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A War for Liberty: On the Law of Conscientious Objection

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A war for liberty

On the law of conscientious objection

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Introduction

One common understanding of the Second World War is that it was a contest between liberty and tyranny. For many at the time – and for still more today – ‘liberty’ meant the rule of law: government constrained by principle, procedure, and most of all, individual rights. For those states that claimed to represent this rule-of-law tradition, total war presented enormous challenges, even outright contradictions. How would these states manage to square the governmental imperatives of military emergency with the legal protections and procedures essential to preserving the ancient ‘liberty of the subject’? This question could be and was asked with regard to many areas of law. The traditional order of property rights, for instance, was already in disarray thanks to the shocks of monopoly capitalism, labour militancy, the First World War, and the profound crisis of the Great Depression. Yet few rights would more directly test a wartime government’s conception of the rule of law than the right of conscientious objection. The refusal of alleged pacifists to participate in the often lawless violence of the Second World War posed fundamental practical and normative challenges for all combatants – but especially for those who understood themselves to be fighting for individual liberty.

Of course, conscientious objection did not emerge as a problem for liberal governance in 1939. New governmental efforts to regulate civilian and military manpower in the late nineteenth century first raised the possibility – even the necessity – of accommodating individuals on the basis of their moral and religious beliefs. And the First World War saw the institution of the first formal systems of military conscientious objection. During the interwar period, however, the virtue of maintaining, let alone extending, such individual rights protection was cast into doubt. By the early 1930s, for instance,

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Hitler and Stalin had parted ways with any liberal notion of legal culture, and launched breakneck programmes of centralization and collectivization. As a consequence, Russian and German pacifists would fare far worse in the Second World War than they had in the First World War, when their treatment was not so different from that of pacifists in the Entente. But even within the liberal nations, most interwar leaders felt that a radical transformation of the rule of law was necessary to create more secure and just democratic societies. By studying the development of the law of conscientious objection from the First World War through the Second World War, we can track both the growing separation between liberal and totalitarian governance and the internal crisis that wracked liberalism in these years.

During the Second World War, all of the major belligerents fought with conscript armies, but only a few created a formal legal process to accommodate pacifist citizens swept up in the draft – Great Britain, some of its Dominions, and the USA. Historians and legal scholars generally attribute the exceptional character of American, British and Commonwealth conscientious objector policy to long-term patterns in Anglo-American legal and political development.¹ These scholars emphasize a shared encounter with religious pluralism, a shared tradition of military voluntarism, and above all, a shared commitment to individual rights against state interference. Such explanations from the persistence of classical liberalism fit neatly within the ideology of the Anglo-American war effort itself, an ideology that framed the war as a struggle ‘to establish, on impregnable rocks, the rights of the individual’² and to preserve ‘that conception of liberty . . . which we have all inherited’.³ But this contrast between totalitarian lawlessness and the traditional liberties preserved by the Western powers is too static: the ‘conception of liberty’ for which the Anglo-Americans fought was in a state of flux during the 1930s and 1940s.

¹ See, for example, Martin Ceadal, *Pacifism in Britain, 1914–1945: The Defining of a Faith* (Oxford: Clarendon Press, 1980); George Flynn, *Conscription and Democracy: The Draft in France, Great Britain, and the United States* (Westport, Conn.: Greenwood Press, 2002), 189–206; Edward P. Cain, ‘Conscientious Objection in France, Britain and the United States’, *Comparative Politics* 2:2 (1970), 275–307; John Whiteclay Chambers II, ‘Conscientious Objectors and the American State from Colonial Times to the Present’, in Charles Moskos and John Whiteclay Chambers II, eds., *The New Conscientious Objection: From Sacred to Secular Resistance* (Oxford: Oxford University Press, 1993), pp. 23–47.

² Winston Churchill, ‘War Speech’, 3 September 1939, in *Winston S. Churchill: His Complete Speeches, 1897–1963*, ed. Robert Rhodes James (New York: Bowker, 1974 vol. VI, at xxx.

³ President Franklin D. Roosevelt, Proclamation 2425, Selective Service Registration, 16 September 1940 (www.presidency.ucsb.edu/ws/index.php?pid=15858).

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The Second World War did not so much interrupt as continue by other means a decades-long, transatlantic debate about the proper relationship between personal liberty and state power. For many – perhaps most – participants in the debate, the task at hand was to shuck off traditional conceptions of liberty as much as to preserve them, to forge a third way between classical liberalism and the totalitarian alternatives. For dogged defenders of the old liberal line, the choice remained stark. Conscription – and the treatment of those who opposed it – became one important site for this larger contest. The law of conscientious objection developed by the Anglo-American combatants reflected less the liberal inheritance for which they claimed to fight than their ongoing search for novel forms of governance, a search that would continue in the post-war years.

This chapter describes the American, British and Commonwealth approaches to conscientious objection during the Second World War and contrasts them with how other belligerents treated those who refused to fight. In doing so, it reveals unexpected similarities between Anglo-American and alternative approaches, and important differences within the Anglo-American world. Taken together, these comparisons and contrasts situate Second World War conscientious objection within a larger legal struggle over the structure and limits of state power. This legal struggle shaped how the war was fought, even as its final resolution depended on the outcome of the war itself.

Conscientious objection before the Second World War

The problem of conscientious objection was first recognized by modern states in the last third of the nineteenth century. In the thirty years following the Franco-Prussian War, the Prussian model of universal military training and service swept the globe. Earlier forms of conscription had included broad regional, socio-economic, and sectarian carve-outs: urban populations, for instance, were often exempted; the wealthy could almost always buy their way out; and provisions were at times made for historically recognized pacifist religious sects. The Prussian model, on other hand, was aimed at militarizing a far greater proportion of the population. This development in military affairs accompanied a more general expansion of state capacity, as governments around the world struggled to contour and control the industrial revolution and global integration. In response, dissident social groups sought at times to restrain, at times to commandeer the increasingly powerful and pervasive military and administrative apparatus of the modern state.

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The legal practice of conscientious objection – by which individuals seek to prove the sincerity of their non-violent convictions to government officials and thereby receive some form of individualized accommodation – emerged from this struggle over growing administrative power. Yet even as administrative power was itself a source of concern for anti-militarists, the practice of conscientious objection tended to take on administrative form, as executive officials – rather than courts – became responsible for adjudicating the sincerity of the individual conscience. This approach to the problem of conscience accompanied a more general turn to administrative decision-making in the late nineteenth and early twentieth centuries, as an increasingly interconnected world demanded expert, adaptive management of workers, owners, immigrants and soldiers.

The phrase ‘conscientious objection’ actually entered the English language in the 1850s, when a movement arose in England to oppose novel legislation mandating compulsory smallpox vaccination of children.⁴ Eventually, the British Parliament responded to this campaign, instituting a system of ‘conscientious objection’ with the Vaccination Act of 1898. The Act’s conscience clause required parents to satisfy a justice of the peace that they ‘conscientiously believe[d] that vaccination would be prejudicial to the health of the child’.⁵ Many anti-vaccinationists and their Liberal supporters in Parliament objected to this juridical procedure, arguing that conscience could simply not be judged.⁶ They got their way in 1907 when the new Liberal government passed an Act allowing for a simple declaration of conscientious objection, without further judicial or administrative inquiry. The rate of objection nearly doubled after the passage of the Act.

Contemporaneously with Britain’s smallpox regime, a few countries implemented formal protections for the individual conscience within their military manpower systems. The first to do so was Norway. In response to a peace movement backed by Quakers and socialists, the Norwegian Department of Defence issued a series of administrative orders between 1900 and 1902, first recommending that conscientious objectors be assigned to non-combatant duty and then exempting all sincere religious pacifists from

4 Nadja Durbach, *Bodily Matters: The Anti-Vaccination Movement in England, 1853–1907* (Durham, NC: Duke University Press, 2005), pp. 172–3; cf. Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977–1978*, ed. Michel Senellart, trans. Graham Burchell (Basingstoke: Palgrave Macmillan, 2005), pp. 85–91.

5 Durbach, *Bodily Matters*, p. 180.

6 John Rae, *Conscience and Politics: The British Government and the Conscientious Objector to Military Service, 1916–1919* (London: Oxford University Press, 1970), pp. 43–4.

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the draft.⁷ A year later, the Australian Defence Act – which made all male citizens between the ages of 18 and 60 liable for compulsory service in time of ‘emergency’ – directed administrators to design procedures to accommodate religious pacifists in the event of conscription.⁸ When compulsory military training was finally introduced in 1910, the procedures were as follows: if a man could prove the sincerity of his objections to war – whether religious or non-religious – in a common law court, he would then be entitled to non-combatant duties, generally in the armed forces. In New Zealand, which also established compulsory military training in 1910, military authorities rather than courts were left to make the determination of sincerity, and only religious objectors were recognized as legitimate.⁹ In Australia and New Zealand, as in Norway, a coalition of religious and secular, socialist peace activists extracted these concessions to the anti-war conscience.

When the debate over military conscription came to Britain in 1916, Parliament adopted the language of ‘conscientious objection’ from the anti-vaccination context. It did not, however, adopt either the 1907 or the 1898 models for accommodating the anti-vaccination conscience, or the Australian model for dealing with military training objectors. Neither a simple affirmation nor appearance in a common law court sufficed to secure conscientious objector status. Instead, alleged conscientious objectors had to prove their sincerity before administrative tribunals established to determine each and every registrant’s draft status.¹⁰ During the First World War, the USA, Canada and New Zealand similarly assigned the task of determining the sincerity of objectors to administrative decision-making bodies. Australia would remain the exception in both the First and the Second World Wars, leaving this determination to common law courts. Elsewhere, expanding administrative states would both pose the primary threat to conscience and provide the primary arena for its accommodation.

While Denmark remained neutral during the First World War, it did mobilize its citizenry and – in response to forceful opposition from the Danish Socialist Party – passed a law providing for conscientious objection

7 Peter Brock, *Against the Draft: Essays on Conscientious Objection from the Radical Reformation to the Second World War* (University of Toronto Press, 2006), pp. 133–4.

8 Hugh Smith, ‘Conscience, Law and the State: Australia’s Approach to Conscientious Objection Since 1901’, *Australian Journal of Politics and History* 35 (1989), 13–28 (p. 15).

9 R. L. Weitzel, ‘Pacifists and Anti-Militarists in New Zealand, 1909–1914’, *New Zealand Journal of History* 7:2 (1973), 123–47 (pp. 136–7).

10 James McDermott, *British Military Service Tribunals, 1916–1918* (Manchester University Press, 2011), pp. 36–58.

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in 1917.¹¹ Mirroring the majority approach in Anglo-American nations, this law delegated the details of accommodation to administrators. Neutral Holland also mobilized during the First World War and, in response to draft resistance and lobbying from ‘progressive clergy’, implemented a system of conscientious objection in November 1917.¹² Whereas Denmark first established a right of conscientious objection by legislative act, conscientious objection in the Netherlands, as in Norway, was initially a matter of purely administrative regulation. The minister of war convened a ‘secret advisory commission’ to which draftees could appeal for conscientious objection recognition; if the commission found a man sincere, he would be assigned to non-combatant duty in the military.

Across the rest of the Continent during the First World War, the ability of pacifists to avoid punishment for refusing to fight depended on long-standing customs and informal practices. These norms and practices generally applied only to members of certain well-pedigreed pacifist religious sects; secular and heterodox pacifists were out of luck. In Russia, for instance, a host of non-violent Christian groups – including ‘the Molokans, Dukhobors, Baptists, Evangelical Christians, Mennonites, and Tolstoians’ – met the universalization of conscription in 1874 with protest.¹³ But only the Mennonites – exempted from military service since their immigration under Catherine the Great – received formal accommodation. Other sectarians who refused to serve were tried by military courts and suffered incarceration and torture. The number of objectors and the severity of punishments both increased dramatically during the First World War. As will be discussed below, the situation changed dramatically after the Bolsheviks seized power.

Germany tended to be more accommodating than Imperial Russia, though mostly through informal means. Following the introduction of universal military service in 1867, Mennonite conscripts were permitted, ‘if they so wished, to serve in the army in noncombatant capacity’.¹⁴ While most Mennonites gave up their pacifist commitments in response to national emergency, about a third of the West Prussian Mennonites requested and received non-combatant duties during the First World War. Army officers

11 Henning Sørensen, ‘Denmark: The Vanguard of Conscientious Objection’, in Moskos and Chambers, eds., *The New Conscientious Objection*, pp. 106–13 (pp. 106–7).

12 J. G. van de Vijver, ‘Appendix E: The Netherlands’, in Moskos and Chambers, eds., *The New Conscientious Objection*, pp. 220–5 (p. 221).

13 Joshua A. Sanborn, *Drafting the Russian Nation: Military Conscription, Total War, and Mass Politics, 1905–1925* (DeKalb: Northern Illinois University Press, 2003), pp. 183–4.

14 Brock, *Against the Draft*, p. 282.

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arrived at similar arrangements with Bible Students (Jehovah's Witnesses) and Seventh-Day Adventists, most of whom served in the medical corps. The military code made clear the informality of these accommodations, explicitly rejecting religious conscience as a legitimate ground of disobedience. Those men who refused orders to perform either non-combatant or combatant duty on conscientious grounds were, however, usually sent to psychiatric clinics for medical rather than military discipline.

In France, there is no record of even informal accommodation of pacifists during the First World War. Would-be conscientious objectors 'were treated as common deserters and given harsh sentences', generally one year in prison – with or without hard labour – for a first refusal to serve, followed by two-year stints after each subsequent refusal.¹⁵ Scholars have attributed this refusal to accommodate even the religious pacifist at times to the cultural dominance of just-war Catholicism, at times to the cultural dominance of republicanism or civic nationalism.¹⁶ Both of these explanations are, however, troubled by the fact that between 1793 and 1815, 'all citizens whose denomination and moral beliefs forbid the bearing of arms' were able either to pay their way out of service or request non-combatant duty.¹⁷ In any event, France may well have been the least accommodating of all belligerent nations during the First World War.

As this brief survey of First World War practice shows, accommodation of the anti-war conscience was – with the sole exception of Australia – managed by administrative decision-makers. National practices differed in four major respects: the range of anti-war beliefs accommodated; the range of accommodations offered; the civilian or military character of the decision-making process; and the formality of the decision-making process. German and Russian practices involved a relatively informal, military-run administrative process that recognized a narrower range of sectarian reasons for objecting. Anglo-American and Danish practices involved a relatively formalized, civilian-run administrative process that recognized a wider range of religious – and in some cases secular – reasons for objecting to combat service.

15 Michel L. Martin, 'France: A Statute but No Objectors,' in Moskos and Chambers, eds., *The New Conscientious Objection*, pp. 80–97 (p. 83).

16 See, for example, Margaret Levi, *Consent, Dissent, and Patriotism* (Cambridge University Press, 1997), pp. 185–6.

17 Flynn, *Conscription and Democracy*, pp. 200–1; Michel Martin, *Warriors to Managers: The French Military Establishment since 1945* (Chapel Hill: University of North Carolina Press, 1981), p. 167 n. 28.

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Even in more accommodating countries, however, advocates for conscientious objectors argued that the administrative process was far too severe. In the USA, for instance, a new generation of civil libertarians assailed as tyrannical the administrative resolution of conscience claims.¹⁸ Similar dissatisfaction with the administration of conscientious objection arose in Britain, where military service tribunals became an exemplary case of the danger of having administrators adjudicate individual rights.¹⁹ In general, the debate over conscientious objection during the First World War foregrounded a larger debate about the increasing power administrators wielded over individual citizens in modern nation states, and about the relative independence of those administrators from judicial and legislative oversight. Although this debate had been well under way before the war, the unavoidable primacy of executive decision-making in wartime kicked it into a higher gear.²⁰

The interwar debate over administrative governance

In the aftermath of the First World War, Britain and the USA dismantled most of their draft apparatus and many other wartime agencies. Yet their administrative states continued to grow in the 1920s, rapidly expanding during the 1930s in response to economic crisis. This growth occasioned a heated debate over the legitimacy of administrative governance – policy-making and adjudication by executive officials rather than legislatures and courts. While anxiety about administrative governance was particularly acute in Britain and the USA, '[e]ven in countries with well-established bureaucratic traditions, the emergence of the welfare state entailed a significant diffusion of normative power away from elected legislatures into an often fragmented and complex executive and administrative sphere'.²¹ This section focuses on the Anglo-American debate, as it was mainly in this context that conscientious objection found a legitimate home during the Second World War. Nevertheless, continental developments – particularly the nightmarish

18 See, for example, John Nevin Sayre, 'Political Prisoners in America', *The Dial* (28 December 1918), 623–4.

19 See, for example, Robert S. W. Pollard, *Conscience and Liberty* (London: Allen & Unwin, 1940).

20 Daniel Ernst, 'Ernst Freund, Felix Frankfurter and the American Rechtsstaat: A Transatlantic Shipwreck, 1894–1932', *Studies in American Political Development* 23 (October 2009), 171–88 (p. 174).

21 Peter L. Lindseth, 'The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s–1950s', *Yale Law Journal* (2004), 1341–415 (p. 1343).

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picture of administrative governance that rose from the ruins of Weimar – would haunt the Anglo-American debate and the administration of conscientious objectors that it produced. Across the globe, administrative governance provided the framework within which the Second World War belligerents would sustain, transform or abandon the legal protection of individual liberty.

At the heart of the interwar debate over administrative governance were three interrelated questions about the proper relationship between agencies, courts and legislatures. The first question was to what extent administrative agencies should make policy. The classic nineteenth-century understanding of the function of administrators was to execute policies designed by legislatures, not to design their own. But in the early twentieth century, as social and economic conflict intensified, legislatures became increasingly keen to delegate policy-making authority to administrative experts. And even in the absence of such explicit delegation, the line between making and simply implementing policy tended to blur, worrying those committed to a classical liberal conception of the separation of powers.²²

The second question also concerned a blurring of the separation of powers – the increasing use of administrative bodies to adjudicate disputes involving individual rights. Here, it seemed, the legislature and executive were usurping the authority of common law courts, while imposing a mode of adjudication stripped of traditional procedural protections.

Finally, the third question concerned the extent to which common law courts could review administrative decisions. This question tended to piggy-back on the first two, because judicial review, if available, might obviate many of the dangers of administrative policy-making and adjudication.

If, on the other hand, the administrative state continued to take on legislative and judicial functions while escaping judicial review, a ‘New Despotism’ would be at hand – or so argued an influential 1929 manifesto

²² There was one basic difference between British and American anxieties about the erosion of the separation of powers. In the USA, legislative delegation of policy-making or adjudicative power to the executive branch was considered presumptively *unconstitutional*, the legislature, executive and judiciary being co-equal branches of government. In English law, on the other hand, there was no strictly ‘constitutional impediment to the delegation of legislative and judicial powers to the Executive’, given ‘the legal omnipotence of the King in Parliament’. Nonetheless, such delegations were seen as undermining prudential and customary norms. See Stanley A. de Smith, ‘Delegated Legislation in England’, *Western Political Quarterly* 2:4 (1949), 514–26; Michael Taggart, ‘From “Parliamentary Powers” to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century’, *University of Toronto Law Journal* 55:3 (2005), 575–627 (pp. 595–6).

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written by the Lord Chief Justice of England, Lord Hewart.²³ The goal of the new despots of the civil service, according to Lord Hewart, was ‘to subordinate Parliament, to evade the Courts, and to render the will, or the caprice, of the Executive unfettered and supreme’.²⁴ At stake was not just the place of judicial and legislative bodies in the constitutional order, but their practical ability to check the executive’s disregard for individual rights.

Critics of administrative governance on both sides of the Atlantic trumpeted the warnings of Lord Hewart, but he also had many detractors. One of the most important American opponents of the Hewart line happened to be the man who had written the blueprint for the USA’s system of conscientious objection during the First World War – Felix Frankfurter. As an assistant in Woodrow Wilson’s War Department, Frankfurter sketched the centralized administrative process that the government used to accommodate a wide range of anti-war belief within the draft apparatus.²⁵ This system exhibited many of the features of administrative governance considered so problematic by critics – policy-making powers unrestrained by legislative guidance, informal adjudicatory procedure, limited judicial review. During the inter-war period, Frankfurter would play a key role in extending these features of administrative governance to other areas of the American state.

Frankfurter and his allies objected to the conventional mode of evaluating administrative action, which asked ‘whether private interests [were] adequately safeguarded’ by a given administrative scheme.²⁶ For them, the task of administration was the expert balancing of private and public interests, not the sacrifice of the former to the latter: ‘we can’t consider whether private interests are safeguarded without equally considering the public interests that are asserted against them.’²⁷ As Frankfurter put it in a landmark 1927 article, the ultimate task of administrative law was to ‘fashion . . . instruments and processes at once adequate for social needs and the protection of individual freedom’.²⁸ If the priority of the classical view was the ‘constraint of administrative discretion, Frankfurter thought it was the freeing of administrators from the oversight of common-law courts’.²⁹

23 Lord Hewart of Bury, *The New Despotism* (London: Ernest Benn, 1929).

24 *Ibid.*, p. 17.

25 Jeremy K. Kessler, ‘The Administrative Origins of Modern Civil Liberties Law’, *Columbia Law Review* 114 (June 2014).

26 Ernst, ‘American Rechtsstaat’, p. 180.

27 *Ibid.* (quoting Frankfurter).

28 Felix Frankfurter, ‘The Task of Administrative Law’, *University of Pennsylvania Law Review* 75 (1927), 614–21 (p. 617).

29 Ernst, ‘American Rechtsstaat’, p. 173.

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Frankfurter was not blind to the risk of abuse, even constitutional abuse, from unchecked administrators. But, he argued, such risk did not merit the imposition of legalistic constraints by courts of law: '[u]ltimate protection' against constitutional abuses by administrators was 'to be found in the people themselves, their zeal for liberty, their respect for one another and for the common good'.³⁰ In addition to this external, political check, he also recommended internal, administrative safeguards: 'a highly professionalized civil service, an adequate technique of administrative application of legal standards, a flexible, appropriate and economical procedure . . . easy access to public scrutiny, and a constant play of criticism by an informed and spirited bar'.³¹ This vision of a democratic and professional civil service free from judicial second-guessing inspired the generation of bureaucrats that built and manned the American state during the New Deal and the Second World War.

Frankfurter's influence also extended across the Atlantic. It was under his supervision that the legal scholar John Willis wrote the leading English response to Lord Hewart's assault on administrative governance – *The Parliamentary Powers of English Government Departments*.³² At the heart of the book was a workmanlike review of English legal history, demonstrating that the parliamentary delegation of "extraordinary" powers' to administrative officials had a long pedigree – a point that no less an authority than F. W. Maitland had made fifty years earlier.³³ Those like Lord Hewart who sought to instigate a moral panic over the 'new despotism' were engaged, Willis contended, in politically motivated scare-mongering; they sought not to save the rule of law but to use a cramped interpretation of it to derail social and economic reform. In applying doctrines such as the 'strict interpretation' of statutes and the 'presumption in favour of the liberty of the subject', judges were simply imposing their 'personal preferences', preferences hostile to the egalitarian work of the bureaucracy.³⁴

³⁰ Frankfurter, 'Task of Administrative Law', p. 618.

³¹ *Ibid.*

³² John Willis, *The Parliamentary Powers of English Government Departments* (Cambridge, Mass.: Harvard University Press, 1933); see also Taggart, 'From "Parliamentary Powers" to Privatization', pp. 581–2.

³³ Taggart, 'From "Parliamentary Powers" to Privatization', pp. 585–6; see also Peter Lindseth, 'Reconciling with the Past: John Willis and the Question of Judicial Review in Interwar and Postwar England', *University of Toronto Law Journal* 55 (2005), 657–89 (p. 664).

³⁴ Willis, *Parliamentary Powers*, pp. 51, 80.

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In an era in which some of the sharpest legal minds in Germany dedicated themselves to overthrowing the Weimar Republic and Stalin launched his collectivization drive and staged his show trials, Anglo-American debates about judicial review of administrative decision-making may look like a side-show. But these debates were themselves occasioned by the same rolling political and economic crisis that toppled Weimar and entrenched Stalin's rule. How would liberal democracy survive in this world of class conflict, ethnic violence and 'Leviathan-states'?³⁵ For defenders of the classical interpretation of liberal democracy, the only hope was the preservation of an independent judiciary capable of preventing a tyrannical executive from suppressing both individual freedom and parliamentary decision-making. For the new guard, led by the likes of Frankfurter and Willis, the survival of both individual and parliamentary autonomy depended on the ability of expert administrators to solve social and economic problems.

While in Britain, the Liberal and Labour partisans of government intervention lost control of Parliament in 1931, the Democratic Party's electoral victories in 1932 and 1936 marked the closest the USA ever came to a labour government, dedicated to public regulation in the interest of the working man. This New Deal regime went on to create vast new administrative bodies, including the National Industrial Recovery Administration and the National Labor Relations Board, agencies empowered to manage the growing struggle between labour and capital and the inefficiencies of market competition. By standing in the way of these efforts, courts only escalated the social and economic crisis that threatened to overwhelm all branches of government – or so the advocates of administrative governance argued. On the other side, critics of the New Deal assailed the administrative state's expanding control of economy and society as a surrender to – rather than a stopgap against – totalitarian rule.

Frustrated by the courts' continuing resistance to New Deal administration, President Roosevelt used the momentum of his landslide re-election in 1936 to try to end the logjam once and for all. During the campaign, Roosevelt had characterized his political opponents as 'economic royalists' and the courts as the seat of oligarchy.³⁶ Flush with victory in the early

35 The term *l'état-Leviathan* was French jurist René Cassin's. See Jay Winter and Antoine Prost, *René Cassin and Human Rights: From the Great War to the Universal Declaration* (Cambridge University Press, 2013), pp. 84–5.

36 Jared A. Goldstein, 'The American Liberty League and the Rise of Constitutional Nationalism' (8 August 2012) (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2126811).

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months of 1937, the President announced his plan to pack the Supreme Court – to force the retirement of some Justices and to expand the number of Justices he himself could appoint. He also pushed for an executive reorganization plan that would heighten presidential control over the administrative state. Although intended to marginalize New Deal critics, these initiatives actually gave new ammunition to the partisans of judicial review and a more restrained administrative state.

In the context of the Nazi government's escalating domestic and international aggression, the American President's efforts to consolidate power were especially vulnerable to charges of 'administrative absolutism'.³⁷ Many lawyers, including many former supporters, saw Roosevelt's move against the Supreme Court as an assault on the very foundations of the rule of law. Indeed, one of the leading opponents of court-packing, the New York corporate lawyer Grenville Clark, had voted for Roosevelt twice and supported many aspects of the New Deal. But in response to Roosevelt's attack on judicial autonomy, Clark launched a campaign to recover the prestige of the courts. Central to this campaign was his identification of judicial review with the protection of non-economic individual rights – civil liberties or 'personal rights'.³⁸

While earlier British and American critics had focused on the threat that administrative governance posed to property rights, Clark and his ideological allies developed a new language that drew morally charged parallels between fascist and communist oppression of ethnic and religious minorities abroad and big government at home. They framed their challenge to the New Deal state as a defence of the rights of freedom of speech and religion, the rights of minorities, and the right to a fair trial. This framing enabled Clark and his elite legal allies at the American Bar Association (ABA) to co-opt a set of issues that had long been the concern of left-wing groups such as the American Civil Liberties Union (ACLU). But whereas these groups had often welcomed New Deal administrators as effective enforcers of the rights of minorities and dissenters against the tyranny of wealthy interests

³⁷ *Annual Report of the American Bar Association* 63 (1938), 331–68 (p. 343).

³⁸ For the following discussion of Clark's advocacy, see Gerald T. Dunne, *Grenville Clark: Public Citizen* (New York: Farrar, Straus & Giroux, 1986); Jeremy K. Kessler, 'First Amendment Challenges to Economic Regulation in the Jehovah's Witness Cases' (paper presented at Freedom of Expression Scholars Conference, Yale Law School, 4 May 2014); Laura Weinrib, 'The Liberal Compromise: Civil Liberties, Labor, and the Limits of State Power, 1917–1940' (PhD dissertation, Princeton University, May 2011), pp. 412–29.

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and jingoistic mobs, Clark and the ABA identified the courts as the bulwark of civil libertarianism.

Felix Frankfurter, himself a co-founder of the ACLU, was left to insist that Clark's 'view of the Supreme Court, as the great safe-guard of those democratic institutions that you and I so passionately care about, is much too romantic and too simplified'.³⁹ For Frankfurter, the first decades of the twentieth century had shown that the best checks on administrative decision-making were democratic politics and professional expertise, not the courts. Frankfurter himself had helped to design an administrative system protecting the rights of conscience during the last war. Unsurprisingly then, when Roosevelt appointed him to the Supreme Court in 1939, Frankfurter attempted to hold the line against the new vogue for judicial supremacy in the name of civil liberty. At that moment, however, the outbreak of the war in Europe reframed this domestic struggle over the American legal order.

One of the first cases that Grenville Clark and his newly formed Bill of Rights Committee championed involved the refusal of Jehovah's Witness children to participate in public-school flag salute ceremonies. In 1935, the Witnesses had begun to object to these ceremonies in response to the suffering of their German brethren, who were being imprisoned and shot for refusing to salute the Führer and to serve in the recently reinstated system of German conscription.⁴⁰ Insensitive to this dynamic, American public schools began expelling recalcitrant Witness children. By the time the dispute reached the Supreme Court in 1940, Europe was in flames.

Indeed, Felix Frankfurter's majority opinion in *Minersville School District v. Gobitis*⁴¹ became known as 'Felix's Fall of France opinion', as the Justice wrote it while the Wehrmacht marched through Paris.⁴² In it, Frankfurter reasoned that legislators and administrators were best suited to resolve the 'clash of rights' that arose between democratic majorities and dissenters, and that in such a time of international crisis, it was reasonable for political

39 Felix Frankfurter to Grenville Clark (1 July 1937), Grenville Clark Papers, Series VI, Box 1, Dartmouth College.

40 Shawn Francis Peters, *Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution* (Lawrence: University Press of Kansas, 2000), pp. 24–8; Peter Brock, 'Conscientious Objectors in Nazi Germany', in Peter Brock and Thomas P. Socknat, eds., *Challenge to Mars: Essays on Pacifism from 1918 to 1945* (University of Toronto Press, 1999), pp. 370–9 (pp. 370–1).

41 310 US 586 (1940).

42 Mary Dudziak, *War Time: An Idea, Its History, Its Consequences* (Oxford University Press, 2012), p. 59.

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decision-makers to value national solidarity over individual difference.⁴³ Justice Harlan Fiske Stone, the lone dissenter in the case, Grenville Clark, and much of the legal press reached the opposite conclusion. As Nazi tyranny ran wild, they argued, it was all the more important to maintain – even expand – Anglo-American traditions of civil liberty and judicial power.

As this example suggests, the onset of war in Europe intensified the debate over administrative governance and its relationship to individual liberty. But war also scrambled that debate's battle-lines. While *Gobitis* appeared to pit partisans of political autonomy and state power against partisans of judicial review and civil liberties, many of those who celebrated the Jehovah's Witnesses' cause also wholeheartedly supported a contemporaneous push for peacetime conscription – an expansion of state control unprecedented in the nation's history. Indeed, at the same moment that he assailed the power of school boards to compel Witnesses to salute the flag, Grenville Clark was working *with* Felix Frankfurter to convince President Roosevelt to support a new draft law. And in writing that law, Clark would make sure to insulate the draft apparatus from judicial review.⁴⁴

Just as earlier civil libertarians had argued that administrative agencies were often themselves the fairest and most efficient defenders of individual freedom, Clark saw the peacetime draft as a civil libertarian institution, uniquely capable of fairly and efficiently managing the manpower necessary to oppose totalitarianism. His preamble to the Selective Training and Service bill stressed both the libertarian and egalitarian character of the draft, explaining that its purpose was 'to insure the independence and freedom of the people of the United States', and that 'in a free society it is just and right that the obligations and risks of military training and service be shared by all'.⁴⁵ Given this framing, the more autonomy for draft administrators the better.

Clark's advocacy *for* the draft and *against* compulsory flag salutes in the spring of 1940 exemplified the legal and ideological challenge that the Second World War posed to its liberal belligerents. On the one hand, they were fighting a war for liberty, and as such needed to uphold and even extend their commitment to the personal freedoms that totalitarian regimes distinctively

43 Letter from Felix Frankfurter to Harlan Fiske Stone (27 May 1940), 4, Container 65, Harlan Fiske Stone Papers, Library of Congress.

44 A Bill to Protect the Integrity and Institutions of the United States Through a System of Selective Compulsory Military Training and Service, S. 4164 (20 June 1940), 12, Series IXA, Box 8, GCP.

45 *Ibid.*, 1.

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opposed. On the other hand, to contend with totalitarian mobilization, these nations would have to expand their administrative capacity, further eroding traditional notions of individual rights against state interference. Conscientious objectors stood at the intersection of these two wartime trajectories; it would largely fall to draft administrators to resolve the contradictions of a total yet ostensibly libertarian war.

Conscription and conscientious objection in the Second World War

The interwar debate over administrative governance had been structured by an overly-simplistic contrast between classical liberal and totalitarian approaches to the rule of law. Yet, as the war years would demonstrate in terrifying detail, this distinction captured a real truth. Whereas the states that fought the First World War had been broadly convergent in their legal systems, they drifted further and further far apart during the interwar years. When it came to the recognition of individual rights and other legal constraints on executive decision-making, the conduct of the totalitarian nations departed markedly from both their more liberal counterparts and their own predecessor regimes. Yet the conduct of the 'liberal' nations also differed from the classical liberal ideals that so much anti-totalitarian rhetoric invoked. As the war made clear, the outcome of the interwar debate over administration in the Anglo-American world had been a hybrid form of governance that sought a middle path between classical liberalism and totalitarianism. It was this new administered liberalism that would contend with the forces of fascism during the Second World War and – shortly after the war's end – Soviet communism.

The treatment of conscientious objectors during the Second World War reflected this complex legal landscape. While there were significant continuities with the First World War when it came to which countries afforded formal recognition of the individual conscience, the actual experiences of conscientious objectors depended upon their nations' changing attitudes toward state power. Imperial Germany, for instance, had offered few if any formal protections during the First World War. Yet state authorities had not been absolutist in their treatment of pacifists. As discussed above, military officers frequently assigned such men to the medical corps, and those who refused or did not receive this offer of alternative service were usually sent to psychiatric hospitals, not prisons. With Hitler's rise to power, however, Germany became a regime of total mobilization, in which a collective notion

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of civic identity went hand-in-hand with unfettered administrative authority. This legal and ideological transformation pervaded the military, eroding informal mores that had once created space, however narrow, for pacifist dissent.

By the time Germany reinstated conscription in 1935, Hitler had already arrested many of the leaders of the interwar peace movement.⁴⁶ The 1935 draft law made no provision for conscientious objectors, and those who refused to serve altogether or sought non-combatant duty generally found themselves before a military court.⁴⁷ Military judges could offer defendants non-combatant duty in lieu of a conviction for disobedience, but they rarely did so, and a few Protestant sectarians who specifically requested medical duty during the war were executed. Scholars know of at least 280 trials of objectors, the majority of which involved Jehovah's Witnesses.⁴⁸ Before the outbreak of war, conviction for refusal to perform military service – whether combatant or non-combatant – meant a prison sentence, often followed by confinement in a concentration camp. Beginning in September 1939, however, execution became the norm.⁴⁹

If anything, the Soviet Union was even more oppressive than Germany when it came to the treatment of pacifists during the Second World War. Yet the Revolution itself had not assured this outcome. As in other areas of Russian law, including the law of divorce and abortion, the early years of the Bolshevik regime witnessed significant liberalization in conscientious objection policy. In 1918, when Lenin reinstated conscription, he reached a deal with Vladimir Chertkov, the leader of the Tolstoyans and founder of the United Council of Religious Communities (UCRC).⁵⁰ Codified in a January 1919 decree, the deal provided for alternative civilian service or unconditional exemptions for anyone with sincere religious objections to war.⁵¹ The decree also authorized Chertkov's UCRC to 'offer expert testimony on the applications of conscientious objectors before people's courts', which would then select the appropriate form of accommodation.⁵² Although 'extremely liberal' in form, this system was undermined from the start by 'militant atheists in

46 Brock, 'Conscientious Objectors in Nazi Germany', p. 370.

47 *Ibid.*, pp. 371–5.

48 Karsten Bredemeier, *Kriegsdienstverweigerung im Dritten Reich* (Baden-Baden: Nomos, 1991).

49 Brock, *Against the Draft*, p. 427.

50 *Ibid.*, p. 329.

51 Paul D. Steeves, ed., *The Modern Encyclopedia of Religions in Russia and the Soviet Union* (Gulf Breeze, Fla.: Academic International Press, 1993), vol. V, pp. 223–5.

52 Sanborn, *Drafting the Russian Nation*, p. 193.

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the Commissariat of Justice', and by provincial officials during the Civil War, who frequently shot religious pacifists in contravention of superior orders.⁵³ The end of the Civil War halted these executions, but by 1923 the Commissariat of Justice had severely restricted the possible grounds of objection, and by 1929 only the long-recognized Mennonites could rely on accommodation. Even this carve-out for Mennonites was eliminated in 1935; imprisonment or forced labour was a pacifist's likely fate. By the time war broke out, 'most pacifists were either dead or dispersed and forced into silence'.⁵⁴ While details are sketchy, it appears that the few pacifists who continued to resist military service during the Second World War died by firing squad.⁵⁵

Like the totalitarian powers to its west, Imperial Japan had no provision for conscientious objection in its draft law. Yet it also had few conscientious objectors. An upper-class strain of Japanese pacifism influenced by Tolstoyan and Quaker ideas generally did not advocate for conscientious objection at all, recommending a sacrificial death on the battlefield.⁵⁶ Those pacifists who more actively resisted the wartime state generally came from poorer backgrounds, and were affiliated with millenarian sects such as the Jehovah's Witnesses.⁵⁷ Authorities suppressed these groups after 1928, and many were imprisoned during the war.

France was the outlier in being a liberal democratic belligerent without formal protections for conscientious objection.⁵⁸ Like Russia, though for quite different reasons, the Third Republic had briefly flirted with liberalization but then retreated. Confronted with the horrors of the First World War, France had seen a surge of interest in conscientious objection in the 1920s: the Committee for the Defence of Conscientious Objection formed in 1920, followed by the League for Legal Recognition of Conscientious Objection in

53 Brock, *Against the Draft*, p. 330.

54 Sanborn, *Drafting the Russian Nation*, p. 199.

55 William Edgerton, *Memoirs of Peasant Tolstoyans in Soviet Russia* (Bloomington: Indiana University Press, 1993), pp. 106–7.

56 Brock, *Against the Draft*, pp. 190–1.

57 Cyril Powles, 'Pacifism in Japan, 1918–1945', in Brock and Socknat, eds., *Challenge to Mars*, pp. 427–39 (pp. 435–6).

58 Denmark, the Netherlands and Norway all had conscientious objector provisions on the books during the Second World War, though conscription was suspended in the Netherlands and Norway during the war, so conscientious objection was not an issue in these countries. Neutral Denmark maintained a system of conscientious objection throughout the period of German occupation, carrying forward the system it had first implemented in 1917. See Nils Petter Gleditsch and Nils Ivar Agøy, 'Norway: Toward Full Freedom of Choice?', in Moskos and Chambers, eds., *The New Conscientious Objection*, pp. 114–26 (pp. 114–15); Sørensen, 'Denmark', p. 108; van de Vijver, 'Appendix E: The Netherlands', p. 221.

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1924.⁵⁹ In the early 1930s, however, the Ministries of War and the Interior took pains to clamp down on pro-conscientious objection propaganda, enlisting religious leaders to associate it with communism.⁶⁰ These efforts were largely successful. In 1931, a lone proposal to legalize conscientious objection was introduced in the National Assembly, but it went nowhere, and in 1934 the government actually dissolved the League for Legal Recognition.⁶¹ Prior to the fall of France, the French military prosecuted and imprisoned those men who refused to serve; conscription was suspended under the Vichy regime. In the wake of the Second World War, a coalition of socialists, communists, Christian Democrats and Protestant ministers sought a legislative amnesty for pacifists imprisoned during the war. The Senate defeated their bill in 1953, however, and it would be another decade before France legalized conscientious objection.

With Russia, Germany and Japan all narrowing earlier protections for pacifists, and France maintaining its First World War policies, it is a striking fact that the other liberal democratic belligerents – all English-speaking – expanded their recognition of conscientious objection during the Second World War. In the USA, which instituted peacetime conscription for the first time in 1940, the draft was itself billed as a civil libertarian institution, a shield against totalitarian threats to individual freedom. The initial peacetime draft bill was written by a prominent civil libertarian, Grenville Clark, and he enlisted the help of another civil libertarian hero, Judge William Clark, in urging Congress to pass it. Two years earlier, Judge Clark had issued a landmark ruling striking down municipal restrictions on labour rallies⁶² and, drawing on this pedigree, Judge Clark assured the House Military Affairs Committee that there was nothing totalitarian about conscription:

There are worse things than laying down that life in the cause of freedom and justice . . . [W]e see no analogy between selective compulsory military service and totalitarianism or any other 'ism.' Such an argument might be as logically applied to taxation. Our government must be defended as it is supported – by all of its citizens.⁶³

⁵⁹ Martin, 'France: A Statute but No Objectors', pp. 83–4.

⁶⁰ Norman Ingram, 'The Circulaire Chautemps, 1933: The Third Republic Discovers Conscientious Objection', *French Historical Studies* 17 (1991), 387–409.

⁶¹ Flynn, *Conscription and Democracy*, p. 201.

⁶² *Hague v. CIO*, 25 F.Supp. 127 (D.N.J. 1938), aff'd 307 US 496 (1939). *Hague* was the first case in which Grenville Clark's Special Committee on the Bill of Rights participated.

⁶³ House Military Affairs Committee, Selective Compulsory Military Training and Service, Hearings Before the House Committee on Military Affairs, H.R. 10132 (1940), 20.

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Most other civil libertarians and peace activists agreed with – or didn't think it worth resisting – the Clarks' egalitarian and libertarian arguments for the draft. Instead, these activists focused their energies on expanding accommodations for conscientious objectors. In the summer of 1940, the American Civil Liberties Union worked with the American Friends Service Committee (AFSC), a Quaker group, to lobby for a bill more respectful of draftees' civil liberties.⁶⁴ Three major changes emerged from their efforts. First, the definition of legitimate conscientious objector was expanded from official member of a pacifist religious sect to any person who objected to all wars on the basis of his 'religious training and belief'. Second, designated conscientious objectors would have a choice of non-combatant service in the military or alternative service under civilian command. Finally, the Department of Justice, not local draft boards, would determine in the first instance who was a legitimate conscientious objector.

The third change was probably the most radical, as it removed the initial determination of conscientious objector status both from local control and from the federal agency whose primary responsibility was furnishing sufficient manpower for the war effort (the Selective Service System). As we will see, English advocates had also sought to centralize decision-making about conscientious objection and to insulate such decision-making from general manpower planning. The move against local control is particularly striking as it was odds with a contemporaneous critique of administrative governance that associated centralization with the suppression of civil liberty. When it came to protecting unpopular and marginal groups, advocates were quite certain that national bureaucrats were preferable to local dignitaries.

The Department of Justice itself, however, blanched at the enormous increase in workload that conscientious objector determinations would entail.⁶⁵ If later intra-departmental debates are any indication, the Department was also likely concerned that the taking on of such a seemingly adjudicative task by a prosecutorial body would itself threaten the separation of powers.⁶⁶ In the end, Quaker lobbyists convinced the bill's conference committee to endorse a compromise whereby local draft boards would make

64 E. Raymond Wilson, 'Evolution of the Conscientious Objector Provisions in the 1940 Conscription Bill', *Quaker History* 64 (Spring 1975), 3–15 (p. 7).

65 J. Garry Clifford and Samuel R. Spencer, Jr., *The First Peacetime Draft* (Lawrence: University Press of Kansas, 1986), pp. 221–3. Wilson, 'Evolution of the Conscientious Objector Provisions', p. 10.

66 See, for example, Assistant to the Attorney General Matthew McGuire to Attorney General Robert Jackson (10 October 1940), 1, Container 93, Robert H. Jackson Papers, Library of Congress.

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the initial determinations of whether an individual qualified as a conscientious objector and, if so, what kind of alternative service he should perform – non-combatant duty in the military or work under civilian command. If the man appealed this initial classification, however, the Department of Justice would review his file and make a recommendation to the relevant appeals board. A final appeal could be made to the Presidential Appeals Board.⁶⁷

Throughout the back-room negotiations over administrative responsibility for determination of conscientious objector status, there was never any disagreement that the conclusions reached by the administrative process would be final. Many of the civil libertarians who composed and supported the draft law – civil libertarians such as Grenville Clark and William Clark – had fought, and would continue to fight, for expanded judicial review of administrative decision-making in other contexts, especially when civil libertarian rights were at stake. But, in their eyes, the draft law's administrative resolution of conscience claims served another kind of civil libertarian end – the defeat of totalitarianism. This administrative approach to the problem of conscientious objection was the norm across the English-speaking world, though the types of accommodation provided and the variety of procedural protections afforded to would-be objectors differed from country to country.

British political and military leaders had been reluctant to bring back conscription at all, given the bloody cost of the First World War. In the wake of Hitler's 1933 rise to power, the military focused on strengthening air defence, a strategic vision that aligned with the government's fiscal concerns. Both the Americans and the French, however, pleaded with the British leadership to reinstitute conscription and commit to continental defence. Eventually, the Chamberlain government did so – in response to Hitler's April 1939 abrogation of the Munich accords. British anti-war groups were more critical of the move to conscription than their American counterparts would be in 1940, but the government dampened criticism by adopting a highly accommodating stance toward conscientious objectors.⁶⁸

Such an accommodating approach was uncontroversial, motivated by a pervasive sense that the local military service tribunals had failed to adequately protect conscience in the last war.⁶⁹ Three First World War conscientious objectors served in the wartime government, and Lord

⁶⁷ Julien Cornell, *The Conscientious Objector and the Law* (New York: John Day, 1944), pp. 25–6.

⁶⁸ Flynn, *Conscription and Democracy*, p. 194.

⁶⁹ Cain, 'Conscientious Objection', pp. 288–99.

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Beveridge, Neville Chamberlain and Winston Churchill all spoke publicly in support of the lenient treatment of conscientious objectors. In 1940, for instance, Beveridge told an audience of radio listeners that ‘admission of the right of conscientious objection to serve in war is the extreme case of British freedom. Nor have I any doubt that it makes Britain stronger in war rather than weaker.’⁷⁰

In the First World War, general military service tribunals had heard conscientious objector claims alongside a host of other requests for deferment or exemption. But the National Service (Armed Forces) Act of 1939 established a semi-autonomous system of ‘Conscientious Objectors’ Tribunals’ to be administered by the Minister of Labour and National Service.⁷¹ Under this system, any man required to register by the Act could ask to be provisionally included on the register of conscientious objectors, indicating whether he sought a total exemption, non-combatant duty in the military, or alternative civilian work. One of nineteen Local Conscientious Objector Tribunals would then consider the application. Either the applicant or the Minister of Labour could appeal a local decision to one of six Appellate Tribunals. The Appellate Tribunal’s decision was final, and the 1939 Act explicitly provided that ‘no determination of a local tribunal or the Appellate Tribunal . . . can be called into question in any court of law.’⁷²

In many respects the British law was more accommodating than the American. First and foremost, it created an entire administrative apparatus devoted to the consideration of claims of conscience, an apparatus at least formally walled off from the general manpower concerns faced by the local military service tribunals. Second, it offered the possibility of an unconditional exemption from all forms of wartime service, though less than 5 per cent of conscientious objectors actually received this status.⁷³ Third, the British civilian service option involved far less coercion than the American version. In Britain, conscientious objectors offered alternative civilian service were simply directed to seek employment in a relatively undermanned industry – agriculture or forestry, for instance. In the USA, on the other hand, the main non-military service was confinement in Civilian Public

70 Quoted in Denis Hayes, *Challenge of Conscience: The Story of the Conscientious Objectors, 1939–1949* (London: Allen & Unwin, 1949), p. 6.

71 Rachel Barker, *Conscience, Government, and War: Conscientious Objection in Great Britain, 1939–1945* (London: Routledge, 1982), p. 12.

72 Pollard, ‘Conscientious Objectors’, p. 74.

73 Roger Broad, *Conscription in Britain, 1939–1964: The Militarisation of a Generation* (London: Routledge, 2006), p. 188.

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Service Camps, administered by the Selective Service System in conjunction with the non-governmental National Service Board of Religious Objectors. These camps were often de facto, if not de jure, under military command. Fourth, the law designated that the chairmen of local tribunals should be judicial officers – county court judges or sheriffs. While these tribunals were administrative bodies, not common law courts, it was thought that the participation of judicial officers would nonetheless lead to fairer treatment of objectors. In the USA, there was no such effort to judicialize the administration of the draft boards. Fifth and finally, the British law recognized both religious and secular beliefs as legitimate grounds for conscientious objection, while the American statute required that the would-be conscientious objector demonstrate ‘religious training and belief’.⁷⁴ On the other hand, American administrators often waived this requirement in practice.

The American system did offer would-be conscientious objectors two major advantages over the British system – an additional layer of administrative appeal and a more centralized process of administrative oversight. First, the existence of a single Presidential Appeals Board, overseen by the Director of Selective Service himself, gave individuals a third shot at receiving some form of accommodation. Second, both the Selective Service Director’s responsibility for this final appellate body and the statutorily mandated involvement of the Department of Justice in advising on conscientious objector claims meant that objector advocates could focus their lobbying on a single group of officials in Washington, DC. This group of officials tended to be much more sympathetic to alleged conscientious objectors than the volunteers who staffed the local draft boards; this group also possessed the power to overrule those boards’ decisions.⁷⁵ In Britain, in contrast, conscientious objector advocates continually complained about the decentralized decision-making of the Local and Appellate Tribunals, and called in vain on the Ministry of Labour and National Service to step in to normalize the process.⁷⁶ Accordingly, while official and academic histories of the US

74 Selective Training and Service Act, 54 Stat. 885 (1940).

75 Mulford Sibley and Philip Jacob, *Conscription of Conscience: The American State and the Conscientious Objector, 1940–1947* (Ithaca: Cornell University Press, 1952), pp. 71–81.

76 Barker, *Conscience, Government, and War*, pp. 16–17; Flynn, *Conscription and Democracy*, pp. 195, 200; Cain, ‘Conscientious Objection’, p. 292; Robert S. W. Pollard, ‘Tribunals for Conscientious Objectors’, in Robert S. W. Pollard, ed., *Administrative Tribunals at Work* (London: Stevens & Sons, 1950), p. 8.

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Selective Service System tend to trumpet its 'Jeffersonian' structure – a fair amount of decision-making being left in the hands of local volunteers – the US system was in fact highly centralized when it came to the administration of conscientious objectors.

By war's end, the USA had inducted 10 million men and heard about 75,000 claims of conscientious objection, assigning 25,000 conscientious objectors to non-combatant service in the military, and 12,000 to work in Civilian Public Service camps.⁷⁷ Another 12,000 men were initially assigned non-combatant or alternative service status on conscientious grounds, but were later reclassified (either because they withdrew their objections, or were deferred on other grounds, such as an occupational or dependency deferment). About 20,000 applications were rejected. Britain inducted about 8 million men and women through military and labour drafts, and considered approximately 60,000 claims of conscientious objection, 1,000 from women.⁷⁸ About 20,000 conscientious objectors served in a civilian capacity, 15,000 performed non-combatant duty in the military, and 3,000 received unconditional exemptions. A third of all applications were rejected

The Canadian system of conscientious objection was less accommodating than either the British or the American. The initial National Resources Mobilization Act of June 1940 and its attendant regulations offered conscientious objection only to members of pacifist religious sects.⁷⁹ Members of a few sects – such as the Dukhobors and Kanadier Mennonites – were entitled to an absolute exemption, while the rest would have to perform some form of alternative service. Over the first two years of the draft, authorities eliminated the absolute exemptions, while gradually expanding the acceptable grounds of objection, first to sincere pacifists of any religious denomination, and then to any sincere pacifist who based his objections on some religious training and belief – the American baseline. Uniquely in the Anglo-American world, Canadian law provided no appeal – not even an administrative appeal – from these Boards' decisions.⁸⁰ These decisions were absolutely final, and could not be attacked in any court – even by a writ of habeas corpus. By

77 Flynn, *Conscription and Democracy*, pp. 191–2; Nicholas A. Krehbiel, *General Lewis B. Hershey and Conscientious Objection during World War II* (Columbia: University of Missouri Press, 2011), p. 145.

78 Barker, *Conscience, Government and War*, Appendix 3; Broad, *Conscription in Britain*, p. 188; Flynn, *Conscription and Democracy*, pp. 167, 196.

79 Thomas P. Socknat, 'Conscientious Objection in Canada', in Brock and Socknat, eds., *Challenge to Mars*, pp. 256–71.

80 Pollard, 'Conscientious Objectors', p. 77.

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December 1945, about 10,000 Canadian men had received conscientious objector status.⁸¹

In a 1943 report, New Zealand's National Service Department bemoaned the problem of conscientious objection: 'Though comparatively few in number, conscientious objectors have proved to be by far the most difficult section of the population to deal with in the matter of national service.'⁸² Of about 300,000 men that New Zealand mobilized for war, 5,000 sought conscientious objector status.⁸³ About 2,000 were deferred on other grounds, about 1,800 were assigned to non-combatant duty or work of national importance, and about 1,200 appeals were rejected outright. The task of identifying genuine objectors fell to six Armed Service Appeals Boards established to hear the full range of deferment and exemption claims. These Boards operated under the authority of the Director of National Service, and only the Director could reopen cases to introduce new evidence, such as evidence of fraud. Otherwise, the Boards' decisions were final, and no administrative appeals process existed. Those objectors assigned to 'work of national importance' were supervised by an additional 'Special Tribunal' with the power to compel evidence, conduct inquiries, and issue orders to ensure that a conscientious objector's salary never exceeded that of a soldier's. This Special Tribunal was closed to the public and its decisions could also not be appealed. As Robert Pollard remarked a year after the end of the war: 'The Special Tribunal has an advantage from the Government's point of view because there is no right of appeal from its decisions and yet it appears to be a judicial body.'⁸⁴

As in the First World War, Australia proved the exception to the Anglo-American rule of administrative adjudication of conscientious objector claims. By 1941, any registrant could apply to a local court of summary jurisdiction, seeking either non-combatant duty or alternative civilian service on grounds of his 'conscientious beliefs'.⁸⁵ And, beginning in 1939, the Australian government expanded the First World War definition of

81 John A. Toews, *Alternative Service in Canada during World War II* (Canadian Conference of the Mennonite Brethren Church, 1959), p. 61.

82 Quoted in Pollard, 'Conscientious Objectors', p. 81.

83 J. E. Cookson, 'Pacifism and Conscientious Objection in New Zealand', in Brock and Socknat eds., *Challenge to Mars*, pp. 292-311.

84 Pollard, 'Conscientious Objectors', p. 81.

85 *Ibid.*, p. 75; Peter Brock and Malcolm Saunders, 'Pacifists as Conscientious Objectors in Australia', in Brock and Socknat, eds., *Challenge to Mars*, pp. 272-91; Smith, 'Conscience, State, and the Law'.

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'conscientious beliefs' to cover both religious and secular objections, mirroring British practice. Either the government or the applicant could appeal a decision of the local court to a court of full jurisdiction in the same territory or commonwealth, and this judicial check seems to have largely satisfied pacifist observers of the draft process. Of the approximately 2,700 conscientious objector applications considered during the war, about 1,000 men were assigned to non-combatant duty in the military, another 1,000 to alternative civilian service, and about 600 were rejected.⁸⁶ Forty men received unconditional exemptions and sixty applications were still pending at war's end. In contrast to New Zealand, which assigned nearly 600 would-be conscientious objectors to detention camps, it appears that fewer than 200 Australian pacifists were imprisoned.⁸⁷ Similarly, Australia rejected just over 20 per cent of conscientious objector applications, while New Zealand rejected 40 per cent. These rejection rates were the outliers in the Anglo-American world, with British and American rates clustered in the middle.

Conclusion

This survey of conscientious objector policies during the Second World War shows both a diversity of approaches within the Anglo-American world and a stark divergence between the Anglo-American powers and their more statist and collectivist enemies and allies. As in the First World War, two long-running factors help explain the divergence: relative strategic isolation and a legal tradition of individual rights protection. Yet interwar strategic and legal developments had dampened the significance of both of these factors. Advances in air and naval power and the emergence of an enormous Pacific theatre threw into question the free security once enjoyed by island nations. At the same time, economic and political upheaval during the interwar period had eroded the traditional practices of individual rights protection. By the early years of the Second World War, the Anglo-American belligerents had parted ways with the rigid enforcement of property and

⁸⁶ Brock and Saunders, 'Pacifists as Conscientious Objectors in Australia', pp. 284, 290 n. 41.

⁸⁷ Compare *ibid.*, p. 284 with Cookson, 'Pacifism and Conscientious Objection in New Zealand', p. 301. The number of conscientious objection claims actually adjudicated by authorities was about the same in the two nations.

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contract rights, and had consigned whole areas of individual rights protection to powerful and pervasive administrative agencies shielded from judicial review.

Given these strategic and legal transformations, it is all the more striking that the Anglo-American nations actually *strengthened* their protections for conscientious objectors during the Second World War. They were indeed fighting a war for liberty, and their treatment of conscientious objectors reflected this ideological critique of totalitarian power as a threat to individual expression and identity. Yet to secure liberty of conscience, Anglo-American nations used the tools of administrative governance that many considered to be a major domestic threat to liberty, even a capitulation to totalitarian rule. There is a striking parallel here with the trajectory of Anglo-American economic governance, in which the 1930s and 1940s saw an unprecedented expansion of state intervention in the interest of securing the market economy.

One takeaway from these wartime experiments might have been that there was in fact no fundamental tension between administrative governance and individual liberty. Some English and American appraisals of wartime and post-war administrative governance made just this point, citing the treatment of conscientious objectors as one example among many of the synthesis of efficiency, expertise and rights protection that administrative decision-making had provided.⁸⁸ Indeed, one could say that the administrative resolution of conscience claims helped to defeat the totalitarian enemy in two senses: first, by maintaining an efficient system of manpower management uninterrupted by slow and inexpert judicial review; second, by incorporating an anti-totalitarian norm of freedom of conscience within the draft apparatus.

Yet this was not the lesson that the Anglo-American and European legal communities generally took from the war. Rather, they gradually accepted the identification of totalitarian misrule with administrative autonomy, and imposed new judicial checks on administrative decision-making.⁸⁹ Some

⁸⁸ See, for example, *United States v. Estep*, 327 US 114, 137 (1946) (Frankfurter, J., concurring); Pollard, 'Tribunals for Conscientious Objectors', p. 9; note, 'Restrictions on Judicial Review of Administrative Agencies Exercising Emergency Powers – Duty to Obey Orders Prior to Determination of Invalidity', *Yale Law Journal* 56 (1947), 403, 407.

⁸⁹ Lindseth, 'The Paradox of Parliamentary Supremacy', pp. 1385–415; Reuel Schiller, 'Reining in the Administrative State: World War II and the Decline of Expert Administration', in Daniel Ernst and Victor Jew, eds., *Total War and the Law: The American Home Front in World War II* (Westport, Conn.: Praeger, 2002), pp. 185–206 (p. 200).

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of the earliest instances of this new vogue for the judicial enforcement of individual rights would occur in the draft law context.⁹⁰ In this regard, the ‘civilianization’⁹¹ of Western militaries and the judicialization of their administrative states would go hand-in-hand, twinned features of a new war for liberty – a Cold War increasingly defined by American commitments to nuclear superiority and lightly regulated markets.

⁹⁰ See, for example, *Dickinson v. United States*, 346 US 389 (1953); Jürgen Kuhlmann and Ekkehard Lippert, ‘The Federal Republic of Germany: Conscientious Objection as Social Welfare’, in Moskos and Chambers, eds., *The New Conscientious Objection*, pp. 98–105.

⁹¹ Jacques van Doorn, *The Soldier and Social Change* (London: Sage, 1975); James J. Sheehan, *Where Have All the Soldiers Gone? The Transformation of Modern Europe* (New York: Houghton Mifflin, 2008).