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"The War Power Is Not a Blank Check": The Supreme Court and Conscientious Objection, 1917–1973

Abstract: This article examines the Supreme Court's role in the development of federal conscientious objector policy in the twentieth century. Focusing on two key periods—the three years following the end of World War II, and the era of the Vietnam War—I argue that the policy's evolution was more complex than previous studies have indicated, and that the Court's changing attitudes toward conscientious objection can be traced to the justices' increasing but irresolute concern for civil liberties. By the early 1970s, the Court was interpreting federal statutes much more broadly than Congress ever intended, but the justices remained divided over just how broad those interpretations should be. While the end of the draft rendered the question of compulsory military service moot, the Court's failure to arrive at a clear position on conscientious objection has had lasting implications on other issues.

Keywords: citizenship, compulsory military service, Congress, conscientious objection, First Amendment, due process of law, Supreme Court, Vietnam War

In 1946, the United States Supreme Court considered the case of William Estep, a Jehovah's Witness indicted under the Selective Training and Service Act, passed by Congress in 1940, for refusing induction into the U.S. Navy. Estep argued that his local draft board had wrongly classified him as I-A, fit for service, when he should have been classified as IV-D, a minister of religion.

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Under the terms of the act, once Estep had appealed his classification to the Selective Service appeals board—which also ruled him fit for service—he had no choice but to submit to induction. Congress had declared draft board decisions final. But the Supreme Court disagreed. Once Estep had "exhausted all administrative remedies"—once he had pursued his appeal as far as the Selective Service allowed—his classification was then, the Court argued, subject to judicial review. In a 6–2 ruling, the Court held that just because Congress had the power under Article 1, Section 8 of the U.S. Constitution to raise armies did not mean it could empower an administrative agency like the Selective Service to deny citizens due process of law. "The war power is not a blank check," wrote Justice Frank Murphy in a concurring opinion, "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."[1] *Estep* protected Selective Service registrants' right to due process, thus opening the door for future draftees—especially conscientious objectors (COs)—to challenge their board classifications.

The decision was striking because until that point the Court *had* granted Congress a blank check to exercise this particular war power. From the establishment of the Selective Service System in 1917 through the end of World War II, the Court upheld Congress's prerogative not only to draft citizens into the armed forces but also to require applicants for U.S. citizenship to swear they would bear arms in defense of the nation if necessary. While federal statutes had always made some allowances for conscientious objectors, the Court interpreted them narrowly, and rejected any challenge to Congress's ability to compel military service.

That changed after World War II. Until 1945, the obligation to perform military service was inextricably tied to the rights and privileges of U.S. citizenship. But that connection began to fray as more and more citizens challenged compulsory military service, and as those citizens found an audience in the Supreme Court. For the first time, the Court placed some limits on the congressional war power, first by subjecting draft board classifications like Estep's to judicial review, and then by ruling that petitioners for U.S. citizenship could not be required to declare their willingness to bear arms. The Court's approach shifted even further during the war in Vietnam, when the justices began to allow objections based not on religious faith per se, but on moral and philosophical opposition to war. Despite deliberate attempts by Congress after 1948 to narrow the relevant statutes, the Court interpreted them more broadly than ever before.

This article examines the reasons for and the implications of this significant shift in the Supreme Court's role in shaping federal conscientious objector policy between 1917 and 1973. My argument is twofold; first, examining the evolution of that policy from the perspective of the Court demonstrates that its history is more complex than previous studies have indicated. Second, the Court's changing outlook on conscientious objection is best understood in light of its increasing but irresolute concern for civil liberties. I focus here on two key periods: 1946–48, when World War II had ended and the United States debated the role of the draft in the context of the Cold War; and 1965–71, when the war in Vietnam raised old questions and provoked new resistance against the draft.

My approach is a departure from most historical studies of conscientious objection, which either center the COs themselves, focusing on their arguments and experiences, or discuss them within the larger context of the draft and the Selective Service System.[2] While some historians and legal scholars have examined significant episodes in the evolution of conscientious objector policy, very few have taken the longer view spanning the whole period of the draft in the twentieth century.[3] In addition, no one has considered in any great depth the role of the Supreme Court in that evolution. The Court is often mentioned as one factor in the development and implementation of federal policy, but disaggregating the Court's treatment of conscientious objection from Congress's brings to light the internal battles over the issue within the federal government.[4]

The simplest explanation of the Court's changing attitudes toward conscientious objection lies in its bourgeoning defenses of individual rights and civil liberties between the 1940s and the 1970s. Histories of the Court during this period emphasize its expanded protection of freedom of speech, the free exercise of religion, equal protection, and due process.[5] This trend led the Court to approach conscientious objector cases with an eye toward balancing the obligations of citizenship and individuals' freedom of conscience.

But just as the Court's changing attitudes on civil liberties did not proceed in a neat, straight line, neither did its treatment of conscientious objectors. Bruce Schulman and Julian Zelizer, writing in this journal in 2008, noted the complex historical relationship between public policy and the constitutional system. "The constitutional system," they wrote, "has furnished disfranchised persons and marginalized groups with tools to seek inclusion and equality. Yet it also has muted such claims by entrenching the power of government elites, taming demands for social change, and bringing into line regional,

economic, and political 'outliers.'"[6] The former statement applies readily to conscientious objectors. The constitutional system allowed COs to challenge federal statutes and the Selective Service System, and after World War II the Court was increasingly responsive to those challenges, even as Congress tried to foreclose them. But Schulman and Zelizer's latter statement applies here as well. Particularly in the early 1970s, when more Americans than ever before began openly questioning the federal government, the Supreme Court sought to close ranks—to defend Congress's war power by demarcating limits on conscientious objection and by making clear that not all forms of resistance to the draft were constitutionally protected. This desire both to expand freedom of conscience and to rein in political "outliers" resulted in divided decisions and no clear judicial policy on conscientious objection.

John Whiteclay Chambers II has called the period between 1940 and 1970 one of "settled national policy" on conscientious objection.[7] But approaching the issue from the perspective of the Court calls that label into question. Far from being settled, national policy on conscientious objection was in fact ambivalent and contested, both between Congress and the Court and within the Court itself. By the time the draft ended in 1973, the Court was interpreting federal statutes much more broadly than Congress had intended, but the justices remained divided over just how broad those interpretations should be. On the question of military service, the end of the draft rendered this issue moot. But as I will show in the conclusion, the Court's failure to arrive at a clear position on conscientious objection in the 1960s and 1970s has had lasting implications.

BEFORE WORLD WAR II

Its centrality to contemporary political discourse notwithstanding, the assertion of individual rights against state power is only about a hundred years old. Before the early twentieth century, neither the political culture of the United States nor the Supreme Court concerned itself much with individual rights.[8] Civil liberties we take for granted today, like freedom of speech, freedom of religion, and freedom of conscience, were much less important to an American ideal of citizenship in the World War I era than were notions of obligation, duty, and sacrifice.[9] The notion that an individual citizen's conscience could be or should be on par with the state's interest in determining a particular course of action was ridiculous. Thus, when Congress passed the Selective Service Act on May 18, 1917, just six weeks after the United States declared war

on Germany, they had little reason to anticipate resistance. In accordance with long-established customs, the 1917 Act exempted from the draft entirely all "regular or duly ordained ministers of religion," as well as all students enrolled in theological or divinity schools.[10] It also recognized explicitly members of the historic peace churches, declaring that while they were eligible for conscription, they would not be compelled to fight:

> Nothing in this Act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations, but no person so exempted shall be exempted from service in any capacity that the President shall declare to be noncombatant.[11]

In practice, the most often recognized "sects" were Quakers and Mennonites, whose numbers in the United States were nowhere near large enough to pose any kind of threat to Congress's ability to raise an army. And they were not exempted entirely; Congress acknowledged that while it could not compel recognized religious pacifists to fight and kill in defense of their country, it could nonetheless compel them to serve in its military.

Nationwide, there was little coordinated resistance to the draft, thanks in large part to the climate of mandatory patriotism and the stifling of dissent orchestrated by the Wilson administration throughout 1917.[12] Men who failed to register for the draft were likely to be rural, uneducated, and unaware, rather than active resisters. Only sixty-five thousand men filed claims for conscientious objector status (out of 24 million registrants and 3 million inductees), and of those, only four thousand drafted COs continued to argue throughout the war that their induction violated their constitutional rights.[13]

The Supreme Court had never ruled directly on the legitimacy of the draft or on conscience exemptions before World War I, but based on a handful of earlier precedents, COs had little cause to hope for help from the judiciary. During the Civil War, the state of Pennsylvania held that conscription was a valid use of state power.[14] A judge in Virginia likewise found the Confederate draft constitutional.[15] And in 1905, in a case upholding a compulsory vaccination law, the U.S. Supreme Court noted that an individual American citizen "may be compelled, by force if need be, against his will and without regard to

his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense."[16] That last statement was dictum, and thus not legally binding, but it indicates that only a decade before World War I, the justices took the legitimacy of compulsory military service for granted, and evinced little concern for conscientious objectors.

That view held during the war. In January 1918, the Supreme Court ruled the draft constitutional, defending in no uncertain terms Congress's power to compel military service. In response to the argument that conscription restricted individual liberty, Chief Justice Edward White argued that the government had a right to expect citizens to serve in wartime in exchange for the protection of their liberties during peacetime: "It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it."[17] The decision in the *Selective Draft Law Cases* was very much in line with other wartime Supreme Court rulings on the broad reach of congressional power, especially where the First Amendment was concerned. Not only did the justices uphold the Selective Service Act, they also ruled that freedoms of speech and of the press were subject to restriction based on the war power.[18] During and immediately after the war, as in the decades leading up to it, individual rights were largely subordinated to the interests of the state. Congress and the Supreme Court agreed: a citizen's duty to the state outweighed any duty to his conscience.

A few notable doubts about this stance surfaced during the interwar period. The Naturalization Act of 1906 required petitioners for U.S. citizenship to declare that they would "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."[19] In three cases between 1929 and 1931, the Court denied the petitions of conscientious objectors. Rosika Schwimmer was a fifty-year-old Hungarian Jewish pacifist who, despite the fact that she would never have been required to bear arms in defense of the nation, refused to swear that she would do so if asked. In her case the Court declared, "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."[20] Douglas Macintosh and Marie Bland had served in the Canadian military as an army chaplain and a nurse, respectively, but both argued that their Christian beliefs precluded them from a making a blanket promise to bear arms if they found a particular war immoral. Writing for a 5–4 majority in *Macintosh*, George Sutherland

argued that "from its very nature, the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law."[21] Congress had the power to allow for conscientious objection, and Congress had the power to dictate its terms. However, unlike in 1918, these decisions were not unanimous. Oliver Wendell Holmes and Charles Evans Hughes wrote important dissents in *Schwimmer* and *Macintosh*, respectively, arguing that the majority's decisions constituted a denial of free speech.

Throughout this period though, the Court proved unwilling to override Congress's limited provisions for conscientious objectors, or its demand that applicants for citizenship declare a willingness to bear arms. Both the power to raise armies and the power to regulate naturalization came from the Constitution, and the Court had no authority or desire to assume those legislative functions. On the contrary, the Court sought to legitimize the draft, especially given the growing international power of the United States, and the perceived need in the late 1910s and 1920s to temper free speech.[22] The Holmes and Hughes dissents in *Schwimmer* and *Macintosh* suggested, however, that some members of the Court were uncomfortable by the early 1930s with the idea that restrictions on freedom of conscience were the price of U.S. citizenship.

IN THE WAKE OF WORLD WAR II

The outbreak of World War II brought a new round of debate about conscientious objection. Citizenship and military service were still deeply linked in American political culture, but the growth of the civil liberties movement during the interwar period led a handful of concerned citizens to pressure Congress to expand the CO provisions in the 1940 Selective Training and Service Act. Pacifists who testified before the House and Senate Committees on Military Affairs argued for allowing objections from registrants who were not members of the historic peace churches—including secular objectors—and for providing a way for COs to offer "alternative service" rather than serve in the military as noncombatants. These witnesses emphasized that COs were good citizens who faced a difficult situation. Howard K. Beale, representing the American Civil Liberties Union, begged the Senate committee to understand that "it is a terrible thing for a man of devotion and high principles, who loves both his God and his country, to be told that he must choose between them."[23] But while Congress as a whole wanted to maintain some provision for COs, opposition to expanding the 1917 provisions was strong.

Charles Faddis (D-Pa.) argued in the House that "it is selfish in any sect of people to be willing to enjoy the benefits and blessings of a free nation and not be willing to sacrifice the same as other people to maintain them."[24]

Ultimately Congress revised the statute in significant ways, although it did not allow for secular objection. It now read: "Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation to war in any form."[25] Congress expanded the provision to include all citizens who objected to war based on "religious training and belief," even if they were not members of the historic peace churches. The law also allowed COs to render alternative national service, rather than having to be inducted into the military to serve in noncombatant roles.[26] But Congress maintained that any conscientious objections had to be based on religious faith.

The Supreme Court proved reluctant during the war years to wade into the territory of conscientious objection. Beginning almost immediately after the 1940 act was passed, hundreds of COs filed lawsuits on various grounds claiming exemption from service. Of the few dozen whose cases were decided by U.S. Circuit Courts of Appeals between 1941 and 1945, only four were granted certiorari on appeal to the Supreme Court.[27] The Court denied certiorari on all cases challenging the constitutionality of the draft in peacetime, all cases challenging Congress's power to compel alternative service, and all cases relating to the interpretation of "religious training and belief."[28] Until the 1945–46 term, the Court demonstrated no desire to reconsider questions concerning either the legitimacy of compulsory service or the workings of the Selective Service System.

But during that first term after the war, the Court agreed to hear two cases that challenged Congress's statutory prerogatives. The first was *Estep*. According to the 1940 act, local draft boards had authority to determine "all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act." The act also stipulated that "the decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe."[29] It was possible then for a registrant like William Estep to challenge his board classification, but once he had exhausted the administrative appeal system, he had no other recourse.

Estep was filing for exemption as a minister of religion rather than as a conscientious objector, but his case had crucial implications for COs.[30] By allowing for judicial review of board classifications, the Court in *Estep*

protected all registrants' rights to due process. If a CO felt he had been wrongly classified by his local board, and was eventually convicted under the 1940 act for refusing to be inducted, as Estep had been, he was now entitled to judicial review of his conscience claim. "We cannot readily infer," wrote William O. Douglas in the majority opinion, "that Congress departed so far from the traditional concepts of a fair trial when it made the actions of local boards 'final' as to provide that a citizen of this country should go to jail for not obeying an unlawful order of an administrative agency."[31] The Constitution empowered Congress to raise armies, but that power, as Justice Murphy asserted, was not a "blank check."[32]

Three justices, it is important to note, believed the majority had overstepped its bounds. They argued that the wording of the 1940 act was plain; Congress had intended the board classifications to be "final," thus forestalling any judicial review. Felix Frankfurter disagreed sharply with what he saw as the majority's curtailing of congressional authority. His arguments underscore the significance of the majority's decision to allow judicial review. "Not only is such a result opposed to the expressed will of Congress," he argued, but it also "runs counter to the achievement of the great object avowed by Congress in enacting this legislation," and "contradicts the settled practice under the Selective Service Act throughout the war years, recognized as such by authoritative Congressional opinion."[33] Congress's duty was to raise an army. That duty should not be "obstructed," in Frankfurter's view, by "subjecting the Selective Process to judicial review when Congress forbade it."[34] Harold Burton and Chief Justice Harlan Fiske Stone agreed with the bulk of Frankfurter's reasoning.

The second case was *Girouard v. United States*. Less than three months after the decision in *Estep*, the Court reversed its earlier rulings in *Schwimmer*, *Macintosh*, and *Bland* when it ruled that James Girouard, a Canadian Seventh-Day Adventist and religious conscientious objector, could become a naturalized citizen. Citing Holmes's dissent in *Schwimmer* and Hughes's dissent in *Macintosh*, the Court argued that "the oath required of aliens does not in terms require that they promise to bear arms. Nor has Congress expressly made any such finding a prerequisite to citizenship. . . . [W]e could not assume that Congress intended to make such an abrupt and radical departure from our traditions unless it spoke in unequivocal terms."[35] Douglas drew attention to the crucial work of noncombatant COs—including around ten thousand Seventh-Day Adventists—during World War II, arguing that "one may serve his country faithfully and devotedly, though his religious scruples make it impossible for him to shoulder a rifle."[36] The Court concluded that the three earlier cases "do not state the correct rule of law" and explicitly overturned them.

This time Stone, Frankfurter, and Stanley Reed dissented, on the grounds that Congress had the opportunity to revise the naturalization oath in 1940, when it passed a new Nationality Act, and declined to do so. Congress had thus "adopted and confirmed this Court's earlier construction of the naturalization laws," giving that construction "the same legal significance as though it had written the very words into the Act of 1940."[37] Congress had the power to set the terms of naturalization, and "it is not," Stone concluded, "the function of this Court to disregard the will of Congress in the exercise of its constitutional power."[38] The majority in *Girouard* ruled that if Congress wanted to exempt COs from citizenship, then the law had to say so specifically. They interpreted the naturalization oath as allowing for noncombatant service in defense of the country and Constitution. The dissenters countered that the Court was acting against Congress's implied *intent* to bar COs from citizenship.

These two cases represent the first crucial shift in the Court's approach to conscientious objection. In *Estep*, for the first time since the draft was instituted in 1917, the Court placed some limitations on congressional authority over the Selective Service System. In *Girouard*, the Court ruled that its own more tolerant attitude toward conscientious objectors took precedence over Congress's power to regulate naturalization. In both cases, however, the dissenters argued that the Court had overreached its authority in limiting those congressional powers.

Three factors help explain this shift. First, World War II was over, and the need to raise an army was no longer as pressing. The Court's denials of certiorari for COs during the war, as well as its holdings in earlier cases that upheld the war power, indicated that the end of the war in 1945 did have some effect on the justices' approach to these cases. During the war, contemporary critics observed, "the doctrine of judicial review of administrative decisions in its several facets either had remained ambiguous or was weighted against the claims of objectors." But within a year after the war ended, the Court developed a position on judicial review that ensured COs' rights to due process.[39]

Second, since the late 1930s a significant number of justices had been adhering more and more to the idea that certain civil liberties, including the freedoms of speech and of religion, occupied a "preferred position" in American jurisprudence that demanded closer scrutiny of laws that potentially curtailed them than did other rights, like property and economic rights.[40] Between 1943 and 1949, those justices constituted a reliable majority on the Court. With one notable exception, they regularly decided in favor of protecting individual freedoms against the power of the state.[41] As William Wiecek has argued,

Estep "touched the heart of wartime personal liberties issues." The majority opinion "preserved the role of civilian courts in protecting individual liberty, in construing statutory terms, and in interpreting the Constitution." Frankfurter, on the other hand, rejected the whole notion of "preferred positions" because he did not see any substantial difference between civil liberties and economic rights. He "would have subordinated jury trial and all other aspects of procedural due process, including ultimate judicial review of administrative determinations, to the 'imperative need' of raising armies."[42]

Finally, on a related note, the justices increasingly disagreed on the extent to which and the manner in which the Court was obligated to exercise restraint when it came to respecting the legislative powers of Congress. Throughout the post–World War I era, the Court had deferred to congressional authority to set the terms for conscientious objector claims. But during the later 1940s, some members of the Court took a different view of their responsibilities. For the majority in *Girouard*, according to Melvin Urofsky, "a wrong decision in the past did not carry any obligation for future courts to adhere to it as a precedent; if an earlier Court had been wrong and Congress had failed to rectify the error, there was no reason why the Court should not correct its own mistake." The majority in 1946 believed the earlier decisions in *Schwimmer*, *Macintosh*, and *Bland* had been incorrect, and thus reversed them. For the dissenters, on the other hand, judicial restraint was paramount. Frankfurter and Stone believed "it was not up to the courts to legislate; even if the Court had been wrong in the previous cases, Congress by not specifically overruling those precedents had validated them."[43] The majority prevailed, in a foreshadowing of the more assertive Court of the 1950s and 1960s.

Knowing that the Court had now established itself as the protector of individual rights within the draft system, and that it had imposed a limit on Congress's power to compel military service from petitioners for citizenship, Congress had an opportunity with a new draft act in 1948 to revisit the issue of conscientious objection. As in 1940, the Senate heard arguments in favor of secular objection, including a proposed amendment from George Malone (R-Nev.) that, among other things, provided for objection based on "humanitarian convictions," but it was rejected.[44] As in 1940, Congress limited the provision to those whose objections were based on religious convictions.

The Senate also had an opportunity to establish civilian oversight of CO appeals, rather than having hearings on board classifications handled by Selective Service personnel, but they rejected this as well. Wayne Morse (R-Ore.) made the case for this change: "I am raising my voice in a plea here today for something which is pretty dear in the American system, namely, that the

rights of the individual, the civil rights of the individual, the civilian rights of the individual, shall be determined by civilian personnel and by procedure administered by civilian personnel." Morse made no mention of what the Court's opinion in *Estep* had made clear—if Congress did not ensure protection of individual rights within the Selective Service System, the federal judiciary would. But his amendment was soundly defeated.[45]

The CO provisions in Section 6(j) of the Selective Service Act of 1948 were identical to those in the 1940 Act, except for two changes. First, instead of allowing COs opposed to all military service to perform alternative "work of civilian importance," it deferred them entirely. Second, it specified the definition of "religious training and belief": "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."[46] Congress's intent here was deliberately to narrow the statute. Almost two decades later, after a highly controversial Supreme Court decision (to be examined in the next section), Richard Russell Jr. (D-Ga.), chair of the Senate Armed Services Committee, noted, "I may say that the Congress thought that we were tightening up this law in 1948, but the Supreme Court came to the conclusion that we were loosening it. . . . We thought we were making it harder, but sometimes the English language doesn't mean the same thing, apparently, to Members of the Congress and to the Supreme Court."[47] Despite the Court's later interpretation, Congress did everything it could in 1948 to limit conscientious objection to religious believers. That limit would be severely tested by a war to which many Americans objected on political, philosophical, and moral grounds.

THE VIETNAM ERA

By the time the next significant conscientious objection case reached the Court in 1965, it had established both its judicial authority and its concern for civil liberties. Under Chief Justice Earl Warren, the Court in the late 1950s and early 1960s asserted itself as the final arbiter of legislative interpretation. In *Cooper v. Aaron*, the Court ruled that the state of Arkansas was bound by the Court's ruling in *Brown v. Board* to desegregate public schools in the state. The majority opinion, signed by all nine justices, quoted former Chief Justice John Marshall: "It is emphatically the province and duty of the judicial department to say what the law is."[48] At the same time, the Court regained a solid majority in favor of civil liberties. In several important cases between

1961 and 1969, the Warren Court ruled that major portions of the Bill of Rights applied to the states as well as to the federal government, thus extending the Court's protection of individual rights like freedom of speech and due process of law.[49]

The Court in 1965, therefore, was inclined neither to defer reflexively to Congress nor to ignore what it saw as an unconstitutional violation of freedom of conscience. Daniel Seeger was a converted Quaker who was classified I-A by his local draft board in 1958. He claimed exemption as a conscientious objector, but was denied because he "preferred to leave the question as to his belief in a Supreme Being open, 'rather than answer "yes" or "no."'" Seeger avowed, however, his "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed."[50] The Court thus had to decide whether, as Justice Tom Clark put it, the term "Supreme Being" meant "the orthodox God or the broader concept of a power or being, or a faith, 'to which all else is subordinate or upon which all else is ultimately dependent'?"[51] Here the justices took a significantly different view of what Congress had intended than did Congress itself. The Court argued that in drafting the 1948 act, Congress's intent had been to "reenact substantially" the provisions of the 1940 act.[52] In other words, even though Congress in 1948 saw itself as deliberately narrowing the provision, the Court determined that Congress had *not* meant to *change* substantially the parameters of conscientious objection by expanding on its definition of "religious training and belief." The Court further argued that Congress could not have intended to discriminate between citizens who believed in an "orthodox God" and those who believed in some other form of a Supreme Being: "Congress, in using the expression 'Supreme Being' rather than the designation 'God,' was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views."[53] Because Seeger claimed the exemption based on what he saw as a religious belief, even though it was not a belief in God per se, the Court ruled he qualified as a conscientious objector. "A sincere and meaningful belief," Clark concluded, "which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition."[54]

The *Seeger* case did not arise in relation to the Vietnam War, but there is no question it resonated strongly in the context of escalation in 1965. The draft, which had been renewed every three to four years since 1948, was set to expire in 1967. Throughout the spring and early summer of that year, it was clear that a majority in Congress had no interest in expanding the provisions

for conscientious objection, and sought instead to reinforce their narrowness. Leading this charge was L. Mendel Rivers (D-S.C.), chair of the House Armed Services Committee. Rivers disdained conscientious objectors and strongly resented what he saw as the Court's overreach in *Seeger*. "I see no reason on God's green earth," he fumed in a speech on May 15, "why your sons and mine should go to Vietnam to protect a fly speck in this country who says 'I don't like this war because I worship a flower pot and that pot says I don't have to serve. . . .' Let's stop mollycoddling these people."[55] When Rivers introduced the draft bill in the House on May 25, he noted that "the present law [regarding conscientious objection] gave rise to the Seeger case, which in substance says a man can decide what war he is opposed to, when, the time and the place, and does not have to conform to any religion. He could worship a rock, if he wanted to."[56] And in an interview on *Meet the Press*, Rivers asserted Congress's prerogative to set military policy by drawing attention to its war power: "Article 1, Section 8 says the Congress shall provide an army and a navy and make the rules for the government thereof. I take that as what it means. . . . Congress alone shall provide the military and make the laws for it, and nobody else."[57] Not all of Rivers's colleagues in the House and Senate shared his antipathy toward COs, but many of them expressed similar frustrations with *Seeger*.

Rivers and his fellow members of Congress heard hours of testimony urging them to expand the conscience provisions, and some members even spoke in favor of doing so, but in the end, the 1967 act was the narrowest one for COs since 1917. Representatives of several prominent religious bodies, including the National Council of Churches, the General Conference of the Methodist Church, the General Synod of the United Church of Christ, and the United Presbyterian Church, spoke in favor of allowing conscientious objection on moral and philosophical grounds. They were supported in Congress by men like Representative Robert Kastenmeier (D-Wis.) and Senator Edward Kennedy (D-Mass.). Members of several pacifist organizations also testified in favor of allowing selective objection—exemptions not from *all* wars, but from one specific, increasingly unpopular war—but this found less support among members of Congress. Even Kennedy, who was much more sympathetic to COs than most, rejected selective objection. Thus the bill that passed the House by a vote of 362–9 on May 25 and the Senate by a vote of 72–23 on June 12 limited objector status to anyone "who, by reason of religious training and belief, is conscientiously opposed to war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code."[58]

As it now stood, Section 6(j) applied only to those who opposed all wars on religious grounds. It also provided that appeals of board classifications would be considered only by internal Selective Service personnel, and it prohibited judicial review of board classifications "except as a defense to criminal prosecution."[59] Congress had done everything within its power to allow as few protections as legally necessary for the First Amendment and due process rights of conscientious objectors.

It took only three years after the passage of the 1967 Act for the Court to contravene the revised version of Section 6(j). When Elliott A. Welsh II, a twenty-eight-year-old California commodities broker, applied for conscientious objector status, he crossed out the words "religious training and," leaving only the word "belief." Welsh declared that his objection to the Vietnam War was political and philosophical, "having been formed by reading in the fields of history and sociology."[60] The appellate court determined that Welsh's beliefs were strong, but not *religious* enough to merit the exemption. Welsh appealed, arguing that following *Seeger* his conviction should be overturned. A divided Court, now under the leadership of Chief Justice Warren Burger, agreed. "What is necessary under *Seeger* for a registrant's conscientious objection to all war to be 'religious' within the meaning of §6(j)," wrote Hugo Black in the plurality opinion, "is that this opposition to war stems from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held *with the strength of traditional religious convictions*."[61] The Court ruled that Welsh's beliefs met this standard and ordered his conviction reversed.

The justices, who had been unanimous on *Seeger*, were deeply divided on *Welsh*. John Marshall Harlan II, who had had doubts about the *Seeger* decision when he joined the majority in 1965, wrote a separate opinion in *Welsh* in which he concurred in the result of the case, because he agreed with Welsh that 6(j) constituted an establishment of religion and thus violated the First Amendment, but argued that the Court had stretched its interpretation of 6(j) too far and had gone beyond what Congress originally intended. Byron White, on the other hand, who was joined in his dissent by Burger and Potter Stewart, agreed with Harlan that the plurality had extended its interpretation of 6(j) beyond reason, but argued that it did *not* violate the establishment clause. "Nothing in the First Amendment," White wrote, "prohibits drafting Welsh and other nonreligious objectors to war. Saving §6(j) by extending it to include Welsh cannot be done in the name of a presumed congressional will but only by the Court's taking upon itself the power to make draft-exemption policy."[62] Despite their different perspectives on 6(j), both Harlan and White

thus viewed both *Seeger* and *Welsh* as instances of judicial overreach. It was only because Harlan concurred in the result (and because Harry Blackmun took no part in the case, leaving only eight justices) that the broad statutory interpretation of the plurality prevailed.

Despite the Court's expansive reading of Section 6(j) in *Seeger* and *Welsh*, it was not prepared to go so far as to allow selective conscientious objection. In 1971 the Court heard the cases of Guy Gillette and Louis Negre, who both objected not to all wars on principle but to the Vietnam War specifically. Gillette's objections were political; Negre argued that his Catholic faith required him to distinguish between just and unjust wars, and as the war in Vietnam fell into the latter category, he could not participate in it. In an 8–1 ruling, the Court denied both claims. Thurgood Marshall, writing for the majority, agreed with the draft board and with lower court rulings that 6(j) applied only to those who opposed *all* wars. "The legislative materials," the Court argued, "simply do not support the view that Congress intended to recognize any conscientious claim whatever as a basis for relieving the claimant from the general responsibility or the various incidents of military service."[63] While acknowledging that the statute discriminated against nonbelievers, the Court ruled that there were neutral (i.e., not related to Congress's concern for its ability to raise an army) and secular reasons for the distinction, including the difficulties of requiring draft boards to determine the sincerity of selective conscientious objector claims. "We conclude," Marshall wrote, "that it is supportable for Congress to have decided that the objector to all war—to all killing in war—has a claim that is distinct enough and intense enough to justify special status, while the objector to a particular war does not."[64]

Taken together, *Seeger*, *Welsh*, and *Gillette* reveal the Court's uneasiness with Section 6(j). The distinction between religious and nonreligious objectors was constitutional, the majority argued in *Gillette*, but the definition of "religion" established in *Welsh* was so broad that it almost didn't matter. Allowing for conscientious objection only on theistic grounds was clearly a violation of the establishment clause, but rather than strike down the statute, the Court chose to interpret it as broadly as possible. The Court wanted to preserve conscientious objector recognition and to protect civil liberties, but the justices also wanted to protect Congress's power to raise armies. The 5–3 split in *Welsh* demonstrates just how divided the justices were on the delicate questions of how to interpret the congressional statute, and how far they could or should restrict Congress's statutory prerogatives.

That ambivalence also characterized other decisions regarding COs and the draft. The Court issued a series of decisions in the late 1960s and early

1970s in which it did not side reliably either with COs or with the Selective Service. The year before *Gillette*, the Court reversed the conviction of a man whose local draft board had refused to reopen his classification even after he brought in new evidence testifying to his conscientious objection.[65] A month after *Gillette*, the Court ruled that a conscientious objector whose beliefs had "crystallized" between the time that he received his notice to report for induction and his scheduled induction date was not entitled to a review of his status by the draft board.[66] Later that term, the Court reversed the conviction of Cassius Clay (known by then as Muhammad Ali) for failing to report for induction after his conscience claim was denied, on the grounds that the Selective Service appeals board had not specified the reason why it denied the claim.[67]

But the most telling cases were those involving active draft resisters. By the late 1960s, a growing number of young men were using their draft cards to express their opposition to the war. In 1968 and again in 1970, the Court protected Selective Service registrants who quietly returned their draft cards in protest from punishment by vindictive draft boards.[68] But in general, the justices shared Americans' antipathy toward public antiwar demonstrations, which they saw as disrespectful and disloyal.[69] As Michael Belknap has pointed out, "despite its otherwise strong commitment to safeguarding freedom of expression, the later Warren Court was not particularly protective of protest against the Vietnam War."[70] Most notably, in 1968 the Court upheld the conviction of David Paul O'Brien, who publicly burned his draft card on the steps of a Boston courthouse. To the justices, O'Brien represented a political outlier who needed to be brought into line. Congress's ability to raise an army, the Court ruled in this case, was a "sufficiently important governmental interest" that justified "incidental limitations on First Amendment freedoms."[71]

By the time the draft ended in 1973, Supreme Court jurisprudence on conscientious objection remained, as one scholar has put it, "unsettled."[72] Section 6(j)'s distinction between religious and nonreligious objectors was constitutional, but a registrant whose moral or philosophical objections met the standard established in *Welsh* was also exempted. Men who returned their draft cards were protected from punishment, but those who destroyed them publicly were not. As in the period after World War II, the Court's growing sense of its own authority and its concern for civil liberties during the Vietnam era led to important shifts in its approach to conscientious objectors. But the justices' ambivalence toward the social and cultural changes of the late 1960s and early 1970s led them—to echo Schulman and Zelizer again—to "entrench" the power of the government and bring outliers into line. While the

Court wanted to protect freedoms of conscience and expression, it was prepared neither to abrogate Congress's war power entirely nor to countenance radical antiwar protests. In an era when the very integrity of the federal government was being called into question, the Court was reluctant to fuel what it saw as a threatening fire of radicalism. The war power may not have been a blank check, but it was still valid currency.

CONCLUSION

The issue of conscientious objection raises fundamental questions about the obligations of U.S. citizenship, and about when citizens are required to subordinate their own conscience and judgment to that of the state. The various branches and members of the federal government have not always agreed on where that line should be drawn. Between the end of World War II and the early 1970s, the Supreme Court gradually expanded the protections it afforded to conscientious objectors to compulsory military service, although that expansion was neither smooth nor uncontested. In the interest of protecting individual civil liberties, especially freedom of conscience, the Court restricted Congress's power to compel military service, but the justices were not prepared to allow citizens to substitute their own political judgment for that of the state. In *Seeger* and *Welsh*, the Court ruled that conscience exemptions could not be limited to traditional religious believers. But in their steadfast refusal to allow selective objection and their punishment of public draft resisters, the Court upheld the power of the government to set foreign policy and to wage war, and to expect that citizens will provide military service in support of those actions.[73]

Debates over citizens' right to conscientiously object to laws contrary to their personal beliefs did not end, of course, with the draft. Individuals and organizations have used the constitutional system more recently to argue, among other things, that religious schools should be able to fire pregnant employees, that businesses should be able to refuse service to gay couples, and that companies should not be required to provide health insurance for contraception. In one of the most-watched cases of the last five years, the Court ruled that an employer could not be legally required to provide insurance coverage for contraception if doing so violated the "sincerely held religious beliefs" of the company's owners.[74]

But the "contraception mandate" is also an excellent example of how the Court's decisions on conscientious objection fifty years ago have had unintended consequences. In August 2015, a federal district court judge cited

Welsh in his decision to exempt a secular organization from the contraception mandate on the basis of moral, rather than religious, objections.[75] As Timothy Jost of Washington and Lee School of Law notes, the federal government "now seems to be stuck"—if it accommodates religious objections to such requirements, it must do so for moral and philosophical objections as well. "It is hard to see," Jost points out, "how we can have a uniform system of insurance coverage if any employer can opt out of a regulatory requirement for its own philosophical reasons and any insurer that wants to sell individuals coverage that complies with their religious or philosophical beliefs can opt out of regulatory requirements that would otherwise apply." Such a course would lead to a "very problematic regulatory environment."[76]

The question of how to balance freedom of conscience and individuals' right not to be discriminated against is complicated, to put it mildly. Most of the recent cases to reach the Court, including *Hobby Lobby* and *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, concern objections based explicitly on religious faith. But as *March for Life* illustrates, *Seeger* and *Welsh* offer precedents that could allow anyone with strong moral or philosophical objections against the contraception mandate or gay marriage to argue they should be legally exempt from regulatory requirements or antidiscrimination statutes. These ongoing battles prove that the contested questions the Supreme Court engaged fifty years ago are far from being resolved.

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NOTES

1. *Estep v. United States*, 327 U.S. 114 (1946) at 132. The term "war power" most often refers to Clause 11 of Article 8, which gives Congress the power to declare war, but it also encompasses Clauses 12 and 13, to "raise and support" an army and navy. U.S. Const. art. I, § 8, cl. 11–13.

2. For examples of the former, see Stephen M. Kohn, *Jailed for Peace: The History of American Draft Law Violators, 1658–1985* (Westport, Conn., 1986); Lawrence M. Baskir and William Strauss, *Chance and Circumstance: The Draft, the War, and the Vietnam Generation* (New York, 1978); Lillian Schlissel, *Conscience in America: A Documentary History of Conscientious Objection in America, 1757–1967* (New York, 1968); Timothy Stewart-Winter, "Not a Soldier, Not a Slacker: Conscientious Objectors and Male Citizenship in the United States during the Second World War," *Gender & History* 19, no. 3 (November 2007): 519–42; Donald W. Maxwell, "'These Are the Things You Gain If You Make Our Country Your Country': U.S.-Vietnam War Draft Resisters and Military Deserters and the Meaning of Citizenship in North America in the 1970s," *Peace & Change* 40, no. 4 (October 2015):

437–61; and Yuichi Moroi, *Ethics of Conviction and Civic Responsibility: Conscientious War Resisters in America During the World Wars* (Lanham, Md., 2008). For examples of the latter, see George Q. Flynn, *The Draft, 1940–1973* (Lawrence, Kans., 1993); Nicholas A. Krehbiel, *General Lewis B. Hershey and Conscientious Objection During World War II* (Columbia, Mo., 2011); Clyde Edward Jacobs and John F. Gallagher, *The Selective Service Act: A Case Study of the Governmental Process* (New York, 1967); Harry A. Marmion, *Selective Service: Conflict and Compromise* (New York, 1968); John Whiteclay Chambers, *Draftees or Volunteers: A Documentary History of the Debate Over Military Conscription in the United States, 1787–1973* (New York, 1975); and John O'Sullivan and Alan M. Meckler, eds., *The Draft and Its Enemies: A Documentary History* (Urbana, 1974).

3. The only work I know of spanning the whole period of the draft is 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, 1993), 23–46. The more episodic or topical approaches include Jeffrey M. Anderson, "Conscience in the Court, 1931–1946: Religion as Duty and Choice," *Journal of Supreme Court History* 26, no. 1 (March 2001): 25–52; Candice Bredbenner, "A Duty to Defend? The Evolution of Aliens' Military Obligations to the United States, 1792 to 1946," *Journal of Policy History* 24, no. 2 (April 2012): 224–62; Ronald B. Flowers, *To Defend the Constitution: Religion, Conscientious Objection, Naturalization, and the Supreme Court* (Lanham, Md., 2003); John M. Glen, "Secular Conscientious Objection in the United States: The Selective Service Act of 1940," *Peace & Change* 9, no. 1 (Spring 1983): 55–71; Shawn Francis Peters, *Judging Jehovah's Witnesses: Religious Persecution and the Dawn of the Rights Revolution* (Lawrence, Kans., 2000); Kent Greenawalt, "All or Nothing at All: The Defeat of Selective Conscientious Objection," *The Supreme Court Review* 1971 (1971): 31–94; Matthew G. Lindenbaum, "Religious Conscientious Objection and the Establishment Clause in the Rehnquist Court: Seeger, Welsh, Gillette, and 6(j) Revisited," *Columbia Journal of Law & Social Problems* 36, no. 3/4 (Spring/Summer 2003): 237–63; and Charles F. Howlett, "The Courts and Peace Activism: Selected Legal Cases Related to Matters of Conscience and Civil Liberties," *Peace & Change* 38, no. 1 (January 2013): 6–32.

4. Chambers, for example, in his survey of COs' interactions with the state, distinguishes the three branches of government, but does not examine the tensions *among* them. Chambers, "Conscientious Objectors and the American State from Colonial Times to the Present," 39–42.

5. On the question of civil liberties in the Warren and Burger Courts, see Michal R. Belknap, *The Supreme Court Under Earl Warren, 1953–1969* (Columbia, S.C., 2005); Lucas A. Powe Jr., *The Warren Court and American Politics* (Cambridge, Mass., 2000); Richard Funston, *Constitutional Counterrevolution? The Warren Court and the Burger Court: Judicial Policy Making in Modern America* (New York, 1977); Earl M. Maltz, *The Chief Justiceship of Warren Burger, 1969–1986* (Columbia, S.C., 2000); William R. Thomas, *The Burger Court and Civil Liberties*, rev. ed. (Brunswick, Ohio, 1979).

6. Bruce J. Schulman and Julian E. Zelizer, "Introduction: The Constitution and Public Policy in U.S. History," *Journal of Policy History* 20, no. 1 (2008): 2.

7. Chambers, "Conscientious Objectors and the American State from Colonial Times to the Present," 35.

8. On the former, see Christopher Capozzola, *Uncle Sam Wants You: World War I and the Making of the Modern American Citizen* (New York, 2008). On the latter,

see Henry J. Abraham and Barbara A. Perry, *Freedom and the Court: Civil Rights and Liberties in the United States*, 8th ed. (Lawrence, Kans., 2003); and David G. Savage, *The Supreme Court and Individual Rights*, 5th ed. (Washington, D.C, 2009).

9. Capozzola, *Uncle Sam Wants You*, 6.

10. Selective Service Act, Pub. L. No. 65-12, 40 Stat. 76 (May 18, 1917) at 78. On those customs, see Kent Greenawalt, *Religion and the Constitution*, vol. 1, *Free Exercise and Fairness* (Princeton, 2006), 52–59.

11. 40 Stat. 76 at 78. For an excellent overview of the draft during World War I, see John Whiteclay Chambers II, *To Raise an Army: The Draft Comes to Modern America* (New York, 1987).

12. Chambers, *To Raise an Army*, 205–10; see also Capozzola, *Uncle Sam Wants You*.

13. Chambers, *To Raise an Army*, 216.

14. *Kneedler v. Lane*, 45 Pa. St. 238 (1863). See also J. L. Bernstein, "Conscription and the Constitution: The Amazing Case of *Kneedler v. Lane*," *American Bar Association Journal* 53, no. 8 (1967): 708–12; and John W. Delehant, "A Judicial Revisitation Finds *Kneedler v. Lane* Not So 'Amazing,'" *American Bar Association Journal* 53, no. 12 (1967): 1132–35.

15. *Burroughs v. Peyton*, 57 Va. (16 Gratt.) 470 (1864), cited in Charles Evans Hughes, "War Powers Under the Constitution," *Marquette Law Review* 2, no. 1 (1917): 4.

16. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) at 29. On that case, see Michael Willrich, "'The Least Vaccinated of Any Civilized Country': Personal Liberty and Public Health in the Progressive Era," *Journal of Policy History* 20, no. 1 (2008): 76–93.

17. *Selective Draft Law Cases*, 245 U.S. 366 (1918) at 378.

18. *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Abrams v. United States*, 250 U.S. 616 (1919). On the restriction of civil liberties during and after World War I, see Paul L. Murphy, *World War I and the Origin of Civil Liberties in the United States* (New York, 1979); Capozzola, *Uncle Sam Wants You*, 144–72.

19. Immigration and Naturalization Act, Pub. L. No. 59-338, 34 Stat. 596 (June 29, 1906) at 598.

20. *United States v. Schwimmer*, 279 U.S. 644 (1929) at 650. On this case, see Megan Threlkeld, "Citizenship, Gender, and Conscience: United States v. Schwimmer," *Journal of Supreme Court History* 40, no. 2 (July 2015): 154–71.

21. *United States v. Macintosh*, 283 U.S. 605 (1931) at 622. The decision in *Macintosh* controlled the decision in *Bland*, which had the same 5–4 split. *United States v. Bland*, 283 U.S. 636 (1931). For more on the naturalization cases, see Bredbenner, "A Duty to Defend?" and Flowers, *To Defend the Constitution*.

22. Chambers, *To Raise an Army*, 221.

23. *Compulsory Military Training and Service: Hearings Before the Committee on Military Affairs, United States Senate, 76th Congress, 3rd session, on S. 4164: A Bill to Protect the Integrity and Institutions of the United States Through a System of Selective Compulsory Military Training and Service* (Washington, D.C., 1940), 311.

24. *Selective Compulsory Military Training and Service*, 206. For a more in-depth analysis of the debates on the bill, see Glen, "Secular Conscientious Objection in the United States."

25. Selective Training and Service Act, Pub. L. No. 76-97, 54 Stat. 885 (September 13, 1940) at 889.

26. For more on this important development, which sent COs to Civilian Public Service camps rather than exposing them to abuse within the military, see Krehbiel, *General Lewis B. Hershey and Conscientious Objection During World War II*; Stewart-Winter, "Not a Soldier, Not a Slacker"; Paul R. Dekar, "The 'Good War' and Baptists Who Refused to Fight It," *Peace & Change* 32, no. 2 (April 2007): 186–202.

27. *Bowles v. United States*, 319 U.S. 33 (1943); *Falbo v. United States*, 320 U.S. 549 (1944); *Billings v. Truesdell*, 321 U.S. 542 (1944); *In re Summers*, 325 U.S. 561 (1945).

28. Mulford Quickert Sibley and Philip E. Jacob, *Conscription of Conscience: The American State and the Conscientious Objector, 1940–1947* (Ithaca, 1952), 421–37.

29. 54 Stat. 885 at 893.

30. The history of the relationship between Jehovah's Witnesses and the Selective Service System is a fascinating topic in its own right. For more, see Peters, *Judging Jehovah's Witnesses*; and Merlin Owen Newton, *Armed with the Constitution: Jehovah's Witnesses in Alabama and the U.S. Supreme Court, 1939–1946* (Tuscaloosa, 1995).

31. 327 U.S. 114 at 122.

32. 327 U.S. 114 at 132.

33. 327 U.S. 114 at 134.

34. 327 U.S. 114 at 139.

35. *Girouard v. United States*, 328 U.S. 61 (1946) at 64.

36. 328 U.S. 61 at 64.

37. 328 U.S. 61 at 72–73; 76. See also Sibley and Jacob, 455.

38. 328 U.S. 61 at 79.

39. R. R. Russell, "Development of Conscientious Objector Recognition in the United States," *George Washington Law Review* 20 (1951–52): 442; Sibley and Jacob, *Conscription of Conscience*, 427.

40. The "preferred positions" doctrine originated with *Palko v. Connecticut*, 302 U.S. 319 (1937).

41. The exception, of course, was *Korematsu v. United States*, 323 U.S. 214 (1944), in which the Court upheld the internment of U.S. citizens on the grounds that Japanese-Americans constituted a threat to national security.

42. William M. Wiecek, *The Birth of the Modern Constitution: The United States Supreme Court, 1941–1953*, vol. 12, *History of the Supreme Court of the United States*, ed. Stanley N. Katz (New York, 2006), 303; 128–38.

43. Melvin I. Urofsky, *Division and Discord: The Supreme Court Under Stone and Vinson, 1941–1953* (Columbia, S.C., 1997), 57.

44. 80 Cong. Red. S.7533, S.7553 (June 9, 1948).

45. 80 Cong. Rec. S.7304 (June 8, 1948).

46. Selective Service Act, Pub. L. No. 80-759, 62 Stat. 604 (June 24, 1948) at 614.

47. *Amending and Extending the Draft Law and Related Authorities: Hearings Before the Committee on Armed Service, United States Senate, 90th Congress, 1st session, on S.1432: To Amend the Universal Military Training and Service Act, and for Other Purposes* (1967), 35.

48. *Cooper v. Aaron*, 358 U.S. 1 (1958) at 18.

49. On the Warren Court's incorporation of the Bill of Rights, see Henry J. Abraham and Barbara A. Perry, *Freedom and the Court: Civil Rights and Liberties in the United States*, 8th ed. (Lawrence, Kans., 2003), 66–95.

50. *United States v. Seeger*, 380 U.S. 163 (1965) at 166.

51. 380 U.S. 163 at 174. Clark was quoting *Webster's New International Dictionary*, 2nd ed.

52. 380 U.S. 163 at 173.

53. 380 U.S. 163 at 165.

54. 380 U.S. 163 at 176.

55. 90 Cong. Rec. S.12,937 (17 May 1967) (speech to the Hampton Road Maritime Association).

56. 90 Cong. Rec. H.14,098 (25 May 1967).

57. L. Mendel Rivers, interview, *Meet the Press*, NBC, 30 April 1967, quoted in Marmion, *Selective Service*, 75–76.

58. Universal Military Training and Service Act, Pub. L. No. 90-40, 81 Stat. 100 (30 June 1967) at 104.

59. 81 Stat. 104.

60. *Welsh v. United States*, 398 U.S. 333 (1970) at 341.

61. 398 U.S. 333 at 339–40 (emphasis added).

62. 398 U.S. 333 at 369.

63. *Gillette v. United States*, 401 U.S. 437 (1971) at 445.

64. 401 U.S. 437 at 460.

65. *Mulloy v. United States*, 398 U.S. 410 (1970).

66. *Ehlert v. United States*, 402 U.S. 99 (1971).

67. *Clay v. United States*, 403 U.S. 698 (1971). On that case, see also Leigh Montville, *Sting Like a Bee: Muhammad Ali vs. the United States of America, 1966–1971* (New York, 2017).

68. *Oestereich v. Selective Service System Local Board No. 11, Cheyenne, Wyoming*, 393 U.S. 233 (1968); *Gutknecht v. United States*, 396 U.S. 295 (1970).

69. Belknap, *The Supreme Court Under Earl Warren, 1953–1969*, 289–90.

70. Ibid., 289.

71. *United States v. O'Brien*, 391 U.S. 367 (1968) at 376.

72. Claire Marblestone, "A Matter of Conscience: *United States v. Seeger* and the Supreme Court's Historical Failure to Define Conscientious Objector Status Under the First Amendment," *Hastings Constitutional Law Quarterly* 38 (2010): 203.

73. Men and women recruited into the armed forces who become conscientious objectors during their period of service are subject to military rather than civilian jurisdiction, which means the federal courts have had no opportunity to weigh in on this issue since the end of the draft in 1973. For a thoughtful consideration of the issue of conscientious objection within the All-Volunteer Force, see Larry Minear, "Conscience and Carnage in Afghanistan and Iraq: US Veterans Ponder the Experience," *Journal of Military Ethics* 13, no. 2 (April 2014): 137–57; and the symposium on Minear's article in the July 2015 issue of the same journal.

74. *Burwell v. Hobby Lobby*, 573 U.S. ___ (2014).

75. *March for Life v. Burwell*, 128 F.Supp.3d 116 (2015) at 127.

76. Timothy Jost, "Implementing Health Reform: Federal Court Rules on *March for Life v. Burwell* (Updated)," *Health Affairs* (blog), 1 September 2015 (accessed 14 June 2018), https://www.healthaffairs.org/do/10.1377/hblog20150901.050294/full/.