Service.

The post World War II Supreme Court decisions concerning conscientious objectors reflected a growing willingness of the Court to establish limits on the ability of Congress to infringe on claims of conscience and an increasing recognition of the important role the Court played in protecting minority groups and unpopular ideas against the authority and power of the modern state. The cases also exhibited the Court's expansion of procedural rules designed to protect the due process rights of COs against government encroachment. The Supreme Court extended that judicial protection to COs slowly and cautiously. It did so in two ways. First, though the Court initially upheld severe restrictions on an individual's ability to seek judicial review of a draft board decision finding that he failed to qualify as a conscientious objector, the Court did eventually allow the federal courts to conduct a limited review of classification rulings by the Selective Service Administration. Though narrow in scope, those reviews allowed the Court to overturn decisions of draft boards that lacked evidentiary support and made the Court the final arbiter in cases where COs sought exemption from military service. Second, the Court mandated that draft boards and the Department of Justice follow certain procedural rules in hearings involving conscientious objectors to safeguard the due process rights of COs. For example, the Court became increasingly concerned that

individuals denied recognition as conscientious objectors be informed of the evidence against them and given a chance to respond.

The first case concerning judicial review of decisions by local draft boards reached the Supreme Court before the end of World War II and addressed when and how an individual could challenge a draft board's decision as to whether or not he qualified as a conscientious objector or for any other exemption to military service. In *Falbo v. United States* (1944), the petitioner, a Jehovah's Witness, argued that his draft board had failed to recognize him as a minister of his church and instead had classified him as a conscientious objector.[11] He refused to report to a Civilian Public Service camp when the board ordered him to do so. (If classified as a minister, Falbo would have been exempted from both CPS and military service.) Arrested and charged with violating the Selective Service Act, Falbo raised as a defense the draft board's refusal to classify him as a conscientious objector. He suggested that the board's decision reflected the prejudice its members felt toward him and his religion. Falbo quoted one of the board members as having said, "I do not have any damned use for Jehovah's Witnesses."[12] The Supreme Court affirmed the District Court's refusal to consider Falbo's defense that the draft board had misclassified him as a conscientious objector rather than as a minister. Writing for the majority, Justice Hugo Black said that an individual could not challenge the draft board's decision until he reported for induction and was accepted for service by either the military or CPS. Congress, observed Justice Black, had specifically provided that no draftee could initiate a judicial review of a board decision until his induction process was complete. Even a clearly erroneous ruling by the board regarding a draftee's

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[11] *Falbo v. United States*, 320 U.S. 549 (1944).
[12] Ibid., 557.

classification status did not excuse his failure to report for service.[13] Since Falbo did not report to CPS, he could not challenge the board's refusal to classify him as a minister.

The *Falbo* decision significantly impacted conscientious objectors by confirming that an individual whose claim for recognition as a CO was rejected by the draft board must report for induction into the military before he could challenge the board's decision in court. After his induction, the objector could challenge the board's ruling only by filing a writ of habeas corpus in federal court. As Supreme Court Justice Frank Murphy subsequently pointed out in *Estep v. United States* (1946), pursuing review of their draft status through a writ of habeas corpus entailed unique risks and inconvenience for conscientious objectors.[14] Upon induction into the military, objectors immediately became subject to military discipline. The military might move a CO thousands of miles from his home, thereby separating him from his legal counsel and the witnesses who could testify on his behalf. Aware of the mistreatment some conscientious objectors had suffered in military prisons during World War I, COs were hesitant to subject themselves to military control.[15] Commenting on the difficulty of challenging a draft board determination through the habeas corpus process, Justice Murphy noted objectors' fears of military authority by stating, "there is little assurance, moreover, that the military will treat [their] efforts to obtain the writ with sympathetic understanding."[16] These inherent

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[13] Ibid., 554.

[14] *Estep v. United States*, 327 United States 114, 130 (1946).

[15] In general, the experience of conscientious objectors during the First World War was dismal. The experience of two Mennonite objectors symbolized the despair and humiliation many experienced; they died in prison from abuse and neglect. Military personal then shipped their bodies home clad in the uniforms they had refused to wear while alive. John Whiteclay Chambers II, "Conscientious Objectors and the American State from Colonial Times to the Present," in *The New Conscientious Objection: From Sacred to Secular Resistance*, ed. Charles C. Moskos and John Whiteclay Chambers II (New York: Oxford University Press, 1993), 35.

[16] *Estep v. United States*, 130.

perils of the habeas corpus process imposed by the Court on conscientious objectors in *Falbo* led Justice Murphy to comment that "these practical difficulties may thus destroy whatever efficacy the remedy might otherwise have, and cast considerable doubt on the assumption that habeas corpus proceedings necessarily guarantee due process of law to inductees."[17]

The question in *Falbo* was not whether or not the limited appeal process afforded conscientious objectors by the Selective Service statutes and regulations abridged the draftee's rights to due process. The Court assumed that it did. The question from the Court's perspective was whether exigent circumstances facing the nation justified that infringement. Did the needs of the nation warrant congressional and administrative action limiting the rights of individuals who placed duty to conscience above duty to country? To answer the question, the Court turned to the clear and present danger test articulated by Justice Holmes in the famous World War I cases concerning the freedom of speech and opposition to military service—*Schenck, Frohwerk, Debs,* and *Abrams*.[18]

The Court held in *Falbo* that the emergency confronting the nation on the eve of World War II justified the severe limitations on judicial appeals included in the 1940 Selective Service Act. Writing for the majority, Justice Black pointed out that Congress had needed to mobilize and arm the nation immediately. The nation, said Black, could not afford to delay while large numbers of conscripts flooded the courts and argued that their draft boards should have exempted them from service. Black wrote, "that dire consequences might flow from apathy and delay was well understood. Accordingly the [Conscription] Act was passed to mobilize national manpower with the speed which that

[17] Ibid.

[18] These cases and the evolution of the clear and present danger rule are discussed in Chapter 2 of this thesis.

necessity and understanding required."[19] Congress had recognized a clear and present danger and had acted appropriately to meet it. Because of that danger, the conscription laws could require that an individual report for induction before any judicial review of his draft classification occurred.

Justice Murphy dissented in *Falbo*, contending that neither legislative intent nor defense of the nation necessitated curtailment of an individual's right to a full judicial review of the draft board's action.[20] Murphy maintained that denial of judicial review for individuals refusing to report for service did nothing to enhance military preparedness, since men who disregarded draft board orders were prosecuted and sent to jail; they did not become part of the armed forces.[21] Judicial review of those cases, in Murphy's view, did not delay the nation's efforts to prepare for war. Accordingly, Murphy saw no clear and present danger posed by extending judicial review to claims of conscientious objection. Applying the clear and present danger standard, Murphy viewed the case, at least in part, through the same lens as Justice Black. But Murphy added a new perspective as well. Arguing for judicial review of draft board decisions, Murphy stressed the importance of individual civil liberties in much the same way Justice Brandeis had previously done in *Gilbert* and *Schaefer,* echoing Brandeis's argument that the protection of conscience was an integral part of the privileges and immunities extended to all U.S. citizens by the Fourteenth Amendment.[22] Murphy observed that "individual rights have been recognized by our jurisprudence only after long and costly

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[19] *Falbo v. United States*, 551-52.
[20] Ibid., 556.
[21] Ibid., 560.
[22] The arguments of Justice Brandeis for the protection of conscience are explored in Chapter Two.

struggles. They should not be struck down by anything less than the gravest necessity."[23] Concerned that the conviction of Falbo may have resulted from wartime anxiety and prejudice against Jehovah's Witnesses and reflecting his commitment to the doctrine of preferred freedoms, Murphy wrote, "The law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution. I can perceive no other course for the law to take in this case."[24]

Black's majority opinion and Murphy's dissent in *Falbo* highlighted the different intellectual legacies of Holmes and Brandeis on the issue of conscience and how those differences manifested themselves. Despite his support for the concept of preferred freedoms and his commitment to judicial protection of civil liberties, Black, echoing Holmes, viewed the *Falbo* case from the perspective of the government and its power and responsibility to defend the nation. Holmes had approached the protection of speech and conscience from the same viewpoint in the post World War I cases. As discussed in Chapter 2, Holmes, and his protégé Felix Frankfurter, saw the protection of speech and conscience as ultimately strengthening the power and legitimacy of the state. Holmes had expressed no doubt that individual rights must yield to state authority, especially in times of crisis. For Black, the crucial question in *Falbo* was if a clear and present danger existed when Congress elected to curtail judicial review of draft board decisions. Once he determined that Congress had indeed confronted an emergency, his approval of the conscription legislation and its abbreviated review procedures followed. The case then became one of statutory construction: Had Congress in the conscription statute authorized

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[23] *Falbo v. United States*, 556.
[24] Ibid., 560-61.

judicial review of draft board rulings before the induction process was complete? Finding no evidence that Congress had created such a remedy, Black noted that, "Surely, if Congress had intended to authorize interference with that process by intermediate challenges of orders to report, it would have said so."[25] In addition, with its focus on the technical aspects of the procedures enumerated in the Selective Service statutes, Black's opinion in *Falbo* served as a harbinger of the new direction the Court eventually followed in protecting claims of conscience. Rather than pursue an ideological consensus over how and why conscience should be protected, the justices instead turned to the strict enforcement of technical rules governing the classification process.[26]

Justice Murphy, on the other hand, in his dissent refused to abandon or deviate from the rationale offered by Justice Brandeis for the protection of speech and conscience—that those rights insure the ability of individuals to participate fully in American society. Murphy's dissent in *Falbo* demonstrated the connection between the emphasis Brandeis placed on individual rights and the Preferred Freedoms doctrine. An adherent of the idea that legislation infringing on the rights guaranteed by the first Ten Amendments to the Constitution must be subjected to a heightened level of judicial scrutiny, Murphy concluded that excluding COs from the courts constituted an unwarranted infringement on fundamental civil liberties of the individual.[27] Emphasizing the need to safeguard individual liberty threatened by government power, Murphy's analysis of *Falbo* differed sharply from the views of Justice Black. The different perspectives from which Black and Murphy approached the case led them to different

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[25] Ibid., 554-55.

[26] Justice William O. Douglas, who also was a proponent of the preferred freedoms doctrine, joined the majority opinion writtened by Justice Black.

[27] Pritchett, *Civil Liberties and the Vinson Court*, 36.

conclusions about how much government interference with personal liberty the Court should tolerate in order to allow the nation to defend itself.

The views espoused by Justice Murphy regarding the procedural aspects of conscription cases involving CO's gained some traction on the Court following the end of World War II. In *Estep v. United States* (1946), the Supreme Court considered issues similar to those in *Falbo*.[28] As in Falbo, the defendant in *Estep* was a Jehovah's Witness. He claimed that he served as a minister in his church and that he therefore was exempt from military conscription. The draft board rejected his petition for designation as a minister and as a conscientious objector and ordered Estep to report for induction into the military. Estep went to the induction center but refused to take the oath and enter the armed services. Prosecuted for violating the Selective Service Act, Estep at his trial moved to assert as a defense the draft board's failure to classify him as a minister exempt from military and civilian service. The Supreme Court held that he could raise that defense. Distinguishing *Falbo*, where the defendant had refused to appear at the CPS camp as the draft board had ordered, the Court held that Estep had complied with all conditions precedent to challenging the board's classification decision by appearing at the induction center but refusing to take the oath.[29] The Court ruled that Estep remained outside of the military and therefore was not subject to military discipline. That meant that he was not forced to contest the board's decision by filing a writ of habeas corpus.[30] Instead, he could wait until the government filed charges against him in federal court and then defend that action based on the board's refusal to recognize him as a minister and

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[28] *Estep v. United States*, 327 United States 114 (1946).

[29] Ibid., 121.

[30] In *Billings v. Truesdell* (1944), the Supreme Court first held that individuals who refused to participate in the induction ceremony remained subject to civilian authority and were not subject to military authority or punishment. *Billings v. Truesdell*, 321 United States 542, 558 (1944).

conscientious objector.[31] Nearly all federal Courts of Appeal had previously treated the draft board decisions as final orders that were not subject to any judicial review.[32] Now, Estep and other conscientious objectors could seek review of their draft status in federal court.[33] Conscientious objectors still found themselves in a precarious position, however. COs had to follow a specific procedural path to protect their judicial rights and avoid becoming subject to military jurisdiction. An objector who intended to challenge the draft board's decision as to his classification had to appear at the induction center, but it was imperative that he announce his refusal to join the military and not take the induction oath.

In *Estep*, the Supreme Court inserted itself as a protector of conscience by adding a layer of judicial review to the administrative appeal process specified in the Selective Service Act. The case was a significant victory for COs, in that it allowed them to avoid entanglement with the military justice system and pursue their claims in federal court. The Supreme Court's ruling in *Estep* thereby ameliorated some the harshest aspects of the rule enunciated in *Falbo*. The Court drew inspiration from Justice Murphy's insistence in *Falbo* that respect for individual liberties and dignity required judicial review of rulings by draft boards. Writing for the majority, Justice Douglas maintained that Congress could not place all actions by draft boards beyond the purview of the courts. Orders that discriminated against a particular ethnic group, for example,

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[31] *Estep v. United States*, 121.

[32] Ibid., 143-45.

[33] The judicial review of the draft board's ruling was, however, a limited one. Though debate raged among the Supreme Court Justices over the level of scrutiny the courts should apply to draft board classification decisions, the Court ruled that a decision by the board must be upheld if the record contained any evidence supporting it, even if contradictory evidence suggested that the board's determination was erroneous. *Cox v. United States*, 332 United States 442, 448-52 (1947).

exceeded the board's authority and could be invalidated by judicial action.[34] Citing concerns for personal liberty and the protection of conscience voiced a generation before by Justice Brandeis, Douglas wrote that, "we cannot read § 11 [of the Selective Service Act] as requiring the courts to inflict punishment on registrants for violating whatever orders the local boards might issue. We cannot believe that Congress intended that criminal sanctions were to be applied to orders issued by local boards no matter how flagrantly they violated the rules and regulations defining their jurisdiction." Douglas noted that fundamental rights and freedoms were at stake. "We are dealing here with a question of personal liberty," he wrote. "A registrant who violates the Act commits a felony. A felon customarily suffers the loss of substantial rights."[35] With its attention to fundamental rights and freedoms, the Court's decision in *Estep* reflected the growing influence of the Preferred Freedoms doctrine. Cutting off the access of conscientious objectors to the Courts, Congress had, in Douglas's view, trampled on basic freedoms embodied in the Constitution. Douglas refused to condone such legislative action without rigorous judicial scrutiny. As his opinion makes clear, Douglas believed there were limits beyond which Congressional power could not extend. Cases involving conscientious objectors forced the Court to consider those boundaries. In *Estep,* the Court concluded that shielding draft board decisions from all judicial review, particularly when they involved claims of conscience, was unconstitutional.

Justice Murphy filed a separate concurring opinion in Estep. He noted the nation's interest in building its armed forces through conscription. At the same time, he

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[34] *Estep v. United States,* 121.
[35] Ibid., 121-22.

asserted that even the exigent circumstances facing the country during times of war did not justify the sacrifice of personal liberty. Murphy wrote:

> We must be cognizant of the fact that we are dealing here with a legislative measure born of the cataclysm of war, which necessitates many temporary restrictions on personal liberty and freedom. But the war power is not a blank check to be used in blind disregard of all the individual rights which we have struggled so long to recognize and preserve. It must be used with discretion, and with a sense of proportionate values. In this instance, it seems highly improbable that the war effort necessitates the destruction of the right of a person charged with a crime to obtain a complete review and consideration of his defense. As long as courts are open and functioning, judicial review is not expendable.[36]

Murphy filed a separate opinion in *Estep* to reiterate his views on where the Court should strike a balance between military preparedness and the protection of conscience. From his perspective, the need to conscript soldiers quickly and efficiently did not justify stripping COs of the opportunity to seek judicial review of administrative decisions made by their draft boards.

Justice Frankfurter concurred with the result in *Estep* on technical grounds, because he believed that the trial judge had improperly and incorrectly told the jury that Estep had not appeared at the induction center. On that basis alone, Frankfurter agreed with the result.[37] But he strongly objected to the Court allowing for even a limited review of decisions by draft boards. Congress intended, said Frankfurter, that all draft board rulings be final and that the courts should not upset decisions made by the Selective Service.[38] With the security of the nation at stake, Frankfurter argued, Congress possessed the exclusive authority to strike a balance between military preparedness and the protection of conscience. Congress, wrote Frankfurter, had

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[36] Ibid., 132.
[37] Ibid., 145.
[38] Ibid.

determined that the need to process conscripts quickly necessitated the truncated review procedures in the Selective Service Act. He observed that, "Congress deemed it imperative to secure a vast citizen army with the utmost expedition. It did so with due regard for the individual interests by giving ample opportunities, within the elaborate system which it established, for supervision of the decisions of the multitudinous draft boards on the selection of individuals for service."[39] Frankfurter argued that the Court should not frustrate the intent of Congress by allowing the courts to review draft board decisions and thereby slow down the induction process. Commenting on the provisions of the Selective Service Act, Frankfurter wrote that, "even were the language not explicit, every provision of the Act should be construed to promote fulfillment of the imperative need which inspired it. Surely it would hamper the aim of Congress to subject the decisions of the selective process in determining who is amenable to service to reconsideration by the cumbersome process of trial by jury, admirably suited as that is for the familiar controversies when the nation's life is not at stake."[40] Congress had determined that judicial review was inconsistent with the state's need to raise an army quickly. The philosophy of judicial restraint espoused by Frankfurter required that the Court respect that decision. In Frankfurter's opinion, the word of Congress should have been final, and the identification and protection of conscientious objectors should have been left exclusively to the Selective Service. As was the case with his actions dealing with COs while a member of the War Department during World War I, Frankfurter's attention focused on building and maintaining the federal power necessary to defend the nation. The protection of conscience could be, and should be, accommodated only to the

[39] Ibid., 137.
[40] Ibid.

extent it did not imperil that paramount goal. As Holmes had done before him, Frankfurter saw the protection of conscience as auxiliary to the development of state power.

Even though the Supreme Court in *Estep* created a larger role for the courts in reviewing the classification of conscientious objectors, judicial review of draft board rulings remained a limited one. The Court addressed this issue in *Cox v. United States* (1947). The case again involved Jehovah's Witnesses who claimed that their draft boards had erred by not recognizing them as ministers exempt from both military duty and alternative service in CPS. Having classified three men as COs, the draft boards ordered them to report to CPS camps. The three defendants did so, but later left the camps without permission. Prosecuted for being absent from the camps, the defendants asked the courts to overturn the decisions of their draft boards and classify them as ministers. The district courts that heard the cases looked only at the evidence before the draft boards and, having found at least some evidence supporting the boards' rulings, upheld their decisions.[41] When the case reached the Supreme Court, a majority of the Justices followed the same approach as the district courts and held that draft board decisions must be affirmed if the board's file contained any evidence supporting its decision, even if other evidence suggested that the board's determination was erroneous.[42] Writing for the majority, Justice Stanley Reed explained that "this standard of review means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the

[41] *Cox v. United States*, 453-55.
[42] Ibid., 452.

regulations are final even though they may be erroneous."[43] He continued, stating that, "Perhaps a court or jury would reach a different result from the evidence, but, as the determination of classification is for selective service, its order is reviewable "only if there is no basis in fact for the classification. * * * Consequently, when a court finds a basis in the file for the board's action, that action is conclusive."[44] Finding a factual basis for the decisions of the draft boards in the file pertaining to each defendant in *Cox*, the Court upheld their convictions.

The *Cox* decision fueled the controversy among the members of the Court concerning its role in protecting claims of conscience. For Justice Murphy, who dissented with Justice Rutledge, the Court exhibited far too much deference to draft board decisions given the individual rights and liberties at stake. He argued for a more robust judicial review, one that would require the Court to find substantial evidence, not merely any evidence, supporting the draft board's decision in order to confirm it.[45] For Justice Murphy, the prosecution of Jehovah's Witnesses claiming exemption from military service as conscientious objectors and ministers differed substantially from civil proceedings in which the court reviewed the validity of administrative orders. Murphy implied that a lower standard of review was appropriate in civil cases, since those matters were "unrelated to freedom of conscience or religion."[46] The prosecution of Cox and the other defendants was a criminal trial concerning "administrative action denying that the defendant has conscientious or religious scruples against war, or that he is a minister. His liberty and his reputation depend upon the validity of that action. If the draft board

[43] Ibid., 448.
[44] Ibid., 453.
[45] Ibid., 458.
[46] Ibid.

classification is held valid, he will be imprisoned or fined, and will be branded as a violator of the nation's law; if that classification is unlawful, he is a free man."[47] Murphy contended that, "since guilt or innocence centers on that classification, its validity should be established by something more forceful than a wisp of evidence or a speculative inference." Murphy asserted that "such a scant foundation should not justify brushing aside *bona fide* claims of conscientious belief or ministerial status. If respect for human dignity means anything, only evidence of a substantial nature warrants approval of the draft board classification in a criminal proceeding."[48]

Douglas also wrote a dissenting opinion in *Cox*, in which Black joined. Douglas did not object to the standard of review adopted by the Court, but he argued that even those minimum requirements—that there be at least some evidence supporting the board's decision not to classify the defendants as ministers—were not satisfied in this case. Douglas reviewed the Selective Service regulations defining ministers of religion and concluded that the defendants in *Cox* met that description. The board should have recognized them as such, he concluded. The board's failure to do so, in Douglas's view, could only have resulted from confusion over and perhaps prejudice towards the unique structure and religious views and practices of Jehovah's Witnesses.[49] They qualified for the exemption, said Douglas, even though they "follow[ed] less orthodox or conventional practices."[50] The dissent written by Douglas disclosed the uncertainty and ambiguity created by even the limited judicial review process described in *Estep* and *Cox*.

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[47] Ibid.
[48] Ibid.
[49] Ibid., 455-57.
[50] Ibid., 455. Footnote 1.

Reviewing the same record, a majority of the justices concluded that the ruling of the draft board should be confirmed, while Douglas and Black voted to reverse it.

Like *Falbo* and *Estep*, the decision in *Cox* highlighted differences on the Court over the protection of conscience. That division on the Court arose from the different perspectives and reasons for the protection of conscience offered by Holmes and Brandeis in the post World War I cases. On the one hand, Justice Reed and the four Justices joining his majority opinion believed that state power trumped the due process concerns of conscientious objectors. For them, the military needs of the state on the verge of war outweighed the importance of protecting individual rights. Congress had identified a clear and present danger and had acted to address it. The majority exhibited no desire or willingness to question the methods or motivations of Congress under those circumstances. Their focus on maintaining the power and integrity of the state found support in the reasoning of Holmes in his famous dissents, where he argued that the ultimate purpose of free speech was to enhance the state's legitimacy and strength through the free exchange of ideas. When the expression of ideas imperiled the state, freedom of speech and conscience had to yield, in Holmes's view, to the protection of the nation. The majority opinion in *Cox* also drew from Justice Frankfurter's philosophy of judicial restraint by deferring to Congressional action on matters of national defense, even though such action impinged on such fundamental liberties as the freedom of conscience.[51]

The dissenting Justices, on the other hand, stressed their concern with protecting the basic privileges and immunities of conscientious objectors as citizens of the United

[51] Justice Frankfurter concurred separately, stating without elaboration that he approved of the result in *Cox*. Ibid. In light of his concurrence in *Estep*, Frankfurter likely objected to the majority's acceptance of even an extremely limited review of draft board decisions.

States. Like Justice Brandeis before them, they addressed the issue from the perspective of the individuals whose rights were abridged by congressional action. As the comments of Justice Douglas in *Cox* revealed, they worried that the unorthodox views of COs made them easy targets of discrimination. The dissenters acknowledged that the nation had faced clear and present dangers when Congress enacted the Selective Service Act. Nonetheless, as proponents of the doctrine of preferred freedoms, they felt obligated to scrutinize the actions of Congress, particularly where legislative action encroached on the freedom of conscience. In cases involving a preferred freedom such as the protection of conscience, the dissenters opposed the judicial restraint and deference to Congressional and administrative action espoused by Justice Frankfurter. *Cox* displayed the tension between the competing judicial philosophies of preferred freedoms and judicial restraint. The case illustrated the different opinions and results that arose from those different perspectives.

While the decision in *Cox* limited the Court's role in reviewing draft board rulings, it did not eliminate all judicial oversight of the conscription process. Instead, based on the holding in *Estep,* the Court had given itself the final say regarding claims over exemption from military service. That became apparent six years later when the Court decided *Dickenson v. United States* (1953). In *Dickenson*, the Court overruled the draft board's determination that the defendant, a Jehovah's Witness, did not meet the criteria for exemption as a minister.[52] According to Justice Tom Clark, who wrote the decision in *Dickenson*, the record included no evidence contradicting the defendant's claim that he worked fulltime as a minister and therefore qualified for the exemption. The

[52] *Dickenson v. United States*, 346 United States 389, 397 (1953).

draft board denied Dickenson's claim for a ministerial exemption because of his youth, the short period of time during which he had served as a minister, and because he also worked a few hours each week as a radio repairman to support himself. Clark asserted that the draft board's skepticism about Dickenson's claim emanated from speculation, not facts.[53] Overruling the draft board's denial of Dickenson's claim, Clark wrote that, "the courts may properly insist that there be some proof that is incompatible with the registrant's proof of exemption."[54] Justice Clark concluded that, "when the uncontroverted evidence supporting a registrant's claim places him *prima facie* within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice."[55]

The decision of the Court in *Dickenson* exhibited a new approach to the protection of conscience. Justice Clark based his opinion on limited, procedural grounds. He reiterated that the role of the Court in reviewing decisions by the draft board was, at least ostensibly, a limited one. The Court would not independently review the facts and form its own conclusion, said Clark, and he confirmed that the Court would intervene only if it found no evidentiary basis at all for the classification ruling made by the draft board.[56] In the decision rendered by the Court in *Dickenson*, Clark included none of the soaring rhetoric about why the protection of conscience mattered found in previous opinions and dissents authored by Justices Brandeis. Douglas, and Murphy. Clark did not refer to or rely on the doctrine of preferred freedoms or subject actions taken by Congress

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[53] Ibid., 396.
[54] Ibid.
[55] Ibid., 397.
[56] Ibid., 394.

to an enhanced level of scrutiny even if they threatened to impinge on freedoms guaranteed by the First Amendment. Instead, he crafted a narrow opinion focused on procedural issues that purported to respect the jurisdictional limits imposed on the courts by Congress in the Selective Service Act of 1948. But despite the restrained language and nod to judicial restraint, the result in *Dickenson* testified to the power and extent of the rule first enunciated in *Estep*—that the courts could invalidate decisions by draft boards when the record disclosed no factual support for the board's ruling. In *Dickenson*, the Court signaled its willingness to use that power to advance the protection of conscience. The Court might have deferred to the judgment of the draft board and respected the inferences it had drawn from the demeanor of Dickenson and from the circumstances of his case. Instead, the Court construed the record narrowly, giving Dickenson the benefit of the doubt and found no factual basis for the decision. The rule of *Estep*, as applied in *Dickenson*, meant that the Court had the final say over who did and who did not qualify for exemption from military service. That shift left the Court, not Congress or the draft boards, as the ultimate protector of conscience.

Three Justices, Robert H. Jackson, Harold Hitz Burton, and Sherman Minton, dissented in *Dickenson*. They objected to the Court overriding the judgment of the draft board. The Court, observed the dissenters, had adopted a rule that made it more difficult for the Selective Service apparatus to function. In their view, the Court's review of classification rulings forced the boards to spend more time documenting files and explaining their decisions in order to guard against judicial attack. That, noted the dissenters, distracted the boards from their primary duty of providing manpower for

defense of the nation.[57] Commenting on what they saw as a contradiction between the limited scope of review espoused by the Court in *Estep* and the bold action of the Court in *Dickenson*, the three dissenters wrote that:

> The problem inherent in *Estep* and raised by the majority opinion today is what is required of the board under such circumstances? It will not do for the Court as in *Estep* to say, on the one hand, that the board's action is not subject to "the customary scope of judicial review," and that "the courts are not to weigh the evidence," and then, on the other, to strike down a classification because no affirmative evidence supporting the board's conclusion appears in the record. Under today's decision, it is not sufficient that the board disbelieve the registrant. The board must find and record affirmative evidence that he has misrepresented his case -- evidence which is then put to the test of substantiality by the courts. In short, the board must build a record.[58]

For the dissenters, the Court exhibited too much concern in *Dickenson* for the civil liberties of conscientious objectors. The dissenters argued that the Court had undermined the intention of Congress that Selective Service boards, not the courts, determine the classification status of draftees.

In addition to establishing judicial review of decisions made by draft boards, the Supreme Court also expanded its role in protecting COs by requiring that appeals from draft board hearings meet certain minimal standards of due process. The changes the court imposed were not dramatic. In fact, the Court affirmed existing procedures and imposed no new requirements. But the Court's insistence that the Department of Justice and the Selective Service follow existing procedures and insure that applicants denied recognition as COs have a meaningful opportunity to address evidence against them constituted an important step forward in the protection of conscience.

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[57] Ibid., 399-401.
[58] Ibid., 399.

The main issue involved the right of an objector to access FBI records concerning his case. The Court initially did no more than confirm that an applicant was entitled only to a summary of the reports in his file, not to inspect the contents of the file. The Court insisted, however, that the summaries be accurate and provide the applicant with an opportunity to address evidence adverse to his claim. While not expanding the rights of COs to inspect information in FBI and draft board files, the Court's increasing concern with the fairness of hearings before the Department of Justice and local appeals boards marked an important step forward for the protection of conscience. As with the issue of judicial review, a dissenting opinion drove the Court's increased sensitivity to due process concerns. In this case, that dissent was written by Justice Frankfurter.

The cases involving conscientious objection that followed World War II revealed the complexity of Justice Frankfurter's perspective on conscientious objection. During World War I, Frankfurter used his position as a member of the War Department to increase the scope of government protection for COs during World War I.[59] Frankfurter believed that acknowledging claims of conscience increased the legitimacy of the government actions concerning military conscription and paved the way for establishing a powerful centralized state.[60] Though he considered it the job of Congress to determine the extent to which the nation should accommodate claims of conscience, he also maintained that acts of Congress should be interpreted to grant more, rather than less, protection to conscientious objectors.

Frankfurter's dissent in *United States v. Nugent* (1953) showed how he maintained this perspective on the connection between state power and the protection of

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[59] See Chapter 2, pages 59-63.

[60] Kessler, "The Administrative Origins of Modern Civil Liberties Law," 1143.

conscience as a member of the Supreme Court.[61] Like most of the cases on conscientious objection reviewed by the Supreme Court, *Nugent* involved procedural questions about the appeal process an applicant for CO status under the Selective Service Act 1948 had to follow if his local draft board denied his claim and deemed him available for military service. If the draft board rejected his application to be designated as a conscientious objector, the applicant could file a claim with the appeals board. That agency then referred the matter to the Department of Justice, and the FBI would conduct an investigation of the applicant's claim. After interviewing the applicant and people who knew him, the FBI issued a report to the Department of Justice. The Department of Justice provided the applicant and his counsel with a summary of the FBI report but did not allow him to inspect it. The Department of Justice then conducted a hearing. The applicant and his counsel attended the hearing and could respond to the contents of the FBI report as it had been summarized for them by the Department of Justice. The Department of Justice then submitted a recommendation to the appeals board, suggesting either that the applicant's claim be allowed or rejected.[62] Nugent challenged this procedure, contending that it was unconstitutional. He argued that the Department of Justice infringed his due process rights and his right to confront adverse witnesses by denying him access to the FBI report. The Supreme Court denied Nugent's challenge to the review procedures of the Department of Justice, rejecting his assertion that he was entitled to review the FBI report concerning his case.

Chief Justice Fred Vinson wrote the majority opinion in *Nugent*. Recognizing, as the Court had done in *Falbo*, that questions concerning the procedural aspects of appeals

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[61] *United States v. Nugent*. 346 United States 1 (1953).
[62] Ibid., 2-6.

from draft board rulings involved balancing individual liberty against the need to raise an army, the Court held that by denying Nugent access to the FBI files and the names of witnesses the Department of Justice did not violate his constitutional rights. The majority of the Justices accepted the balance between the protection of conscience and military preparedness struck by Congress in the Selective Service Act of 1948. Vinson commented on that balance, noting that, "it is always difficult to devise procedures which will be adequate to do justice in cases where the sincerity of another's religious convictions is the ultimate factual issue. It is especially difficult when these procedures must be geared to meet the imperative needs of mobilization and national vigilance -- when there is no time for "litigious interruptions. [Citing *Falbo*.] Under the circumstances presented, we cannot hold that the statute, as we construe it, violates the Constitution."[63]

Dissenting in *Nugent*, Justice Frankfurter disagreed with the majority's interpretation of the Selective Service Act. He argued that the Court should construe the statute as providing both the appeals board and the applicant full access to the Department of Justice file. Frankfurter noted the country's long-standing respect for claims of conscience. He wrote that, "considering the traditionally high respect that dissent, and particularly religious dissent, has enjoyed in our view of a free society, this Court ought not to reject a construction of congressional language which assures justice in cases where the sincerity of another's religious conviction is at stake, and where prison may be the alternative to an abandonment of conscience. The enemy is not yet so near the gate that we should allow respect for traditions of fairness, which has heretofore

[63] Ibid., 10.

prevailed in this country, to be overborne by military exigencies."[64] In Frankfurter's view, the military dangers confronting the nation as a result of the Cold War did not merit curtailing the due process rights of applicants by denying them access to the FBI files. Though not a proponent of the clear and present danger test, Frankfurter invoked that standard in *Nugent*, arguing that the need to protect the state by bolstering the armed forces did not warrant the administrative restriction on review of the FBI reports and the concomitant infringement of civil liberties. As he had done during World War I, Frankfurter argued that commitment to the protection of conscience strengthened the nation, observing that, "in a country with our moral and material strength, the maintenance of fair procedures cannot handicap our security. Every adherence to our moral professions reinforces our strength and therefore our security."[65] Like the majority, Frankfurter's paramount concern was protection of the nation. Unlike the majority, however, Frankfurter believed that goal was best achieved by bolstering the administrative protection of conscience, rather than by restricting it. He believed that goal could be achieved in *Nugent* without undermining Congressional intent. In *Nugent*, Frankfurter presented an argument for the protection of conscience similar to the one developed by Holmes in *Abrams*—that tolerance of dissenting creeds and ideas strengthened the nation and increased its security.[66]

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[64] Ibid., 12-13.

[65] Ibid., 13.

[66] Justice Douglas and Justice Black joined the dissenting opinion of Justice Frankfurter. Justice Douglas also wrote a separate opinion in which he argued for identification of the witnesses named in the FBI report. Douglas contended that, "without the identity of the informer, the person investigated or accused stands helpless. The prejudices, the credibility, the passions, the perjury of the informer are never known. If they were exposed, the whole charge might wither under the cross-examination." Ibid., 14.

As Justice Murphy's dissent in *Falbo* had done, Frankfurter's dissent in *Nugent* pushed the Court in new directions, as the review process of the Selective Service Administration became the subject of greater scrutiny. In *Simmons v. United States* (1955), the Supreme Court reversed the conviction of a conscientious objector for failing to submit to induction. The Court held that the Department of Justice had violated the Selective Service Act of 1948 and the defendant's constitutional rights by failing to provide him with a fair summary of the FBI report.[67] Justice Tom C. Clark distinguished *Simmons* from the ruling in *Nugent*. The holding in *Nugent* that the Department of Justice need not give a copy of the FBI report to the applicant was premised, wrote Clark, on the assumption that the Department of Justice would at least provide the applicant with a fair summary of the FBI's conclusions. Clark held that Congress mandated that the Department of Justice provide such a report to the applicant. The Court also held that an applicant must be informed of the FBI's conclusions and be given a chance to respond at the Department of Justice hearing in order to satisfy the minimum requirements of due process.[68] The Supreme Court reached a similar result in *Gonzales v. United States* (1955), in which the Court held that the failure of the appeals board to provide the defendant with a copy of the recommendation issued by the Department of Justice violated his right to due process.[69] Justice Clark again wrote the opinion of the Court. The reasoning of *Nugent,* said Clark, dictated that the appeals board mail a copy of the Department of Justice recommendation to the applicant and allow him to respond.[70] By holding in *Nugent* that the Department of Justice could deny conscientious objectors

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[67] *Simmons v. United States*, 348 United States 397, 405 (1955).
[68] Ibid.
[69] *Gonzales v. United States*, 348 United States 407, 412 (1955).
[70] Ibid., 417.

access to FBI files, the Court had accepted limitations on the procedural rights of COs. *Simmons* and *Gonzales*, on the other hand, made clear that the Court refused to condone any action that went further and effectively eliminated the right of objectors to learn of and respond to evidence against them.

As in *Dickenson*, the decisions in *Simmons* and *Gonzales* were narrow in scope and focused on procedural details rather than on ideological debates over the doctrine of preferred freedoms versus the practice of judicial restraint. But, as in *Dickenson*, the Court also made it clear in *Simmons* and *Gonzales* that it had the final say on issues involving claims of conscience, including whether draft board and Justice Department hearings complied with the requirements of due process. In those post World War II cases involving the procedural due process rights of conscientious objectors, the Supreme Court continued its quest to reconcile the desire of Congress that a large military force be assembled promptly and efficiently with the protection of personal liberty and human dignity. Noting the fine line the Court walked between those competing interests, Justice Clark observed in *Simmons* that:

> We are now dealing with constitutional limitations. We are endeavoring to apply a procedure, set forth by Congress, in accordance with the statutory plan and the concepts of basic fairness which underlie all our legislation. We have held that, to meet its duty under § 6(j), the Department must furnish the registrant with a fair resume of the FBI report. It is clear in the circumstances of this case that it has failed to do so, and that petitioner has thereby been deprived of an opportunity to answer the charges against him. This is not an incidental infringement of technical rights. Petitioner has been deprived of the fair hearing required by the Act, a fundamental safeguard, and he need not specify the precise manner in which he would have used this right -- and how such use would have aided his cause -- in order to complain of the deprivation. [71]

[71] *Simmons v. United States,* 40.

Simmons, and *Gonzales* found proponents of the two different rationales for the protection of conscience together on the same side. The cases turned on an odd alliance between Frankfurter—the leading proponent of judicial restraint—and Douglas and Black—advocates of the Preferred Freedoms doctrine. Neither side won support from the other for its judicial philosophy. Black and Douglas did not abandon their belief that the courts should carefully scrutinize congressional and administrative actions infringing basic constitutional liberties such as the right of conscience, while Frankfurter continued to maintain that the courts should uphold all congressional and administrative decisions except those lacking any reasonable justification. Instead, the decisions of the Supreme Court in *Simmons*, and *Gonzales* emerged from Black, Douglas, and Frankfurter focusing and agreeing on procedural questions. Frankfurter opened the door for this comprise when he concluded in his dissent in *Nugent* that Congress intended that draft boards and the Department of Justice follow the procedural safeguards outlined by the Court in *Simmons* and *Gonzales*. The evolution of the law concerning conscientious objectors evident in *Nugent*, *Simmons*, and *Gonzales* demonstrated how members of the Court increased the scope of individual rights such as the freedom of conscience by agreeing on the extension of procedural safeguards, even though significant differences existed among the justices over the ideological foundations of their decisions.

The cases on conscientious objection decided by the Supreme Court in the aftermath of World War II established three important things: First, that administrative hearings within the Department of Justice and the Selective Service system had to comply with minimal standards of due process; second, that draft board decisions were subject to judicial review; and third, that decisions by the draft boards must be based on

evidence and could not be arbitrary or capricious. In those cases, the Court interposed itself as the ultimate protector of conscience and refused to relinquish that role to Congress or to the Selective Service Administration. As these cases indicate, the Court did so primarily by imposing procedural safeguards on which members of the different factions of the Court could agree. The debate over the broader substantive issues commenced by Holmes and Brandeis in the post World War I cases remained unresolved. Procedural questions that arose in the post World War II cases provided a means for the Court to extend the protection of conscience without confronting bigger, philosophical issues. The post World War II cases did not resolve the overarching debate over where and why the Court should draw the line between the protection of conscience and government power.

The post World War II cases did, however, pave the way for the Supreme Court to address broader, more fundamental issues concerning COs and the protection of conscience. In *Sicurella v. United States* (1955), the Court became involved in defining who qualified as a conscientious objector.[72] The draft board had refused to classify Sicurella, a Jehovah's Witness, as a CO because of his express willingness to fight in theocratic wars. When Sicurella appealed, the Department of Justice recommended that the appeals board deny his claim, reasoning that since Sicurella did not oppose all forms of warfare he did not meet the statutory definition of a conscientious objector provided by Congress.[73] The Supreme Court overruled the decision of the draft board and directed

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[72] *Sicurella v. United States*. 348 United States 385.

[73] The 1948 Selective Service Act provided that: ""Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

that Sicurella be recognized as a conscientious objector.[74] The Court concluded that Congress had not intended to deny exemptions from military service to objectors willingly to conduct only theocratic battle. Writing for the Court, Justice Clark observed "that Congress had in mind real shooting wars when it referred to participation in war in any form -- actual military conflicts between nations of the earth in our time -- wars with bombs and bullets, tanks, planes, and rockets. We believe the reasoning of the Government in denying petitioner's claim is so far removed from any possible congressional intent that it is erroneous as a matter of law."[75] With its decision in *Sicurella*, the Court had parlayed its limited power to review draft board decisions established in *Estep* into the authority to dictate who should and who should not be designated as a conscientious objector. The *Sicurellla* decision served as additional evidence that the Supreme Court had assumed the role of being the primary protector of conscience.

The *Sicurella* case was one of the disputes over conscription generated by the Cold War and the conflict in Korea. Ten years later, the war in Vietnam brought a new wave of cases involving COs before the Court. The Court picked up where it left off and once again determined who qualified as a conscientious objector. In *Seeger v. United States* (1965), the Court held that secular objectors—individuals opposed to participation solely on moral rather on religious grounds—must be recognized as conscientious objectors.[76] Seeger represented a major victory for conscientious objectors. Justice Clark again wrote the majority opinion, crafting another narrow decision that purported to do

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[74] *Sicurella v. United States,* 397.
[75] Ibid., 392.
[76] Ibid., 391.

no more than interpret the conscription statute. Yet, given the topic, the language Clark employed could not help but echo the same concern with the sanctity of personal beliefs and dignity Brandeis had addressed in the World War I era cases. Clark wrote that as to secular objectors the controlling question was "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is 'in a relation to a Supreme Being' and the other is not."[77]

From the perspective of conscientious objectors, however, the most significant and encouraging case decided by the United States Supreme Court during the post World War II era was *Girouard v. United States* (1946).[78] In *Girouard*, the Court drew from the intellectual arguments of both Holmes and Brandeis and issued a strong statement in support of conscience by contending that individuals who obeyed their conscience and refused to serve in the military were nonetheless loyal, valuable citizens. The next chapter considers the history of *Girouard* and its impact.

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[77] *United States v. Seeger*, 187-88.
[78] Ibid., 166.

Chapter Four

A "Most Heart Searching Question": The Admission of Conscientious Objectors as Citizens of the United States

Though most of its decisions regarding conscientious objectors during the post World War II era addressed procedural issues, the Supreme Court also spoke on one of the most fundamental and hotly contested questions debated by the opponents and supporters of COs: Whether individuals who refused to bear arms in defense of the nation qualified for U.S. citizenship. The Court had first entered the debate over COs and citizenship twenty years earlier. In a series of cases stretching back to the 1920s, the Court initially held that applicants for citizenship must confirm their willingness to take up arms in defense of the nation, regardless of their age, sex, or professional qualifications.[1] Those decisions were, however, far from unanimous. Like *Abrams* and other decisions of the Supreme Court involving opposition to the draft and the question of free speech, the citizenship cases generated passionate dissents in which some the Court's most eloquent and respected jurists advocated the protection of conscience and debated where to strike the balance between individual liberty and defense of the nation. As in post World War I cases involving the prosecution of individuals opposed to the draft and in the post World War II cases concerning the procedural rules governing the identification and classification of conscientious objectors, the views of the justices who dissented in the first citizenship cases to reach the Court eventually prevailed. After first agreeing that applicants expressing reservations about their willingness to bear arms on behalf of the nation were properly denied citizenship, the Court in *United States v.*

[1] *United States v. Schwimmer*, 279 United States 644 (1929). *United States v. Macintosh*, 283 United States 605 (1931). *United States v. Bland*, 283 United States 636 (1931).

Girouard (1946) reversed its earlier rulings and held that conscientious objection to military service did not provide an adequate basis for excluding individuals from citizenship.[2] In *Girouard*, the Court observed that individuals who put duty to conscience above duty to country were nonetheless valuable, loyal citizens. As conscientious objectors and members of the American Legion and VFW battled over whether even native-born COs were entitled to enjoy the full benefits of U.S. citizenship, the Court said that they were. By changing course in *Girouard*, the Court moved to protect the rights of COs and demonstrated its increasing commitment to protecting some forms of conscience.

This chapter explores the decisions of the United States Supreme Court addressing the admission of conscientious objectors as U.S. citizens and examines how the Court's position on this issue evolved. It also considers how those cases related to the debate over the protection of conscience initiated by Justices Holmes and Brandeis.

The first Supreme Court cases focusing on the qualifications of conscientious objectors for U.S. citizenship reflected some of the same distrust and fear of COs and their beliefs that the American Legion and VFW would express following World War II. In *United States v. Schwimmer* (1929) the Court ruled that a Hungarian woman who described herself as a committed pacifist did not qualify for citizenship because of her beliefs.[3] In the Court's decision, Justice Pierce Butler cited the same connection between citizenship and military service that became the cornerstone of Legion and VFW attacks against conscientious objectors twenty years later.[4] Contending that all citizens shared an

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[2] *Girouard v. United States*. 328 United States 61 (1946).

[3] *United States v. Schwimmer*, 653-54.

[4] Ibid., 651.

obligation to defend the nation by force of arms, Butler wrote that: "The common defense was one of the purposes for which the people ordained and established the Constitution."[5] The beliefs of conscientious objectors threatened the nation's ability to defend itself. Butler observed that:

> Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the government. And their opinions and beliefs as well as their behavior indicating a disposition to hinder in the performance of that duty are subjects of inquiry under the statutory provisions governing naturalization and are of vital importance, for if all or a large number of citizens oppose such defense the 'good order and happiness' of the United States cannot long endure. And it is evident that the views of applicants for naturalization in respect of such matters may not be disregarded. The influence of conscientious objectors against the use of military force in defense of the principles of our government is apt to be more detrimental than their mere refusal to bear arms.[6]

In Butler's opinion, the government properly denied Schwimmer's application for citizenship because the views of individuals like her were responsible for the wave of opposition to conscription the nation experienced during World War I. Again expressing his concern about what he considered the dangerous ideas of conscientious objectors, Butler wrote that during World War I a number of citizens had been "unwilling to bear arms in that crisis and [had] refused to obey the laws of the United States and the lawful commands of its officers and encouraged such disobedience in others. It is obvious that the acts of such offenders evidence a want of that attachment to the principles of the Constitution of which the applicant is required to give affirmative evidence by the Naturalization Act."[7] Because of her unwillingness to fight on the nation's behalf, wrote Butler, Schwimmer failed to qualify for citizenship. Butler's opinion in *Schwimmer*

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[5] Ibid., 650.

[6] Ibid., 650-51.

[7] Ibid., 653.

followed the same logic that had supported the Court's rulings in *Schenk*, *Frohwerk*, *Debs*, and *Abrams*.[8] From Butler's perspective, Schwimmer's views on war and participation in the military created the same clear and present danger to the nation and its survival as had the incendiary pamphlets and speeches of the defendants prosecuted under the Espionage and Sedition Acts. Butler maintained that excluding individuals like Schwimmer from U.S. citizenship was a valid means of protecting the nation from the harm their ideas might generate.[9]

By the time the Supreme Court issued its decision in *Schwimmer,* Justice Holmes, the architect of the clear and present danger standard, together with Justice Brandeis, was employing that doctrine as a means of promoting free speech rather than as a justification for punishing it. Consequently, Butler's opinion in *Schwimmer* engendered a strong dissent from Holmes, who saw no clear and present danger in admitting Schwimmer as a citizen.[10] Holmes objections to the majority's decision in *Schwimmer* were in essence the same points he had raised in his *Abrams* dissent ten years earlier. A champion of free speech, Holmes believed that opposing ideas should be freely expressed so that they could compete with each other.[11] Society ultimately benefited from such an exchange, said Holmes, as newer, better philosophies and practices identified through that process replaced obsolete ones. As he had done in *Abrams*, Holmes argued that silencing

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8 *Schenck v. United States*; *Frohwerk v. United States*; *Debs v. United States*; *Abrams v. United States.* The decisions of the Supreme Court in these important cases are discussed in Chapter 2.

9 If they had not perceived her pacifist ideology as a legitimate threat to the nation, Butler and his colleagues might have considered Schwimmer's unwillingness to render military service on behalf of the United States a moot point. Schwimmer was a highly unlikely candidate for the draft. Women had never been subject to military conscription in the United States, and at the time she applied for American citizenship, Schwimmer was fifty-two years old—well beyond the age of the men who had been subject to the draft during World War I. The Court also ignored Schwimmer's admiration for and commitment to the democratic principles of the United States. *United States v. Schwimmer*, 647-48.

10 Justice Brandeis joined Holmes's dissent. *United States v. Schwimmer*, 655.

11 Chafee, *Free Speech in the United States*, 136.

unpopular ideas hurt the nation by limiting that debate. Holmes objected to the Court's ruling in *Schwimmer,* because he believed that the government was excluding Schwimmer from citizenship because most Americans disagreed with her pacifist philosophy. Refusing to admit Schwimmer because of her pacifist philosophy was, in Holmes's view, counterproductive and a violation of the nation's constitutional principles. He wrote that, "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. I think that we should adhere to that principle with regard to admission into, as well as to life within this country."[12] In Holmes view, conscientious objectors added to the exchange of ideas that strengthened the country. In his dissent in *Schwimmer*, Holmes suggested that objectors and pacifists were valuable citizens meriting the benefits and protections of the nation's laws because of their dissenting ideology, not in spite of it. Holmes's dissent in Schwimmer marked another important entry in his work arguing for the protection of conscience.

The Supreme Court's initial pronouncement on the admission of pacifists as citizens thus, in many respects, mirrored the Court's earlier decisions concerning the suppression of speech under the Espionage and Sedition Acts during World War I. The majority had determined that the opposition to the war and the draft espoused by the defendants in *Schenck, Frohwerk, Debs*, and *Abrams* justified their prosecution. *Schwimmer* followed the same pattern, with the majority holding that the danger posed by Schwimmer's ideas warranted denial of her application for citizenship. But in *Abrams*

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[12] *United States v. Schwimmer*, 654-55. Justice Louis D. Brandeis joined Holmes' dissent.

and *Schwimmer*, Holmes and Brandeis broke with the majority and emphasized how protecting claims of conscience benefitted the nation.

The debate among members of the Court over the dangers and benefits of respecting claims of conscience arose again in *United States v. Macintosh* (1931). When Douglas Macintosh, a preeminent theologian and professor at Yale Divinity School, applied for U.S. citizenship, the petition he submitted to the federal district court required that he answer the following question: "If necessary, are you willing to take up arms in defense of this country?" Macintosh, who had served as an ambulance driver during World War I answered, "Yes; but I should want to be free to judge of the necessity."[13] He attached a memorandum to his petition in which he expanded on his answer:

> I am willing to do what I judge to be in the best interests of my country, but only in so far as I can believe that this is not going to be against the best interests of humanity in the long run. I do not undertake to support 'my country, right or wrong' in any dispute which may arise, and I am not willing to promise beforehand, and without knowing the cause for which my country may go to war, either that I will or that I will not take up arms in defense of this country, 'however necessary' the war may seem to be to the Government of the day. It is only in a sense consistent with these statements that I am willing to promise to "support and defend" the Government of the United States 'against all enemies, foreign and domestic.[14]

Deeming Macintosh unwilling to assume all obligations of citizenship because of his equivocal answer about bearing arms, the district court denied his application.

The Supreme Court affirmed the district court's decision, citing the Court's ruling in *United States v. Schwimmer*. Writing for the Majority, Justice George Sutherland observed that, "we are a nation with the duty to survive; a nation whose Constitution contemplates war as well as peace; whose government must go forward upon the

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[13] *United States v. Macintosh*, 617-18.

[14] Ibid.

assumption, and safely can proceed upon no other, that unqualified allegiance to the nation and submission and obedience to the laws of the land, as well those made for war as those made for peace, are not inconsistent with the will of God."[15] Macintosh, said Sutherland, "speaks of putting his allegiance to the will of God above his allegiance to the government, it is evident, in the light of his entire statement, that he means to make his own interpretation of the will of God the decisive test which shall conclude the government and stay its hand."[16] Because Macintosh insisted on reserving the right to place his conscience above obligations to his country, the Court ruled that he did not qualify for citizenship.

Four justices, Brandeis, Holmes, Hughes, and Stone, dissented in *Macintosh*. Chief Justice Charles Evans Hughes wrote for them. Hughes argued that it was unrealistic to require applicants to swear that they will put obligations to their country before obligations to their conscience. Such a requirement would trouble many Americans, observed Hughes. He wrote that, "while it has always been recognized that the supreme power of government may be exerted and disobedience to its commands may be punished, we know that with many of our worthy citizens it would be a most heart-searching question if they were asked whether they would promise to obey a law believed to be in conflict with religious duty. Many of their most honored exemplars in the past have been willing to suffer imprisonment or even death rather than to make such a promise."[17] Citizens of the United States, argued Hughes, shared a legacy of

[15] Ibid., 625.
[16] Ibid.
[17] Ibid. 631.

accommodating claims of conscience, and they had done so, he noted, with minimal impact on law and order. He argued that:

> There is abundant room for enforcing the requisite authority of law as it is enacted and requires obedience, and for maintaining the conception of the supremacy of law as essential to orderly government, without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power. The attempt to exact such a promise, and thus to bind one's conscience by the taking of oaths or the submission to tests, has been the cause of many deplorable conflicts. The Congress has sought to avoid such conflicts in this country by respecting our happy tradition. In no sphere of legislation has the intention to prevent such clashes been more conspicuous than in relation to the bearing of arms.[18]

As Justice Brandeis had done in *Gilbert v. Minnesota*, Hughes in his dissent in *Macintosh* emphasized the value to the individual of recognizing claims of conscience. Forcing individuals to subordinate their beliefs to the needs of the state generated, in Hughes view, unnecessary conflict and should be avoided if possible. He portrayed the right to follow one's own beliefs and place those beliefs above all other obligations as one of American's most cherished rights. Hughes also pointed out the various ways conscientious objectors served the nation in noncombatant roles during wartime. He wrote that "we have but to consider the defense given to our country in the late war, both in industry and in the field, by workers of all sorts, by engineers, nurses, doctors and chaplains, to realize that there is opportunity even at such a time for essential service in the activities of defense which do not require the overriding of such religious scruples."[19] In his dissent in *Macintosh*, Hughes argued that individuals who placed duty to conscience above duty to country were nonetheless valuable, loyal citizens.

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[18] Ibid.

[19] Ibid., 631.

The Court's decision in *Macintosh* and the dissent authored by Hughes highlighted the chasm between those justices who maintained that Congress had validly conditioned admission to citizenship on an individual's willingness to render military service—even if serving in the military required that he disregard his conscience—and the dissenters who saw the realm of conscience as insulated from intrusion by the government. Hughes's dissent in *Macintosh* rested on the argument Brandeis had developed in his dissent to the Court's ruling in *Gilbert v. Minnesota*. Arguing for broad judicial recognition and protection of conscience, Brandeis had maintained in *Gilbert* that the Fourteenth Amendment prohibited the government from prosecuting certain personal beliefs, such as opposition to war or conscription. Hughes went one step further. Not only was it improper for the government to interfere with claims of conscience, it was also impractical to do so. When it came to certain crucial issues, such as if one would fight and kill, some individuals would invariably place duty to conscience above duty to country if forced to make such a "heart-searching decision."[20] Hughes expanded the discussion by contending that those individuals who insisted on following their consciences remained loyal citizens.

In addition to his rhetoric about the importance of not forcing individuals to choose country over conscience, the dissent Justice Hughes wrote in *Macintosh* made another important contribution to the discussion over granting citizenship to pacifists and conscientious objectors. Hughes maintained that the issue presented a technical question of statutory interpretation in addition to philosophical ones about the protection of conscience. He asserted that the key issue was whether or not Congress had mandated

[20] Ibid.

that all applicants for citizenship express a willingness to bear arms. Hughes pointed out that the statute mandated only that the applicant pledge 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."[21] Congress had not included, said Hughes, an express requirement that the applicant agree to serve in the military.[22] Given the nation's long history of accommodating claims of conscience, Hughes argued that the Court should not interpret the statute as including such a requirement.[23] The approach advocated by Hughes in his dissent in *Macintosh* anticipated the course the Court would later follow in the post World War II cases addressing the procedural rights and protections of conscientious objectors. Instead of entering the debate over who should and who should not be classified as a conscientious objector, the Court in those later cases read the conscription statute as requiring that a minimum level of due process compliance, including judicial oversight applied to all draft board hearings. By focusing on technical requirements governing administrative actions, the justices eventually extended the protection of COs without resolving difficult substantive questions, such as whether individuals objecting solely on secular grounds should be excused from military service. Hughes's dissent in *Macintosh*, in which he contended that the immigration law did not exclude COs from citizenship, eventually produced a similar result in the citizenship cases, as it provided a technical argument supporting the admission of pacifists and conscientious objectors that did not require that the Court also resolve the more difficult philosophical questions surrounding the issue.

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[21] Ibid., 630.
[22] Ibid., 630-31.
[23] Ibid.

The argument Hughes developed in his dissent to the Court's ruling in *Macintosh* prevailed when the Supreme Court revisited the issue of citizenship for conscientious objectors following the end of World War II. In *Girouard v. United States* (1946). The Court reversed its previous decisions in *Schwimmer, Macintosh,* and *Bland*, this time holding that conscientious objectors qualified for U.S. citizenship.[24] Girouard was a Seventh-day Adventist and a conscientious objector. Writing for the Court, Justice William Douglas followed the path Chief Justice Hughes had laid out in his dissent in *Macintosh*. Douglas began by finding that the oath taken by applicants for citizenship included no language expressly requiring the individual to bear arms in the nation's defense.[25] After disposing of that technical point, Douglas proceeded to address some of the concern and suspicion surrounding conscientious objectors and their role as citizens. Referring to Girouard's willingness to serve in noncombatant roles, Douglas wrote that, "The bearing of arms, important as it is, is not the only way in which our institutions may be supported and defended, even in times of great peril. Total war in its modern form dramatizes as never before the great cooperative effort necessary for victory."[26] Douglas continued: "The struggle for religious liberty has, through the centuries, been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that, in the domain of

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[24] The *Bland* decision was a short one reiterating the Court's ruling in *Macintosh*. Bland had insisted on modifying her citizenship oath to clarify that she would fight on behalf of the nation only if her Christian beliefs permitted her to do so. Writing for the Court, Justice Sullivan took only a few sentences to deny Bland's petition for citizenship, citing as precedent the Court's decision in *Macintosh*. Chief Justice Hughes, who was joined by Brandeis; Holmes; and Stone, dissented. Bolstering his argument that pacifists and COs often provided valuable support to the nation despite their refusal to bear arms, Hughes pointed out that Bland had cared for wounded American soldiers while serving in France as a nurse during World War I. *United States v. Bland*. 283 United States 636-37.

[25] *Girouard v. United States*, 64.

[26] Ibid.

conscience, there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle."[27]

With those words, the *Girouard* opinion removed the bar to citizenship imposed on alien objectors and pacifists. Perhaps even more important, the Court recognized that individuals could place allegiance to conscience above duty to their country and still be loyal citizens. Douglas recognized the contribution of many objectors to the nation's welfare and thereby legitimized their claims to citizenship. His logic extended beyond alien objectors and pacifists applying for citizenship to encompass American COs treated as second-class citizens. Douglas' opinion provided a basis for conscientious objectors to claim all the benefits and protections of U.S citizenship.[28]

Conscientious objectors and their supporters rejoiced. *The Advent Review and Sabbath Herald*, wrote: "We can thank God anew that those of us who live in America are protected by the provisions of a written Constitution, and that its guarantees are sacredly guarded by men on our highest tribunal who are anxious apparently to recognize that one's conscientious convictions and devotion to God, while they may prevent him from participating in some activities of the Government, do not in any degree indicate disloyalty or unwillingness to serve."[29]

Opponents of conscientious objectors felt differently. The *Girouard* decision angered the Legion and the VFW by severing the connection between citizenship and

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[27] Ibid., 68.

[28] Justice Stone dissented from the Court's ruling in *Girouard*. Stone felt that Congress when reenacting the immigration laws had considered and rejected proposals to allow pacifists and conscientious objectors to become citizens. Justices Frankfurter and Reed also dissented on the same grounds. Ibid., 72-73.

[29] Heber H. Votaw, "Supreme Court Decides Noncombatant Adventists May Become Citizens," *The Advent Review and Sabbath Herald,* May 16, 1946, 7.

military service that those organizations held dear. The Legion, for example, had lobbied against legislation to admit Macintosh as a citizen that was introduced in Congress after the Supreme Court ruled against him.[30] The veterans' organizations, however, were not the only ones bothered by the Court's ruling. Reflecting anxiety about the possibility that another war might soon follow the last one, the American Bar Association worried that the Court might have undermined the ability of Congress to defend the nation. The Court, according to the ABA, had raised doubts about a premise of modern society—that government can force all citizens to take up arms to defend the nation. The ABA questioned the sincerity and patriotism of objectors and echoed traditional stereotypes about them. The ABA quoted a source in the Selective Service Administration who said of COs that, "There was something soft, effeminate, or furtive about many of them. They were frequently referred to by others as 'yellow'." The ABA promoted the same link between citizenship and military service as did the Legion and VFW. "An alien who asks the favor of citizenship and at the same time demands that he be exempt from the kind of service that was necessary to establish our form of government and may at any time be necessary to maintain it, and who shows a want of respect for such an obligation of citizenship, is hardly worthy of our regard."[31] Critics of the *Girouard* decision introduced legislation to reverse the Court's ruling by amending the Naturalization Law.[32] The bill failed, and the Court's decision in favor of conscientious objectors stood.

Girouard signified an important evolution in the Court's view of conscientious objectors. In *Girouard*, the Court abandoned its initial suspicion of COs and their

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[30] Baker, *The American Legion and American Foreign Policy*, 67.

[31] "American Citizenship: Can Applicants Qualify Their Allegiance?," *American Bar Association Journal* 33 (1947): 95-98.

[32] "On the Religious Liberty Front," *The Advent Review and Sabbath Herald,* February 5, 1948, 9.

motives. The views of Holmes in support of ideas and their expression triumphed in *Girouard*, as Douglas's opinion asserted that conscientious objectors served the nation despite their pacifist ideals. The case was also a victory for the views of Brandeis, in that it demonstrated the Court's increasing recognition of the important role conscience played in the lives of American citizens. The tolerance for claims of conscience expressed by the Court in *Girouard* gave Gara and his supporters reason for optimism that his conviction would be reversed on appeal, but those hopes were dashed by the cold reception Gara's case received in the United States District Court of Appeals for the Sixth Circuit and by a deadlock among the Justices on the Supreme Court.

Chapter Five

The Gara Case and Freedom of Conscience

The Gara case arose amidst the legal and social turmoil concerning conscientious objectors and their status as American citizens that intensified during World War II and continued after its end. Fear that the ideas espoused by pacifists and COs undermined the nation's security intensified, as the United States soon found itself embroiled in the Cold War and then the conflict in Korea. Objectors were not without supporters, as the reaction to the firings in Virginia and the public support for releasing COs from jail demonstrated. Congress and state governments had not adopted the more draconian recommendations of the Legion and the VFW; they did not ban COs from public employment or from receiving public assistance. Nonetheless, conscientious objectors remained a small, marginalized group. For adhering to their beliefs, some lost jobs and others their freedom. The nation remained skeptical of their loyalty, as the Cold War expanded in scope and the country searched for enemies at home as well as abroad.

The Gara case posed a new danger to the rights of conscientious objectors and to all Americans concerned about protection of belief and expression—the threat that the government could prosecute conscientious objectors for encouraging each other to adhere to their principles. Rickert had decided not to register for the draft and had even traveled to his local draft board and informed the officials there of his decision before he met Gara for the first time. Rickert had already ignored the statutory mandate that he register by a specific date before Gara, in the presence of the federal officers who came to arrest Rickert, advised Rickert to stand by his principles and not allow the officers to coerce

him into registering. If the government could prosecute Gara for telling Rickert not to abandon his beliefs, what remained of the First Amendment's protection of conscience? Conscientious objectors viewed the prosecution of Gara as a new attack on their most important and fundamental civil liberties—their rights of speech and conscience.

Though the district court had convicted Gara and sentenced him to eighteen months in prison for aiding and abetting violation of the conscription statute, Gara and his supporters had reason to hope that his conviction would be overturned on appeal. The Supreme Court had expressed strong support for the protection of the rights of conscientious objectors in the *Girouard* decision. In addition to the Supreme Court's ruling in *Girouard,* other judicial trends also gave Gara and his supporters reasons for optimism.

Gara and his lawyers were encouraged by the increasing vigor of the law governing the protection of speech under the First Amendment. The rigorous application of the clear and present danger rule espoused by Brandeis and Holmes eventually had become the majority rule of the Court.[1] While Gara waited for his appeal to be heard, the Supreme Court decided *Terminiello v. Chicago* (1949).[2] Terminiello, a defrocked Catholic priest, had delivered a controversial speech on behalf of The Christian Veterans of America. During his speech, Terminiello verbally attacked political leaders and racial minorities. His remarks generated a number of skirmishes in the large crowd assembled outside the hall where he spoke. Terminiello's inflammatory rhetoric led to his arrest and prosecution for disorderly conduct. At his trial, the court instructed the jury that speech breaches the peace and thereby violates the law "if it stirs the public to anger, invites

[1] The evolution of the clear and present danger rule and how Holmes and Brandeis defined and applied that doctrine are discussed in Chapter Two.

[2] *Terminiello v. Chicago,* 337 United States 1 (1949).

dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm."[3] Satisfied that Terminiello's speech met that standard, the jury found him guilty. The Supreme Court reversed the conviction because of the jury instructions. Justice William O. Douglas wrote the opinion for the Court. In it, he explained that the judge's instruction improperly allowed the jury to convict Terminiello for merely creating a disturbance that fell short of a clear and present danger to public safety. Douglas wrote that, "speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, [citations omitted] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[4]

The jury instructions in the Gara trial suffered from the same infirmity as the instructions in *Terminiello*. As happened in *Terminiello*, the trial judge in the Gara case misinterpreted the law and failed to apply the clear and present danger test. During Gara's trial, the judge told the jury that "the real question is whether the words used by Gara were knowingly used in such circumstances and were of such a nature as that they would have a tendency to cause a refusal of duty as required by the [conscription] act."[5] The courts had frequently applied this "bad tendency" test before it was overruled and replaced by Holmes' formulation of the clear and present danger standard. Legal

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[3] Ibid., 4.

[4] Ibid.

[5] *Gara v. United States.*

commentators described the difference between the "bad tendency" and the "clear and present danger" test as "whether the state can punish words which have some tendency, however remote, to bring about acts in violation of law, or only words which directly incite to acts in violation of law."[6] Gara's lawyers pointed out this discrepancy in their appellate briefs, arguing that the trial court should have followed the rigorous standards protecting free speech established in *Terminiello*.[7] They also stressed that Gara first meet Rickert after September 10, 1949, the day on which Rickert went to the local draft board and informed them of his decision not to register. Since Rickert did not even know Gara when Rickert violated the conscription law, Gara, said his lawyers, could not be guilty of counseling, aiding and abetting Rickert's actions.

Despite the apparent strength of his legal arguments, Gara's appeals proved unsuccessful. The Court of Appeals for the Sixth Circuit held that the regulations implementing the Selective Service Act made the obligation to register a continuous one. Accordingly, the Court of Appeals concluded that Rickert remained obligated to register when the FBI arrived to arrest him and that Gara therefore violated the statutory prohibition against aiding and abetting by encouraging Rickert to follow his conscience instead.[8] The Court of Appeals also found no fault with the jury instructions and the lack of analysis by the trial court concerning clear and present danger. The Court of Appeals held that:

> On the question whether a clear and present danger existed, requiring the enactment of the statute, the Congress is the judge. It has the obligation, under the Federal Constitution, of providing for the common defense. In the

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6 Chafee, *Free Speech in the United States*, 23.

7 Francis Heisler and Additional Contributors, *Larry Gara, Petitioner, v. United States of America. U.S. Supreme Court Transcript of Record with Supporting Pleadings*, trans. U.S. Supreme Court (Gale, U.S. Supreme Court Records, 2011), 163.

8 Ibid., 23.

> preamble to the Selective Service Act of 1948, under the congressional declaration of policy it is stated 'The Congress declares that an adequate armed strength must be achieved and maintained to insure the security of this Nation.' We take judicial notice of the existence of the so-called 'Cold War' which in the view of the Congress necessitated this peacetime draft.[9]

The Court of Appeals conducted no independent analysis to determine if Gara's words actually created any imminent threat or danger or if they produced any result at all since Rickert had decided not to register well before Gara had spoken his words of encouragement.

After the Court of Appeals issued its decision, Gara petitioned the United States Supreme Court to hear his case. The Supreme Court agreed to do so. Justice Clark, who had been serving as the United States Attorney General when Gara was arrested, recused himself. The remaining eight justices split evenly—four voting to uphold Gara's conviction and four voting to overturn it. According to court rules, in the absence of consensus existed among the participating Justices, the judgment was affirmed. The Supreme Court issued no written opinion in the case.[10]

Why was Gara convicted and why were his appeals unsuccessful? The record and chronology of the case offer a few insights. As noted above, the trial court reverted to the antiquated and discredited "bad tendency" test when instructing the jury as to the findings of fact required to convict Gara of aiding and abetting Rickert's violation of the draft law. The "bad tendency" test allowed the jury to convict Gara if it found that his words and actions might cause others to disobey the law. The bad tendency test was far less

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[9] *Gara v. United States*, 41.

[10] The only record of the Supreme Court's decision is this entry in the Journal of the Supreme Court for October 23, 1950: "On writ of certiorari to the Court of Appeals for the Sixth Circuit. Per curiam: The judgment is affirmed by an equally divided Court. Mr. Justice Clark took no part in the consideration or decision of this case." , *Journal of the Supreme Court of the United States* (1950-1951): 45.

protective of speech and conscience than the clear and present danger criteria. For that reason, the "clear and present danger" standard had replaced the "bad tendency" test thirty years before the Gara case, when Justice Holmes began to define the limits of free speech and the protection of conscience in *Schenck* and *Abrams*.[11] The Court of Appeals for the Sixth Circuit compounded the error. The court of appeals ignored the trial court's improper instruction to the jury, and while ostensibly applying the clear and present danger standard, it did so in an odd way. The court of appeals recognized the Congressional determination that the Cold War created a state of emergency justifying adoption of the Selective Service Act. The court then used that same determination to uphold the conviction of Gara for encouraging Rickert to disobey that law. The court of appeals failed to determine independently whether or not Gara's actions created a clear and present danger. That was a crucial question in the case, especially since Gara had not spoken with Rickert until after Rickert had already violated the conscription law. The court of appeals might have found that Gara's words of encouragement to Rickert created no clear and present danger under those circumstances and that his speech therefore was protected by the First Amendment. Instead, the court of appeals seized on a regulation of the Selective Service stating that the duty to register was a continuing one that Gara encouraged Rickert to violate. By doing so, the Court of Appeals characterized Gara's speech as incitement of a sequence of reoccurring illegal actions, not as moral support for a comrade about to suffer the consequences of following his conscience. The court of appeals appeared to have been far more concerned with supporting the efforts of

[11] *Schenck v. United States*; *Abrams v. United States*. Chapter Two traces the evolution of the clear and present danger as articulated by Justices Holmes and Brandeis.

Congress to protect the nation against the dangers of the Cold War than with protecting acts of conscience.

In their application to the Supreme Court, Gara's counsel vociferously objected to the court of appeals upholding the conviction based on Rickert's continuing violation of the conscription statute. Gara's lawyers argued that the government had charged him with aiding Rickert's failure to register by the September 10, deadline. His conviction was now being upheld on a different basis—that Rickert's violation continued indefinitely and that Gara therefore aided in the commission of a continuing felony. According to Gara's lawyers, this discrepancy between the charges against Gara and the basis of his conviction violated his due process rights. Since the Supreme Court deadlocked and therefore disposed of the case without issuing a written opinion, the unique legal issues and complexities embedded in the court of appeals ruling that Gara had aided a continuing violation of the law were not explored further. The Supreme Court did, however, eventually discredit the interpretation of the Selective Service regulations adopted by the court of appeals in *Gara*. In a Vietnam era case, *Toussie v. United States* (1970), the Court held that the obligation of young men to register for military service pursuant to the conscription statute was not a continuing one for purposes of applying the statute of limitations. Toussie failed to register within one year of his eighteenth birthday as mandated by the draft law. Eight years later, the government arrested and prosecuted him for draft evasion. Though a five year statute of limitations normally would have required dismissal of the charges, the government argued that Toussie's violation of the draft law was a continuing one to which the statute of limitations did not apply. The Supreme Court disagreed, holding that Toussie broke the law when he first failed to

register and that the statute of limitations ran from that date, thereby foreclosing the prosecution of Toussie eight years later. The Court concluded that the obligation to register for the draft should not be viewed as a continuing obligation in order expand the criminal liability of individuals charged with violating the conscription statute.[12]

As for the reaction of the Supreme Court to the Gara case, the *Terminiello* decision may have overstated its commitment to the protection of speech at the time of Gara's appeal. Shortly after reaching a deadlock in *Gara*, the Court decided *Feiner v. New York* (1951).[13] The facts in *Feiner* paralleled those in *Terminiello*, except for one crucial point: Feiner was a communist, not a facist. Speaking on a Syracuse street corner, Feiner addressed a racially mixed crowd of blacks and whites. The main purpose of his speech was to promote a local meeting of the Progressive League, but during his speech, Feiner also insulted and criticized President Truman, the mayor of Syracuse and the police department. Noting the lack of civil rights afforded to blacks, Feiner encouraged blacks to rise up and forcefully seize those rights. The police arrived, and one member of the audience told them that he intended to take Feiner down from his soap box if the police did not. Apparently concerned about a potential outbreak of violence, the officers told Feiner to end his speech. When he refused to do so, they arrested him. Feiner was tried and convicted of breaching the peace.

The Supreme Court affirmed the conviction of Feiner. Chief Justice Fred Vinson wrote the opinion. Vinson and three other Justices had dissented in Terminiello. The dissenters contended that Terminiello had waived his right to complain about the jury

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[12] *Toussie v. United States*, 397 United States 112, 121-23 (1970).
[13] *Feiner v. New York*, 340 United States 315 (1951).

instructions by failing to raise any objection to them during his trial.[14] The decision penned by Vinson in *Feiner* suggests a changing perspective on the Court towards speech and the protection of conscience. Vinson observed that the trial judge in *Feiner* had listened to the officers' testimony and then determined that Feiner's speech created a clear and present danger of violence erupting in the crowd.[15] The police did not arrive with the intention of silencing Feiner, said Vinson, and had directed him to stop only when the crowd began to stir.[16] Vinson concluded by noting that the Court would not interfere with legitimate police actions designed to preserve public safety.[17]

The Court's decision in *Feiner* elicited strong dissents from Justices Black and Douglas. Both argued that the police should have protected Feiner from members of the crowd threatening to harm him and thereby protected his right to speak. Black and Douglas worried that by upholding the conviction of Feiner the Court had created a heckler's veto allowing anyone who disagreed with a speaker to silence him by becoming disorderly.[18] But in 1949 death had robbed Black and Douglas of two of their crucial allies on the Court regarding civil liberties, Justices Murphy and Rutledge, both staunch supporters of the preferred freedoms doctrine. Without them, Black and Douglas could not generate in *Feiner* the support for the freedom of speech and protection of conscience they had mustered in *Terminiello*. The limited focus of Douglas's opinion in *Terminiello* also impacted Feiner's appeal. Douglas had addressed only the defective instructions given to the jury that convicted Terminiello. He had not attempted to construct a broader

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[14] *Terminiello v. Chicago*, 7-8. Vinson's dissent in *Terminiello* left Black as the senior justice on the majority side. Black assigned the task of writing the Court's opinion in *Terminiello* to Douglas.
[15] *Feiner v. New York*, 320-21.
[16] Ibid.
[17] Ibid., 321.
[18] Ibid., 326-27. 330-31.

argument justifying the expression of unpopular ideas or questioning the legitimacy of punishing speech that stirs strong dissent. That allowed Vinson to distinguish *Feiner* from *Terminiello* and, in the absence of an improper charge to the jury, to uphold the conviction of Feiner based on the public interest in maintaining order.[19] There was another important difference as well between Feiner and Terminiello. As a fascist, Terminiello represented a political movement that the United States had recently defeated and that no longer posed a credible threat to the nation's security. Feiner, a communist, espoused an ideology that currently challenged America's interests around the globe, and its adherents were waging a hot war with the United States and its allies in Korea. Under those circumstances the Court could have easily viewed the ideas and words of the communist Feiner, and not those of the fascist Terminiello, as posing a clear and present danger.

Justices Black and Douglas saw *Feiner* as a step backwards in the protection of speech and conscience. Other champions of First Amendment rights saw the result in *Gara* the same way. Robert F. Drinan, a lawyer and a professor at Weston College, commented about the *Gara* decision shortly after the Supreme Court's order brought the matter to an end. He criticized the obvious shortcomings in the reasoning of both the trial court and the court of appeals in *Gara*. Both had ignored or misconstrued the law governing the freedom of speech, he said, and the Supreme Court should have reversed their rulings. The case centered, in Drinan's view, on the protection of conscience. Drinan saw the *Girouard* decision as progress and credited the Court for recognizing that individuals who place duty to conscience above duty to country were also loyal citizens.

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[19] Pritchett, *Civil Liberties and the Vinson Court*, 61.

The Court's concern in *Girouard* for the protection of conscience made the *Gara* case even more disappointing than it otherwise would have been. Drinan wrote that, "the *Gara* decision, it seems to this observer, is an unfortunate backward step in the Court's forward march to grant that complete liberty of conscience to all which is not inconsistent with the common good."[20]

The *Gara* decision represented, as Drinan observed, a retreat from the protection of conscience. Rather than apply the more robust standards of the clear and present danger test to determine if Gara's encouragement of Rickert created any imminent peril, the courts merely deferred to the decision of Congress that speech against the draft in general endangers the nation and should be suppressed. In that sense, the government's prosecution of Larry Gara resembled the World War I speech cases that led to the conviction of individuals who posed little or no real threat to the Selective Service system. In both cases, wartime fears triumphed over the protection of conscience. By the time Gara's appeal reached the Supreme Court, Americans were again fighting and dying in Korea and fear of communism gripped the nation.

The Gara case also demonstrated the extent to which conscientious objectors were excluded from the benefits of American citizenship in the aftermath of World War II. For following their consciences, they forfeited job and financial security, as veterans' organizations lobbied to deny them those privileges. The Gara case reminded COs that their civil liberties were imperiled as well. The decision indicated that they might be imprisoned for encouraging each other to remain true to their convictions or for any statements that might be construed as interfering with conscription. Frequently viewed as

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[20] Robert F. Drinan, "Is Pacifist Larry Gara a Criminal?," *Catholic World* Vol. 172 (1951): 410-15.

disloyal for rejecting the link between military service and citizenship, conscientious objectors remained a powerless minority group treated as second-class citizens. The rulings in *Gara* left them even more vulnerable. Formulating his argument in favor of free speech, Justice Brandeis had referred to the freedom of expression and conscience as inherent privileges of all American citizens. Those rights sheltered even the incendiary speech of the pugnacious Terminiello from prosecution. The *Gara* decision, however, warned conscientious objectors that the protection of speech and other benefits of citizenship extended even to hate mongers like Terminiello may not apply to them. From the trial court to the Supreme Court, the judiciary had refused to extend to Gara the broad protections of speech and conscience afforded other defendants. Perhaps, as Minister Harrington had observed from his pulpit in New York after first learning of Gara's arrest and conviction, the courts and powerful opponents of conscientious objectors did consider them more dangerous than traitors and murderers.

Conclusion

Claims of Conscience and the Supreme Court in the Post World War II Era

The prosecution and conviction of Larry Gara illustrated the precarious position claims of conscience occupied in American Society in the years immediately after World War II. The trial court and the court of appeals both saw Gara as a purveyor of dangerous ideas capable of hampering the nation's ability to protect itself against the Soviet threat. Much of American society viewed conscientious objectors the same way, maintaining that COs had broken a fundamental principle of citizenship—that an individual owes military service to the nation in return for the benefits and protections the state provides. As groups like the Veterans of Foreign Wars and the American Legion lobbied to remove conscientious objectors from public jobs and to deny them any form of public assistance, those groups maintained that COs were not entitled to enjoy the full benefits of citizenship because of their refusal to fight. They also asserted that children and other impressionable individuals must be shielded from the harmful philosophy spread by conscientious objectors and pacifists. The status of conscientious objectors during the post World War II era disclosed the nation's ambivalence over the expression and protection of beliefs contrary to those of the majority. To many, minority views, such as the refusal to bear arms, seemed anti-democratic and threatened the nation's existence.

The Gara case demonstrated the difficulty of reconciling the protection of civil liberties and freedom of conscience with the operation and protection of a modern democratic society. The arrest and conviction of Gara raised questions that extended far beyond the small group of conscientious objectors who, like Larry Gara, refused to bear

arms in defense of the nation and created doubts about the extent to which all Americans were entitled to believe and say what they wished. Was it true, as the supporters of Gara charged, that in the United States, with its constitutional protection of speech and ideas, encouraging someone to follow the dictates of his conscience was illegal? That question must have bothered the District Court of Appeals for the Sixth Circuit, because it specifically addressed it in the court's opinion upholding the conviction of Gara. Gara, said the Court, was free to believe and say what he wished. He could speak against the draft and urge its repeal. What the law prohibited, however, and where, in the court's estimation, Gara crossed the line between protected speech and an illegal act, was encouraging others to disobey the Selective Service Act of 1948 by not registering for the draft. According to the court of appeals, the government was not punishing Gara for following his conscience or for speaking his mind about conscription. The case was not about free speech, said the court of appeals; it was about Gara committing an illegal act when he told Rickert to follow his conscience and not to allow anyone to coerce him into registering.[1]

The United States Supreme Court had struggled with how to define the difference between the First Amendment freedoms of thought and expression and illegal behavior long before the prosecution of Larry Gara. If the Gara case had arisen thirty years earlier, Justices Holmes and Brandeis might have commented that distinguishing between protected speech and unlawful incitement was not as simple as the court of appeals claimed. Holmes had struggled with the same issue. In *Debs v. United States* (1919), socialist leader Eugene V. Debs had delivered a series of speeches in which he opposed

[1] *Gara v. United States,* 41-42.

U.S. involvement in World War I and spoke admiringly of men and women opposed to the draft. Debs never directly suggested that his listeners disobey the conscription laws. Despite Debs's circumspection, the Supreme Court upheld his conviction for violating the Espionage Act of 1917. Justice Holmes wrote the opinion for the Court. Even though Debs never expressly advocated disobedience of the law or interference with the war effort, Holmes construed Debs's praise for dissidents and opposition to the war as designed to encourage opposition to the draft and insurrection in the military.[2] Holmes held that the prosecution of Debs did not violate his rights under the First Amendment because Debs's words and the examples he cited suggested that he intended to encourage resistance to conscription and opposition to the war effort.

The Supreme Court decided *Debs* before *Abrams*, where Holmes in his famous dissent injected life and vigor into the clear and present danger test and deployed it as a tool for the protection of thought and speech. Holmes changed direction in *Abrams* to correct the deficiencies and inconsistencies he recognized in his opinion upholding the conviction of Debs. As Holmes noted in *Gitlow*, all speech is an incitement designed to change minds and spur others into action.[3] For Holmes, the question became whether the speech and ideas at issue were likely to cause immediate turmoil and revolt threatening public safety and welfare. Only then could speech be suppressed. That was the essence of the clear and present danger rule. The pamphlets distributed by the defendants in *Abrams* and *Gitlow* called more directly for revolution than anything Debs told his audiences. But Holmes considered those flyers innocuous, contending that they were unlikely to generate a significant following or threat to public order. The defendants in

[2] *Debs v. United States*, 216.
[3] *Gitlow v. People of New York*, 673.

Abrams and *Gitlow* should have been exonerated, said Holmes, because their words and beliefs created no clear and present danger.[4] Those two cases demonstrated a strong shift by Holmes in favor of the protection of conscience.

Gara represented a step backwards in the protection of conscience because the Court of Appeals ignored Holmes's admonition in *Gitlow* that the expression of any idea is an incitement. Would the court of appeals have reached a different result if Gara had told Rickert only that Gara opposed the draft? Such a statement might easily have been interpreted as a suggestion to Rickert that he not register. Since the court of appeals could have viewed any positive statement by Gara relating to Rickert's actions as intended to strengthen Rickert's resolve, the distinction made by the court of appeals between protected opinions and prohibited calls for disobedience of the law was at best a troublesome one to apply. The court should have followed Holmes's lead and asked whether Gara's words of encouragement to Rickert created a clear and present danger. Opinions on that question might have varied, but, as Holmes had learned, the clear and present danger test provided a more appropriate and predictable means of striking the balance between claims of conscience and the legitimate exercise of state power. Holmes had come to realize that allowing the government to punish speech exhibiting only a tendency to incite or encourage disobedience or unrest eviscerated the protections of speech and conscience embodied in the First Amendment.

The cases involving COs decided by the Supreme Court following World War II reflected how some the nation's most articulate jurists attempted to reconcile claims of conscience with the operation of a modern, democratic state. The discussion among the Supreme Court Justices on why and to what extent claims of conscience merited

[4] *Abrams v. United States*, 628. *Gitlow v. People of New York*, 673.

protection began following World War I. Though individual justices, such as Holmes; Brandeis; Frankfurter; Douglas; and Murphy, wrote eloquently on why claims of conscience mattered and benefitted the nation as well as individuals, the debate produced no consensus how such claims should be evaluated and the extent to which they should be accommodated. The preferred freedoms doctrine might have provided such a consensus and an ideological underpinning capable of guiding the Court in all cases involving conscience and other First Amendment issues, but that doctrine no longer had sufficient support on the Court following the deaths of Justices Murphy and Rutledge. Their passing left the surviving proponents of the preferred freedoms doctrine to cobble together an agreement with Justice Frankfurter, the Court's leading supporter of judicial restraint, on procedural rules concerning the due process rights of COs. This alliance exhibited a new trend on the Court, one less concerned with ideology than with the results achieved by judicial imposition of procedural rules like those implemented by the Court in the post World War II Selective Service cases. Decisions like *Estep* and *Dickenson* increased judicial protection for claims of conscience by insuring that proceedings of draft boards comply with basic standards of due process. But those cases reached no conclusion and offered little guidance on the overarching questions of why the protection of conscience mattered and where the boundaries lay between conscience and government authority.

The *Gara* case disclosed the inadequacy of and danger hidden in the Court's reliance on procedural details for the protection of civil liberties. Safeguards created by procedural rules could later be reduced simply by changing the rules or eliminating them. In Gara's case, the procedural rules the Court fashioned in the post World War II

Selective Service cases were irrelevant, because Gara was not subject to the draft or classification process. His case could not be disposed of by interpreting statutes or by imposing rules that draft boards must follow. His case required application of the principles governing the freedoms of speech and conscience that Holmes, Brandeis, and Frankfurter wrestled with after World War I. The Court needed to answer the basic question posed about the Gara case by the *Christian Century*: Was it illegal to encourage a young man like Rickert to follow his conscience? That issue impacted the civil rights of all Americans. But the Supreme Court failed to provide an answer. Instead, the Court deadlocked, and Gara's conviction was sustained without further comment.

The demise of the preferred freedoms coalition left the Court without a clear voice on where and how it would strike a balance between claims of conscience and national security. The Court in *Girouard* had issued a passionate statement in support of pacifists and COs. The Court had also voiced strong support for the expression of ideas, even repugnant ones, in *Terminiello*. By then, the United States had defeated Fascism, and so the Court could more easily find that the propaganda spewed by Terminiello created little danger beyond the anger and hurt feelings experienced by some of his listeners. But, in contrast, the decision in *Feiner* suggested that the Court harbored little patience or tolerance for Communist ideology that seemed at the time to pose a legitimate threat to the nation's survival.

The post World War II cases involving COs showed how the line between the protection of conscience and the pursuit of legitimate government interests could shift and was subject to constant reappraisal and adjustment. Those changes occurred as perceived dangers arose and subsided. The World War I era cases, where Holmes and

Brandeis first challenged the wisdom and legitimacy of suppressing unpopular ideas, arose from attempts by the government to eradicate opposition to conscription and the war effort. With Germany defeated, the Court turned its attention to bolstering its protection of the civil liberties sacrificed during the war. In a similar manner, the Court enhanced the civil liberties of COs after World War II by implementing the judicial review procedures and due process requirements outlined in *Estep* and in *Dickenson*. The *Gara* case, on the other hand, formed part of a swing away from the enhancement of civil liberties in favor of national security as concerns about the loyalty of COs and the threat posed by their beliefs increased following the outbreak of the Korean War. The result in *Gara* also indicated that the Court had, due to changes in its composition, grown less concerned with the protection of conscience and more sympathetic to interests of national security.

With time, conscientious objectors and their supporters could see, as Robert Drinan hoped they might, that the Gara case represented no more than a temporary step backwards in the Court's effort to extend greater protection for claims of conscience. The importance of individual claims of conscience had already triumphed in the *Girouard* case, where, writing for the Court, Justice Douglas refuted the widely-held belief that individuals who placed duty to conscience before duty to country were disloyal and not deserving of the benefits of U.S. citizenship. COs could also take some comfort from the numerous rulings issued by the Court concerning procedures followed by the Selective Service when identifying and classifying objectors. Continuing the dialogue that began with Holmes and Brandeis following World War II, those decisions included passionate language in support of claims of conscience and established that COs

must be afforded due process of law. The Court's role as the protector of conscience continued to grow. In subsequent cases the Court would decide who did and who did not qualify as a conscientious objector.

Though military conscription ended more than forty years ago, the tension between fulfillment of national goals and the protection of individual conscience remains. Photographers and florists who contend that same-sex marriage violates their religious convictions refuse to render their services for celebrations of those unions, and anti-vaccination groups question the authority of the state to forcibly inoculate their children. Like conscientious objection to military service, these cases often involve attempts by a small, dedicated group of individuals to exclude themselves from activities generally approved by a majority of the nation's citizens. Whatever the cause, COs generally find themselves opposing the wishes of their fellow citizens and thereby challenging the legitimacy of democratic action.

In 2014, the Supreme Court decided *Burwell v. Hobby Lobby*. The case involved three closely-held for-profit corporations that objected to the requirement created by the Affordable Care Act of 2010 that the medical insurance provided to their female employees include coverage for certain contraceptive procedures. The shareholders of the three entities claimed that providing access to the "Morning After Pill" and similar contraceptive measures violated their religious principles and that the Religious Freedoms Restoration Act therefore exempted them from complying with the mandate of the Affordable Care Act. A sharply divided Court agreed, holding that the religious scruples of the shareholders of a closely-held corporation excused the entity from providing coverage for contraceptive services. As with all claims of conscience, the

decision generated substantial controversy and strong dissents. In her dissenting opinion, Justice Ruth Bader Ginsburg argued that the decision created an easy way for individuals asserting claims of conscience to frustrate the government's interest in providing health care for all of its citizens.[5]

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Larry Gara's sentence had expired by the time the Supreme Court heard his case, and he had been released from prison. He was not the last individual the U.S. government prosecuted for encouraging others to follow their consciences. In 1968, as opposition to the Vietnam War grew, the government charged Dr. Benjamin Spock and three others with aiding and abetting violations of the Selective Service Act. The jury convicted Spock, an ardent opponent of the draft and a public critic of the Vietnam War, and the court sentenced him to two years in jail.[6]

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[5] *Burwell v. Hobby Lobby* 578 United States ___(2014)

[6] M. S. Foley, "Confronting the Johnson Administration at War: The Trial of Dr. Spock and Use of the Courtroom to effect Political Change," *Peace & Change* 28, no. 1 (2003): 68.

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