2000

Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment

Reuel E. Schiller

UC Hastings College of the Law, schiller@uchastings.edu

Follow this and additional works at: http://repository.uchastings.edu/faculty_scholarship

Part of the [Administrative Law Commons](#), and the [Legal History Commons](#)

Recommended Citation

Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 *Va. L. Rev.* 1 (2000).

Available at: http://repository.uchastings.edu/faculty_scholarship/707

This Article is brought to you for free and open access by UC Hastings Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of UC Hastings Scholarship Repository. For more information, please contact marcusc@uchastings.edu.

Faculty Publications

UC Hastings College of the Law Library

Author: Reuel E. Schiller

Source: Virginia Law Review

Citation: 86 Va. L. Rev. 1 (2000).

Title: *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*

Originally published in VIRGINIA LAW REVIEW. This article is reprinted with permission from VIRGINIA LAW REVIEW and University of Virginia School of Law.

VIRGINIA LAW REVIEW

VOLUME 86

FEBRUARY 2000

NUMBER 1

ARTICLE

FREE SPEECH AND EXPERTISE: ADMINISTRATIVE CENSORSHIP AND THE BIRTH OF THE MODERN FIRST AMENDMENT

*Reuel E. Schiller**

I. INTRODUCTION.....	2
II. HISTORIANS AND THE FIRST AMENDMENT.....	5
III. DEFINING THE SCOPE OF ADMINISTRATIVE CENSORSHIP: POLICE POWER AND EXPERTISE.....	11
IV. ADMINISTRATIVE CENSORSHIP.....	21
A. <i>State Administrative Censorship: 1900–1952</i>	22
1. <i>Public Fora</i>	22
2. <i>Motion Pictures</i>	29
B. <i>Federal Censorship: 1900–1945</i>	37
1. <i>The Mails</i>	38
2. <i>Customs Prohibitions</i>	42
3. <i>Radio Broadcasting</i>	43
C. <i>Conclusion</i>	51
V. THE DECLINE OF ADMINISTRATIVE CENSORSHIP.....	51
A. <i>The Beginnings</i>	51
B. <i>Weakening Administrative Censorship</i>	57
1. <i>Federal Customs Restrictions</i>	57

* Associate Professor of Law, University of California, Hastings College of the Law. B.A., Yale University. J.D., University of Virginia. Ph.D. (History), University of Virginia. My thanks to Vik Amar, Ash Bhagwat, Michael Klarnian, Evan Lee, Charles McCurdy, Robert Post, G. Edward White, and Jane Williams, each of whom commented on drafts of this Article. Suzanne Robinson provided excellent research assistance. I presented a version of this Article at the New York University Legal History Colloquium and benefited from the thoughts of the participants.

2. <i>State Regulation of Public Fora</i>	59
3. <i>Federal Regulation of the Mails</i>	66
4. <i>State Regulation of Motion Pictures</i>	70
C. <i>Conclusion</i>	74
VI. CAUSATION: WHY THE DECLINE?	75
VII. THE CURIOUS CASE OF RADIO REGULATION	96
VIII. CONCLUSION	101

I. INTRODUCTION

HISTORICAL inquiries into the origins of judicial protection of free speech usually come festooned with great stories—thrilling narratives, albeit in a legal mode. The time: 1917. The Great War ravages Europe. The Bolsheviks seize power in Russia. In the United States, paranoid legislatures pass oppressive sedition laws. Reactionary prosecutors throw outspoken reformers and political radicals in jail. Noble lawyers battle for their freedom. Many ringing phrases are bandied about: “Every idea is an incitement”;¹ “It is the function of speech to free men from the bondage of irrational fears.”² Our heroes lose at first, but ultimately justice triumphs and freedom of expression is elevated to its rightful position in the pantheon of constitutional liberties.

Unfortunately, thrilling stories do not complete history make. Even as these legal battles were fought and, indeed, after they were won, vast amounts of censorship and expression regulation continued unabated. Certainly the sedition cases that followed the First World War (the dramatic narrative) are worthy of our attention. They involved an egregious trespass on individual liberties—imprisoning people for expressing their political views—and they marked the first steps towards our contemporary understanding of the First Amendment. This Article, however, argues that to truly understand the emergence of the modern First Amendment we need to shift our attention forward in time, to the 1940s. We also need to inquire into an area of speech suppression that was more banal, and more widespread, than criminal prosecution of seditious speech: administrative censorship. From the Civil War until the

¹ *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

² *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring), overruled in part by *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

1950s, state and federal administrative agencies and municipal officials routinely suppressed speech based on judgments about its content. Administrative regulation of speech was pervasive. Administrative agencies determined what movies Americans could see, what books they could read, what they could send through the mails, what programming would be broadcast on the radio, and who could speak on the proverbial village green. Much of this censorship was uncontroversial, in that it did not touch on the politically charged issues of the day. Nevertheless, administrators judged the content of speech in ways that would be unthinkable today.

The extant scholarship fails to discuss this sort of censorship in any detail. Consequently, the story of the rise and persistence of substantial judicial controls over executive and legislative actions that restrict speech is incomplete. This Article argues that to understand this story fully, we must place it in the context of the American people's conceptions about government. In particular, we must examine how they thought public policy should be made and which institutions they believed were best suited to protect civil liberties. I will suggest that the recognition of a constitutionally preferred position for the Free Speech Clause of the First Amendment required a two-step process. Not only did courts have to lose faith in the ability of legislators to regulate speech, they also had to lose faith in the ability of administrators to do so. That process involved more than a simple shift in the judiciary's priorities about which rights it should protect. It required a shift in the judges'—and I will argue, all Americans'—beliefs about how public policy is best made in a democracy; a shift in how people thought government should work.

The substance of this shift was the ebbing of a faith in expertise that dominated policymaking from the turn of the century to the eve of World War II. Progressives and New Dealers both believed in what I will call *prescriptive government*, in which expert administrators controlled the policymaking process. By virtue of their expertise, it was thought that these administrators could arrive at objectively correct public policy outcomes. Only when the prescriptive beliefs of prewar reformers were destroyed during the Second World War could the new libertarian conception of free speech be applied to administrative regulation. Previously, faith in administrative expertise acted as a buffer to protect administrative

action from judicial scrutiny. The constitutional value of freedom of expression was left to administrators, not to courts, to protect. It was subsumed under administrative law.

The existing historiography describes events in the 1910s, 1920s, and 1930s that caused the judiciary to begin to lose trust in legislatures' ability to regulate speech. This Article demonstrates how this process accelerated during the 1940s and explains why this acceleration occurred. It also explains why, around the same time, the judiciary began to lose its faith in expert administrators. I will argue that both of these phenomena had to occur before administrative censorship would decline. By describing the decline of administrative censorship, I will demonstrate that the emergence of modern free speech libertarianism was related to broader changes in American political culture that occurred during the New Deal and World War II.

To accomplish these tasks, this Article proceeds as follows. Part II recounts the existing historical scholarship that provides a background for my story. I then describe the regime of administrative censorship that existed prior to the Second World War. Part III explains how the two abstract concepts—"the police power" and "expertise"—that provided the basis for this regime were incorporated into prewar constitutional and administrative law. Part IV then delves into the case law, demonstrating how state and federal courts transformed these ideas into legal doctrines. In particular, Part IV examines five areas of administrative speech regulation: (1) state regulation of speech in public fora, (2) state regulation of motion pictures, (3) federal regulation of the mails, (4) federal regulation of customs, and (5) federal regulation of radio broadcasting. In each of these five areas, state and federal courts created legal doctrines that gave administrators a great deal of power to censor expression, scrutinizing their actions under deferential administrative law standards rather than under independent constitutional ones.

Part V describes the collapse of this model in four of the five areas of administrative censorship identified in Part IV. By examining state and federal courts' growing reluctance to support state regulation of public speaking and motion pictures and federal regulation of customs and the mails, Part V recounts the emergence of special constitutional treatment for freedom of expression and the

decline of judicial deference to administrative experts. Part V then argues that it was the combination of these two factors—increased commitment to free speech and diminished faith in experts—that heralded the modern constitutional commitment to free speech libertarianism.

Part VI explores the reasons behind the decline of the traditional, prescriptive model of speech regulation. In particular, Part VI suggests that the American judiciary reacted to totalitarianism abroad and fears about the rise of totalitarianism in the United States by increasing its role in the protection of civil liberties. At the same time, the specter of totalitarianism caused the judiciary to lose faith in administrative expertise, one of the foundations of the pre-World War II prescriptive speech regulation regime. The courts' shaken faith in experts was reinforced by political and economic developments during the 1940s that changed the nature of liberalism by renewing confidence in markets and rejecting liberalism's more statist, New Deal antecedents.

Finally, Part VII describes the special case of the Federal Communications Commission ("FCC"). Unlike the four other areas of administrative censorship described in Parts IV and V, federal regulation of broadcasting largely escaped the effects of the courts' increased constitutional commitment to free speech and declining faith in administrative expertise. In fact, throughout the post-World War II period, the FCC retained an unparalleled amount of power to regulate speech. The story of the FCC suggests that even after the rise of constitutional free speech libertarianism, ideas of expertise still had—and continue to have—the power to insulate administrative action from constitutional scrutiny. This fact in turn illustrates that judicial protection of individuals' free speech rights was not an inevitability, but was instead the product of historical forces that continue to define the contours of the First Amendment in an inconsistent fashion.

II. HISTORIANS AND THE FIRST AMENDMENT

The development of judicial protection of freedom of expression is a fascinating story, as are the ways that the story has changed as historians have told it over the years. From the end of World War I until the early 1960s, lawyers and historians who studied the First Amendment saw its guaranty of free speech as emblematic of

the legacy of self-government willed to contemporary Americans by the Constitution's Framers. Accordingly, these thinkers, who included such preeminent free speech theorists as Zechariah Chafee and Alexander Meiklejohn, traced the history of free expression in the United States back to the founding period and portrayed near absolute prohibitions on governmental interference with political speech as the norm.³ They used America's tradition of free speech to attack what they saw as deviations from that norm. Writing in 1920, Chafee portrayed the American Revolution as a fight for freedom of expression.⁴ Using the Zenger trial, the guarantees of free speech in the various state constitutions, and the ratification of the Bill of Rights as evidence, Chafee argued that Americans of the Revolutionary Era had thrown off the meager protections provided for freedom of speech by the unwritten British constitution and replaced them with robust protection for political speech.⁵ This tradition, Chafee argued, had only come undone in the antiradical hysteria that accompanied the First World War.⁶ Thus, Chafee penned his most famous book, *Freedom of Speech*, in an effort to provide a historical and theoretical justification for restoring freedom of expression to its paramount place among American liberties.

In his famous concurrence in *Whitney v. California*,⁷ Justice Louis Brandeis took a similar approach. Quoting Thomas Jefferson, he argued that "[t]hose who won our independence" intended the Constitution to embody a libertarian conception of free speech: "They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth"⁸ Similarly, Alexander Meiklejohn traced the origin of absolutist freedom of expression back to *The Federalist*

³ See Zechariah Chafee, Jr., *Freedom of Speech* 17–22 (1920) [hereinafter Chafee, *Freedom*]; Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* 20–21 (1960). *Political Freedom* is an expanded reprint of Meiklejohn's famous 1948 book, *Free Speech and Its Relation to Self-Government*. See Meiklejohn, *supra*, at vii.

⁴ See Chafee, *Freedom*, *supra* note 3, at 19–24.

⁵ See *id.* at 3–4, 17–24.

⁶ See *id.* at 1.

⁷ 274 U.S. 357 (1927), overruled in part by *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁸ *Id.* at 375 (Brandeis, J., concurring).

Papers and used this history to attack the restrictions on so-called subversive speech during the 1950s.⁹

Beginning in the early 1960s, this narrative ran aground on the shoals of historical reality. The most treacherous of these shoals was Leonard Levy's 1960 book, *Legacy of Suppression*.¹⁰ In it, Levy showed that, far from providing robust protection for expression, the framers of the First Amendment intended to do nothing more than prevent prior restraints upon speech, thus providing exactly the same protection for expression as offered by the British constitution.¹¹ The skepticism engendered by Levy's blasphemous recounting of this early disdain for freedom of expression inspired historians to search for the genuine origins of free speech libertarianism. Some writers noted that even if constitutional protection for freedom of expression had not been the norm throughout American history, there had always existed an alternative "worthy tradition"—a tradition of free speech.¹² Levy himself found it in the opposition to the Sedition Act of 1798.¹³ Others placed it in the writings of turn-of-the-century libertarians,¹⁴ or intellectuals, including Chafee, writing after World War I, who managed to get the ear of Justices Oliver Wendell Holmes and Louis Brandeis.¹⁵ This tradition might have been suppressed due to the political, social, or cultural exigencies of the moment, but it provided contemporary judges with theoretical and historical justifications for an expansive reading of the Free Speech Clause of the First Amendment.

⁹ See Meiklejohn, *supra* note 3, at 102–04, 106–09.

¹⁰ Leonard W. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (1960).

¹¹ See *id.* at 3–6, 8–9, 221–24, 233–38.

¹² See Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America* (Jamie Kalven ed., 1988).

¹³ See Levy, *supra* note 10, at 249–309.

¹⁴ See Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* 17–21 (1991); David M. Rabban, *Free Speech in Its Forgotten Years* 23–26 (1997).

¹⁵ See Graber, *supra* note 14, at 95–100, 104–06, 122; Rabban, *supra* note 14, at 342–43; Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 *Stan. L. Rev.* 719, 719–22 (1975); Fred D. Ragan, *Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919*, 58 *J. Am. Hist.* 24, 37–43 (1971); G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 *Mich. L. Rev.* 299, 316–23 (1996) [hereinafter White, *First Amendment*].

Revisionist historians also began to address two questions raised by the conclusion that, for most of American history, government repression of speech was quite common: When did a modern, libertarian conception of freedom of expression arise, and why did such a conception emerge? In answering the first of these questions, historians pointed to events occurring at the end of the First World War and during the interwar period. The end of the war was followed by a Red Scare of an unprecedented scale in which the state and federal governments aggressively used sedition statutes passed during the war to suppress politically deviant speech.¹⁶ The scope of this suppression drove a number of legal thinkers—Chafee in particular—to write about the importance of freedom of expression to a democratic society.¹⁷

Thus, Chafee's historical claims were nothing more than post-hoc rationalizations for his argument in favor of judicial scrutiny of legislative actions that restricted expression.¹⁸ Freedom of expression, he argued, served a "political function."¹⁹ Restricting speech would prevent people who wanted to change the status quo from participating in the political process.²⁰ On the other hand, allowing as many people as possible to express their opinions on a particular matter was the best way to ensure that the country would "adopt the wisest course of action" and "carry it out in the wisest way."²¹ Consequently, under Chafee's vision, free speech doctrine had to become what I will call *participatory* in nature. It had to facilitate participation in governance. Otherwise Chafee's functionalist aspiration for the First Amendment—the idea that freedom of expres-

¹⁶ See Paul L. Murphy, *World War I and the Origin of Civil Liberties in the United States* 71–132 (1979); Rabban, *supra* note 14, at 248–61.

¹⁷ See Graber, *supra* note 14, at 123, 153; Rabban, *supra* note 14, at 316–18, 331; see also Murphy, *supra* note 16, at 71–73, 133–37, 177–78 (describing the general reaction to the suppression of speech).

¹⁸ See Graber, *supra* note 14, at 4–7; Rabban, *supra* note 14, at 318, 321–26.

¹⁹ Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 *Harv. L. Rev.* 932, 960 (1919), *quoted in* Rabban, *supra* note 14, at 332. Ted White describes the political function of freedom of expression, particularly as developed by Justice Brandeis, in *The First Amendment Comes of Age*. See White, *First Amendment*, *supra* note 15, at 323–27.

²⁰ See Graber, *supra* note 14, at 135, 140, 144–47; Rabban, *supra* note 14, at 316–35; White, *First Amendment*, *supra* note 15, at 316–23.

²¹ Chafee, *supra* note 3, at 36, *quoted in* White, *First Amendment*, *supra* note 15, at 317.

sion was necessary for a democracy to function properly—would be thwarted. Picking up on this idea, Justices Holmes and Brandeis began a series of eloquent dissents from cases in which the United States Supreme Court upheld convictions under state and federal sedition laws.²² By the 1930s these dissents had become majority opinions and the vocabulary for contemporary free speech doctrine was born. Thus, instead of tracing the origins of the libertarian conception of free speech all the way back to the Nation's founding, revisionist historians viewed the emergence of the libertarian First Amendment as a much more recent phenomenon, occurring as a result of the work of post-World War I intellectuals like Chafee, Brandeis, and Holmes.

Of course the "why" question is much more interesting than the "when" question: Why did this modern, libertarian conception of the First Amendment emerge? Some writers have suggested that the broad scope of the post-World War I Red Scare caused judges to become more protective of free speech.²³ As the net of government censorship and persecution spread wider and wider, legal scholars and judges were unable to ignore the perversity of suppressing speech in a democratic society.²⁴ More cynically, as government suppression of speech became more pervasive, this censorship moved into the liberal elite's backyard. Government censors and their private minions were no longer pursuing the frightening subversive fringe but were instead attacking liberal academics and the high-brow literature and periodicals that judges and intellectuals might actually wish to read.²⁵ Finally, some historians have linked the birth of free speech libertarianism to disillusionment with statist reform after World War I²⁶ or to the rise of

²² See *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). In *Whitney*, Brandeis vigorously attacked the majority's reading of the First Amendment but concurred with the decision because of un rebutted evidence that Whitney planned to commit specific crimes. See *Whitney*, 274 U.S. at 375–77, 379 (Brandeis, J., concurring).

²³ See Graber, *supra* note 14, at 76, 123–24; Rabban, *supra* note 14, at 299–304, 342–44, 351–52; Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 Va. L. Rev. 1, 34–38 (1996).

²⁴ See Rabban, *supra* note 14, at 299–302, 342–44, 351–52.

²⁵ See Murphy, *supra* note 16, at 70; Klarman, *supra* note 23, at 37.

²⁶ See Rabban, *supra* note 14, at 3–4, 316–20, 393.

modernist epistemologies premised on individual autonomy and cognitive freedom.²⁷

This brief overview of the free speech historiography illustrates the debt we owe to the historians who have retold the story of the emergence of a libertarian conception of the First Amendment. Their scholarship does more than merely get the facts right, debunking the myth of America's time immemorial commitment to freedom of expression. It also does more than suggest causal links between free speech libertarianism and the politics and culture of the interwar years. The revisionists' work is particularly valuable because it destroyed a Mamchaean vision of free speech where good guys support broad freedom of expression while bad guys oppose it. The story is much more complex. The people who wanted government regulation of speech were sometimes privileged reactionaries.²⁸ Just as often, however, supporters of speech restrictions were social democrats trying to promote communal values in the face of what they saw as individualism run rampant.²⁹ Thus, prewar progressives battled with antistatist libertarians over whether judicial protection of "rights" was appropriate in a democracy. Interwar intellectuals carved out exceptions for expression in their philosophy of judicial passivity. Different systems of speech regulation emerged with different intellectual rationales that yielded differing degrees of protection for individual expression.³⁰ By addressing the issue of freedom of expression in the context of broader intellectual and jurisprudential trends, these historians have started to integrate the study of the development of the First Amendment into Progressive and New Deal constitutional historiography.

²⁷ See White, *First Amendment*, *supra* note 15, at 301-04.

²⁸ See Murphy, *supra* note 16, at 72; Melvin I. Urofsky, *A March of Liberty: A Constitutional History of the United States 607-08* (1988) [hereinafter Urofsky, *March of Liberty*].

²⁹ See Graber, *supra* note 14, at 51-52, 65-74, 82-86; Rabban, *supra* note 14, at 211-17.

³⁰ See Norman L. Rosenberg, *Another History of Free Speech: The 1920s and the 1930s*, 7 *Law & Ineq. J.* 333, 335-42, 360-63 (1989) (discussing Holmes's and Brandeis's free speech metaphors—e.g., the marketplace of ideas, clear and present danger, the deliberative process—as well as prominent post-World War II theories set forth by Alexander Meiklejohn and Thomas Emerson); Norman Rosenberg, *Taking a Look at "The Distorted Shape of an Ugly Tree": Efforts at Policy-Surgery on the Law of Libel During the Decade of the 1940s*, 15 *N. Ky. L. Rev.* 11, 25-30 (1988) (describing the emergence of a "Cold War libertarian" First Amendment theory in the early 1940s).

However, they have only just begun. What remains is to examine changes in free speech jurisprudence in the many areas of law ignored by these writers. Such an examination reveals a different story from the one that they have told. It demonstrates that the contours of modern freedom of expression jurisprudence did not truly emerge until after the Second World War. It also suggests that to understand the reasons why the judiciary became the primary protector of freedom of expression we must examine broader changes in American political culture, particularly changes in Americans' attitudes towards the administrative state.

III. DEFINING THE SCOPE OF ADMINISTRATIVE CENSORSHIP: POLICE POWER AND EXPERTISE

To grasp fully the jurisprudence of administrative speech regulation before the Second World War we must first understand how judges transformed two abstract intellectual concepts—"the police power" and "expertise"—into legal doctrines between the turn of the century and the United States's entry into World War II forty-one years later. These phrases, and the judicial doctrines that emerged from them, defined the permissible extent of legislative and executive action and prescribed the degree of judicial leniency towards those acts. From 1900 until the 1940s, these concepts interacted to create a regime of extreme judicial deference towards government regulation of speech.

At the beginning of the twentieth century, the notion of the police power was the standard way of conceptualizing the scope of a state's regulatory powers.³¹ It defined the constitutional bounda-

³¹ This paragraph draws upon the huge literature describing the historical development of the police power. See, e.g., Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* 47–48, 54 (1998); Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (1993); William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (1988); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 *L. & Hist. Rev.* 293 (1985); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897*, 61 *J. Am. Hist.* 970 (1975); Charles W. McCurdy, *The Roots of Liberty of Contract Reconsidered: Major Premises in the Law of Employment, 1867–1937*, at 1984 *Y.B. Sup. Ct. Hist. Soc'y* 20 [hereinafter McCurdy, *Roots*]; William E. Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning*

ries of the state's authority to legislate. The two most famous early commentators on the police power's dimensions—Thomas Cooley and Ernst Freund—defined it as state action that protected the public welfare or, phrased differently, public safety, order, or morals.³² Thus, under the police power doctrine, governmental power was to be used only to help society as a whole, not some special class within society. For a law to be constitutional it had to have a public purpose. Laws that benefited a particular class of people without advancing the interests of the polity as a whole were unconstitutional.³³ Similarly, laws that were arbitrary or unreasonable would not pass constitutional muster.³⁴

*Lochner v. New York*³⁵ is probably the most famous police power case.³⁶ In *Lochner* the Supreme Court held unconstitutional a New York State law that limited the number of hours per day that bakers could work.³⁷ Though the decision is best known for Justice Holmes's tart dissent ("The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."³⁸), the debate between the majority, speaking through Justice Rufus Peckham, and Justice John Marshall Harlan's dissent more accurately illustrates the parameters of police power jurisprudence. Both Harlan and the majority agreed that the police power allowed regulation that furthered the public welfare by protecting health, safety, and morals.³⁹ They just disagreed about whether the law at issue did so. According to

in Nineteenth Century America, 87 Harv. L. Rev. 513 (1974); Melvin I. Urofsky, Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era, 1983 Y.B. Sup. Ct. Hist. Soc'y 53 [hereinafter Urofsky, Myth]; Melvin I. Urofsky, State Courts and Protective Legislation during the Progressive Era: A Reevaluation, 72 J. Am. Hist. 63 (1985) [hereinafter Urofsky, State Courts].

³² See Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 572–77 (1868); Ernst Freund, The Police Power: Public Policy and Constitutional Rights 3–7 (1904) [hereinafter Freund, Police].

³³ See, e.g., Cushman, *supra* note 31, at 47–48; Gillman, *supra* note 31, at 45–47, 61–62.

³⁴ See, e.g., Gillman, *supra* note 31, at 45–47, 61–62.

³⁵ 198 U.S. 45 (1905), overruled by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

³⁶ Historians have suggested that while the result in *Lochner* was atypical, the opinion's analysis was typical of the Supreme Court's police power jurisprudence. See Urofsky, Myth, *supra* note 31, at 62; Charles Warren, The Progressiveness of the United States Supreme Court, 13 Colum. L. Rev. 294, 308–13 (1913).

³⁷ See *Lochner*, 198 U.S. at 52–53, 64.

³⁸ See *id.* at 75 (Holmes, J., dissenting).

³⁹ See *id.* at 53; *id.* at 67 (Harlan, J., dissenting).

the majority, there was no evidence that the hours that bakers worked affected the wholesomeness of the bread they produced or that working long hours had a detrimental effect on the bakers themselves.⁴⁰ Consequently, the law was an arbitrary interference with the rights of individuals and a quintessential piece of class legislation—a legislative power grab by one group of workers at the expense of the rights of others.⁴¹ Harlan, on the other hand, thought that it was clear that working long hours was detrimental to the health of bakers and that, accordingly, the law was perfectly reasonable and therefore within the police power.⁴²

Defined as it was by general phrases such as public good, public welfare, general prosperity, or reasonableness, the scope of the police power was quite elastic. When the Supreme Court judged the novel regulations that states enacted to respond to the growing complexity of industrial society (e.g., minimum wage laws, laws protecting union organizing, laws regulating prices in certain industries), it shifted over the course of the late nineteenth and early twentieth century, becoming less forgiving of legislative innovations as time passed.⁴³ Nevertheless, while the police power became more narrowly defined at the margins as the Progressive Era shaded into the Roaring Twenties and, ultimately, the Great Depression, the core powers of the state remained unchanged. As I will demonstrate in Part IV, the power of the state and federal governments to regulate speech in order to protect public morals and public safety was never seriously questioned. The police power's relationship to freedom of expression—whether embodied in the Fourteenth Amendment's general protection of "liberty," the

⁴⁰ See *id.* at 57, 62.

⁴¹ See *id.* at 61–62. For modern scholarship explaining the conflict between Progressive attempts to protect workers' rights and the traditional conception of health, safety, and morals, see William E. Forbath, *Law and the Shaping of the American Labor Movement* 37–53, 177–92 (1991); McCurdy, *Roots*, *supra* note 31, at 24–26; G. Edward White, *Revisiting Substantive Due Process and Holmes's Lochner Dissent*, 63 *Brook. L. Rev.* 87, 97–100 (1997). In fact, Justice Peckham seems to have been correct in arguing that the purpose of the law was not to protect the health of bakers. Instead, the law was the result of an alliance of unions and the management of unionized bakeries who wished to ensure that nonunion shops did not have a competitive advantage over unionized shops. See Urofsky, *March of Liberty*, *supra* note 28, at 555.

⁴² See *Lochner*, 198 U.S. at 70–72 (Harlan, J., dissenting).

⁴³ See Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 *Harv. L. Rev.* 943, 944–45 (1927); Urofsky, *Myth*, *supra* note 31, at 53, 69–70.

the First Amendment, or analogous state constitutional provisions—was no different than its relationship to any other liberty that the government might restrict. If the state could articulate a public purpose then the law would pass constitutional muster.

Police power was a legal concept with its origins in nineteenth-century common-law doctrines.⁴⁴ The other important concept in the story of the emergence of the modern First Amendment—expertise—was neither legal in nature nor venerable in origin. The years between the turn of the century and beginning of World War II were a period marked by a faith that properly trained experts could find objectively correct solutions to the myriad of social problems extant in a rapidly industrializing, increasingly fractious society. This faith in expertise was first articulated by Progressive reformers in the 1910s and 1920s. Progressives believed that the scientific method could be applied to social problems.⁴⁵ Then, technocratic experts, having arrived at a solution to a given social problem, would be allowed to implement it.⁴⁶ Central to the Progressives' faith in expertise was the idea that administrative experts needed the flexibility to shape governmental responses to individual problems. Static laws had to be replaced by adjustable, context-specific guidelines.⁴⁷

The advent of the Great Depression and the New Deal did nothing to dampen enthusiasm for expertise.⁴⁸ New Deal-era reform

⁴⁴ See Gillman, *supra* note 31, at 20; Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* 27–28 (1992); Charles McCurdy, *The Liberty of Contract Regime in American Law*, in *The State and Freedom of Contract* 161, 173–74 (Harry Scheiber ed., 1998); Benedict, *supra* note 31, at 323–26.

⁴⁵ See James T. Kloppenberg, *Uncertain Victory: Social Democracy and Progressivism in European and American Thought, 1870–1920*, at 270, 385 (1986); Robert H. Wiebe, *The Search for Order, 1877–1920*, at 150 (1967); Dorothy Ross, *Modernist Social Science in the Land of the New/Old*, in *Modernist Impulses in the Human Sciences, 1870–1930*, at 171, 187–88 (Dorothy Ross ed., 1994); Daniel T. Rodgers, *In Search of Progressivism*, 10 *Revs. Am. Hist.* 113, 126–27 (1982).

⁴⁶ See, e.g., Horwitz, *supra* note 44, at 224; Kloppenberg, *supra* note 45, at 385; Wiebe, *supra* note 45, at 160.

⁴⁷ See, e.g., Horwitz, *supra* note 44, at 222–25; Kloppenberg, *supra* note 45, at 270–71, 385, 391; Wiebe, *supra* note 45, at 145, 150, 160–63; Rodgers, *supra* note 45, at 126–27.

⁴⁸ For examples of the continuity between Progressive and New Deal thought, see Otis L. Graham, Jr., *An Encore for Reform: Old Progressives and the New Deal* 4–7,

thought may have been more committed to representative democracy than was Progressivism, but it had the same belief that expert administrators were the proper mechanism for solving the massive social problems brought about by the economic collapse. Intellectuals both inside and outside of the Roosevelt Administration believed that the Depression was a sure sign that unregulated capitalism could not sustain economic prosperity.⁴⁹ Expert administration of the economy was the solution.⁵⁰ The failure of laissez-faire capitalism demonstrated the need for regulation, wrote James Landis in 1938,⁵¹ and

[w]ith the rise of regulation, the need for expertness became dominant; for the art of regulating an industry requires knowledge of the details of its operation, ability to shift requirements as the condition of the industry may dictate, the pursuit of energetic measures upon the appearance of an emergency, and the power through enforcement to realize conclusions as to policy.⁵²

Indeed, expertise was necessary not merely to prop up the nation's failing economy. In 1930 Felix Frankfurter wrote that expertise was required for the survival of democracy: "In a democracy, politics is a process of popular education—the task of adjusting the conflicting interests of diverse groups in the community, and bending the hostility and suspicion and ignorance engendered by group interests toward a comprehension of mutual understanding. For these ends, *expertise* is indispensable."⁵³

Unlike the concept of the police power, expertise was not itself a legal doctrine. Legal scholars sympathetic to Progressivism and the New Deal, however, suggested what the legal consequences of a commitment to government by administrative experts entailed. Courts, these theorists argued, were by definition inept on most

101–28 (1967); Ellis W. Hawley, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence* 3–16 (1966); Wiebe, *supra* note 45, at 301–02.

⁴⁹ See Reuel Edward Schiller, *Policy Ideals and Judicial Action: Expertise, Group Pluralism, and Participatory Democracy in Intellectual Thought and Legal Decision-Making, 1932–1970*, at 44–46 (1997) (unpublished Ph.D. dissertation, University of Virginia) (on file with the University of Virginia library) [hereinafter Schiller, *Policy Ideals*].

⁵⁰ See *id.* at 48–67.

⁵¹ See James M. Landis, *The Administrative Process* 6–9, 14 (1938).

⁵² *Id.* at 23–24.

⁵³ Felix Frankfurter, *The Public & Its Government* 161 (1930).

matters of public policy. Judges were generalists who were unqualified to review the actions of administrative experts. Accordingly, courts were to be highly deferential to the actions of administrative agencies. James Landis's suggestions in *The Administrative Process* about the judicial role were typical. Issues of fact determined by an agency should be unreviewable by a court.⁵⁴ Additionally, the manner in which an agency interpreted a law should not be disturbed by a court unless the issue fell within the expertise of the judiciary rather than that of the administrative agency; that is, unless it was a question "that lawyers are equipped to decide."⁵⁵ Though Landis did not provide examples that sprang from this rather tautological definition, he strongly implied that most legal definitions within regulatory statutes (e.g., "unfair methods of competition" in trade regulation⁵⁶ or "manipulative, deceptive or fraudulent" practice in securities regulation⁵⁷) should be outside of the courts' reach.⁵⁸

Legal historians have yet to portray fully the doctrinal manifestations of this faith in expertise. This much, however, is clear: By the time Landis wrote *The Administrative Process*, Franklin Roosevelt's appointments to the federal bench had developed a profoundly deferential approach to judicial review of administrative action. Prior to 1946, there was no unified, legislatively mandated standard for courts to apply when reviewing administrative acts. Instead, each federal or state statute that created an agency provided individual standards for judicial review. Nevertheless, some degree of uniformity developed. Pre-World War II commentators and courts divided administrative actions into three types: (1) determinations of fact, (2) determinations of law, and (3) determinations of mixed law and fact (that is, determining whether facts met a legal standard).⁵⁹ New Deal-era courts repeatedly upheld agency

⁵⁴ See Landis, *supra* note 51, at 124–34.

⁵⁵ *Id.* at 152 (emphasis omitted).

⁵⁶ *Id.* at 149 (quoting Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 717, 719 (1914), codified as amended at 15 U.S.C. § 45 (1994)).

⁵⁷ *Id.* at 146–47 (quoting Securities and Exchange Commission rules).

⁵⁸ See *id.* at 146–51.

⁵⁹ See, e.g., Ernst Freund, *Cases on Administrative Law* 705–30 (2d ed. 1928); E. F. Albertsworth, *Judicial Review of Administrative Action* by the Federal Supreme Court, 35 Harv. L. Rev. 127, 127–28 (1921); Nathan Isaacs, *Judicial Review of Administrative Findings*, 30 Yale L.J. 781, 781–83 (1921).

factual determinations without even examining parts of the record that indicated that the agency decision was incorrect.⁶⁰ More remarkable was the Supreme Court's tendency to defer to agency interpretations of law.⁶¹

In addition to this minimal judicial review of substantive agency decisions, courts developed procedural administrative law doctrines—such as implied preclusion,⁶² the negative order doctrine,⁶³ and narrow standing⁶⁴—that limited judicial supervision of the administrative process. Courts justified this circumscribed intervention in the administrative process with references to expertise and efficiency. Courts had to submit to “the strength due to the judgments of a tribunal appointed by law and informed by experience.”⁶⁵ A less deferential division of power between the judiciary and agencies would hobble governmental efficiency: “It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action.”⁶⁶ Such judicial overreaching would also defeat the purpose of creating expert agencies in the first place. An agency “deals with a subject that is highly specialized and so complex as to be the despair of judges. It is relatively better staffed for its task than is the judiciary. Its members not infrequently bring to their task long legislative or administrative experience in their subject.”⁶⁷ Thus, too much judicial oversight would constitute a judicial usurpation of legislative and executive power, an interference with “fields

⁶⁰ See, e.g., *NLRB v. Bradford Dyeing Ass'n*, 310 U.S. 318, 333–40 (1940); *NLRB v. Waterman Steamship Co.*, 309 U.S. 206, 226 (1940); *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297, 304–07 (1937).

⁶¹ See, e.g., *NLRB v. Hearst Publications*, 322 U.S. 111, 130–31 (1944), overruled in part by *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Gray v. Powell*, 314 U.S. 402, 412–13 (1941).

⁶² See, e.g., *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297, 300–01, 305–06 (1943); *American Fed. of Labor v. NLRB*, 308 U.S. 401, 408–11 (1940).

⁶³ See, e.g., *Federal Power Comm'n v. Metropolitan Edison Co.*, 304 U.S. 375, 381–83, 385–87 (1938); *Shannahan v. United States*, 303 U.S. 596, 599 (1938).

⁶⁴ See, e.g., *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 129 (1940); *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 131–32 (1939).

⁶⁵ *Rochester Tel. Corp. v. FCC*, 307 U.S. 125, 138 (1939) (quoting *Illinois Cent. R.R. v. ICC*, 206 U.S. 441, 454 (1907)).

⁶⁶ *Gray v. Powell*, 314 U.S. 402, 412 (1941).

⁶⁷ *Dobson v. Commissioner*, 320 U.S. 489, 498–99 (1943) (footnote omitted).

hitherto wisely and happily apportioned by the genius of our polity to the administration of another branch of Government."⁶⁸

While this image of a profoundly deferential New Deal-era judiciary is nearly canonical,⁶⁹ historians have yet to explore satisfactorily the relationship between courts and agencies before the New Deal. The received wisdom is that before Roosevelt appointees and their state court equivalents came to dominate the state and federal judiciaries, courts were hostile to administrative agencies and subjected their decisions to rigorous substantive review.⁷⁰ Closer examination, however, reveals more continuity between New Deal and pre-New Deal administrative law doctrines than was previously thought.⁷¹ Even before the New Deal, courts repeatedly asserted a presumption of the validity of administrative actions.⁷² Commentators from the 1920s and 1930s found that courts frequently applied a relatively lax reasonableness or nonarbitrariness standard to most administrative actions.⁷³ Additionally, many of the procedural doctrines that New Deal-era courts deployed to avoid judicial review of administrative decisions were, in fact, used before 1930.⁷⁴ Finally, as during the New Deal, the pre-

⁶⁸ *Lukens Steel*, 310 U.S. at 128.

⁶⁹ See, e.g., Horwitz, *supra* note 44, at 213-17; Louis L. Jaffe, *Judicial Control of Administrative Action* 343-44 (1965); William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* 227 (1995).

⁷⁰ See Leuchtenburg, *supra* note 69, at 227; C. Herman Pritchett, *The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947*, at 167-72 (1948); Michael E. Parrish, *The Hughes Court, the Great Depression, and the Historians*, 40 *Historian* 286, 302-06 (1978).

⁷¹ There has been very little scholarship regarding pre-New Deal administrative law doctrines. Indeed, one of the purposes of this Article is to begin to explore this area of American legal history. For one of the few studies of pre-New Deal administrative law, see Lucy Salyer's wonderful study of the Bureau of Immigration, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (1995).

⁷² See, e.g., *ICC v. Louisville & Nashville R.R.*, 227 U.S. 88, 98-100 (1913); *ICC v. Chicago, Rock Island & Pacific Ry.*, 218 U.S. 88, 110-11 (1910); *Illinois Cent. R.R. v. ICC*, 206 U.S. 441, 454 (1907).

⁷³ See Gerard C. Henderson, *The Federal Trade Commission: A Study in Administrative Law and Procedure* 97-98 (1924); 2 I.L. Sharfman, *The Interstate Commerce Commission: A Study in Administrative Law and Procedure* 385-93 (1931); Alberts-worth, *supra* note 59, at 151-53; Armistead M. Dobie, *Judicial Review of Administrative Action in Virginia* (pt. 2), 8 *Va. L. Rev.* 557, 559-70 (1922).

⁷⁴ Both the negative order doctrine and the doctrine of implied preclusion were used by the Fuller, White, and Taft Courts. See, e.g., *Piedmont & Northern Ry. v. United States*, 280 U.S. 469, 475-77 (1930); *United States v. New River Co.*, 265 U.S. 533,

New Deal Supreme Court justified its deference to administrative actions by reference to expertise and efficiency.⁷⁵

Though historians have not fully examined the scope of the Progressive-era judiciary's commitment to expertise, the beliefs and actions of Progressive policymakers are well documented. In passing legislation designed to cope with the problems arising out of an increasingly complex industrial society, the state legislatures and Congress skirted the boundaries of their constitutional powers, regulating transactions—particularly commercial transactions—that had previously been entirely in the private sphere. In many instances these legislative innovations necessitated the creation of administrative agencies, manned by experts.⁷⁶ Accordingly, in ar-

539–42 (1924); *Lehigh Valley R.R. v. United States*, 243 U.S. 412, 414 (1917); *Procter & Gamble Co. v. United States*, 225 U.S. 282, 292–94 (1912), overruled in part by *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 140–43 (1939); *Illinois Cent. R.R. v. ICC*, 206 U.S. 441, 454–55 (1907). Similarly, a narrow conception of standing, which also served to insulate agencies from judicial oversight, developed before the New Deal. See, e.g., *Moffat Tunnel League v. United States*, 289 U.S. 113, 119 (1933); *Alexander Sprunt & Son v. United States*, 281 U.S. 249, 254–55 (1930); *Edward Hines Yellow Pine Trustees v. United States*, 263 U.S. 143, 147–49 (1923). But see *The Chicago Junction Case*, 264 U.S. 258, 266–68 (1924).

⁷⁵ See, e.g., *ICC v. Louisville & Nashville R.R.*, 227 U.S. 88, 98 (1913) (“[T]he weight to be given [the evidence] is peculiarly for the body experienced in such matters and familiar with the complexities, intricacies and history of rate making . . .”); *ICC v. Chicago, Rock Island & Pacific Ry.*, 218 U.S. 88, 102, 110 (1910) (holding that only minimal judicial supervision of the administrative process was necessary because expertise itself was a sufficient guard against administrative arbitrariness: “[T]he training that is required, the comprehensive knowledge which is possessed, guards or tends to guard against the accidental abuse of [the powers of the ICC] or, if such abuse occur, to correct it”); *Illinois Cent. R.R.*, 206 U.S. at 454 (requiring judicial submission to “the strength due to the judgments of a tribunal appointed by law and informed by experience”); *Chicago, Burlington & Quincy Ry. v. Babcock*, 204 U.S. 585, 598 (1907) (“[The Board] express[es] an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth. The Board was created for the purpose of using its judgment and its knowledge.”).

⁷⁶ There is no lack of literature on the rise of expert administration during the Progressive Era. A good place to start is Morton Keller’s *Regulating a New Economy* and Stephen Skowronek’s *Building a New American State*, which both discuss the role of expertise in Progressive administration. See, e.g., Morton Keller, *Regulating a New Economy: Public Policy and Economic Change in America, 1900–1933*, at 32–33 (1990) (discussing the Federal Trade Commission); *id.* at 55–65 (discussing public utilities commissions); Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920*, at 248–84 (1982) (discussing the Interstate Commerce Commission); see also Thomas K. McCraw, *Prophets of Regulation 17–44*, 60–65 (1984) (discussing state and federal railroad regulation);

eas such as workmen's compensation or wage and hours legislation, police power doctrine conflicted with expertise.⁷⁷

By limiting the scope of the police power, courts defined certain policy desires—equalizing bargaining power between employers and employees, for example—as inappropriate for expert administration. Consequently, throughout the first four decades of the twentieth century, the courts' application of the police power doctrine often had an antagonistic relationship with Progressives' and New Dealers' faith in expertise.⁷⁸ Yet a focus on administrative innovations at the boundaries of the police power exaggerates the conflict between constitutional limits on the government's power and the Progressive emphasis on expertise. The next Part of this Article will demonstrate that in more traditional areas of government activity the police power and expertise were not in conflict at all. Cases presenting challenges to government actions that restricted freedom of expression demonstrated the judiciary's commitment to both traditional police power jurisprudence and deference to administrative experts. Indeed, it was this combination that drove free speech jurisprudence, in some instances, until the early 1950s and thus defined the First Amendment and its state constitutional equivalents in a narrow fashion.

Wiebe, *supra* note 45, at 190–92 (discussing the United States Forest Service, the Bureau of Corporations, and pure food and drug regulation). For two masterful case studies of Progressive-era administrative agencies, see Samuel P. Hays, *Conservation and the Gospel of Efficiency: The Progressive Conservation Movement, 1890–1920*, at 27–48 (1959) (studying the origins of the United States Forest Service), and Phillippe Nonet, *Administrative Justice: Advocacy and Change in a Government Agency* (1969) (examining the administration of workmen's compensation laws in California).

⁷⁷ For examples of judicial insistence on a variety of legal controls over administrative expertise, including the police power restrictions, see *Adkins v. Children's Hosp.*, 261 U.S. 525, 554–55 (1923), overruled in part by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); Louis L. Jaffe & Nathaniel L. Nathanson, *Administrative Law: Cases and Materials* 122–23 (4th ed. 1976); Nonet, *supra* note 76, at 30–37; Salyer, *supra* note 71, at 94–116; Skowronek, *supra* note 76, at 150–60, 252–67. Morton Horwitz and William Chase recount a parallel intellectual battle that took place during the first third of the century. See William C. Chase, *The American Law School and the Rise of Administrative Government* 94–135 (1982); Horwitz, *supra* note 44, at 219–30.

⁷⁸ See generally Gillman, *supra* note 31, at 147–93 (describing the relationship between police power jurisprudence and Progressive legislation, particularly minimum wage laws, after the turn of the century).

IV. ADMINISTRATIVE CENSORSHIP

This Section examines the law of administrative censorship that existed in the United States from the late nineteenth century until the years immediately after the Second World War. In describing this legal regime I will explore five types of administrative speech regulation: (1) state and local regulation of speech on public property, (2) state and local regulation of the content of motion pictures, (3) federal regulation of the mails, (4) federal regulation of literary imports, and (5) federal regulation of radio broadcasts. In each area the same pattern emerged. State and federal courts analyzed constitutional objections to state legislation under a police power standard that gave legislatures broad authority to enact laws that suppressed speech. According to these courts, legislation infringing on people's speech rights was to be judged by the same constitutional standard as any other piece of legislation. Even after 1925, when the Supreme Court applied the Free Speech Clause of the First Amendment to the states in *Gilow v. New York*,⁷⁹ the judiciary continued to approve these laws with minimal scrutiny. If the legislation was reasonable and passed in order to promote the general welfare, then it was constitutional. It did not make a difference to the courts whether the legislation regulated speech or the purity of food.

Courts approached federal legislation in a similar fashion. Congress's enumerated powers under Article I, Section 8 of the Constitution were limited only by police power-like restrictions requiring rationality, nonarbitrariness, and public purpose. Despite the obvious applicability of the First Amendment, the courts judged congressional legislation under this lax rationality standard regardless of its subject matter.

Having put aside constitutional objections, courts would then examine the action of the state or federal agency under administrative law standards. Shaped by faith in expertise, these standards required a great deal of judicial deference to administrators. Once again, actions restricting speech were treated like any other administrative action. Administrators were trusted to weigh the constitutional considerations at issue with other public policy concerns. Courts

⁷⁹ 268 U.S. 652, 666 (1925).

allowed administrators to be the constitutional decisionmakers. Thus, constitutional protection of freedom of expression was subsumed under administrative law. Courts would correct administrators who violated administrative law standards, but the fact that these administrators were regulating speech, as opposed to any other activity, was irrelevant.

A. *State Administrative Censorship: 1900–1952*

1. *Public Fora*

On May 28, 1935, Reverend Charles E. Coughlin applied to the Chicago Park District Commissioners for permission to hold a mass meeting at Soldier Field.⁸⁰ Coughlin was a popular, highly controversial “radio priest” who, throughout the 1930s, agitated for an increasingly eccentric series of social policies including a strange mixture of anticommunism, anti-Semitism, and loose monetary policy.⁸¹ Noting that Coughlin’s “opinions expressed on political and economic subjects in many instances had been inflammatory and had tended to promote bitter controversies and ill feeling on questions doubtful of solution,” the Commissioners denied the permit.⁸² Coughlin’s meeting, they suggested, “would be inimical to the harmony, good will, and good order of the people.”⁸³ Alleging violations of his state and federal constitutional rights of freedom of expression and assembly, Coughlin asked the Illinois Supreme Court to require the Commissioners to issue the permit.⁸⁴ In *Coughlin v. Chicago Park District*,⁸⁵ the supreme court refused.⁸⁶ A state or municipality had the power to exclude people entirely from the use of public property. Accordingly, it could establish criteria for using public property.⁸⁷ The only restriction upon the gov-

⁸⁰ The facts recounted in this paragraph can be found in *Coughlin v. Chicago Park Dist.*, 4 N.E.2d 1, 2–6 (Ill. 1936).

⁸¹ See Alan Brinkley, *Voices of Protest: Huey Long, Father Coughlin, and the Great Depression* 110–13, 237, 269 (1982).

⁸² *Coughlin*, 4 N.E.2d at 5.

⁸³ *Id.*

⁸⁴ See *id.* at 3–4.

⁸⁵ 4 N.E.2d 1 (Ill. 1936).

⁸⁶ See *id.* at 10.

⁸⁷ The court summarized a string of cases cited by the city and then adopted the holdings in those cases. See *id.* at 7–9. The opinion stating the proposition that a municipality’s greater power to exclude a party from using public property includes the

ernment, when it established these criteria, was that its actions must fall within the police power. So long as the Commissioners had not acted "in haste, through caprice, [or] prejudice," they had behaved constitutionally.⁸⁸ Since the Commissioners' belief that Coughlin's meeting might disrupt the harmony of the community was perfectly reasonable, their actions were constitutional.

Coughlin was typical of the public fora cases that percolated through state and federal courts between the end of the Civil War and the beginning of World War II. State and local governments routinely engaged in speech regulation when they determined who would be allowed to use public spaces within their jurisdiction. Local administrators, usually police commissioners or mayors, decided which groups would be given permission to hold public meetings or parades. Often these decisions were based upon the content of the message that the group wished to communicate. The judicial passivity embodied by the combination of pre-World War II police power constitutionalism and expertise-based administrative theory resulted in a legal regime that allowed content-based speech suppression.

The jurisprudential basis for this regime was *Commonwealth v. Davis*,⁸⁹ an 1895 opinion of the Massachusetts Supreme Judicial Court that was affirmed by the Supreme Court two years later.⁹⁰ In a typically terse and elliptical opinion, Justice Holmes, then sitting on the state court, held that legislatures had plenary authority to regulate the uses of public space: "For [a] legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for [an] owner of a private house to forbid it in his house."⁹¹ In *Davis v. Massachusetts*,⁹² the Supreme Court endorsed Holmes's opinion wholeheartedly, directly quoting the bulk of it.⁹³ The Court's decision, however, was doctrinally confused. The Court

lesser power to regulate the property's use was *Commonwealth v. Davis*, 39 N.E. 113 (Mass. 1895), *aff'd sub nom. Davis v. Massachusetts*, 167 U.S. 43 (1897). See *Coughlin*, 4 N.E.2d at 7.

⁸⁸ *Coughlin*, 4 N.E.2d at 10.

⁸⁹ 39 N.E. 113 (Mass. 1895), *aff'd sub. nom. Davis v. Massachusetts*, 167 U.S. 43 (1897).

⁹⁰ See *Davis v. Massachusetts*, 167 U.S. 43, 48 (1897).

⁹¹ *Davis*, 39 N.E. at 113.

⁹² 167 U.S. 43 (1897).

⁹³ See *id.* at 47.

made a federalism argument for denying Davis's claim⁹⁴ but also quoted Holmes's opinion that rationalized the state's actions on the grounds that the proprietor of a public place could exclude whomever he wished.⁹⁵ The message to municipalities, however, was clear: *Davis v. Massachusetts* gave them discretion to regulate the use of public spaces as they wished.

Indeed, on its face *Davis v. Massachusetts* provided localities unlimited power to determine who used public fora. Nevertheless, courts set some constitutional boundaries on this discretion. Like all other state action, municipal regulation of public speaking had to fall within the police power. It had to be reasonable and not arbitrary, capricious, or discriminatory.⁹⁶ This was the same standard that was used to judge the constitutionality of any type of state regulation. The existence of specific guaranties of free speech in state constitutions—or, after 1925, in the Federal Constitution—did not alter the judiciary's attitude. Administrative speech suppression was judged under a lax police power standard, like any other piece of legislation. Thus, in upholding local officials' refusal to issue a permit to a socialist group for a public meeting⁹⁷ and a license to an atheist for public preaching,⁹⁸ the New York Court of Appeals used analogies to the regulation of barbers, plumbers, and racetracks.⁹⁹ The Massachusetts Supreme Judicial Court justified a statute prohibiting the exhibition of a red banner by referring to cases upholding workmen's compensation statutes and maximum

⁹⁴ See *id.* at 47–48.

⁹⁵ See *id.* at 47.

⁹⁶ See Freund, *Police*, *supra* note 32, at 515. There are a huge number of cases that use these standards. *Ruhrstrat v. People*, 57 N.E. 41, 46 (Ill. 1900); *Davis*, 39 N.E. 113; *Love v. Phalen*, 87 N.W. 785 (Mich. 1901); *Frazee's Case*, 30 N.W. 72 (Mich. 1886); and *In re Garrabad*, 54 N.W. 1104, 1107–08 (Wis. 1893), are the germinal cases. *Fitts v. City of Atlanta*, 49 S.E. 793 (Ga. 1905), states the standard with particular clarity. See *id.* at 797–98.

⁹⁷ See *People ex rel. Doyle v. Atwell*, 133 N.E. 364, 366 (N.Y. 1921), error dismissed, 262 U.S. 590 (1923).

⁹⁸ See *People ex rel. O'Connor v. Smith*, 188 N.E. 745, 745–46 (N.Y.), appeal dismissed, 292 U.S. 606 (1934).

⁹⁹ See *Smith*, 188 N.E. at 745 (citing *People v. Havnor*, 43 N.E. 541 (N.Y. 1896) (barbers), error dismissed, 170 U.S. 408 (1898)); *Doyle*, 133 N.E. at 366 (citing *People ex rel. Empire City Trotting Club v. State Racing Comm'n*, 82 N.E. 723 (N.Y. 1907) (racetracks); *People ex rel. Nechamcus v. Warden of City Prison*, 39 N.E. 686 (N.Y. 1895) (plumbers)).

hours laws.¹⁰⁰ According to the Supreme Court of Pennsylvania, federal cases upholding building ordinances and the regulation of milk justified the mayor of Duquesne's decision to prohibit a pro-union rally.¹⁰¹

As the *Coughlin* case demonstrated, content could provide a reasonable basis for denying a permit. If what the speaker was saying might provoke violence or a breach of the peace, then banning that speech was perfectly reasonable and clearly within the police power.¹⁰² Indeed, the police power doctrine's reasonableness standard seemed to demand a judgment about content so that the state could demonstrate that the regulation was reasonable. *Commonwealth v. Karvonen*,¹⁰³ the Massachusetts red flag case, provides an illustration of this sort of analysis. The state supreme court held that a law prohibiting people from marching in a parade with a red flag did not infringe any constitutional liberty:

Liberty is immunity from arbitrary commands and capricious prohibitions, but not the absence of reasonable rules for the protection of the community. . . . It is said in Webster's Dictionary that "historically, a red flag has been a revolutionary and terroristic emblem." . . . In the light of this well recognized significance of the red flag, it may be assumed that the Legislature regarded it as the symbol of ideas hostile to established order, and decided that its carrying in parades would be likely to provoke turbulence or to menace the safety of travelers or citizens in general, or otherwise to interfere with the common welfare.

¹⁰⁰ See *Commonwealth v. Karvonen*, 106 N.E. 556, 557 (Mass. 1914) (citing *Chicago, Burlington & Quincy R.R. v. McGuire*, 219 U.S. 549 (1911) (workmen's compensation); *Commonwealth v. Riley*, 97 N.E. 367 (Mass. 1912) (maximum hours), *aff'd*, 232 U.S. 671 (1914)).

¹⁰¹ See *City of Duquesne v. Fincke*, 112 A. 130, 132 (Pa. 1920) (citing *New York ex rel. Lieberman v. Van De Carr*, 199 U.S. 552 (1905) (milk regulation); *Wilson v. Eureka City*, 173 U.S. 32 (1899) (building ordinances)). *Coleman v. City of Griffin*, 189 S.E. 427 (Ga. Ct. App. 1936), appeal dismissed, 302 U.S. 636 (1937); *City of Buffalo v. Till*, 182 N.Y.S. 418 (App. Div. 1920); and *City of Milwaukee v. Kassen*, 234 N.W. 352 (Wis. 1931) are other frequently cited cases that upheld municipal restrictions on public speakers that allowed officials to make content-based decisions. See also M.L. Cross, Annotation, Use of Streets or Parks for Religious Purposes, 133 A.L.R. 1402 (1941); Annotation, Law as to Street Parades, 40 A.L.R. 954 (1926).

¹⁰² See *City of Pineville v. Marshall*, 299 S.W. 1072, 1074 (Ky. 1927); *People ex rel. Wilson v. Sinclair*, 149 N.Y.S. 54, 62-63 (Ct. Gen. Sess. 1914), *aff'd sub nom. People v. Sinclair*, 151 N.Y.S. 1136 (App. Div. 1915).

¹⁰³ 106 N.E. 556 (Mass. 1914).

Its determination in this regard cannot be pronounced by the courts contrary to the fundamental law, as being arbitrary or unreasonable, or as having clearly no relation to the ends for which the police power may be exercised.¹⁰⁴

State and federal constitutions required the legislature to articulate a reasonable rationale for a law. Fears about the content of a given speech or the effect of a given symbol were exactly what the courts demanded to demonstrate the rationality of the law. The court's inquiry in *Karvonen* was no different than that which courts made about other legislation that had no impact upon freedom of speech—regulations, regardless of the type of activity they restricted, had to be reasonable. Laws restricting freedom of expression did not present a special case.¹⁰⁵

This doctrinal pattern held even when courts struck down municipal restrictions on the use of public fora. Rather than relying on state constitutional provisions protecting freedom of expression—or, after 1925, the First Amendment—courts overturned administrative actions because local officials acted outside of the bounds of the police power. In certain instances courts held that the actions of local officials were beyond reason and were thus un-

¹⁰⁴ Id. at 556–57.

¹⁰⁵ The hegemony of the police power model is illustrated by the fact that even judges writing in dissent used the police power doctrine rather than an appeal to state constitutional protections of free speech—or, after 1925, the First Amendment—to argue with the majority. For instance, dissenting from *People ex rel. Doyle v. Atwell*, 133 N.E. 364 (N.Y. 1921), error dismissed, 261 U.S. 590 (1923), a New York case upholding Mount Vernon's prohibition of a socialist rally, Judge Cuthbert Pound argued that by discriminating against socialists, the mayor was behaving in an arbitrary fashion and was thus outside of the bounds of the police power. See id. at 367–68 (Pound, J., dissenting). Like the Pennsylvania Supreme Court in *City of Duquesne*, Judge Pound cited federal case law sustaining milk regulation. See id. at 367–68 (Pound, J., dissenting) (citing *New York ex rel. Lieberman v. Van De Carr*, 199 U.S. 552 (1905)). He also cited to *Yick Wo v. Hopkins*, 118 U.S. 356 (1896), analogizing discrimination against socialists to the discrimination against Chinese practiced by regulatory agencies in San Francisco. See *Doyle*, 133 N.E. at 367 (Pound, J., dissenting). Each of these cases was an example of arbitrary behavior by local administrators. Dissenters in other cases similarly pointed to the arbitrariness of administrative action, rather than the need to give extra scrutiny to regulatory activity that impacted upon speech, as the reason for their disagreement with the majority. See, e.g., *Harwood v. Trembley*, 116 A. 430, 432 (N.J. 1922) (Minturn, J., dissenting).

constitutional.¹⁰⁶ In other cases, courts held that the legislature simply had delegated too much discretion to the local officials.¹⁰⁷ Again, this objection was not particular to speech cases. The problem of overdelegation was a generic, police power objection to all legislation. There was no special rule for the regulation of speech.¹⁰⁸ For example in *State v. Coleman*,¹⁰⁹ the Connecticut Supreme Court of Errors overturned Coleman's conviction for speaking in the Meriden town square without a permit on the ground that the town council had given the police chief unlimited discretion in awarding permits.¹¹⁰ To support its opinion the court cited cases involving the licensing of gas appliances, amusement parks, tanneries, insurance companies, and other non-speech-related activities.¹¹¹ The fact that this discretion was given with regard to the regulation of someone's speech was irrelevant. Any action within the police power would be evaluated the same way. Thus, the right to freedom of expression or assembly—whether based on the federal or state constitution—did not have any independent force. State officials either acted within the police power or they did not. Prior to the late 1930s, it was irrelevant whether the state was regulating milk prices or political speech. Each was judged under the same lenient standard.

Thus, while there were instances when the judiciary held regulation of speech unconstitutional, basing the constitutional protection of speech on the limitations of the police power offered considerably less protection of expressive activity than do modern

¹⁰⁶ See, e.g., *State v. Butterworth*, 142 A. 57, 60–61 (N.J. 1928); *Commonwealth v. Mervis*, 55 Pa. Super. 178, 182–84 (1913); *In re Garrabad*, 54 N.W. 1104, 1106 (Wis. 1893).

¹⁰⁷ See, e.g., *State v. Coleman*, 113 A. 385, 386–87 (Conn. 1921); *Anderson v. Tedford*, 85 So. 673, 673–74 (Fla. 1920); *City of Chicago v. Trotter*, 26 N.E. 359, 360 (Ill. 1891); *Rich v. City of Naperville*, 42 Ill. App. 222, 224–25 (1891).

¹⁰⁸ Compare Freund, *Police*, *supra* note 32, at 157 (discussing court decisions applying delegation analysis to government regulation of parades and public meetings), with *id.* at 535–36 (discussing limitations on delegation of legislative power with respect to licensing); see also Cooley, *supra* note 32, at 116–25 (presenting general principles concerning the delegation of legislative power).

¹⁰⁹ 113 A. 385 (Conn. 1921).

¹¹⁰ See *id.* at 386.

¹¹¹ See *id.* at 387 (citing *Sheldon v. Hoyne*, 103 N.E. 1021 (Ill. 1913) (gas appliances); *City of Plymouth v. Schultheis*, 35 N.E. 12 (Ind. 1893) (tanneries); *Bills v. City of Goshen*, 20 N.E. 115 (Ind. 1889) (amusement parks); *Welch v. Maryland Casualty Co.*, 147 P. 1046 (Okla. 1915) (insurance companies)).

interpretations of the First Amendment. The effect of this lax constitutional standard was increased by the deference with which courts judged the actions of administrative officials. When this weak constitutional basis for the protection of speech was combined with expertise-based faith in administrators, the effect was to decrease even further the role of the judiciary in the protection of expression before the Second World War.

Once the limited constitutional requirements for speech regulation were met, only the protection of administrative law stood between the censor and the citizen. Because of the respect afforded administrative expertise, this protection was minimal. For example, when the city council of Los Angeles denied a parade permit to the left-wing United Front Conference Against Hunger, a federal district court upheld its action under a lax administrative law standard: "It does not matter that the court might differ from [the council's] conclusions. Under the circumstances here presented, the city council exercised a reasonable discretion in the refusal of the permit."¹¹² The Illinois Supreme Court used the same justification to allow the Chicago Park Commissioners to silence Reverend Coughlin: "When a statute vests discretion in a municipal body to determine any matter or thing, it is not the province of courts to control the exercise of that discretion."¹¹³ This deference was justified by the judiciary's faith in administrative expertise. A Pennsylvania court, allowing a police chief to prevent a meeting of the Philadelphia Council of Unemployed, was most explicit:

The factors involved in the meeting of the kind intended by defendants and its potentiality for disturbing the public peace are peculiarly within the province of the police authorities. They know, or should know, men, conditions, the state of the public mind and the probable outcome of the combined action of men under prevailing conditions. This they are qualified to do by special training and experience and upon them falls the responsibility for determining whether a proposed meeting is inimical or not to the public good, peace or safety of the community.¹¹⁴

¹¹² *Sullivan v. Shaw*, 6 F. Supp. 112, 113 (S.D. Cal. 1934).

¹¹³ *Coughlin*, 4 N.E.2d at 10.

¹¹⁴ *Commonwealth v. Benjamin*, 10 Pa. D. & C. 775, 779 (C.P. 1928).

Thus, by combining minimal protections of expression under police power jurisprudence with lax review of administrative actions, the judiciary placed constitutional protection of expression under administrative law. Deferential administrative law standards, justified by agencies' expertise, were used to judge the constitutionality of state limitations on speech in the public fora. Indeed, courts used this approach to decide cases in each area of administrative speech regulation before World War II. Police power jurisprudence and faith in expertise provided substantial protection to the power of the Progressive and New Deal-era censor.

2. *Motion Pictures*

A similar pattern of judicial deference to administrative authority on issues of free speech emerged in the other major area of state censorship: the regulation of the content of motion pictures. Between the First and Second World Wars, Progressive reformers became increasingly troubled by the growing popularity of motion pictures.¹¹⁵ Too many of the movies in this new, massively popular medium titillated impressionable audiences with stories of sex and violence that many reformers believed would naturally lead to imitation.¹¹⁶ They were particularly worried that Hollywood's sympathetic portrayal of gangsters and "loose women" would corrupt the values of children and newly arrived immigrants.¹¹⁷ Finally, they feared, with some justification, that movies that touched on issues of race and ethnicity might result in a heightening of tensions among immigrants, African-Americans, and native-born whites.¹¹⁸ Although the focus of Progressive attempts to reform the movie industry was self-regulation, seven states established official film censorship boards during the interwar period.¹¹⁹ Additionally,

¹¹⁵ See Edward de Grazia & Roger K. Newman, *Banned Films: Movies, Censors and the First Amendment* 7-10 (1982); Morton Keller, *Regulating a New Society: Public Policy and Social Change in America, 1900-1933*, at 85-89 (1994); Alison M. Parker, *Purifying America: Women, Cultural Reform, and Pro-Censorship Activism, 1873-1933*, at 134-57 (1997).

¹¹⁶ See de Grazia & Newman, *supra* note 115, at 7-10.

¹¹⁷ See *id.* at 7.

¹¹⁸ See, e.g., *id.* at 180-86, 194-95.

¹¹⁹ See Zechariah Chafee, *Free Speech in the United States* 540-41 (1941) [hereinafter Chafee, *Free Speech*]; Theodore Kadın, *Administrative Censorship: A Study of the Mails, Motion Pictures and Radio Broadcasting*, 19 B.U. L. Rev. 533, 553 (1939);

many municipalities—as many as seventy-nine by one count¹²⁰—censored films, either directly or through the power to revoke the licenses of theaters that showed objectionable materials.¹²¹ In particular, film censorship in the nation's two most populous cities, New York and Chicago, exercised an indirect censoring effect on the exhibition of films in every city and state in the country because most films had to be shown in these two cities to be profitable.¹²² Thus, by the beginning of World War II, a substantial administrative apparatus for censoring motion pictures existed. As in the area of the regulation of speech in public fora, judicial treatment of motion picture censorship combined traditional police power jurisprudence with Progressive and New Deal deference to administrative experts in a manner that gave state and local authorities wide discretion to censor movies.

Constitutional challenges to censors' actions were uniformly unsuccessful. The state's police power clearly authorized states and localities to protect public decency, morality, and order, even if doing so involved suppressing speech. Courts that heard constitutional challenges repeatedly rejected the notion that the value of freedom of expression—whether embodied in a state constitutional provision, in the word "liberty" in the Fourteenth Amendment, or in the First Amendment applied to the states through the Fourteenth Amendment—somehow limited the police power. Accordingly, courts held that revoking the license of a theater that showed a particular movie was no different from revoking a license for any other, non-speech-related reason. Licensing theaters was no different from licensing dram shops, casinos, securities dealers, or cattle drivers.¹²³

Note, *Film Censorship: An Administrative Analysis*, 39 *Colum. L. Rev.* 1383, 1384–85 (1939) [hereinafter Note, *Film Censorship*]. Chafee for some reason left Louisiana off of his list, though his appendix of state laws affecting speech included Louisiana's law. See Chafee, *Free Speech*, *supra*, at 584.

¹²⁰ See Note, *Film Censorship*, *supra* note 119, at 1385 n.17.

¹²¹ See de Grazia & Newman, *supra* note 115, at 13–15; Keller, *supra* note 115, at 87–88; Kadin, *supra* note 119, at 553–54; Note, *Film Censorship*, *supra* note 119, at 1385–86.

¹²² See Richard S. Randall, *Censorship of the Movies: The Social and Political Control of a Mass Medium* 117–18 (1968).

¹²³ See, e.g., *Brooks v. City of Birmingham*, 32 F.2d 274, 275 (N.D. Ala. 1929) (citing *Railroad Company v. Husen*, 95 U.S. 465 (1878) (cattle drives); *Booth v. Illinois*, 184 U.S. 425 (1902) (commodities options)); *Block v. City of Chicago*, 87 N.E. 1011, 1015 (Ill. 1909) (discussing, in an analysis of an ordinance for licensing theaters, the licens-

The manner in which the Supreme Court upheld state censorship legislation was representative. In 1915 the Court decided *Mutual Film Corp. v. Industrial Commission*.¹²⁴ The General Assembly of Ohio had established a board of motion picture censors in 1913, supplying it with authority to approve only films that were "moral, educational or amusing and harmless."¹²⁵ A three judge district court convened to rule on the constitutionality of the statute reasoned that it was simply an extension of the state's police power to regulate activities that affected public health and safety. Because concern for public welfare, not the restriction of speech, was the statute's impetus, the legislative act was perfectly constitutional.¹²⁶ The court further noted: "It is to be remembered, too, that the guaranty [of freedom of expression] . . . is to be reasonably restricted and so reconciled with the exercise of the fundamental powers and duties of the state in relation to the public at large."¹²⁷ The court then cited a plethora of cases that permitted states, under the police power, to issue or withhold licenses in a manner that restricted speech.¹²⁸ Among those cases was *Davis v. Massachusetts*.¹²⁹

The following year the Supreme Court upheld the district court's opinion.¹³⁰ The Court's decision had two components. First, the Court acknowledged that movies were a powerful means of communication.¹³¹ That fact, however, did not suggest that they should be afforded extra protection. Indeed, the Court believed quite the opposite:

[Movies] may be used for evil, and against that possibility the statute was enacted. Their power of amusement and, it may be,

ing of dram shops); *id.* at 1014 (citing *City of Chicago v. Brownell*, 34 N.E. 595 (Ill. 1893) (gambling)).

¹²⁴ 236 U.S. 230 (1915), overruled in part by *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

¹²⁵ *Mutual Film Co. v. Industrial Comm'n*, 215 F. 138, 140 (N.D. Ohio 1914) (per curiam), *aff'd sub nom. Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230 (1915), overruled in part by *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). For background on the *Mutual Film* case, see de Grazia & Newman, *supra* note 115, at 3-5; John Wertheimer, *Mutual Film Reviewed: The Movies, Censorship, and Free Speech in Progressive America*, 37 *Am. J. Legal Hist.* 158 (1993).

¹²⁶ See *Mutual Film Co.*, 215 F. at 141-43.

¹²⁷ *Id.* at 143.

¹²⁸ See *id.* at 143-45.

¹²⁹ See *id.* at 144.

¹³⁰ See *Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230, 247 (1915).

¹³¹ See *id.* at 241-42.

education, the audiences they assemble, not of women alone nor of men alone, but together, not of adults only, but of children, make them the more insidious in corruption by a pretense of worthy purpose or if they should degenerate from worthy purpose

. . . .

. . . They are . . . vivid, useful and entertaining no doubt, but . . . capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition.¹³²

Considering the potentially malevolent effect of motion pictures, their regulation was clearly within the police power: "Ohio . . . [has] considered it to be in the interest of the public morals and welfare to supervise moving picture exhibitions. We would have to shut our eyes to the facts of the world to regard the precaution unreasonable or . . . a mere wanton interference with personal liberty."¹³³ Thus, motion picture censorship was a form of protective legislation aimed at vulnerable members of society and as such was worthy of constitutional approval. In a subsequent case, the Illinois Supreme Court made the connection explicitly: "Moving picture shows . . . are frequently patronized by large numbers of children The audiences include those classes, whose age, education, and situation in life especially entitle them to protection against the evil influence of obscene and immoral representations."¹³⁴

The Supreme Court's second answer to the plaintiff's free speech concerns in *Mutual Film* was to hold that the Ohio Constitution's protection of expression did not apply to movies because they were only incidentally a form of expression. Movies were "a business pure and simple, originated and conducted for profit."¹³⁵ Accordingly, they could be regulated like any other business. Thus, movies were doubly damned by the Supreme Court. On the one hand they were a potent and dangerous form of communication and thus could be regulated under the police power. On the other hand they were "spectacles" without significant social value and thus were not worthy of constitutional protection. As in the

¹³² Id. at 242, 244.

¹³³ Id. at 242.

¹³⁴ *United Artists Corp. v. Thompson*, 171 N.E. 742, 745 (Ill. 1930).

¹³⁵ *Mutual Film Corp.*, 236 U.S. at 244.

area of regulation of public fora, free speech concerns were subsumed within the Court's police power analysis. The constitutional value of freedom of expression—or the clause of the state constitution that declared that value—did not possess independent legal significance.

Mutual Film set the standard by which the constitutionality of movie censorship was judged in state and federal courts for the next thirty-five years. Constitutional challenges, both before and after *Gitlow*, were repeatedly rejected. State courts found that movie censorship, whether to protect the morals of the populace or the public order, was at the very center of the police power granted to the states.¹³⁶ Motion pictures, and even newsreels, were nothing more than dangerous spectacles worthy of no more protection than any other private activity that a state could license.¹³⁷ Indeed, the one court that did hold a given act of censorship unconstitutional did so under this police power model. In *Message Photoplay Co. v. Bell*,¹³⁸ a New York trial judge issued an injunction prohibiting the New York City Commissioner of Licenses from revoking the license of a theater showing a film entitled *Birth Control*.¹³⁹ *Birth Control* was what we might now call a “docudrama” showing Margaret Sanger distributing birth control to the poor in violation of state law and being punished for doing so.¹⁴⁰ Quoting from *Lochner*, the judge noted that the state's police power was limited

¹³⁶ See, e.g., *American Comm. on Maternal Welfare, Inc. v. Mangan*, 14 N.Y.S.2d 39, 41 (App. Div. 1939), *aff'd*, 27 N.E.2d 278 (N.Y. 1940); *Pathé Exch. v. Cobb*, 195 N.Y.S. 661, 664, 666–67 (App. Div. 1922), *aff'd*, 142 N.E. 274 (N.Y. 1923); *Message Photo-Play Co. v. Bell*, 166 N.Y.S. 338, 344 (App. Div. 1917); *Universal Film Mfg. Co. v. Bell*, 167 N.Y.S. 124, 126–27 (Sup. Ct.), *aff'd*, 166 N.Y.S. 344 (App. Div. 1917); *Thayer Amusement Corp. v. Moulton*, 7 A.2d 682, 686–90 (R.I. 1939).

¹³⁷ In *Pathé Exchange*, the New York Appellate Division's newsreel case, the court used particularly vivid language to assign even documentary news footage to the category of “a spectacle or show, rather than a medium of opinion.” *Pathé Exch.*, 195 N.Y.S. at 665. For examples of analogies to nonspeech activities in other cases, see *supra* notes 99–101, 111, 123, and accompanying text. The district court's opinion in *Mutual Film* made similar comparisons. See *Mutual Film Co. v. Industrial Comm'n*, 215 F. 138, 143–44 (N.D. Ohio 1914) (*per curiam*), *aff'd sub nom. Mutual Film Corp. v. Industrial Comm'n*, 236 U.S. 230 (1915), *overruled in part by Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

¹³⁸ 167 N.Y.S. 129 (Sup. Ct.), *rev'd sub nom. Message Photo-Play Co. v. Bell*, 166 N.Y.S. 338 (App. Div. 1917).

¹³⁹ See *id.* at 129.

¹⁴⁰ See *id.* at 130.

to “fair, reasonable, and appropriate” actions.¹⁴¹ Since *Birth Control* was clearly not immoral or obscene, and since allowing political speech was necessary for the survival of the Republic, the Commissioner’s act was outside of the police power and therefore unconstitutional.¹⁴² Freedom of expression did not have any independent force as a constitutional doctrine. The value of free speech was something that a judge might consider in construing the police power, but it was just one of many considerations in determining the reasonableness of a regulation. It was accorded no more weight than the justifications for regulating the hours of bakers at issue in *Lochner* itself. Indeed, the Appellate Division, which lifted the injunction several weeks later, did not disagree with this method of analysis.¹⁴³ It simply thought that the constitutional issue was settled. So long as the Commissioner was acting in good faith to protect the morality of the citizens of New York City he was acting within the police power.¹⁴⁴

Because the constitutionality of censoring motion pictures had been so authoritatively decided by *Mutual Film*, the vast majority of challenges to censors’ acts were administrative. Litigants would suggest that the censor had acted outside of the powers delegated to him by the legislature or in contravention of some other canon of administrative law. Thus, considerations of the social value of freedom of expression were subsumed under administrative law and the ethos of expertise that informed it. *Mutual Film* itself made clear that expertise was one of the driving rationales behind the constitutionality of movie censorship. It was perfectly appropriate to give the censorship board wide discretion because the general words of the statute would “get precision from the sense and experience of men.”¹⁴⁵ Courts would police these censors, but in the same manner that a court would review the decisions of any other administrative agency.

In the three decades between the *Mutual Film* decision and the end of World War II, courts throughout the nation adopted an extremely deferential standard for reviewing administrative determi-

¹⁴¹ Id. at 132 (quoting *Lochner v. New York*, 198 U.S. 45, 56 (1905)).

¹⁴² See id. at 132–34.

¹⁴³ See *Message Photo-Play Co. v. Bell*, 166 N.Y.S. 339, 341–43 (App. Div. 1917).

¹⁴⁴ See id. at 342–43.

¹⁴⁵ *Mutual Film*, 236 U.S. at 246.

nations that banned movies. Again and again, courts stated that they could not substitute their judgment for that of the official empowered to enforce the censorship ordinance.¹⁴⁶ Courts articulated a variety of highly deferential standards under which they reviewed the censor's actions: "unreasonabl[e] and arbitrar[y]";¹⁴⁷ "arbitrary, unlawful or capricious";¹⁴⁸ "without reasonable grounds for apprehending that public morality, decency, or welfare would be endangered";¹⁴⁹ "act[ing] fraudulently";¹⁵⁰ "[failure to] exercise . . . discretion fairly, honestly, upon correct information, and with a view to the moral and physical welfare of the public";¹⁵¹ "[not] supported by any competent or substantial evidence";¹⁵² "so plainly wrong as to be placed beyond reasonable debate";¹⁵³ or

so free from vice and vicious suggestion that whether . . . public exhibition . . . would have a tendency to debase or corrupt morals was a question upon which the educated, intelligent, disinterested minds of men and women could not differ, and that universal approval of the pictures would follow the submission . . . of any such question.¹⁵⁴

Indeed, appellate courts were vigilant in ensuring that lower courts practiced the appropriate degree of deference to administrative experts. Lower courts were required to accord experts "such discretion as may be expected from persons well qualified by education and experience to act as censors."¹⁵⁵ Lower courts that failed to do so were reversed.¹⁵⁶

¹⁴⁶ See, e.g., *Brooks v. City of Birmingham*, 32 F.2d 274, 275 (N.D. Ala. 1929); *Bainbridge v. City of Minneapolis*, 154 N.W. 964, 966 (Minn. 1915); *Foy Prods. v. Graves*, 3 N.Y.S.2d 573, 575 (App. Div.), *aff'd*, 15 N.E.2d 435 (N.Y. 1938); *Thayer Amusement Corp. v. Moulton*, 7 A.2d 682, 689-90 (R.I. 1939).

¹⁴⁷ *United Artists Corp. v. Thompson*, 171 N.E. 742, 746 (Ill. 1930).

¹⁴⁸ *American Comm. on Maternal Welfare, Inc. v. Mangan*, 14 N.Y.S.2d 39, 40 (App. Div. 1939), *aff'd*, 27 N.E.2d 278 (N.Y. 1940).

¹⁴⁹ *Public Welfare Pictures Corp. v. Lord*, 230 N.Y.S. 137, 138 (App. Div. 1928).

¹⁵⁰ *Mid-West Photo-Play Corp. v. Miller*, 169 P. 1154, 1155 (Kan. 1918).

¹⁵¹ *Silverman v. Gilchrist*, 260 F. 564, 566 (2d Cir. 1919).

¹⁵² *Thayer Amusement Corp. v. Moulton*, 7 A.2d 682, 689 (R.I. 1939).

¹⁵³ *Rollins v. Graves*, 30 N.Y.S.2d 510, 512 (Sup. Ct. 1941), *aff'd*, 32 N.Y.S.2d 11 (App. Div. 1942).

¹⁵⁴ *In re Goldwyn Distrib. Corp.*, 108 A. 816, 818 (Pa. 1919).

¹⁵⁵ *Id.*

¹⁵⁶ See *United Artists Corp. v. Thompson*, 171 N.E. 742, 746 (Ill. 1930); *Mid-West Photo-Play Corp. v. Miller*, 169 P. 1154, 1155-56 (Kan. 1918); *Goldwyn*, 108 A. at 819.

Only when state authority had violated some principle of administrative law would courts refuse to allow a film to be censored. Most frequently courts would find that the legislature had not delegated a particular power to the official. For example, on four separate occasions the Superior Court of New Jersey held that municipal officials had not been given the power to revoke the licenses of theaters simply because of the content of the films they were showing.¹⁵⁷ The Michigan Supreme Court overturned the Detroit Police Commissioner's decision to ban a film "likely to instill class hatred" because the city ordinance only gave him the power to censor indecent or immoral movies.¹⁵⁸ A New York court took a similarly dim view of a city official's attempt to ban a concededly unobjectionable film simply because the advertising was "disgusting, offensively sensational, and even dishonest."¹⁵⁹ The court noted: "Whether it is desirable and necessary to give the commissioner of licenses jurisdiction over methods of advertising . . . is not for the court to say. Plainly, however, no such authority has been vested in the commissioner"¹⁶⁰ Chicago's Police Superintendent also overstepped the bounds of his authority when censoring a film because a particular scene was "too harrowing . . . for the sensibilities of minors."¹⁶¹ The United States Court of Appeals for the Seventh Circuit stressed that "[t]he 'harmful impression on the minds of children' must be an impression caused by the obscenity or other forbidden characteristic of the picture—not an impression which the administrator on non-legislatively-defined grounds may deem harmful to them."¹⁶²

Courts would also reverse a censor's determination in the rare instance that they found that he had abused his discretion. When

¹⁵⁷ See *Hygienic Prods. v. Keenan*, 62 A.2d 150 (N.J. Sup. Ct. Ch. Div. 1948); *Public Welfare Pictures Corp. v. Brennan*, 134 A. 868, 869 (N.J. Ch. 1926). The other two cases are unreported but were mentioned by the court in *Public Welfare Pictures*. See *Public Welfare Pictures*, 134 A. at 869–70. Interestingly, Commissioner Brennan, whose attempt to ban a venereal disease morality play called *The Naked Truth* was the subject of the litigation in *Public Welfare Pictures*, see *id.* at 868, was the father of future Supreme Court Justice William J. Brennan, Jr. See de Grazia & Newman, *supra* note 115, at 205 n.2.

¹⁵⁸ *Schuman v. Pickert*, 269 N.W. 152, 153 (Mich. 1936); see *id.* at 153–54.

¹⁵⁹ *Ivan Film Prods. v. Bell*, 167 N.Y.S. 123, 124 (Sup. Ct. 1916).

¹⁶⁰ *Id.*

¹⁶¹ *City of Chicago v. Fox Film Corp.*, 251 F. 883, 884 (7th Cir. 1918).

¹⁶² *Id.*

the New York City Commissioner of Licenses refused to allow an admittedly unobjectionable film about the Franco-Prussian War to be shown lest it offend people of German ancestry, the state court overturned his decision: "The play itself to a sensible and ordinary mind could in no way create racial strife. . . . The only possible objection that could be made is that possibly some supersensitive Teuton might consider it . . . an unfair characterization and a misrepresentation of the German army" ¹⁶³ The court thus ordered the ban lifted. This result, however, was quite exceptional. As a rule, courts were profoundly deferential to the judgment of expert administrators: "[I]f the question [of the movies' immoral or obscene nature] be doubtful, and there be room for an honest difference of opinion, then the matter must be left to the official to whom the Legislature has delegated authority" ¹⁶⁴ Like the mayors and police chiefs who determined who could speak on the public streets, the combination of faith in expertise and lenient police power doctrine provided movie censors with considerable protection from judicial oversight.

B. Federal Censorship: 1900–1945

Federal officials who were empowered to regulate speech enjoyed administrative freedom comparable to their state counterparts. Before World War II, the federal government exercised its censorship powers in three areas. Most famous were the Post Office's power to exclude items from the mail and the Customs Bureau's power to prevent certain materials from entering the country. Less well-known, but equally pervasive, was the ability of the Federal Radio Commission ("FRC") to dictate programming content when issuing licenses. In each of these areas federal law followed the pattern established in the state cases involving movie censorship and the regulation of public fora. Constitutional attacks on speech regulation routinely failed because courts held that Congress's enumerated powers were constrained only by police-power-like limitations. Then courts deferred to administrative expertise, trusting that agency personnel were qualified to make judgments about whether speech should be restricted. Here too, free speech concerns be-

¹⁶³ *Life Photo Film Corp. v. Bell*, 154 N.Y.S. 763, 764 (Sup. Ct. 1915).

¹⁶⁴ *Message Photo-Play Co. v. Bell*, 166 N.Y.S. 338, 343 (App. Div. 1917).

came an element of administrative law. Statutes gave supposed experts the power to determine whether people could exercise their right to freedom of expression, and the judiciary reviewed these expert decisions under deferential administrative law standards.

1. *The Mails*

Prior to the Second World War, federal law allowed the Postmaster General essentially unbounded discretion to censor materials sent through the mails. The 1873 Comstock Act¹⁶⁵ declared that "obscene" or "immoral" publications were nonmailable and prohibited the Post Office from delivering them.¹⁶⁶ An 1888 amendment added indecent or libelous materials appearing on envelopes or postcards and private obscene letters to the Act's scope.¹⁶⁷ "Filthy" materials¹⁶⁸ and mailings "containing any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States"¹⁶⁹ were added in 1909 and 1917, respectively. Additionally, postal officials used their power to block letters sent to a "fictitious" business name—envisioned originally as a method of preventing mail fraud—to cut off mail suspected of containing objectionable materials.¹⁷⁰ Finally, during the first decades of the twentieth century, the Postmaster General used his power to withhold second-class mailing privileges for magazines he considered inappropriate as a potent method of censorship.¹⁷¹ The statute delegating this authority had no provision for regular judicial review of the Post Office's actions exercising these powers.¹⁷²

Using these powers, postal officials kept materials they considered obscene or subversive out of the mails. The vague standards established by the Comstock Act and its amendments ("obscene," "filthy," or "urging treason"), as well as the total discretion given the Postmaster to withhold second-class privileges, resulted in the

¹⁶⁵ Comstock Act, ch. 258, 17 Stat. 598 (1873).

¹⁶⁶ *Id.* § 2, 17 Stat. at 599.

¹⁶⁷ See Act of June 18, 1888, ch. 394, § 2, 25 Stat. 187, 188.

¹⁶⁸ Act of Mar. 4, 1909, ch. 321, §§ 211, 245, 35 Stat. 1122, 1129, 1138.

¹⁶⁹ Act of June 15, 1917, ch. 30, tit. XII, § 2, 40 Stat. 217, 230.

¹⁷⁰ James C.N. Paul & Murray L. Schwartz, *Federal Censorship: Obscenity in the Mail* 34 (1961).

¹⁷¹ See *id.* at 34–35; see also Kadin, *supra* note 119, at 546–47 (discussing the Supreme Court's approval of the Postmaster's authority).

¹⁷² See 39 U.S.C. §§ 224–34 (1926) (containing no judicial review clause).

censoring of a wide variety of publications ranging from the slightly risqué to the overtly erotic.¹⁷³ Publications concerning contraception and sex education were also routinely excluded from the mails.¹⁷⁴ Additionally, the Post Office used its powers to block “dissident” political journals or to revoke their second-class postal rate.¹⁷⁵

The Supreme Court’s constitutional decisions regarding Congress’s power to exclude items from the mail based on their content followed the same pattern as the state speech regulation cases. Congress’s constitutionally granted power to establish post offices gave it police-power-like control over the mails:

The States before the Union was formed could establish post-offices . . . and in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes [that might] . . . exert a demoralizing influence upon the people. When the power to establish post-offices . . . was surrendered to the Congress it was as a complete power¹⁷⁶

The scope of the police power defined the constitutional limits of Congress’s power regardless of the First Amendment. So long as Congress’s goal was to exclude materials that would be injurious to public morals, the Court would find the exclusion constitutional. In *Ex parte Jackson*,¹⁷⁷ the germinal case regarding the constitutionality of content-based exclusions from the mails, Justice Stephen Field recognized that forbidding the Post Office from carrying certain materials was constitutionally problematic.¹⁷⁸ However, so long as Congress was pursuing a public policy goal that was permissible under the police-power-like authority given it by a specific clause in Article I, Section 8, its actions were constitutional: “In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribu-

¹⁷³ See Paul & Schwartz, *supra* note 170, at 45–49, 69–73.

¹⁷⁴ See Keller, *supra* note 115, at 110–11; Paul & Schwartz, *supra* note 170, at 44–45.

¹⁷⁵ Keller, *supra* note 115, at 83; see *United States ex rel. Milwaukee Soc. Democratic Publ’g Co. v. Burleson*, 255 U.S. 407 (1921).

¹⁷⁶ *In re Rapiet*, 143 U.S. 110, 134 (1892).

¹⁷⁷ 96 U.S. 727 (1878).

¹⁷⁸ See *id.* at 733.

tion of matter deemed injurious to the public morals.”¹⁷⁹ Since Congress was regulating the mails to further an interest that was clearly within the scope of its constitutionally enumerated powers, incidental restrictions on speech were irrelevant. Thus, the facial constitutional issue—whether the government could exclude items from the mail based on their content—fell by the wayside and only administrative law checks on the power of the Post Office remained. Once again, the constitutional law issue became an administrative matter, judged under the deferential rules of the expertise-driven, prescriptive administrative state.

The Supreme Court reviewed the Post Office’s powers with a deference to expertise typical of the Progressive and New Deal Eras. The Postmaster’s presumed expertise trumped any First Amendment concerns that might have been raised by the federal government’s exclusion of items from the mails based on their content. Administrative personnel judged whether the content of a particular piece of mail was objectionable, and the courts reviewed the bureaucrats’ actions as if they were any other administrative determination. As two cases from 1904 indicate, this type of review was exceedingly lax.

In *Public Clearing House v. Coyne*¹⁸⁰ and *Bates & Guild Co. v. Payne*,¹⁸¹ the Supreme Court established highly permissive standards under which federal courts were to review the Post Office’s administrative decisions. In *Public Clearing House*, the Chicago Postmaster seized the mail of a company that he believed was engaged in an illegal pyramid scheme.¹⁸² Reasoning that Congress had a proprietary interest in the mails, the Court held that Congress had the power to exclude any materials that “may seem objectionable to it upon the ground of public policy.”¹⁸³ Persons who thought they were wronged by the actions of postal officials, the Court continued, could “apply to the courts for redress” only if the Postmaster had “exceeded his authority” or if he was “palpably wrong.”¹⁸⁴

¹⁷⁹ Id. at 736.

¹⁸⁰ 194 U.S. 497 (1904).

¹⁸¹ 194 U.S. 106 (1904).

¹⁸² See *Public Clearing House*, 194 U.S. at 498–501.

¹⁸³ Id. at 507.

¹⁸⁴ Id. at 509.

The Court defined the Post Office's discretion even more broadly in *Bates & Guild Co.*, which examined the Postmaster General's decision to deny a second-class permit for a periodical known as *Masters in Music*.¹⁸⁵ According to the Postmaster, *Masters in Music* was nothing more than sheet music parading as a periodical in order to get the second-class subsidy.¹⁸⁶ The Court upheld the Postmaster General's decision:

That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing.¹⁸⁷

The Court believed that it should defer to the Postmaster General even on an issue of law because he possessed expertise and experience: "Although a comparison of the exhibit with the statute may raise only a question of law, the action of the Postmaster General may have been, to a certain extent, guided by extraneous information obtained by him"¹⁸⁸

The Supreme Court used a similarly deferential standard of review even when the Postmaster General's decision was based entirely on the content of the item excluded from the mails. In a 1921 case, *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*,¹⁸⁹ the Supreme Court held that the Postmaster General had acted within his discretion in revoking the second-class permit of the *Milwaukee Leader*, a newspaper that had run several editorials condemning the United States's involvement in World War I.¹⁹⁰ The Postmaster General found that these editorials rendered the issues carrying them "non-mailable."¹⁹¹ Then, rather than reviewing every issue of the *Leader* to determine whether each contained articles that would make it nonmailable,

¹⁸⁵ See *Bates & Guild Co.*, 194 U.S. at 107.

¹⁸⁶ See *id.*

¹⁸⁷ *Id.* at 109–10.

¹⁸⁸ *Id.* at 110.

¹⁸⁹ 255 U.S. 407 (1921).

¹⁹⁰ See *id.* at 413–16.

¹⁹¹ *Id.* at 409.

he simply revoked its second-class permit. The editors of the *Leader* claimed that the Postmaster General's actions violated the First Amendment,¹⁹² an argument that the Court did not even feel the need to address. The constitutionality of his actions was "settled law,"¹⁹³ the Court said, citing *Public Clearing House* and *Bates & Guild Co.*¹⁹⁴ All the Court had to do was determine whether the Postmaster's decision was supported by substantial evidence, disturbing his finding only if the Court was "clearly of the opinion that it [was] wrong."¹⁹⁵ Since this was not the case, the Court upheld the permit revocation, thereby setting the pattern for judicial scrutiny of the Post Office's content-based regulation. Throughout the 1920s and 1930s, federal courts applied these deferential standards of review to Post Office actions that infringed people's freedom of expression.¹⁹⁶

2. Customs Prohibitions

A similar pattern of constitutional and administrative deference emerged when courts reviewed Customs Bureau decisions to prohibit the import of objectionable literature and art. The Tariff Act of 1842¹⁹⁷ permitted customs officials to confiscate and destroy "indecent and obscene" images that persons attempted to bring into the country.¹⁹⁸ In 1873, the Coinstock Act amended the Tariff Act to allow customs officials to seize books and pamphlets as well.¹⁹⁹ When the constitutionality of such restrictions was challenged, courts held that they were clearly within Congress's powers. As in the area of postal regulation, the Constitution's explicit granting to Congress of the power to regulate commerce with foreign nations created a police-power-like authority to exclude items that would detrimentally affect the health, safety, or morals of the American

¹⁹² See *id.* at 409.

¹⁹³ *Id.* at 413.

¹⁹⁴ See *id.* at 409.

¹⁹⁵ *Id.* at 413.

¹⁹⁶ See, e.g., *Shoemaker v. Burke*, 92 F.2d 205, 207 (D.C. Cir. 1937); *Anderson v. Patten*, 247 F. 382, 384 (S.D.N.Y. 1917)

¹⁹⁷ Act of Aug. 30, 1842, ch. 270, 5 Stat. 548.

¹⁹⁸ *Id.* § 28, 5 Stat. at 566-67.

¹⁹⁹ See Paul & Schwartz, *supra* note 170, at 23.

people.²⁰⁰ Once again, the police power limitation, not the First Amendment, defined the outer boundary of Congress's power. Expression had no privileged place in the Constitution. In *Weber v. Freed*,²⁰¹ the Third Circuit upheld a customs collector's decision to exclude a film of the Willard-Johnson boxing match.²⁰² The court held that such an exclusion was clearly within Congress's power. It was no different than excluding opium, inferior tea, or poorly harvested sponges.²⁰³

The procedures that customs agents followed in seizing and destroying books were typical of the method of governance that valued expert agencies more than courts. Though the 1842 Act required a court's permission to destroy seized materials, customs officials developed procedures that bypassed the courts entirely. The Customs Bureau informed importers that their materials had been seized and asked them to consent to their immediate destruction without informing them of their right to have a court review the decision.²⁰⁴ Alternatively, customs officials would turn materials over to the Post Office, which could destroy them without a court's permission.²⁰⁵

3. Radio Broadcasting

As broad as this discretion was, the power that Congress and the courts gave to customs and postal officials to take administrative actions based on judgments about the content of people's speech was minimal compared to that provided to the FRC and its successor, the Federal Communications Commission ("FCC"). Given essentially unrestricted discretion in granting radio licenses by Congress and only minimally unsupervised by the judiciary, the FRC exercised de facto prior restraint power over the content of radio broadcasts in the United States.

²⁰⁰ See, e.g., *Brolan v. United States*, 236 U.S. 216, 218–19 (1915); *Buttfield v. Stranahan*, 192 U.S. 470, 492–93 (1904).

²⁰¹ 224 F. 355 (3d Cir.), aff'd, 239 U.S. 325 (1915).

²⁰² See *id.* at 356, 358. In 1912 Congress had banned the importation of films of boxing matches for fear that these sporting events, which frequently involved boxers of different races, might cause race riots. See de Grazia & Newman, *supra* note 115, at 185.

²⁰³ See *Weber*, 224 F. at 358.

²⁰⁴ See Paul & Schwartz, *supra* note 170, at 39.

²⁰⁵ See *id.* at 40.

The status of the American airwaves in the late 1920s can best be described as chaotic. The Radio Act of 1912²⁰⁶ required the licensing of radio stations and established a range of frequencies for use by commercial and amateur operators.²⁰⁷ The Act delegated responsibility for the licensing to the Secretary of Commerce, who assigned frequencies to stations and dictated what hours and at what power levels they were permitted to operate.²⁰⁸ By the mid-1920s, the Act's regulatory potency had disappeared. In 1923, the Court of Appeals of the District of Columbia held that the Secretary had no authority to refuse to issue a license—the airwaves were open to all takers and the Secretary's job was simply to assign applicants a wavelength.²⁰⁹ Three years later, the Secretary lost even this power. In *United States v. Zenith Radio Corp.*,²¹⁰ a federal district court in Illinois held that the 1912 Act did not empower the Secretary to assign wavelengths.²¹¹ Shortly thereafter, in July of 1926, the Attorney General issued an opinion letter that confirmed the holding of the court in *Zenith*. The Secretary was required to issue licenses, but had no power to assign wavelengths to particular stations or to limit the power of their broadcasts or their hours of operation.²¹² The result was, in the words of one historian of broadcasting, bedlam.²¹³ During the summer and fall of 1926, nearly two hundred new stations appeared.²¹⁴ Other stations increased their power and shifted the frequency and time of their

²⁰⁶ Act of Aug. 13, 1912, ch. 287, 37 Stat. 302 (codified as amended at 18 U.S.C. §§ 1304, 1464 and 47 U.S.C. §§ 151–614 (1994 & Supp. III 1997)).

²⁰⁷ See *id.*; Erik Barnouw, 1 *A Tower in Babel: A History of Broadcasting* 31–32 (1966); Laurence F. Schmeckebier, *The Federal Radio Commission: Its History, Activities and Organization* 2–3 (1932).

²⁰⁸ See Act of Aug. 13, 1912, § 2, 37 Stat. at 303.

²⁰⁹ See *Hoover v. Intercity Radio Co.*, 286 F. 1003, 1007 (D.C. Cir. 1923), error dismissed, 266 U.S. 636 (1924).

²¹⁰ 12 F.2d 614 (N.D. Ill. 1926).

²¹¹ See *id.* at 617–18.

²¹² See Barnouw, *supra* note 207, at 189–90; Schmeckebier, *supra* note 207, at 12–13.

²¹³ See Barnouw, *supra* note 207, at 190; see also Kadin, *supra* note 119, at 562 (noting that after *Zenith*, “chaos resulted”).

²¹⁴ See Louis G. Caldwell, *Radio and the Law*, in *Radio and Its Future* 219, 230 (Martin Codel ed., 1930) [hereinafter Caldwell, *Radio*]. There were only 578 stations as of November 1925. See *id.* at 229.

broadcasts, searching for a combination that would drown out their competitors and attract large audiences.²¹⁵

Congress reacted quickly to the situation and, in February of the following year, enacted the Radio Act of 1927.²¹⁶ This statute created an administrative agency, the FRC.²¹⁷ Congress gave the FRC the power to license radio stations, assign them frequencies, limit the power of their broadcasts, and determine when they were permitted to operate.²¹⁸ Unlike the Secretary of Commerce under the 1912 Act, the FRC under the 1927 Act had discretion to approve or reject license applications.²¹⁹ In granting licenses the Commission was supposed to consider a variety of technical and financial factors (whether the operators had the capital to maintain their equipment, whether they knew how to work the equipment) as well as whether it believed that the applicant would serve the "public convenience, interest, or necessity."²²⁰ The Act explicitly prohibited the FRC from using its licensing power to "interfere with the right of free speech by means of radio communications," though the same section prohibited the utterance of "obscene, indecent, or profane language" over the airwaves.²²¹

As it turned out, the 1927 Act's vague language gave the FRC broad censorship powers. In its 1928 and 1929 annual reports, the Commission declared that it would consider the content of a station's programming when determining whether that station served public convenience, interest, or necessity. If the FRC found that a station was broadcasting programs that were "uninteresting" or

²¹⁵ See Barnouw, *supra* note 207, at 190; Caldwell, *Radio*, *supra* note 214, at 230; Kadin, *supra* note 119, at 562; Jora R. Minasian, *The Political Economy of Broadcasting in the 1920's*, 12 *J.L. & Econ.* 391, 400 (1969).

²¹⁶ Act of Feb. 23, 1927, ch. 169, 44 Stat. 1162 (codified as amended at 18 U.S.C. §§ 1304, 1464 and 47 U.S.C. §§ 151-614 (1994 & Supp. III 1997)).

²¹⁷ See *id.* § 3, 44 Stat. at 1162-63.

²¹⁸ See *id.* § 4, 44 Stat. at 1163-64.

²¹⁹ Originally, Congress authorized the FRC to exist only for a single year, to straighten out the mess created by the demise of the Radio Act of 1912. Then, its powers were supposed to be handed over to the Secretary of Commerce, with the FRC hearing appeals of the Secretary's decisions. See Schmeckebier, *supra* note 207, at 15-16. In 1929 this plan was abandoned and Congress made the FRC the permanent licensing authority. See Act of Dec. 18, 1929, ch. 7, 46 Stat. 50 (codified as amended at 47 U.S.C. §§ 151-614 (1994 & Supp. III 1997)).

²²⁰ Act of Feb. 23, 1927, § 9, 44 Stat. at 1166; see *id.* §§ 9-10, 44 Stat. at 1166.

²²¹ *Id.* § 29, 44 Stat. at 1173.

"distasteful to the listening public," it would refuse to renew the station's license.²²² Radio stations, the Commission believed, had to meet "the tastes, needs, and desires of all substantial groups among the listening public."²²³ The Commission was particularly worried about the existence of what it called "propaganda stations"—stations that acted as a "mouthpiece" for a particular point of view.²²⁴ The Commission insisted that its job was to ensure that stations provided broadcasting for the entire public. As one contemporary legal commentator put it: "Popular acceptability... seems to be the commission's criterion of the 'public interest.'"²²⁵ By issuing short-term licenses—generally only six months in duration—the FRC was able to police programming content with the ever-present threat of refusing to renew a station's license.²²⁶

Thus, the FRC's authority to restrict freedom of speech was much greater than that of the Post Office or Customs Bureau. The Commission's powers were not limited even by vague words like "obscene" or "immoral." If the content of a program did not serve the public interest, the Commission could refuse to renew the station's license. Because stations had to seek renewal every six months, the FRC essentially exercised prior restraint over programming. It defined the types of broadcasting that were permitted and forbidden, and stations that ignored these criteria found themselves out of business within six months.

FRC officials rationalized these broad powers with appeals to expertise. Louis Caldwell, the FRC's first general counsel and chairman of the American Bar Association's standing committee on communications, wrote that the technical nature of radio regulation and the speed with which technology changed necessitated wide administrative discretion in regulating the airwaves.²²⁷ For instance, Caldwell argued that licensing decisions "cannot safely be prescribed by statute, both because of the length of time which it

²²² Federal Radio Commission, Second Annual Report, 169 (1928) [hereinafter FRC Second Annual Report].

²²³ Federal Radio Commission, Third Annual Report, 34 (1929).

²²⁴ *Id.* at 34; see *id.* at 34–35.

²²⁵ Note, The Freedom of Radio Speech, 46 Harv. L. Rev. 987, 988–89 (1933).

²²⁶ See Kadin, *supra* note 119, at 565–66 & n.218.

²²⁷ See Robert W. McChesney, Free Speech and Democracy! Louis G. Caldwell, the American Bar Association and the Debate over the Free Speech Implications of Broadcast Regulation, 1928–1938, 35 Am. J. Legal Hist. 351, 368–70 (1991).

takes to enact laws and because of the fact that they involve highly technical problems and complicated issues of fact which are unsuited for decision by a legislative body."²²⁸ Legislative involvement in defining "public interest, convenience, or necessity" meant that inefficient political considerations would sidetrack the work of expert radio administrators.²²⁹ While courts might be insulated from such political pressures, they were too slow to adapt formal legal rules to the necessities of radio regulation.²³⁰ Accordingly, Caldwell believed that the vague standard that existed was perfect: "[O]nly an indefinite and very elastic standard should be prescribed for the regulation of an art and a field of human endeavor which is progressing and changing at so rapid a pace as is radio communication."²³¹

Two cases from the early 1930s established the courts' willingness to defer to the expertise of the FRC and, after it assumed the FRC's responsibilities in 1934, the FCC. In June of 1930, the FRC refused to renew the license of KFKB, a station in Milford, Kan-

²²⁸ Caldwell, *Radio*, *supra* note 214, at 227.

²²⁹ *Id.* at 234; see *id.* at 233-34; Louis Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, at 1 *Air L. Rev.* 295, 296 (1930) [hereinafter Caldwell, *Standard*].

²³⁰ See Caldwell, *Radio*, *supra* note 214, at 241; Caldwell, *Standard*, *supra* note 229, at 296-97.

²³¹ Caldwell, *Standard*, *supra* note 229, at 296. Caldwell suggested that the ideal statute would have only four short sections:

Section 1. That a licensing authority is hereby created and established to be known as the Radio Czar of America.

Section 2. The Radio Czar created by Section 1 shall do the best he can.

Section 3. For the purposes of this Act the United States is divided into two zones, as follows:

The first zone shall embrace the area comprised within a circle having a radius of one block to be drawn around the office of the Radio Czar; the second zone shall comprise the rest of the United States, its territories and possessions.

Section 4. It is hereby expressly forbidden that any Senator, Congressman, politician, president of a women's club, or broadcaster shall set foot within the first zone, under penalty of capital punishment.

Id. at 295. Caldwell used this statute not only to state his faith in expertise but to poke fun at Representative Ewin L. Davis's amendment to the Radio Act of 1927, which required the FRC to license a certain number of stations within each of five geographic zones regardless of actual need. See Schmeckebier, *supra* note 207, at 27-29 (describing the legislative history of the Davis Amendment). Caldwell saw this amendment as a perfect example of senseless legislative meddling with administrative prerogatives. See Caldwell, *Radio*, *supra* note 214, at 231-32.

sas.²³² Three times a day, the owner of the station, Dr. J.R. Brinkley, broadcast a show called the "medical question box" in which he prescribed treatments to people who had written in describing their illnesses.²³³ The treatments Brinkley prescribed generally consisted of various tonics and medications that he made and sold.²³⁴ Brinkley contended that the revocation of his license amounted to censorship. In *KFKB Broadcasting Ass'n v. FRC*,²³⁵ the Court of Appeals of the District of Columbia disagreed. Although it conceded that much of Brinkley's program was "entertaining and unobjectionable," the court refused to overturn the FRC's "exercise of judgment and discretion."²³⁶ Because the courts were not empowered "to substitute [their] judgment and discretion for that of the commission," the court was not at liberty to question the FRC's determination.²³⁷ As for Brinkley's allegations of censorship, the court reaffirmed the Commission's power to consider the past conduct of station owners when it reviewed applications for license renewals:

There has been no attempt on the part of the commission to subject any part of appellant's broadcasting matter to scrutiny prior to its release. In considering the question whether the public interest, convenience, or necessity will be served by a renewal of appellant's license, the commission has merely exercised its undoubted right to take note of appellant's past conduct, which is not censorship.²³⁸

The Court of Appeals of the District of Columbia handed down a similar decision in *Trinity Methodist Church, South v. FRC*,²³⁹ decided the following year. In this case, the FRC did not renew the license of KGEF, a Los Angeles station. KGEF was owned by "Fighting Bob" Schuler, who, for three hours a week, delivered diatribes against Jews, Catholics, local political officials, and trade

²³² See *KFKB Broad. Ass'n, v. FRC*, 47 F.2d 670, 670-71 (D.C. Cir. 1931).

²³³ *Id.* at 671.

²³⁴ See *id.*

²³⁵ 47 F.2d 670 (D.C. Cir. 1931).

²³⁶ *Id.* at 672.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ 62 F.2d 850 (D.C. Cir. 1932), cert. denied, 288 U.S. 599 (1933).

union leaders.²⁴⁰ Schuler claimed that, by refusing to renew his license because of the content of his programming, the Commission had violated his right to freedom of speech.²⁴¹ In rejecting his claim, the D.C. Circuit gave the FRC essentially unfettered discretion to determine whether the content of a program was in the public interest. The First Amendment's prohibition against restricting freedom of expression did not prevent "the application of the regulatory power of Congress in a field within the scope of its legislative authority."²⁴² To hold otherwise would turn radio broadcasting into "a scourge, and the nation a theater for the display of individual passions."²⁴³ To prevent this danger through regulation was "neither censorship nor previous restraint, nor . . . a whittling away of the rights guaranteed by the First Amendment."²⁴⁴

The impact of these decisions on the radio industry was profound. In each case, a station lost its license because of the content of a single program that made up but a small portion of the station's broadcasting day. Over the next decade, an ominous statement by the FRC (or, later, the FCC) that it would consider a particular show when reviewing a station's renewal application would cause stations to suspend the broadcast. A contemporary commentator noted that rumblings of disapproval from the FCC after the nationwide stir caused by Orson Welles's *The War of the Worlds* led CBS to prohibit the use of simulated news broadcasts.²⁴⁵ Several years earlier, CBS had cancelled a broadcast by an opponent of the New Deal after the FRC urged its licensees to avoid sponsors who objected to New Deal legislation.²⁴⁶ The FCC came down particularly hard on stations whose broadcasting it believed

²⁴⁰ See *id.* at 850, 852; Note, *supra* note 225, at 989.

²⁴¹ See *Trinity Methodist*, 62 F.2d at 851.

²⁴² *Id.*

²⁴³ *Id.* at 853.

²⁴⁴ *Id.*

²⁴⁵ See Kadin, *supra* note 119, at 570–71.

²⁴⁶ See Mitchell Dawson, *Censorship on the Air*, 31 *Am. Mercury* 257, 267 (1934). CBS broadcast the speech after several objections to the FRC's behavior in the United States Senate. See *id.* NBC had a similar problem with a broadcast of Eugene O'Neill's *Beyond the Horizon*, after which the FCC—the FRC's successor—sought to contest the station's license renewal, only to back down after a public outcry. See Kadin, *supra* note 119, at 571. Of course, the behavior of the FRC (and later the FCC) led broadcasters to self-censor rather than face a hostile agency at a license renewal hearing. See Dawson, *supra*, at 262–64.

did not represent the views of the entire community.²⁴⁷ It was not only controversial opinions like those expressed by "Fighting Bob" Schuler that aroused the ire of the FRC and the FCC. Any instance where a station's program departed from absolute neutrality on issues of public importance could draw a reprimand. Editorialization was strictly forbidden. "[T]he broadcaster," the Commission stated in 1940, "cannot be an advocate."²⁴⁸

In 1949 the FCC extended even further its administrative control over the content of radio and television broadcasts. That year it issued a report entitled *Editorializing by Broadcast Licensees*²⁴⁹ in which it announced the creation of the "fairness doctrine."²⁵⁰ The purpose of mass communications, the Commission asserted, was to promote "the development of an informed public opinion."²⁵¹ The best way to achieve this goal was to ensure that individuals were exposed to the views of "the various groups which make up the community" on "vital and often controversial issues."²⁵² To accomplish this objective, the Commission required licensees to make their facilities available "for the expression of the contrasting views of all responsible elements in the community on the various issues which arise."²⁵³ Indeed, passively allowing people with contrasting opinions on the air if they wished to respond to something they had heard was not enough. Licensees had to promote dialogue and debate actively: "[L]icensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities, over and beyond their obligation to make available on demand opportunities for the expression of opposing views."²⁵⁴ As part of these new regulations,

²⁴⁷ See, e.g., *Young People's Ass'n for the Propagation of the Gospel*, 6 F.C.C. 178 (1938); FRC Second Annual Report, *supra* note 222, at 152-53. In *Chicago Federation of Labor v. FRC*, 41 F.2d 422 (D.C. Cir. 1930), the FRC refused an application for permission to broadcast a stronger signal, by a radio station owned by a labor union, in part because of the station's views. See Jonathan W. Emord, *The First Amendment Invalidity of FCC Content Regulations*, 6 Notre Dame J.L. Ethics & Pub. Pol'y 93, 126 (1992).

²⁴⁸ *Mayflower Broad. Corp.*, 8 F.C.C. 333, 340 (1940).

²⁴⁹ 13 F.C.C. 1246 (1949).

²⁵⁰ See *id.* at 1249-50, 1257-58.

²⁵¹ *Id.* at 1249.

²⁵² *Id.*

²⁵³ *Id.* at 1250.

²⁵⁴ *Id.* at 1251.

the Commission overturned its previous ban on editorializing.²⁵⁵ Editorializing was permitted, but only if the licensee allowed opposing viewpoints on the air.²⁵⁶ Those who did not risked losing their licenses.²⁵⁷ The FCC, in essence, could compel speech. It could force broadcasters to carry programs with certain viewpoints and punish them if they did not.

C. Conclusion

This examination of the federal censorship of broadcast regulation, customs, and the mails, and state and local censorship of movies and speakers in public fora demonstrates that between the Civil War and the beginning of World War II state and federal censors carried out content-based speech regulation with a minimum of judicial supervision. The combination of a lax police power doctrine, which gave legislatures broad constitutional authority to regulate speech, and a faith in expertise, which provided administrators with wide discretion in implementing the legislatures' desires, left few incidents of speech outside the reach of the censors' control. It was up to the legislatures and executives of the state and federal governments to determine the scope of constitutional protection accorded to the speech of Americans. Until the end of the 1930s, the protection of these rights was not primarily within the judicial role. Beginning in 1939, that state of affairs would change. The boundaries of the police power began to shift, giving legislatures less freedom to regulate speech. Shortly thereafter, a decline in Americans' faith in expertise resulted in increased judicial supervision of all administrative actions. This combination of events resulted in a dramatic decline in administrative censorship.

V. THE DECLINE OF ADMINISTRATIVE CENSORSHIP

A. The Beginnings

In the 1930s, the Supreme Court began interpreting the First Amendment to require extra scrutiny of laws that restricted

²⁵⁵ See *id.* at 1252–53.

²⁵⁶ See *id.* at 1252–55.

²⁵⁷ See *id.* at 1255–56.

speech. The Court started gradually in *Fiske v. Kansas*,²⁵⁸ reversing the conviction of several leaders of the Industrial Workers of the World under a criminal syndicalism statute.²⁵⁹ The Court found that the state had not presented sufficient evidence to demonstrate that the defendants planned to use illegal acts to further their political agenda.²⁶⁰ Then, in *Stromberg v. California*,²⁶¹ *De Jonge v. Oregon*,²⁶² and *Herndon v. Lowry*,²⁶³ the Court overturned convictions under state sedition and criminal syndicalism statutes, holding the statutes unconstitutional.²⁶⁴ These cases marked the triumph of Holmes's and Brandeis's opinions from the post-World War I sedition cases.²⁶⁵ As such, *Stromberg*, *De Jonge*, and *Herndon* demonstrated the Court's increasing tendency to closely scrutinize governmental acts that restricted freedom of expression. The legal rules that emerged from these sedition cases, however, were *sui generis*. *Stromberg*, *De Jonge*, and *Herndon* did not address the police power issue at all. Each Justice conceded that it was within the state's police power to protect itself from destruction.²⁶⁶ The debate on the Court was a factually intensive one about how to determine the potential danger of a given speaker and whether a particular statute was so vague as to allow prosecution of speakers who were no threat to the polity.²⁶⁷

²⁵⁸ 274 U.S. 380 (1927).

²⁵⁹ See *id.* at 387.

²⁶⁰ See *id.* When read carefully, it is apparent that *Fiske* is primarily a due process case that happens to implicate free speech concerns rather than a pure free speech case. See *id.* at 386–87. Nevertheless, in subsequent opinions the Supreme Court cited *Fiske* for the proposition that the Court would, under the Fourteenth Amendment, carefully scrutinize legislation that punished people for the content of their speech. See, e.g., *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 519 (1939) (opinion of Stone, J., joined by Reed, J.); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931); *Stromberg v. California*, 283 U.S. 359, 368 (1931).

²⁶¹ 283 U.S. 359 (1931).

²⁶² 299 U.S. 353 (1937).

²⁶³ 301 U.S. 242 (1937).

²⁶⁴ See *Herndon*, 301 U.S. at 261; *De Jonge*, 299 U.S. at 365–66; *Stromberg*, 283 U.S. at 369–70.

²⁶⁵ See *supra* note 22.

²⁶⁶ See *Herndon*, 301 U.S. at 258; *id.* at 276–77 (Van Devanter, J., dissenting); *De Jonge*, 299 U.S. at 363; *Stromberg*, 283 U.S. at 368–69.

²⁶⁷ See *Herndon*, 301 U.S. at 261 (stating that the criminal conviction could not be upheld since the defendant's "membership in the Communist Party and his solicitation of a few members wholly fails to establish an attempt to incite others to insurrection"); *id.* at 264 (Van Devanter, J., dissenting) (arguing that a criminal defendant was "attempting

In contrast, the free speech cases not involving sedition statutes directly addressed the scope of the state's police power and illustrate how a majority of the court was beginning to depart from the traditional police power standard. There were two such cases decided before 1939: *Near v. Minnesota*²⁶⁸ and *Grosjean v. American Press Co.*²⁶⁹ Both cases involved legislative attempts to censor newspapers. The law at issue in *Near* allowed the state attorney general to abate (that is, impound and destroy) defamatory or scandalous newspapers.²⁷⁰ In a five-to-four decision the Court struck down the law.²⁷¹ The majority opinion, written by Chief Justice Charles Evans Hughes, purported to stay within the traditional conception of the police power. Hughes noted that the police power was limited in a variety of ways: Regulation of railroad rates must allow a reasonable rate of return and interferences with contractual freedom must stop short of disrupting "certain indispensable requirements of . . . liberty."²⁷² Similarly, he wrote, citing *Whitney v. California*²⁷³ and *Stromberg*, that the police power allowed people to be punished for abusing the right of freedom of expression.²⁷⁴ Freedom of the press from prior restraint, however, was an "essential attribute[]" of liberty.²⁷⁵ Accordingly, the statute was unconstitutional regardless of the fact that it was passed in order to prevent violent reactions from the people or groups defamed by the press.²⁷⁶

Hughes's mode of analysis, which created a right to freedom of expression despite the perfectly rational action of the legislature in furtherance of an interest clearly within the police power (i.e., public safety), was an innovation. As the four dissenting Justices, speaking through Justice Pierce Butler, noted, Hughes's opinion expanded the scope of the constitutional protection beyond what it

to induce and incite others to join in combined forcible resistance to the lawful authority of the State"); *De Jonge*, 299 U.S. at 365 (arguing that "peaceable assembly for lawful discussion cannot be made a crime"); *Stromberg*, 283 U.S. at 369 (holding a statute punishing flag display to be unconstitutionally "vague and indefinite").

²⁶⁸ 283 U.S. 697 (1931).

²⁶⁹ 297 U.S. 233 (1936).

²⁷⁰ See *Near*, 283 U.S. at 701-02.

²⁷¹ See *id.* at 722-23.

²⁷² *Id.* at 707-08.

²⁷³ 274 U.S. 357 (1927), overruled in part, *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

²⁷⁴ See *Near*, 283 U.S. at 708.

²⁷⁵ *Id.* at 708; see *id.* at 713-16.

²⁷⁶ See *id.* at 722.

had ever been before.²⁷⁷ The intent of the First Amendment, they argued, was to prevent arbitrary restrictions on speech,²⁷⁸ and Minnesota's restrictions on papers like Near's hate-filled "scandal sheet"²⁷⁹ were most certainly not arbitrary:

The long criminal career of the Twin City Reporter [a paper Near had previously worked for] . . . and the arming and shooting arising out of the publication of the Saturday Press [Near's paper], serve to illustrate the kind of conditions . . . by which the state legislature presumably was moved to enact the law in question. It must be deemed appropriate to deal with conditions existing in Minnesota.²⁸⁰

The dissent thus noted that Hughes was ignoring previous police power jurisprudence by creating some special protection for speech rather than testing it for its rationality and the legitimacy of the legislature's intent, like every other government action.

Indeed, the innovative nature of Hughes's opinion is evident from the briefs the parties submitted to the Court. Near's brief is short on case law, and particularly short on case law that was binding on the Court. Near attempted to persuade the Court that prior restraints were unconstitutional by citing to William Blackstone and a number of state court cases.²⁸¹ He suggested that the Court's own free speech cases—the post-World War I sedition cases—in fact gave speech broader protection²⁸² but declined to actually quote from these cases, because, as Minnesota's brief demonstrated, many such cases contained language that gave the state plenty of power to regulate speech.²⁸³ Considering the outcome of those cases, Near could not have wanted to highlight them. Having

²⁷⁷ See *id.* at 723 (Butler, J., dissenting).

²⁷⁸ See *id.* at 733–34 (Butler, J., dissenting).

²⁷⁹ *Id.* at 731 (Butler, J., dissenting).

²⁸⁰ *Id.* at 732 (Butler, J., dissenting).

²⁸¹ See Appellant's Brief at 22, 24–45, *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (No. 91) [hereinafter *Near Appellant's Brief*].

²⁸² See *id.* at 23 (citing *Pierce v. United States*, 252 U.S. 239 (1920); *Schaefer v. United States*, 251 U.S. 466 (1920); *Abrams v. United States*, 250 U.S. 616 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Schenck v. United States*, 249 U.S. 47 (1919)).

²⁸³ See Brief of Appellee at 8–10, *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (No. 91) [hereinafter *Near Appellee's Brief*] (citing *Schenck*, *Frohwerk*, *Debs* and *Schaefer* and quoting *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Schenck*, 249 U.S. at 52; *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897)).

made this novel argument, *Near* fell back to a more traditional constitutional argument: Minnesota violated the Due Process Clause by enacting a statute that was outside of the police power.²⁸⁴ The statute was overbroad, going beyond the evil the state sought to remedy, and it interfered with *Near's* right to pursue his lawful occupation.²⁸⁵ For these propositions *Near* had plenty of Supreme Court cases to cite,²⁸⁶ and Minnesota had plenty to cite back at him.²⁸⁷ These were the usual parameters of the constitutional debate.

The *Grosjean* case, decided five years later, revealed that litigants still needed to approach Hughes's innovation in *Near* tentatively. *Grosjean* was a unanimous opinion written by Justice George Sutherland, one of the dissenters in *Near*. The Court struck down a Louisiana law that taxed the advertising revenues of newspapers with a circulation of more than 20,000.²⁸⁸ The purpose of the tax seems to have been to punish newspapers that opposed the political ambitions of Huey Long.²⁸⁹ While Sutherland articulated a participatory interpretation of the First Amendment ("informed public opinion is the most potent of all restraints upon misgovernment"²⁹⁰), his opinion was not a ringing endorsement of Hughes's speech-protective reading of the First Amendment in *Near*. Instead, Sutherland used the traditional police power rationale for striking down the law. According to Sutherland, the law's purpose was so obviously malevolent that it was impossible to justify it as promoting the general welfare:

²⁸⁴ See *Near* Appellant's Brief, *supra* note 281, at 51.

²⁸⁵ See *id.*

²⁸⁶ See *id.* at 51–55, 59–61.

²⁸⁷ See *Near* Appellee's Brief, *supra* note 283, at 19–25.

²⁸⁸ See *Grosjean*, 297 U.S. at 240, 251.

²⁸⁹ See Appellees' Brief at 9, *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (No. 303). The state argued that its distinction based on circulation was perfectly rational, though it never specifically denied that Long was hostile towards most of the daily newspapers in the state. See Brief for Appellant at 47–56, *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (No. 303).

²⁹⁰ *Grosjean*, 297 U.S. at 250.

The tax here involved is bad not because it takes money from the pockets of the appellees. . . . It is bad because . . . it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. . . .

....

The form in which the tax is imposed is in itself suspicious. . . . It is measured alone by the extent of the circulation . . . with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers.²⁹¹

Unlike the law in *Near*, there was no rational basis for the Louisiana tax. Heightened scrutiny was not needed to void it.

The short-term significance of *Near*, *Grosjean*, and the sedition cases is difficult to figure out. Clearly, by the mid-1930s a majority of Justices believed in some form of heightened scrutiny for laws that had the potential to criminally punish political speech. Similarly, at least four Justices—Hughes, Brandeis, Stone, and Roberts—explicitly endorsed a presumption that laws that effected a prior restraint on the press were unconstitutional.²⁹² Indeed, two years after *Grosjean*, in *United States v. Carolene Products Co.*,²⁹³ these same four Justices, citing *Near*, *Grosjean*, *Fiske*, *Stromberg*, *De Jonge*, and *Herndon*, expanded this presumption to apply to “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation [including] . . . restraints upon the dissemination of information . . . interferences with political organizations, . . . [and] prohibition of peaceable assembly.”²⁹⁴ These decisions, however, had no effect on administrative censorship. Movie censorship continued unabated,²⁹⁵ as did content-based regulation of the use of

²⁹¹ *Id.* at 250–51.

²⁹² These four Justices, plus Justice Holmes, made up the majority in *Near*.

²⁹³ 304 U.S. 144 (1938).

²⁹⁴ *Id.* at 152 n.4 (citations omitted).

²⁹⁵ See, e.g., *American Comm. on Maternal Welfare, Inc. v. Mangan*, 14 N.Y.S.2d 39, 39, 41–42 (App. Div. 1939), *aff'd*, 27 N.E.2d 278 (N.Y. 1940); *Thayer Amusement Corp. v. Moulton*, 7 A.2d 682, 684, 691 (R.I. 1939); *United Artists Corp. v. Board of Censors*, 225 S.W.2d 550, 556 (Tenn. 1949), *cert. denied*, 339 U.S. 952 (1950).

public fora,²⁹⁶ and radio regulation.²⁹⁷ Content-based censorship of the mails actually increased.²⁹⁸ Only customs censorship had decreased by the mid-1930s, and, as we shall see, this occurred without any reference to the Supreme Court's free speech jurisprudence. Contemporary conceptions of the police power were changing. Judicial protection of economic rights was ebbing, and the Court had begun a more searching inquiry into the validity of laws that restricted speech. But in the area of the law where the vast majority of governmental restriction of speech occurred, these changes were as yet unfelt. Beginning in 1939, that would change.

B. Weakening Administrative Censorship

1. Federal Customs Restrictions

The Customs Bureau's regime of censorship was the first area of administrative censorship to decline. It did so at roughly the same time that the Supreme Court became increasingly speech protective, though the change in the Customs Bureau's behavior was not a response to the Court's holdings. Instead, the impetus came from Congress and the lower federal courts. In 1929, Congress undertook a massive reform of the country's tariff laws. Much of the debate over what was to become the Smoot-Hawley tariff concerned protecting industries and agricultural producers that were crippled by the Depression. However, amidst the discussion of import tariffs on various commodities, Bronson Cutting, a Republican Senator from New Mexico, moved to amend the pending legislation to stop the Customs Bureau from preventing obscene or treasonous materials from entering the country.²⁹⁹ A vigorous debate ensued. Cutting argued that customs officials used their authority to exclude books of genuine literary merit and that the Bureau's decen-

²⁹⁶ See, e.g., *Lovell v. City of Griffin*, 191 S.E. 152, 152 (Ga. Ct. App. 1937), rev'd, 303 U.S. 444 (1938); *People v. Smith*, 188 N.E. 745, 745 (N.Y.), appeal dismissed, 292 U.S. 606 (1934); *City of Milwaukee v. Kassen*, 234 N.W. 352, 352, 354 (Wis. 1931).

²⁹⁷ See, e.g., *Trinity Methodist Church v. FRC*, 62 F.2d 850, 854 (D.C. Cir. 1932), cert. denied, 288 U.S. 599 (1933); *KFKB Broad. Ass'n v. FRC*, 47 F.2d 670, 672 (D.C. Cir. 1931).

²⁹⁸ See Paul & Schwartz, *supra* note 170, at 68-74.

²⁹⁹ See *id.* at 55-56; Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 Wm. & Mary L. Rev. 741, 772 (1992).

tralized decisionmaking mechanisms resulted in random and haphazard exclusion.³⁰⁰ When the Tariff Act of 1930 passed, both the restrictions to which Cutting had objected remained.³⁰¹ In response to pressure from professors and lawyers concerned with customs censorship, however, the bill's sponsors added a proviso creating an exception for "so-called classics or books of recognized and established literary or scientific merit."³⁰² Additionally, under the Act, customs officials no longer had the last word in determining whether an article was obscene or treasonous. Instead, they had to go to a federal district court to obtain permission to exclude an item and importers were entitled to present their case to a jury in that proceeding.³⁰³

Thus, the effect of the 1930 Act was to create a small loophole for works of artistic merit and, more significantly, to remove customs censorship from the administrative process, placing it within the authority of the federal courts. These courts then went on to narrow the definition of what constituted obscenity. In 1934, in the famous *Ulysses* case,³⁰⁴ the Second Circuit held that a book would only be considered obscene if it, "taken as a whole," would "tend to promote lust" in normal adults.³⁰⁵ In doing so the Second Circuit rejected a more traditional definition of obscenity that condemned works containing a single passage that might corrupt the most tender members of society (i.e., women and children).³⁰⁶ Six years later, the D.C. Circuit strongly endorsed the Second Circuit's innovation, writing a veritable dissertation on the evolution of Ameri-

³⁰⁰ See Paul & Schwartz, *supra* note 170, at 55-60; Blanchard, *supra* note 299, at 771-74.

³⁰¹ See Act of June 17, 1930, ch. 497, § 305(a), 46 Stat. 590, 688 (prohibiting importation of "obscene" material or writings "containing any matter advocating or urging treason or insurrection").

³⁰² *Id.*; see Paul & Schwartz, *supra* note 170, at 59.

³⁰³ See Act of June 17, 1930, § 305(a), 46 Stat. at 688; Paul & Schwartz, *supra* note 170, at 60.

³⁰⁴ *United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705 (2d Cir. 1934).

³⁰⁵ *Id.* at 707.

³⁰⁶ See *id.* at 708. This traditional definition, known as the "*Hicklin* test," derived from *Regina v. Hicklin*, 3 L.R.-Q.B. 360 (1868), and had been adopted by the Circuit Court for the Southern District of New York in *United States v. Bennett*, 24 F. Cas. 1093, 1104 (C.C.S.D.N.Y. 1879) (No. 14,571).

can attitudes towards sexuality and the culturally contingent nature of the question of whether nudity was inherently obscene.³⁰⁷

While the Customs Bureau's censorship powers were considerably circumscribed during the 1930s, this was not done in the shadow of unconstitutionality. The debates over the 1930 Tariff Act and the decisions of the Courts of Appeals did not suggest that the Customs Bureau's authority was somehow unconstitutional. Senator Cutting simply suggested that customs censorship was bad public policy. Similarly, the federal court decisions purported to do nothing more than interpret the meaning of the word "obscene" in the statute. There was no suggestion that Congress was without the constitutional authority to exclude items regardless of their prurient nature. Congress had simply become skeptical of the Customs Bureau's expertise.³⁰⁸

2. State Regulation of Public Fora

The next area of administrative censorship to disappear—state regulation of public fora—was a different story. In this area the Supreme Court stripped local administrators of their traditional power—power previously considered constitutional—to exclude speakers from public fora based on the content of their speech. With two cases from early 1938 and mid-1939, *Lovell v. City of Griffin*³⁰⁹ and *Hague v. CIO*,³¹⁰ the Court began to remove free speech from the domain of administrative law, thus undermining the prescriptive vision of the First Amendment.

At issue in *Lovell* was a city ordinance that required people to obtain written permission from the city manager if they wished to distribute literature within the city.³¹¹ *Lovell*, a Jehovah's Witness,

³⁰⁷ See *Parmelee v. United States*, 113 F.2d 729, 731–38 (D.C. Cir. 1940).

³⁰⁸ The nature of the materials censored by customs inspectors suggests a reason why Congress and the federal judiciary lost faith in their expertise before the more general decline in prescriptive regulation described in the pages that follow. Unlike movie or postal censorship, most Customs Bureau censorship inhibited the reading desires of America's intelligentsia, who were unable to read the works of Ovid, James Joyce, and Henry Miller because of overly zealous customs inspectors. See Paul & Schwartz, *supra* note 170, at 69. Perhaps this group's political clout—and the fact that federal judges and Congressmen belonged to it—hastened the loss of faith in expertise in this area.

³⁰⁹ 303 U.S. 444 (1938).

³¹⁰ 307 U.S. 496 (1939).

³¹¹ See *Lovell*, 303 U.S. at 447.

refused to get a permit and was convicted of violating the ordinance when she began distributing religious tracts.³¹² The Georgia Court of Appeals summarily dismissed Lovell's appeal.³¹³ That the ordinance was within the state's police power was so obvious to the Georgia court that it did nothing more than state the proposition when it rejected Lovell's free speech claim under the Fourteenth Amendment.³¹⁴

The Supreme Court, however, disagreed. The ordinance, it held unanimously, was facially unconstitutional.³¹⁵ Citing John Milton, as well as *De Jonge, Near, Stromberg*, and *Grosjean*,³¹⁶ Chief Justice Hughes rejected the traditional police power inquiry into the motives behind the municipal ordinance: "Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. . . . in its baldest form."³¹⁷ Similarly, the Court made no mention of the city's proprietary right to control its public spaces or of its ability, under the police power, to pass whatever ordinances were needed to keep the streets clean and safe. These staple rationales for administrative discretion, so prominent in the case law since *Davis v. Massachusetts*,³¹⁸ suddenly carried no weight with the Supreme Court.

The following year, in *Hague*, the Court delivered the *coup de grace* to content-based limitations on access to public fora. The case involved Mayor Frank Hague's attempts to keep the Committee for Industrial Organization ("CIO") from organizing workers in Jersey City. A Jersey City ordinance required persons wishing to assemble in public to apply for a permit, which the Director of Public Safety was to refuse only "for the purpose of preventing ri-

³¹² See *id.* at 447-48.

³¹³ See *Lovell v. City of Griffin*, 191 S.E. 152 (Ga. Ct. App. 1937), *rev'd*, 303 U.S. 444 (1938).

³¹⁴ See *id.* at 152. The Court cited *Coleman v. City of Griffin*, 189 S.E. 427 (Ga. Ct. App. 1936), appeal dismissed, 302 U.S. 636 (1937), a case it had decided four months earlier sustaining the ordinance against a claim that it violated the Free Exercise Clause. See *id.* at 430.

³¹⁵ See *Lovell*, 303 U.S. at 451.

³¹⁶ See *id.* at 450-52.

³¹⁷ *Id.* at 451-52.

³¹⁸ 167 U.S. 43 (1897). For a discussion of the *Davis* regime, see *supra* notes 89-101 and accompanying text.

ots, disturbances or disorderly assemblage.”³¹⁹ Hague had repeatedly used this ordinance to prevent meetings of labor unions, socialists, and liberal advocates of freedom of expression, such as the American Civil Liberties Union.³²⁰ Wishing to avoid yet another encounter with Jersey City police, the CIO asked the federal court sitting in Trenton to enjoin enforcement of the ordinance. The district court granted the injunction, suggesting that the Supreme Court’s decisions applying the Free Speech Clause to the states had overruled *Davis v. Massachusetts*.³²¹ As for the portion of *Davis v. Massachusetts* that was based not on federalism but on Holmes’s claim that the state had a proprietary interest in public property, the district court judge labeled this “double dictum . . . entitled to the weight attaching to the lightest utterances of the members of our final tribunal [and] . . . not binding either on us or on them.”³²² The Third Circuit upheld the injunction.³²³ Rather than calling Holmes’s logic in *Commonwealth v. Davis* dictum (or “double dictum,” whatever that is) the court simply held that all of the Supreme Court’s decision in *Davis v. Massachusetts* had been overruled by implication. *Davis v. Massachusetts*, the court argued, had been “modified” by subsequent Supreme Court opinions, including *Lovell* and the Court’s decisions overturning state sedition convictions during the late 1920s and early 1930s.³²⁴ According to the Third Circuit, comparing the power of municipal authorities to “the powers of an individual over his own dwelling, does not seem consonant with the expressions of the Supreme Court upon germane subjects in a later period.”³²⁵

Both the district court and the circuit court were reading tea leaves, predicting—correctly as it turned out—that the Supreme Court would continue its liberalizing trend with respect to the First Amendment by restricting municipal police power. It is important to recognize, however, that the accuracy of this prediction was not

³¹⁹ *Hague*, 307 U.S. at 502 n.1 (opinion of Roberts, J., joined by Black, J.).

³²⁰ See Chafee, *Free Speech*, *supra* note 119, at 410.

³²¹ See *Committee for Indus. Org. v. Hague*, 25 F. Supp. 127, 151 (D.N.J. 1938), modified, 101 F.2d 774 (3d Cir.), modified, 307 U.S. 496 (1939).

³²² *Id.* at 151.

³²³ *Hague v. Committee for Indus. Org.*, 101 F.2d 774, 791 (3d Cir.), modified, 307 U.S. 496 (1939).

³²⁴ *Id.* at 785.

³²⁵ *Id.*

self-evident. As the aptly named Judge Davis, who dissented in part from the Third Circuit's opinion, noted, *Hague* was easily distinguished from prior free speech case law. Each of these cases, Davis argued, prohibited the state from punishing people for the expression of ideas but allowed the statutes and ordinances "passed for self protection and self preservation."³²⁶ Thus, the usual police power standards and administrative standards should be applied. All that a court should require was that "the Director had reasonable grounds to believe that the meeting for which he refused a permit would have resulted in riots, disturbances or disorderly assemblage."³²⁷ Davis then listed various inflammatory statements made by the regional director of the CIO and the heads of various organizations that opposed the CIO's so-called "invasion" of Jersey City.³²⁸ Under these circumstances, Davis argued, the Director's refusal to issue the permit was perfectly reasonable and the district court erred in preventing him from doing so.³²⁹

Perhaps Judge Davis's opinion minimized the strength of Chief Justice Hughes's opinion in *Near*, but his assessment of the sedition cases was correct. Each of these cases contained language asserting that the state retained the power to take actions to protect public safety even if speech was suppressed.³³⁰ The convictions overturned in *Fiske*, *Stromberg*, and *De Jonge* were for expressive activity unaccompanied by any violence or threat of violence whatsoever. The debate in these cases, as well as in *Whitney* and *Gilow v. New York*,³³¹ which both sustained convictions, was about the amount of evidence necessary to demonstrate that public safety was actually at risk. Additionally, the sedition cases involved criminal statutes, which were presumably due greater scrutiny because they involved punitive sanctions rather than the mere restriction of speech. Even *Near*, the case that most strongly stated the newly elevated status of the First Amendment, was based on the importance of a free press. *Near* said nothing explicit about limiting the power of ad-

³²⁶ Id. at 803 (Davis, J., dissenting in part).

³²⁷ Id. at 807 (Davis, J., dissenting in part).

³²⁸ Id. at 805-06 (Davis, J., dissenting in part).

³²⁹ See id. at 806-07 (Davis, J., dissenting in part).

³³⁰ See, e.g., *Herndon*, 301 U.S. at 255, 258; *De Jonge*, 299 U.S. at 363; *Stromberg*, 283 U.S. at 368-69; *Fiske*, 274 U.S. at 386.

³³¹ 268 U.S. 652 (1925).

ministrators to suppress speech in a public place, as opposed to distribution of printed materials, if public safety required it.

Indeed, the speculative nature of the district and circuit court opinions and the strength of Davis's dissent are demonstrated by the nature of the arguments that the parties made to the Supreme Court. Hague parroted Judge Davis's dissent, arguing that the administrative actions of municipal officials should be judged under a highly deferential standard. Only if the Director of Public Safety had abused his discretion could his decision be overturned:

Manifestly, a court should not undertake to place itself in the position occupied by the Director of Public Safety and undertake to perform the functions imposed upon that official by the law. The statute in question calls for his judgment—not the Court's judgment, and unless the Court finds by convincing proof that there has been a clear violation of duty on the part of the municipal officer by abusing the discretion which the law imposes upon him, it is not justified in disturbing his determination.³³²

Because the Director had heard plenty of evidence that the CIO's "invasion" of Jersey City could result in violence, his decision was reasonable:

[Such information] furnished a reasonable basis for the "state of mind[.]" which led him to make his decisions. And if there was a conceivably reasonable basis for his action, it cannot be said that there was an abuse of discretion, *regardless of what the reaction of the court below, or of this Court, or of any person other than the Director, would have been in similar circumstances.*³³³

The CIO responded with a two-pronged strategy. First, it argued that restricting expression required a greater justification than other actions taken pursuant to the police power. Citing *Near*, *De Jonge*, and *Lovell*, it argued that all prior restraints of speech were unconstitutional.³³⁴ The CIO then claimed that *Davis v. Massachusetts* was no longer good law and that it was inconsistent with "The English Tradition" and "The American Tradition"

³³² Brief on Behalf of Petitioners at 58–59, *Hague v. Committee for Indus. Org.*, 307 U.S. 496 (1939) (No. 651) [hereinafter *Hague* Petitioners' Brief].

³³³ *Id.* at 61.

³³⁴ See Respondents' Brief at 42–51, *Hague v. Committee for Indus. Org.*, 307 U.S. 496 (1939) (No. 651) [hereinafter *Hague* Respondents' Brief].

to limit people's right to speak in public places.³³⁵ It bolstered this argument by quoting from a series of sources stating the proposition that freedom of expression was an essential component of a free society, "the matrix, the indispensable condition . . . of nearly every other form of freedom."³³⁶

Recognizing that this participatory rationale for free speech was not yet canonical, the CIO also made an administrative argument—an argument designed to convince Justices still operating under the prescriptive vision of free speech. The Director's action, they argued, was arbitrary, unreasonable, and discriminatory.³³⁷ No reasonable person would have believed that public safety was threatened by the CIO's arrival in Jersey City.³³⁸ Furthermore, the Director's action was obviously discriminatory. His record of granting and denying permits indicated that the political beliefs of the applicants, not genuine concern for the public safety, were the bases for his decision.³³⁹

The Supreme Court's decision in *Hague* was an explicit rejection of traditional police power deference to local administrators who attempted to promote public safety by suppressing speech. While the members of the Court could not agree on the doctrinal hook upon which to hang their decision—Justices Roberts and Hugo Black, and Chief Justice Hughes used the Privileges and Immunities Clause of the Fourteenth Amendment,³⁴⁰ while Justices Stone and Stanley Reed used the First Amendment applied to the states through the Due Process Clause³⁴¹—they all spoke of the importance of free speech to a properly functioning democracy³⁴² and used this fact as a

³³⁵ *Id.* at 59–66.

³³⁶ *Id.* at 69 (quoting Justice Benjamin Cardozo in *Palko v. Connecticut*, 302 U.S. 319, 327 (1937)). The brief also quotes Thomas Jefferson, see *id.* at 71, and Justice Brandeis, see *id.* at 71–74, each of whom gave participatory rationales for free speech.

³³⁷ See *id.* at 74.

³³⁸ See *id.* at 81–92.

³³⁹ See *id.* at 92–100.

³⁴⁰ See *Hague*, 307 U.S. at 514–16 (opinion of Roberts, J., joined by Black, J.); *id.* at 532 (Hughes, C.J., concurring).

³⁴¹ See *id.* at 519 (opinion of Stone, J., joined by Reed, J.). Justices Frankfurter and William O. Douglas did not participate, see *id.* at 500, while Justices Butler and McReynolds dissented, see *id.* at 532–33 (McReynolds, J. dissenting); *id.* at 533 (Butler, J., dissenting).

³⁴² See *id.* at 513 (opinion of Roberts, J., joined by Black, J.); *id.* at 524 (opinion of Stone, J., joined by Reed, J.).

justification for restricting administrative discretion with respect to its suppression.³⁴³ Thus, in *Hague*, the Court accepted Chafee's utilitarian justification for judicial activism in the name of protecting free speech.³⁴⁴ As Justice James McReynolds noted in dissent, the Court had abandoned its prescriptive administrative vision: "[T]he District Court should have refused to interfere . . . with the essential rights of the municipality to control its own parks and streets. Wise management of such intimate local affairs, generally at least, is beyond the competency of federal courts"³⁴⁵

Indeed, over the next year-and-a-half the Court followed *Hague* with several cases—*Schneider v. State*,³⁴⁶ *Thornhill v. Alabama*,³⁴⁷ and *Cantwell v. Connecticut*³⁴⁸—in which it strictly scrutinized and overturned the administrative actions of localities that it believed were restricting free speech. In each instance, it used participatory rationales for doing so. In *Schneider*, Justice Roberts struck down four municipal ordinances prohibiting the distribution of circulars in the streets or other public places,³⁴⁹ asserting as one of the grounds for the decision the importance of free speech for self-governance: "This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. . . . [They] reflect[] the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men."³⁵⁰ In *Thornhill*, Justice Frank Murphy based his decision to strike down a municipal antipicketing ordinance³⁵¹ on the importance of speech for self-governance: "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the

³⁴³ See *id.* at 516–18 (opinion of Roberts, J., joined by Black, J.); *id.* at 519, 524 (opinion of Stone, J., joined by Reed, J.).

³⁴⁴ For a discussion of Chafee's political function conception of freedom of expression, see *supra* notes 17–21 and accompanying text.

³⁴⁵ *Hague*, 307 U.S. at 532 (McReynolds, J., dissenting).

³⁴⁶ 308 U.S. 147 (1939).

³⁴⁷ 310 U.S. 88 (1940).

³⁴⁸ 310 U.S. 296 (1940).

³⁴⁹ See *Schneider*, 308 U.S. at 154–57, 163.

³⁵⁰ *Id.* at 161 (footnote omitted).

³⁵¹ See *Thornhill*, 310 U.S. at 91, 101.

exigencies of their period.”³⁵² Justice Roberts used similar logic in *Cantwell*, a case that overturned a breach of the peace conviction of a Jehovah’s Witness who was peacefully denouncing the Catholic Church.³⁵³ “[T]he people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.”³⁵⁴ Thus, by 1940, the Court had begun to take free speech jurisprudence out from under administrative law. Using a libertarian, participatory rationale, the Court had increased the level of scrutiny with which it examined administrative restrictions of free speech. In doing so, it discarded the prescriptive vision of freedom of expression and the judicial passivity required by that vision.

3. Federal Regulation of the Mails

The next area of administrative speech suppression to collapse was content-based censorship of the mails. In the early 1940s, Postmaster General Frank Walker suggested reconceptualizing the second-class postal subsidy as a “certificate of good moral character” in order to clean up the magazine industry.³⁵⁵ Thus, the Post Office began to deny second-class privileges to magazines that were not up to the Postmaster General’s unstated moral standards, regardless of whether they were obscene or not. In early 1943 Walker revoked *Esquire*’s second-class permit.³⁵⁶ Although he admitted that the magazine’s contents were “not obscene in a technical sense,” he found that “indecent, vulgar, and risqué” materials were a “dominant and systematic feature” of the magazine.³⁵⁷ As such, it was inappropriate to give *Esquire* a subsidized postal rate that was intended to promote periodicals that made a “special contribution to the public welfare.”³⁵⁸ A publication that benefited

³⁵² Id. at 102.

³⁵³ See *Cantwell*, 310 U.S. at 301–03, 307.

³⁵⁴ Id. at 310.

³⁵⁵ Paul & Schwartz, *supra* note 170, at 73 (quoting Annual Report of the Postmaster General 12 (1942)).

³⁵⁶ The Postmaster General’s revocation decision led to the litigation in *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 149–50 (1946).

³⁵⁷ Id. at 149 (quoting the Postmaster General’s opinion).

³⁵⁸ Id. at 149–50 (quoting the Postmaster General’s opinion).

from the second-class rate must “do more than refrain from disseminating material which is obscene or bordering on the obscene. It is under a positive duty to contribute to the public good and the public welfare.”³⁵⁹

The Post Office’s arguments before the Supreme Court in *Hannegan v. Esquire, Inc.*³⁶⁰ are illustrative of the fact that in the early 1940s administrators still believed that prescriptive assumptions about expertise could insulate their actions from heightened judicial scrutiny. According to the Post Office, the postal subsidy was a privilege, similar to a license, and the government had always had wide discretion in dispensing such privileges.³⁶¹ Furthermore, recent Supreme Court cases striking down speech-restrictive laws involved criminal statutes or complete repression of speech, not simply the removal of a subsidy.³⁶² Expert administrators had to be allowed the flexibility to balance free speech concerns with the other needs of society. The criteria that the Postmaster used to determine whether a particular periodical deserved the subsidy “derive precision from experience”,³⁶³ employing such criteria, “it may be possible ‘to shape a public policy on the basis of an investigation of the socio-psychological effects, if any, of commercially promoted pornography.’”³⁶⁴ Thus, because of the Postmaster’s expertise, his actions should be judged by a deferential standard: They could be overturned only if they were “arbitrary”³⁶⁵ or “fraudulent, or palpably wrong, or wholly outside [his] authority.”³⁶⁶

Like the CIO six years earlier, *Esquire* responded not only with a constitutional argument but also with an administrative one. Its constitutional argument simply pointed out that when it came to suppressing speech, administrative discretion simply was not what it used to be. *Lovell, Hague, and Thomas v. Collins*³⁶⁷ each demon-

³⁵⁹ *Id.* at 150 (quoting the Postmaster General’s opinion).

³⁶⁰ 327 U.S. 146 (1946).

³⁶¹ See Brief for the Postmaster General at 32–35, *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1949) (No. 399).

³⁶² See *id.* at 25, 28.

³⁶³ *Id.* at 35.

³⁶⁴ *Id.* at 35 n.5 (quoting David Riesman, *Civil Liberties in a Period of Transition*, 3 *Pub. Pol’y* 33, 35 (1942)).

³⁶⁵ *Id.* at 28.

³⁶⁶ *Id.* at 36.

³⁶⁷ 323 U.S. 516 (1945).

strated that licensing was no different from any other government action that limited speech.³⁶⁸ Esquire emphasized that administrative agencies and legislatures were no longer the governmental entities that would balance the social need to suppress speech with the individual's right to speak; courts were.³⁶⁹ Thus, the Postmaster had to overcome a presumption that content-based restrictions on speech were unconstitutional by articulating the existence of a clear and present danger.³⁷⁰ Since no such danger existed, the Post Office's action was unconstitutional.

Having forcefully articulated the new, post-*Hague* constitutional rejection of prescriptive speech regulation, Esquire nevertheless felt it necessary to make the more traditional, administrative argument that Walker's action was invalid. It spent almost as many pages of its brief arguing that the revocation of the permit was "arbitrary, capricious, result[ed] in unjust discrimination and . . . [was] unsupported by [the] evidence" as it did arguing that the revocation was unconstitutional.³⁷¹ After all, while *Hague* had been a blow to prescriptive speech regulation, content-based regulation of movies and radio broadcasts was still the norm. Esquire had no response to the Post Office's argument that refusing to award a second-class permit was not that different from refusing to license a movie, something that state actors were clearly allowed to do even if the refusal was based on content. By the mid-1940s, administrative expertise may have been offering less of a shield from judicial inquiry, but it was still a potent argument.

In February of 1946, the Supreme Court decided *Esquire*, ending Walker's decency campaign. Writing for a unanimous Court, Justice William O. Douglas held that the Postmaster General had exceeded his authority and that he had, in fact, no discretion to deny second-class permits absent actual obscenity.³⁷² While the decision was based on congressional intent—the legislative history of the postal laws did not give the Postmaster the discretion—Douglas's

³⁶⁸ See Brief for Respondent at 42–43, *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1949) (No. 399).

³⁶⁹ See *id.* at 43.

³⁷⁰ See *id.* at 47.

³⁷¹ *Id.* at 56. Esquire's constitutional argument took up 22 pages, see *id.* at 34–55, while its administrative argument took up 16, see *id.* at 56–71.

³⁷² See *Esquire*, 327 U.S. at 158–59.

language was constitutional in scope.³⁷³ “[G]rave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever.”³⁷⁴ Douglas then offered a participatory reading of the First Amendment:

What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. . . . From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values. But to withdraw the second-class rate from this publication today because its contents seemed to one official not good for the public would sanction withdrawal of the second-class rate tomorrow from another periodical whose social or economic views seemed harmful to another official.³⁷⁵

For Douglas, administrative judgments about the appropriateness of literature were an invalid justification for censoring the mails. Instead, he adopted the participatory vision of free speech under which free dissemination of opinions was necessary both to create an enlightened polity and to allow individuals to express fully their personal beliefs and values.

Thus, by the mid-1940s, the Court had begun to limit the Postmaster General’s administrative discretion to censor free speech. What had previously been unfettered discretion, as was appropriate for the prescriptive model of policymaking, was increasingly brought under judicial supervision. Indeed, the year before *Esquire*, in *Walker v. Popenoe*,³⁷⁶ the D.C. Circuit prohibited the Postmaster General from declaring items “non-mailable” without notice or a hearing.³⁷⁷ In that same case, the court imposed a definition of obscenity on the Postmaster General that was narrower

³⁷³ Indeed, Frankfurter, who concurred with Douglas’s decision, felt it necessary to write separately to emphasize that *Esquire* was not a constitutional decision. See id. at 159–60 (Frankfurter, J., concurring).

³⁷⁴ Id. at 156.

³⁷⁵ Id. at 157–58.

³⁷⁶ 149 F.2d 511 (D.C. Cir. 1945).

³⁷⁷ See id. at 513.

than what he had been using previously.³⁷⁸ Increasingly, the Post Office—traditionally the government agency least subject to judicial review—was forced to conform to more stringent administrative procedures. Similarly, as *Esquire* indicated, courts became less inclined to defer to administrative determination of what types of speech were protected by the First Amendment.

4. State Regulation of Motion Pictures

In the other major area of state censorship, motion pictures, the Supreme Court did not end judicial deference to administrative determination of free speech rights until the early 1950s.³⁷⁹ In February of 1951, the New York Board of Regents, authorized by state law to prohibit the licensing of films deemed sacrilegious, voted to rescind the license of *The Miracle*.³⁸⁰ The film told the story of a

³⁷⁸ See *id.* at 512 (noting that obscenity should turn on the “dominant effect of an entire publication” on “the ordinary reader”).

³⁷⁹ Part of the reason the Court delayed doing so until the early 1950s, despite the decline of the prescriptive model of policymaking in the early 1940s, may be that state authorities censored fewer films during the 1940s because the industry, under the auspices of the Motion Picture Association of America, aggressively censored itself. See de Grazia & Newman, *supra* note 115, at 61–76; Leonard J. Leff & Jerold L. Simmons, *The Dame in the Kimono: Hollywood, Censorship, and the Production Code from the 1920s to the 1960s*, at 109–72 (1990). A notable exception was the controversial “Curley” case, in which the Tennessee Supreme Court refused to hear the merits of United Artists’s constitutional challenge to the City of Memphis’s ban of a Little Rascals film. See *United Artists Corp. v. Board of Censors*, 225 S.W.2d 550 (Tenn. 1949), cert. denied, 339 U.S. 952 (1950). The Board had censored the film because it showed black and white children attending school together. See *id.* at 551–52; Theodore R. Kupferman & Philip J. O’Brien, Jr., *Motion Picture Censorship—The Memphis Blues*, 36 Cornell L.Q. 273, 276 (1951). The United States Supreme Court declined to hear United Artists’s appeal. See *United Artists Corp. v. Board of Censors*, 339 U.S. 952 (1950); see also Kupferman & O’Brien, *supra*, at 283–84 (noting that the Court could have overturned the decision based on either Commerce Clause or First Amendment grounds).

³⁸⁰ See *Joseph Burstyn, Inc. v. Wilson*, 104 N.Y.S.2d 740, 742–43 (App. Div.), *aff’d*, 101 N.E.2d 665 (N.Y. 1951), *rev’d*, 343 U.S. 495 (1952). In an earlier case, *Joseph Burstyn, Inc. v. McCaffrey*, 101 N.Y.S.2d 892 (Sup. Ct. 1951), the film’s distributor had challenged the decision of another city official, the Commissioner of Licenses, to suspend the permit of movie theaters that refused to stop showing *The Miracle*. See *id.* at 893. The Commissioner had found the film to be “a blasphemous affront to a great many of the citizens of our city.” *Id.* at 894. The New York trial court found that the Commissioner was without authority, since state law vested the right to determine whether a motion picture was sacrilegious solely in the State Education Department and Board of Regents. See *id.*

poor, simple-minded woman seduced by a stranger she believed to be Saint Joseph.³⁸¹ She became pregnant and was tormented by the inhabitants of the town in which she lived when she told them who the father of the child was.³⁸² The case progressed through New York's court system, being treated like any other administrative appeal. The intermediate appellate court held that movie censorship was within the state's police power and then reviewed the Board of Commissioner's action to see if it was arbitrary and capricious, finding that it was not.³⁸³

The New York Court of Appeals also upheld the Board's decision.³⁸⁴ Yet the simplicity of the deferential administrative approach to free speech began to unravel. In a lengthy dissent, Judge Stanley Fuld called upon the court to reject the Supreme Court's *Mutual Film* decision—which had held that movies were not protected by the First Amendment—and to overrule the Board's determination.³⁸⁵ Citing *Cantwell*, *Lovell*, *Hague*, and *Thornhill*, Fuld suggested that courts should not defer to the judgments of administrative agencies on free-speech issues.³⁸⁶ Instead, such restrictions on freedom of speech should be subjected to heightened scrutiny.³⁸⁷ Quoting Justice Roberts's opinion in *Cantwell*, Fuld proffered a participatory justification of free speech: It was, he wrote, “essential to enlightened opinion and right conduct on the part of the citizens of a democracy.”³⁸⁸

The majority opinion in the court of appeals, on the other hand, stayed firmly within the prescriptive model. The court started with the presumption that motion pictures' “potentiality for evil, especially among the young, is boundless.”³⁸⁹ Accordingly, film regulation was clearly within the police power.³⁹⁰ Articulating a prescriptive vision of the police power, the court of appeals believed that the legislative and executive branches were perfectly capable of

³⁸¹ See *Joseph Burstyn, Inc. v. Wilson*, 101 N.E.2d 665, 671 (N.Y. 1951).

³⁸² See *id.*

³⁸³ See *Burstyn*, 104 N.Y.S.2d at 744–47.

³⁸⁴ See *Burstyn*, 101 N.E.2d at 671, 674.

³⁸⁵ See *id.* at 678 (Fuld, J., dissenting).

³⁸⁶ See *id.* at 678–79 (Fuld, J., dissenting).

³⁸⁷ See *id.* at 679 (Fuld, J., dissenting).

³⁸⁸ *Id.* at 679 (Fuld, J., dissenting) (quoting *Cantwell*, 310 U.S. at 310).

³⁸⁹ *Id.* at 668.

³⁹⁰ See *id.*

balancing constitutional values against other social needs. Indeed, in this case, the court believed that the state's censorship represented a balancing of two separate constitutional values:

To say that government may not intervene to protect religious beliefs from purely private or commercial attacks . . . is to deny not only its power to keep the peace, but also the very right to "the free exercise" of religion, guaranteed by the First Amendment. The offering of public gratuitous insult to recognized religious beliefs by means of commercial motion pictures is not only offensive to decency and morals, but constitutes in itself an infringement of the freedom of others to worship and believe as they choose.³⁹¹

It was appropriate for the legislature to delegate the power to further constitutional values to an expert administrator, and since the administrator had not acted "arbitrarily or capriciously" the court was obligated to uphold its decision.³⁹²

Thus, when the Supreme Court agreed to hear *Burstyn's* appeal the stage was set for yet another slowdown between prescriptive and participatory visions of what freedom of expression meant; another debate about which branch of government was best suited to further the values of the First Amendment. The debate before the Court centered on whether motion pictures were a dangerous form of mind control produced by studios that were more interested in making a buck than in promoting rational discussion of important issues, as the state argued,³⁹³ or whether they were a form of communication that "perform[ed] the same functions as other media . . . consider[ing] and comment[ing] on . . . social and political problems,"³⁹⁴ as *Burstyn* and his amici, the American Civil Liberties Union and the American Jewish Congress, argued. The Court, in a unanimous opinion, sided with *Burstyn*.³⁹⁵

³⁹¹ *Id.* at 673.

³⁹² *Id.* at 670-71.

³⁹³ The state's brief is loaded with language asserting the dangerous potential of movies, particularly to young people. See Brief for Appellees at 30-34, 39-41, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (No. 522).

³⁹⁴ Brief for Appellant at 13, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (No. 522) [hereinafter *Burstyn* Appellant's Brief].

³⁹⁵ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

Writing for the Court, Justice Tom Clark overruled *Mutual Film*.³⁹⁶ This decision had the same effect as *Lovell, Hague*, and *Hannegan*, differentiating administrative speech censorship from other administrative actions, and thereby subjecting it to close judicial scrutiny. Justice Clark used a participatory rationale. Motion pictures were “a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.”³⁹⁷ Clark rejected the notion that censors would be making decisions based on their own expertise. In defining the “sacrilegious,” the censor would inevitably heed the wishes of “the most vocal and powerful orthodoxies.”³⁹⁸ Under such circumstances even “the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority.”³⁹⁹ Thus, Clark decided, the Court—not mere administrative agencies—should have the power to weigh the preeminent value of free expression against other social values.

In a typically lengthy and grandiloquent concurrence Justice Frankfurter did the same thing, striking a blow against judicial deference to administrative expertise and for judicial supervision of the administrative process. Frankfurter focused on the New York censorship statute’s use of the word “sacrilegious” as a standard by which the Board of Commissioners was supposed to judge the content of motion pictures: “On the basis of such a portmanteau word as ‘sacrilegious’ the judiciary has no standards with which to judge the validity of administrative action which necessarily involves, at least in large measure, subjective determinations.”⁴⁰⁰ He was no longer willing to defer to the opinion of administrative experts. Frankfurter also noted that the current administrative scheme forced individuals to shape their behavior to the will of large groups: “[T]o bar such pictorial discussion [of religious issues] is to

³⁹⁶ See *id.* at 502.

³⁹⁷ *Id.* at 501.

³⁹⁸ *Id.* at 505.

³⁹⁹ *Id.*

⁴⁰⁰ *Id.* at 532 (Frankfurter, J., concurring).

subject non-conformists to the rule of sects.”⁴⁰¹ Thus, not only did Frankfurter and Clark reject the idea that administrators should use their expert opinion to balance society’s needs against the constitutional rights of individuals, they rejected the notion that these administrators had expertise at all. Administrators reacted to pressure groups, not to their own expertise-based judgments. Prescriptive government, it seemed, was an illusion. Expertise provided no justification for insulating administrators from judicial scrutiny because expertise was not the basis for administrative decisionmaking.

C. Conclusion

The decline of administrative censorship was a gradual process. Over the course of the 1930s and 1940s the participatory theory of the sedition cases seeped into the doctrinally distinct area of administrative censorship. Thus, throughout the 1940s, the litigants in these administrative free speech cases were forced to operate within two different regimes of free speech law: the fading, prescriptive, administrative model and the emergent, participatory, judicial model. Only by the early 1950s was it clear that freedom of expression, as a constitutional right, would trump administrative rationales for particular policy decisions. Changes in the police power doctrine had limited legislative restrictions on speech and, over the course of the 1940s, courts extended similar scrutiny to the acts of administrators that impacted expressive activity. With the notable exception of the FCC and federal regulation of broadcasting, which I will discuss later,⁴⁰² administrative censorship of speech had withered away.⁴⁰³

⁴⁰¹ Id. at 519 (Frankfurter, J., concurring).

⁴⁰² See *infra* Part VII.

⁴⁰³ The fact that the Court was not particularly protective of political speech in the face of post-World War II anticommunist legislation does not diminish the force of this observation. Though the Court declined to prohibit suppression of political speech in the most famous anticommunist cases of the 1950s, the legal rules under which these cases were decided clearly called for heightened scrutiny of legislation that impacted upon political speech. See *Dennis v. United States*, 341 U.S. 494, 508–11 (1951) (plurality opinion of Vinson, C.J.); *American Communications Ass’n v. Douds*, 339 U.S. 382, 397–99 (1950).

VI. CAUSATION: WHY THE DECLINE?

What were the causes of the decline of administrative censorship? As the last Part demonstrated, two doctrinal changes had to occur before a recognizably modern version of the First Amendment could emerge. The first of these events, the redefinition of the police power, is commonly recognized within the historical literature. By the end of the 1930s and the beginning of the 1940s the Supreme Court stopped closely scrutinizing regulatory legislation said to infringe on people's economic liberties and refocused its attention on legislation that infringed on people's civil liberties, particularly their freedom of expression.⁴⁰⁴ The Court reshaped the boundaries of the police power, giving the state more authority in the economic realm and less authority to take away what we now call civil rights and liberties. As we have seen, however, this change in the boundaries of the police power was not enough to give the First Amendment its full modern scope. Courts had to lose faith in administrators as well. Expertise could act as a buffer to the Supreme Court's novel conception of what types of liberties the judiciary should protect. Accordingly, in order to explain the emergence of the modern conception of free speech we need to examine why, beginning in the 1940s, judges began to lose faith in expert administrators as well.

This Part suggests that the changing scope of the police power and the end of prescriptive government were caused by Americans' encounter with totalitarianism in Europe, their reaction to the potential for totalitarianism at home, and a change in American liberalism at the end of the New Deal that denigrated the importance of regulation for creating a harmonious and prosperous society. As American political culture changed in the late 1930s and early 1940s, Americans became less and less inclined to trust legislators or administrative experts to look after their civil liberties. Instead, Americans came to expect the judiciary to serve that role—to protect individuals and minorities from the deadly tide of totalitarian-

⁴⁰⁴ See, e.g., Kermit L. Hall, *The Magic Mirror: Law in American History* 282–84, 313–22 (1989); Melvin I. Urofsky, *Division and Discord: The Supreme Court under Stone and Vinson, 1941–1953*, at 85–113 (1997).

ism that seemed to be infecting legislative and administrative actors in Europe and, perhaps, in the United States.⁴⁰⁵

At the onset of the Great Depression, American intellectuals were surprisingly accepting of dictatorial forms of government. A crisis of the magnitude of the Great Depression seemed to require the type of quick, decisive action that many believed a democracy was incapable of. Left-wing intellectuals suggested that the world economic crisis demonstrated that a socialist-planned economy, brought about by “disciplined leadership,” was the only way a country could overcome economic stagnation.⁴⁰⁶ Similarly, genuinely antidemocratic, fascist “solutions” to the Great Depression received popular airing and discussion to a degree that is shocking to modern ears.⁴⁰⁷ Early New Dealers such as brains trusters Rexford Tugwell and National Recovery Administration directors Hugh Johnson and Donald Richberg displayed an affection for Mussolini’s ideas about planning.⁴⁰⁸ Indeed, even relics of early 1930s popular culture reveal that a crisis of such a grand scale stimulated interest in decisive, authoritarian rule. In 1933 *Barron’s* editorialized that a “genial and lighthearted dictator” or a “mild species of dictatorship will help us over the roughest spots in the

⁴⁰⁵ For a more detailed study of this phenomenon, see Reuel E. Schiller, *Reining in The Administrative State: World War II and the Decline of Expert Administration* (on file with the Virginia Law Review Association), in *Total War and the Law: New Perspectives on World War II* (Daniel Ernst & Victor Jew eds., forthcoming) [hereinafter Schiller, *Reining*].

⁴⁰⁶ Richard H. Pells, *Radical Visions and American Dreams: Culture and Social Thought in the Depression Years* 301 (1998); see id. at 48, 64, 73, 301–02.

⁴⁰⁷ Perfectly respectable publishing houses published several books suggesting that fascism was the solution to America’s woes. See, e.g., Ralph Adams Cram, *The End of Democracy* (1937); Lawrence Dennis, *The Coming American Fascism* (1936); Edward McChesney Sait, *Political Institutions: A Preface* (1938). Dennis’s book, which a reviewer in *The New York Times* portrayed as an “earnest, frank,” but ultimately unpersuasive argument for the institution of a totalitarian government in the United States, see Schiller, *Policy Ideals*, supra note 49, at 60–61 (quoting E.L. Duffus, Mr. Dennis and His “American” Fascism, *New York Times Book Review*, Jan. 5, 1936, at 3), was also reviewed in the *Atlantic*, the *Christian Science Monitor*, the *Nation*, and the *New Republic*, see id.

⁴⁰⁸ See Jolin P. Diggins, *Mussolini and Fascism: The View from America* 280 & n.34 (1972); James Q. Whitman, *Of Corporatism, Fascism, and the First New Deal*, 39 *Am. J. Comp. L.* 747, 747–48, 755 (1991).

road ahead.”⁴⁰⁹ As if to oblige, that year William Randolph Hearst and Metro-Goldwyn-Mayer produced a movie called *Gabriel Over the White House* in which just such a benevolent dictator took control of the federal government long enough to solve a national crisis and then died, struck down by a heart attack in time to prevent the audience from wondering if the premise was not catastrophically dissonant with the basic assumptions of American political culture.⁴¹⁰

By the middle of the 1930s, however, whatever sympathetic inclinations Americans might have had towards less than democratic forms of government disappeared. During the three middle years of the decade totalitarianism showed its true face: the Italian invasion of Ethiopia, Stalin’s Show Trials, as well as the trio of Nazi atrocities—the Night of the Long Knives, *Kristallnacht*, and the passage of the Nuremberg Laws. Americans responded by scrambling to differentiate themselves from European regimes that perpetrated these atrocities. Indeed, the successes of European totalitarianism forced American intellectuals to distinguish American politics and culture from the European variants that seemed to act as a seedbed for fascism and Stalinism.⁴¹¹ Thinkers and manufacturers of popular culture emphasized the importance of the rule of law and the notion that the people were protected from arbitrary state power by a tradition of constitutionalism. These were quickly proffered as attributes of American government that prevented the flourishing of so-called “alien,” totalitarian

⁴⁰⁹ William E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal, 1932–1940*, at 30 (1963) [hereinafter *Leuchtenburg, New Deal*] (quoting *Semi-Dictator?*, *Baron’s*, Feb. 13, 1933, at 12).

⁴¹⁰ See Barry D. Karl, *The Uneasy State: The United States from 1915 to 1945*, at 92 (1983).

⁴¹¹ See Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism & the Problem of Value* 125–38 (1973) [hereinafter *Purcell, Crisis*]; G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 *Va. L. Rev.* 279 (1973), *reprinted in* *Patterns of American Legal Thought* 136, 136–44 (1978) [hereinafter *White, Patterns*]; Herman Belz, *Changing Conceptions of Constitutionalism in the Era of World War II and the Cold War*, 59 *J. Am. Hist.* 640, 641, 646–47 (1972); Edward A. Purcell, Jr., *American Jurisprudence between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 *Am. Hist. Rev.* 424, 437–38, 445 (1969) [hereinafter *Purcell, American Jurisprudence*]; Benjamin Leontief Alpers, *Understanding Dictatorship and Defining Democracy in American Public Culture, 1930–1945*, at 154–254 (1994) (unpublished Ph.D. dissertation, Princeton University) (on file with the Virginia Law Review Association) [hereinafter *Alpers, Understanding Dictatorship*].

vented the flourishing of so-called "alien," totalitarian ideologies.⁴¹² Additionally, American democracy was portrayed as pluralist and inclusive. Not only were we tolerant of the great variety of ethnic and racial groups that made up the polity, the nation was made stronger by this diversity. In contrast to fascism, Nazism, and Stalinism, "Americanism" was equated with individualism as well as with cultural and political pluralism.⁴¹³

Nor were Americans' fears about totalitarianism limited to observations about events in Europe. During the late 1930s and early 1940s many people thought events in America demonstrated frightening tendencies towards totalitarian rule. Of course Roosevelt's zanier detractors had accused him of having dictatorial ambitions since he came into office in 1932.⁴¹⁴ By the middle of the decade, however, a broader spectrum of people began to worry about totalitarianism taking hold in the United States. Polling data from 1936 revealed that 45% of respondents believed that the Roosevelt administration's policies could lead to a dictatorship.⁴¹⁵

Between his plan to reorganize the executive and his attempt to pack the Court, Roosevelt did little to assuage these fears. In the spring of 1936 Roosevelt had appointed a committee to suggest ways to increase the efficiency and decrease the cost of the executive branch's operations.⁴¹⁶ The committee's report, which Roosevelt received right after his reelection, called for a substantial centralization of executive power. In particular, it recommended the abolition

⁴¹² See Purcell, *Crisis*, supra note 411, at 159–78; White, *Patterns*, supra note 411, at 140–41; Belz, supra note 411, at 641, 648–54; Purcell, *American Jurisprudence*, supra note 411, at 437–46; Alpers, *Understanding Dictatorship*, supra note 411, at 210–54.

⁴¹³ See, e.g., Gary Gerstle, *Working-class Americanism: The Politics of Labor in a Textile City, 1914–1960*, at 278–309 (1989); Richard Polenberg, *One Nation Divisible: Class, Race, and Ethnicity in the United States Since 1938*, at 51–54 (1980) [hereinafter Polenberg, *One Nation*]; Benjamin L. Alpers, *This Is the Army: Imagining a Democratic Military in World War II*, 85 *J. Am. Hist.* 129, 143–47 (1998) [hereinafter Alpers, *Army*]; Philip Gleason, *Americans All: World War II and the Shaping of American Identity*, 43 *Rev. Pol.* 483, 498–500 (1981); William E. Nelson, *The Changing Meaning of Equality in Twentieth-Century Constitutional Law*, 52 *Wash. & Lee L. Rev.* 3, 21–28 (1995).

⁴¹⁴ See Anthony J. Badger, *The New Deal: The Depression Years, 1933–40*, at 285 (1989); Leuchtenburg, *New Deal*, supra note 409, at 178.

⁴¹⁵ See Alpers, *Understanding Dictatorship*, supra note 411, at 132.

⁴¹⁶ See Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* 21–23 (1995) [hereinafter Brinkley, *End of Reform*]; Karl, supra note 410, at 156–57.

of the independent administrative agencies, suggesting that they be reconstituted as executive agencies under the jurisdiction of the appropriate cabinet officer.⁴¹⁷ It also recommended the creation of a central planning board to allow the president greater bureaucratic control over the large number of regional planning offices that the executive ran throughout the country.⁴¹⁸ When Roosevelt passed the report on to Congress, asking for legislation that would implement its recommendations, he got a chilly response. His critics pointed to the report as evidence of his "dictatorial ambitions," and when Congress got around to debating it in 1938, just months after Germany's annexation of Austria, the parallels were too obvious to be ignored: "We have just witnessed, in Europe," one of the plan's opponents argued, "what happens when one man is permitted too much power . . ."⁴¹⁹ After antireorganization rallies were staged in New York and Washington, the plan went down to defeat, with 108 Democrats voting against it.⁴²⁰

Even for those predisposed to write off claims of Roosevelt's totalitarian ambitions as intemperate partisanism, the introduction of the court-packing plan three weeks after FDR sent the executive reorganization plan to Congress could not have been comforting. Naturally, the court packing plan drew shrill criticism from Roosevelt's political opponents, but it also triggered rather subtle critiques from less ideological quarters.⁴²¹ Several people who testified before the Senate Judiciary Committee saw the plan as a symptom not of Roosevelt's autocratic aspirations but of a more disturbing tendency of the people themselves to desire the destruction of limited government in a time of crisis.⁴²² Events in Europe had demonstrated that excesses of democracy that disregarded the

⁴¹⁷ See Brinkley, *End of Reform*, supra note 416, at 21; Karl supra note 410, at 157.

⁴¹⁸ See Karl, supra note 410, at 157.

⁴¹⁹ *Whose Recovery?*, New Republic, Apr. 20, 1938, at 319, quoted in Brinkley, *End of Reform*, supra note 416, at 22.

⁴²⁰ See id.

⁴²¹ See David M. Bixby, *The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at United States v. Classic*, 90 Yale L.J. 741, 747-52 (1981).

⁴²² See *Reorganization of the Federal Judiciary: Hearings on S. 1392 Before the Senate Comm. on the Judiciary, 75th Cong. 620 (1937)* [hereinafter *Reorganization Hearings*] (statement of H.W. Dodds, President of Princeton University); Alpers, *Understanding Dictatorship*, supra note 411, at 135. In their 1936 sociological study of Muncie, Indiana, Robert and Helen Lynd explicitly stated their fears about Americans' desire for totalitarian leadership. See id. at 127-28.

rule of law and the rights of minorities were the preludes to totalitarianism. Dorothy Thompson, a famous columnist for the *New York Herald Tribune* who had made her name reporting from Germany on the collapse of the Weimar Republic,⁴²³ suggested that totalitarian regimes had their origins in politicians' hasty responses to the demands of majorities in times of crisis. Recounting in great detail the events that led to Hitler's rise to power, she testified that the greatest danger to democracies

is the danger that eager and unchecked majorities should set up new instruments of power, before they are equipped properly to administer such instruments. It is that the will of powerful pressure groups, even when such groups embrace a majority of voters, should find expression in total disregard of the feelings, apprehensions, and interests of large and important minorities.⁴²⁴

Accordingly, there was a need for an independent judiciary to check popular power and protect the rights of minorities. An attempt to bully the Court, even if most Americans supported it, threatened that role.

Thus, as the 1930s wore on, there was an increasing fear in the United States that Americans themselves were either easily manipulated by a totalitarian dictator or were themselves clamoring for one. Ironically, America's entry into the war against fascism in December of 1941 intensified, rather than assuaged, this fear. In the years before Pearl Harbor, both the popular and elite press portrayed totalitarian governments as ones that demanded militaristic regimentation from their citizens.⁴²⁵ As the United States geared up to fight, people expressed the fear that the war effort might make

⁴²³ For an overview of Dorothy Thompson's career, see James Boylan, Dorothy Thompson, in *Dictionary of American Biography* 739, 739-41 (John A. Garraty ed., Supp. VII 1981).

⁴²⁴ Alpers, *Understanding Dictatorship*, supra note 411, at 135 (quoting Reorganization Hearings, supra note 422, at 861 (statement of Dorothy Thompson)). Yale Law Professor Edwin Borchard made a statement to the same effect:

The minority, for whose protection a Constitution largely exists, is readily subjected to coercion by the majority in times of excitement. Especially with the vote now universal and with the radio as first aid to the rabble rouser, with the systematic development of pressure groups, with the growth of administrative government, is the exposed minority in need of constant protection.

Reorganization Hearings, supra note 422, at 827.

⁴²⁵ See Alpers, *Army*, supra note 413, at 132-33.

similar demands on American citizens. Thus, while isolationists had exploited these worries in the months leading up to Pearl Harbor, by the time America entered the war, even the internationalist allies of the President were warning that “[m]ilitary discipline provides excellent training for citizenship in a totalitarian society.”⁴²⁶ Indeed, the army itself was worried about the effect that mass conscription and military training might have on the citizenry. A 1945 study by two army psychiatrists suggested that many combat veterans would be “angry, regressed, anxiety-ridden, dependent men” who would naturally gravitate towards fascist organizations in the United States.⁴²⁷ The military was so conscious of this problem that it worked assiduously to portray the experience of service and the submission to discipline it required as familiar (like being on a team or obeying your parents) and, even more incredibly, voluntary.⁴²⁸

When the judiciary transformed the scope of the police power in the late 1930s and early 1940s, it was in response to these fears. Many liberal intellectuals who, in the face of judicial hostility towards the New Deal, had demanded that the Supreme Court abandon any countermajoritarian role, reversed themselves.⁴²⁹ The proper role of the judiciary was to protect the civil liberties of minorities. By doing so courts would act as a buffer against totalitarianism. Thus, in many of the most famous civil liberties cases from the 1940s and the early 1950s, the United States Supreme Court and various state courts invoked the specter of totalitarianism in order to limit the police power in such a way as to protect the rights of individuals.⁴³⁰ Indeed, Justice Stone wrote footnote four

⁴²⁶ *Id.* at 137 (quoting *Peacetime Conscription?*, 61 *Christian Century* 1190, 1191 (1944)).

⁴²⁷ *Id.* at 137–38 (quoting Roy R. Grinker & John P. Spiegel, *Men under Stress* 450 (1945)).

⁴²⁸ See *id.* at 140–43, 147–49.

⁴²⁹ See Belz, *supra* note 411, at 650–63.

⁴³⁰ See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593–94 (1952) (Frankfurter, J., concurring); *id.* at 629 (Douglas, J., concurring); *id.* at 641, 651 (Jackson, J., concurring); *Korematsu v. United States*, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640–42 (1943); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *id.* at 546 (Stone, J., concurring); *Chambers v. Florida*, 309 U.S. 227, 241 (1940); *Sullens v. State*, 4 So. 2d 356, 361 (Miss. 1941); Bixby, *supra* note 421, at 766, 774–75; Richard Primus, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 *Yale L.J.* 423, 423, 437–50 (1996).

of *Carolene Products*,⁴³¹ the manifesto for the new dimensions of the police power, amidst a flurry of correspondence with John Bassett Moore, Learned Hand, Irving Lehman, and Karl Loewenstein. Stone and his correspondents each despaired of racism and attacks on civil liberties in the United States, decried the Nazi's use of minority scapegoating to stir up popular support, and declared the need for the judiciary to protect minorities in order to save America from a similar fate.⁴³²

These references to totalitarianism cropped up with particular frequency in the litigation surrounding restrictions on expression. Litigants whose speech had been suppressed often reminded the courts that such an action was typical of the behavior of totalitarian governments. As early as *Near v. Minnesota*,⁴³³ lawyers analogized government suppression of speech to the Star Chamber.⁴³⁴ As the 1930s wore on litigants invoked contemporary dictators. Both the plaintiffs and the amici in *Hague v. CIO*⁴³⁵ analogized Mayor Hague's attempts to prevent the CIO from organizing in Jersey City to European totalitarianism.⁴³⁶ The CIO's brief noted that

[the] force [that] is the officialdom of Jersey City . . . has for many years held absolute power . . . [I]t decides whether a given idea is or is not the kind of idea that ought to be disseminated in Jersey City; if the answer is no, it proceeds with efficiency and despatch [sic] to prevent its dissemination. . . . The parallel between this process and those current in the despotisms abroad is too plain to be labored.⁴³⁷

Indeed, after the Second World War, when the paradigmatic totalitarian had changed from Hitler to Stalin, so the litigants' rhetoric changed. The plaintiffs in *Joseph Burstyn, Inc. v. Wilson*,⁴³⁸ for example, reminded the Court that movies with religious themes, in-

⁴³¹ 304 U.S. 144, 152 n.4 (1938).

⁴³² See Bixby, *supra* note 421, at 762-67; Matthew Perry, Justice Stone and Footnote 4, 6 Geo. Mason U. Civ. Rts. L.J. 35, 49-53 (1996).

⁴³³ 283 U.S. 697 (1931).

⁴³⁴ See *Near Appellant's Brief*, *supra* note 281, at 34.

⁴³⁵ 307 U.S. 496 (1939).

⁴³⁶ See Bixby, *supra* note 421, at 757 n.106.

⁴³⁷ *Hague Respondents' Brief*, *supra* note 334, at 6-7.

⁴³⁸ 343 U.S. 495 (1952).

cluding *The Miracle*, were censored in both communist and fascist countries.⁴³⁹

Courts frequently picked up on this rhetoric. The federal district court in the *Hague* case tellingly contrasted the free speech protections in the Weimar Constitution with Hitler's abolition of those protections in 1933.⁴⁴⁰ In upholding the district court's injunction the Third Circuit noted that Hague's policy of suppressing political speech with which he did not agree "would result eventually in the existence of but one political party as is now the case under totalitarian governments."⁴⁴¹ Similar language cropped up in *Hague's* progeny. In his opinion in *Hannegan v. Esquire, Inc.*,⁴⁴² Justice Douglas noted that "a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system."⁴⁴³ Similarly, the famous flag salute cases, *Minersville School District v. Gobitis*⁴⁴⁴ and *West Virginia State Board of Education v. Barnette*,⁴⁴⁵ are riddled with references to totalitarianism. The district court opinion in *Gobitis*, which struck down a Pennsylvania school regulation requiring students to salute the flag despite their religious objections,⁴⁴⁶ compared the regulation to dictatorial regimentation: "Our country's safety surely does not depend upon the totalitarian idea of forcing all citizens into one common mold of thinking . . . Such a doctrine seems to me utterly alien to the genius and spirit of our nation and destructive of . . . personal liberty . . ."⁴⁴⁷ Indeed, preventing such laws from taking effect was crucial to protecting American democracy: "In these

⁴³⁹ See *Burstyn Appellant's Brief*, supra note 394, at 7; *Brief of American Civil Liberties Union and American Jewish Congress*, as *Amici Curiae* at 32, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (No. 522).

⁴⁴⁰ See *Committee for Indus. Org. v. Hague*, 25 F. Supp. 127, 151 (D.N.J. 1938), modified, 101 F.2d 774 (3d Cir.), modified, 307 U.S. 496 (1939).

⁴⁴¹ *Hague v. Committee for Indus. Org.*, 101 F.2d 774, 784 (3d Cir.), modified, 307 U.S. 496 (1939).

⁴⁴² 327 U.S. 146 (1946).

⁴⁴³ *Id.* at 158.

⁴⁴⁴ 310 U.S. 586 (1940), overruled by *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

⁴⁴⁵ 319 U.S. 624 (1943).

⁴⁴⁶ See *Gobitis v. Minersville Sch. Dist.*, 24 F. Supp. 271, 274 (E.D. Pa. 1938), *aff'd*, 108 F.3d 683 (3d Cir. 1939), *rev'd*, 310 U.S. 586 (1940), overruled by *Barnette*, 319 U.S. 624 (1943).

⁴⁴⁷ *Id.* at 274.

days when religious intolerance is rearing its ugly head in other parts of the world it is of the utmost importance that the liberties guaranteed to our citizens by the fundamental law be preserved from all encroachment."⁴⁴⁸ When the Supreme Court reversed the district court's decision,⁴⁴⁹ Justice Stone's dissent made the same point: "[F]reedom of mind and spirit must be preserved . . . if [the state] is to adhere to that justice and moderation without which no free government can exist."⁴⁵⁰ When, three years later, *Gobitis* was reversed by *Barnette*, Justice Robert Jackson's opinion eloquently argued that the steps from compelling speech to dictatorship to holocaust were short ones. Thus, speech suppression and coercion were markers along the road to totalitarianism:

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. . . . As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. . . . Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.⁴⁵¹

As courts reconceptualized the police power in the 1930s and 1940s, they attempted to ensure that the United States never traveled down that road. Indeed, the whole premise of importing Chafee's vision of free speech into constitutional law was to promote and preserve democracy.⁴⁵² In *Thornhill v. Alabama*,⁴⁵³ Justice

⁴⁴⁸ *Gobitis v. Minersville Sch. Dist.*, 21 F. Supp. 581, 586 (E.D. Pa. 1937).

⁴⁴⁹ See *Gobitis*, 310 U.S. at 600.

⁴⁵⁰ Id. at 606-07 (Stone, J., dissenting).

⁴⁵¹ *Barnette*, 319 U.S. at 640-41.

⁴⁵² For a brief summary of Chafee's participatory vision of free speech, see *supra* notes 19-21 and accompanying text.

⁴⁵³ 310 U.S. 88 (1940).

Murphy based his decision to strike down a municipal antipicketing ordinance on the importance of speech for self-governance: "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."⁴⁵⁴ Justice Roberts used similar logic in *Cantwell v. Connecticut*,⁴⁵⁵ a case that overturned a breach of the peace conviction of a Jehovah's Witness who was peacefully denouncing the Catholic Church: "[T]he people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."⁴⁵⁶ Thus, by the beginning of the 1940s fears of totalitarianism had caused the judiciary to take upon itself the task of protecting the rights of minorities and individuals. It had limited the police power in areas that impacted upon people's freedom of expression.

This change in the nature of the police power was not enough to eliminate administrative censorship. Expertise could still buffer administrative actors from the judiciary's novel inclination to protect people's speech rights.⁴⁵⁷ By the middle of the 1940s, however, the notion of expertise had itself come under attack. The same fears of totalitarianism that helped to reshape the police power placed administrative discretion in a sinister light. Americans were less inclined to trust unelected experts, less inclined to believe that administrators' expertise would somehow prevent them from behaving tyrannically. On a broader scale, the changing nature of liberalism brought the idea of administrative expertise into disrepute. By the end of World War II, liberals were less committed to regulation as a method of managing the economic and social problems. Thus, as the postwar period began administrative experts had fallen out of favor. Their putative expertise was no longer a persuasive reason to give them the power to limit people's freedom of speech.

⁴⁵⁴ Id. at 102.

⁴⁵⁵ 310 U.S. 296 (1940).

⁴⁵⁶ Id. at 310.

⁴⁵⁷ See *supra* notes 295–297 and accompanying text.

Of course, conservatives had accused administrative agencies of totalitarian behavior since before the beginning of the New Deal, and these objections increased in vociferousness as the 1930s wore on.⁴⁵⁸ In 1933 the American Bar Association established a Special Committee on Administrative Law to examine the field and propose reform legislation.⁴⁵⁹ The Committee's bitter critique of the administrative state was suffused with accusations of totalitarianism. O.R. McGuire, the Committee's chair from 1935 until 1937 and again in 1939⁴⁶⁰ asserted that the administrative state was leading the United States towards "a form of government on the Russian, Italian or German models."⁴⁶¹ The Committee's report in 1938, written by that year's chair, a particularly cranky Roscoe Pound, evidenced an extreme hostility towards what it called the prevalence of "administrative absolutism."⁴⁶²

In 1939 the ABA proposed legislation that would have ensured a much greater degree of judicial control over the administrative process.⁴⁶³ The fate of this legislation, known as the Walter-Logan bill, illustrates that by the end of the 1930s, fears of administrative

⁴⁵⁸ See, e.g., James M. Beck, *Our Wonderland of Bureaucracy: A Study of the Growth of Bureaucracy in the Federal Government, and Its Destructive Effect Upon the Constitution* (1932); Lord Hewart, *The New Despotism* (1929); see also George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 *Nw. U. L. Rev.* 1557, 1581 (1996) (noting that after FDR's court packing plan, "some voters began to fear that the president sought the same absolute authority as the dictators who had recently achieved power in Europe"); Schiller, *Policy Ideals*, *supra* note 49, at 384-90 (describing the ABA's critique of the New Deal).

⁴⁵⁹ For a history of the Committee, see Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 *Va. L. Rev.* 219 (1986); O.R. McGuire, *The American Bar Association's Administrative Law Bill*, 1 *La. L. Rev.* 550 (1939); Shepherd, *supra* note 458, at 1569-75.

⁴⁶⁰ See McGuire, *supra* note 459, at 550.

⁴⁶¹ O.R. McGuire, *Administrative Law and American Democracy*, 25 *A.B.A. J.* 393, 394 (1939).

⁴⁶² Report of the Special Committee on Administrative Law at the 1938 Cleveland Convention of the American Bar Association, *reprinted in* *Administrative Law: Hearings on H.R. 4236, H.R. 6198, and H.R. 6324 Before Subcomm. No. 4 of the House Comm. on the Judiciary, 76th Cong.* 129, 139 (1939) [hereinafter *House Hearings*]; see Horwitz, *supra* note 44, at 219-20. One of the report's principal sections was entitled "Administrative absolutism." *House Hearings*, *supra*, at 137-40.

⁴⁶³ A slightly modified version of the ABA's reform proposal was introduced in the House of Representatives as H.R. 6324. H.R. 6324, 76th Cong. (1939), *reprinted in* *House Hearings*, *supra* note 462, at 10-14; see Shepherd, *supra* note 458, at 1598. For a description of the bill's effect, see Schiller, *Policy Ideals*, *supra* note 49, at 392-95.

absolutism had moved beyond the conservative interests that had originally articulated them. Both the testimony in the congressional hearings on the bill and the debates on the floor were riddled with comparisons of the administrative state to fascist and communist governments⁴⁶⁴ and accusations that administrative agencies were being used to advance the totalitarian ambitions of CIO president John Lewis or Franklin Roosevelt.⁴⁶⁵ By increasing judicial supervision of the administrative process and by forcing administrative agencies into traditional "legal" molds (i.e., separation of powers, judicial review, rules of evidence, right of cross-examination), the bill would promote fairness and eliminate arbitrary action.⁴⁶⁶ This reform, according to supporters like Senator William King, would protect the liberties of citizens from arbitrary government: "There must be adequate checks upon administrative action . . . if liberty is to survive."⁴⁶⁷ If these checks made the administrative process less efficient, so be it. Congressman Everett Dirksen made just such an argument on the final day of the House debate:

A noted sage once observed that democracy is like an old scow. It does not move very fast nor very far at one time, but it never sinks. I prefer these attributes of an old scow with the security which it tends to give to democratic processes as against the totalitarian superfluous liners of the Old World with an impetuous captain giving orders for full speed ahead, no matter what happens.⁴⁶⁸

By 1940 these accusations seemed less like reactionary scare tactics and more like an accurate description of events in Europe. When the House passed the bill in April of 1940 and the Senate passed it

⁴⁶⁴ See, e.g., House Hearings, *supra* note 462, at 33 (statement of O.R. McGuire); 86 Cong. Rec. 13,811 (1940) (statement by Senator Sumners about the lack of judicial review in Germany and Italy); *id.* at 4603 (1940) (statement by Congressman Hawks' comparing the SEC to the Gestapo).

⁴⁶⁵ See 86 Cong. Rec. 4668 (1940) (statement of Congressman White); *id.* at 4542 (statement of Congressman Hoffman).

⁴⁶⁶ See, e.g., *id.* at 13,665 (statement of Senator King); *id.* at 4650 (statement of Congressman Martin).

⁴⁶⁷ *Id.* at 13,676.

⁴⁶⁸ *Id.* at 4736; see also *id.* at 4535 (statement of Congressman Michener) ("Slowing-down procedure is exactly what is needed when procedure which means the life or death of industry, or the financial ruin of individuals, is in the hands of an arbitrary, tyrannical, and bitterly prejudiced agency.").

in November of that year, many stalwart New Dealers voted for it.⁴⁶⁹ Even those who opposed the bill asserted that some type of reform of the administrative process was necessary.⁴⁷⁰ Despite the fact that the bill's supporters did not have enough votes to override Roosevelt's veto, the President understood the significance of its passage and announced that the administration was considering its own reform of the administrative process.⁴⁷¹

Indeed, by the mid-1940s the idea of the existence of a connection between the administrative state and totalitarianism was prevalent among intellectuals across the political spectrum and had even entered mainstream culture. Friedrich von Hayek's *The Road to Serfdom*,⁴⁷² which argued that increasing the administrative power of the state inevitably led to totalitarianism, was a best seller in 1944 and was reissued as a *Reader's Digest* condensed book.⁴⁷³ In the introduction, Hayek was explicit about where administrative planning would end up: "It is necessary now to state the unpalatable truth that it is Germany whose fate we are in some danger of repeating."⁴⁷⁴ Thinkers with radically different political views from

⁴⁶⁹ Such New Deal supporters as Senators Carl Hatch, Henrick Shipstead, and David Walsh voted for Walter-Logan. See 86 Cong. Rec. 13,748 (1940). Indeed, prior to his introduction of the Walter-Logan bill, Senator Logan himself had been a "reliable supporter" of the New Deal. See Shepherd, *supra* note 458, at 1601. George Shepherd notes that 41% of Northern Democratic House Members and 43% of Northern Democratic Senators voted for Walter-Logan. See *id.* at 1619, 1622. Because Francis Walter, co-sponsor of the bill, was a vehement anticommunist, chair of the infamous House Un-American Activities Committee, and co-author of the racist McCarran-Walter Immigration Act of 1952, he has gotten a reactionary reputation that is only partially deserved. Walter, first elected in 1932, generally supported the social and economic legislation proposed by the Roosevelt, Truman, and Kennedy administrations. He was one of the key Republican supporters of the Marshall Plan. See Alfred L. Morgan, Francis Eugene Walter, in *Dictionary of American Biography*, *supra* note 423, at 766-67.

⁴⁷⁰ See H.R. Rep. No. 76-1149, pt. 2, at 2 (1940) (minority report of Congressman Cellar to accompany H.R. 6324) ("I deplore the tendency of some of these bureaus. Some remedy is essential, for otherwise we shall drift into some sort of executive domination, if not totalitarianism . . .").

⁴⁷¹ See Franklin D. Roosevelt, Logan-Walter Bill Veto Message (Dec. 18, 1940), *reprinted* in 27 A.B.A. J. 52, 53 (1941).

⁴⁷² Friedrich A. Hayek, *The Road to Serfdom* (1944).

⁴⁷³ See Alan Brinkley, *Liberalism and Its Discontents* 283-84 (1998) [hereinafter Brinkley, *Liberalism*]; Theodore Rosenof, *Freedom, Planning, and Totalitarianism: The Reception of F.A. Hayek's Road to Serfdom*, 5 *Canadian Rev. Am. Stud.* 149, 150 (1974).

⁴⁷⁴ Brinkley, *Liberalism*, *supra* note 473, at 284 (quoting Hayek, *supra* note 472).

Hayek's echoed his fears.⁴⁷⁵ In 1945 Rienhold Niebuhr wrote that "[t]he rise of totalitarianism" suggested that democratic countries should "walk warily" before establishing bureaucracies to solve social problems.⁴⁷⁶ Democratic authority, wrote Robert Lynd in 1942, might be unable to contain the ambitions of bureaucrats.⁴⁷⁷ Dwight Macdonald agreed. To him the dropping of the atomic bomb was proof of America's inability to control the technological and bureaucratic processes of the government.⁴⁷⁸

Not surprisingly, legal intellectuals mirrored the sentiments held in the culture at large. By the late 1930s and early 1940s, fears about administrative absolutism had entered the writings of New Dealers and other previous supporters of administrative expertise. In 1938, the legal realist George Gardner⁴⁷⁹ published a scathing review of James Landis's *The Administrative Process* in the *Harvard Law Review*.⁴⁸⁰ Throughout the review, Gardner referred to Landis as "Squire."⁴⁸¹ Nor was this the only suggestion that Landis's administrative state tended towards authoritarianism. "[I]t was . . .," Gardner wrote,

wholly impossible for any candid mind to listen to Squire Landis's vindication of . . . these . . . agencies . . . without perceiving that we have here a reassertion of the antique conception of royal power. There is the same . . . claim of "expertness"—that is, of a divine power and calling to gov-

⁴⁷⁵ See Rosenof, *supra* note 473, at 156–57.

⁴⁷⁶ Brinkley, *Liberalism*, *supra* note 473, at 86 (quoting Rienhold Niebuhr, *The Children of Light and the Children of Darkness: A Vindication of Democracy and a Critique of Its Traditional Defence* 117 (1945); Rienhold Niebuhr, *The Collectivist Bogy*, *Nation*, Oct. 21, 1944, at 478, 478 (reviewing Friedrich A. Hayek, *The Road to Serfdom* (1944))).

⁴⁷⁷ Robert Lynd argued that big businessmen wielding concentrated economic power had co-opted the government and that American democracy was unprepared to counter this symbiotic combination of businessmen and bureaucrats. See Richard H. Pells, *The Liberal Mind in a Conservative Age: American Intellectuals in the 1940s and 1950s*, at 18–19 (1985) (discussing Robert S. Lynd, *The Structure of Power*, *New Republic*, Nov. 9, 1942, at 597, 597–99).

⁴⁷⁸ See *id.* at 45–46 (discussing Dwight Macdonald, *The Bomb*, *Politics*, Sept. 1945, at 257; *Politics*, Aug. 1945, at 225).

⁴⁷⁹ Laura Kalman classifies Gardner as a realist or as at least an "antiformalist." See Laura Kalman, *Legal Realism at Yale, 1927–1960*, at 49, 52–54 (1986).

⁴⁸⁰ George Gardner, *Book Review*, 52 *Harv. L. Rev.* 336 (1938).

⁴⁸¹ See *id.*

ern,—[and] the same reluctance to submit one's case to trial and argument before impartial judges⁴⁸²

Such an autocratic conception of government was inappropriate for the United States. Even the more sympathetic reviews, such as the one that appeared in the pro-New Deal *American Political Science Review*, were skeptical of the notion that experts should be the source of all policymaking. The reviewer was not convinced that expertise and what he called "professionalism" were sufficient barriers to administrative arbitrariness.⁴⁸³

Administrative law theorists began to take a similarly dismissive view of expertise after World War II. Once-loyal New Dealers like Louis Jaffe became concerned about the autocratic tendencies of the administrative state. Administration, Jaffe wrote, was in grave danger of becoming totalitarianism: "Value-free concepts" and autonomous "systems of expert justice" simply did not exist.⁴⁸⁴ Instead, a faith in "expert[s]" and "rationalism" could lead to totalitarianism.⁴⁸⁵ Only the courts, through the process of judicial review, could "protect[] the agencies themselves against the temptation of absolutism."⁴⁸⁶

Accordingly, Jaffe called for aggressive judicial review of administrative action. "The availability of judicial review," he wrote, "is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid."⁴⁸⁷ Recalling recent events in Europe, Jaffe asserted that administrative power was easily abused: "Even if we grant . . . the magnificent accomplishment of the New Deal, we cannot forget that our age has produced elsewhere, and even on occasion in our own country, the most monstrous expressions of administrative

⁴⁸² Id. at 338–39.

⁴⁸³ John Thurston, *American Government and Politics*, 33 Am. Pol. Sci. Rev. 524, 525 (1939) (book review).

⁴⁸⁴ Louis L. Jaffe, *The Illusion of the Ideal Administration*, 86 Harv. L. Rev. 1183, 1187 (1973), *quoted in* Horwitz, *supra* note 44, at 240.

⁴⁸⁵ Horwitz, *supra* note 44, at 239 (discussing Louis L. Jaffe, *The Judicial Universe of Mr. Justice Frankfurter*, 62 Harv. L. Rev. 357, 410–11 (1949)).

⁴⁸⁶ Louis L. Jaffe, *The Judicial Universe of Mr. Justice Frankfurter*, 62 Harv. L. Rev. 357, 373–74 (1949), *quoted in* Horwitz, *supra* note 44, at 239.

⁴⁸⁷ Jaffe, *supra* note 69, at 320. Though this book was published after the period I am discussing in this Article, it is based on articles that Jaffe wrote between 1940 and the early 1960s. See *id.* at vii.

power.”⁴⁸⁸ Courts were the perfect entities to ensure that these abuses did not occur: “The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law.”⁴⁸⁹ Not surprisingly, Jaffe called for broad judicial review of administrative actions. He condemned the “self-deprecation and abdication” of the New Deal-era judges who, “beguiled by the promise of administrative action . . . were easily persuaded of the irrelevance of the judicial role.”⁴⁹⁰ Instead, he argued for a strong presumption of the availability of judicial review of administrative action, and a wide conception of standing that would promote judicial review by increasing the number of people who had a right to demand it.⁴⁹¹

As American intellectuals responded to European totalitarianism by backing away from their endorsement of expert administration, federal courts did the same. Administrative law changed to give courts a more active role in policing the actions of administrative agencies. By doing so, the courts asserted the importance of universal legal principles—the existence, for example, of due process and substantial evidence—over the pragmatic, situational logic of expert administration.

In the mid-1940s, the Supreme Court began to reverse many of the doctrines that had previously insulated administrative decisionmaking from judicial review. It discarded the presumption of implied preclusion and began requiring explicit congressional intent to preclude review of an agency decision.⁴⁹² Similarly, the Court (and lower federal courts) broadened standing, allowing all parties adversely affected by administrative action to challenge that action in court.⁴⁹³ Most importantly, the Court increased the

⁴⁸⁸ *Id.* at 323.

⁴⁸⁹ *Id.* at 327.

⁴⁹⁰ *Id.* at 344.

⁴⁹¹ See *id.* at 336–53, 381–89; Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. Pa. L. Rev. 1033, 1035–36, 1043–47 (1968).

⁴⁹² This process happened in fits and starts. See, e.g., *Stark v. Wickard*, 321 U.S. 288, 309 (1944); *Rusk v. Cort*, 369 U.S. 367, 374–75 & n.6 (1962). But see *Estep v. United States*, 327 U.S. 114, 122 (1946).

⁴⁹³ See, e.g., *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 476–77 (1940); *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 14–15 (1942); *Associated Indus. v. Ickes*,

amount of scrutiny that the judiciary was supposed to give to agency actions.⁴⁹⁴

The rhetoric in federal judicial decisions also evidenced a fear of administrative absolutism. As early as 1940 a Ninth Circuit panel made up entirely of Roosevelt appointees accused the National Labor Relations Board of

the kind of administrative absolutism denounced in democratic assemblies . . . as characteristic of the totalitarianism of the Central European powers. . . . We do not believe [sic] that . . . the National Labor Relations Act intended to make a long start on the road where our civil liberties are to be regarded as the "pale phantoms of objective law" which no longer control our deliberations, as the German chief justice . . . of the newly constituted court in conquered Poland is reported to have told his colleagues.⁴⁹⁵

In the 1947 case *SEC v. Chenery Corp.*,⁴⁹⁶ Justices Jackson and Frankfurter dissented from an opinion upholding a Securities and Exchange Commission ("SEC") decision: "This administrative authoritarianism, this power to decide without law, is what the Court seems to approve in so many words This decision is an ominous one to those who believe that men should be governed by laws"⁴⁹⁷

In *Radio Corp. of America v. United States*,⁴⁹⁸ decided in 1951, the Court upheld the FCC's decision to certify a particular system of color television broadcasting.⁴⁹⁹ Frankfurter issued an opinion, titled "*dubitante*," in which he belittled administrative expertise and suggested that more judicial supervision of administrative decisionmaking was necessary.⁵⁰⁰ The same year Justice Douglas dissented from the Court's per curiam affirmance of an Interstate

134 F.2d 694, 705 (2d Cir. 1943), vacated on other grounds, 320 U.S. 707 (1943); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 140-41 (1951).

⁴⁹⁴ See, e.g., *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951).

⁴⁹⁵ *NLRB v. Sterling Elec. Motors*, 112 F.2d 63, 68 (9th Cir.), cert. dismissed, 311 U.S. 722 (1940). All three members of the panel—Judges Denman, Mathews, and Healy—were Roosevelt appointees. See 21 *Who's Who in America* 755, 1209, 1713 (1940-41). Judge Healy dissented.

⁴⁹⁶ 332 U.S. 194 (1947).

⁴⁹⁷ *Id.* at 216-17 (Jackson, J., dissenting, joined by Frankfurter, J.).

⁴⁹⁸ 341 U.S. 412 (1951).

⁴⁹⁹ See *id.* at 421.

⁵⁰⁰ *Id.* at 426-27 (Frankfurter, J., dissenting).

Commerce Commission ("ICC") decision and used even more striking language: "Unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty."⁵⁰¹

While the theoretical possibility that expert administration might undermine democracy filled the minds of judges and intellectuals during the 1940s, the actual functioning of the bureaucracy during the war also weakened Americans' faith in expertise.⁵⁰² In particular, Americans' experiences with the two dominant wartime agencies, the War Production Board ("WPB") and the Office of Price Administration ("OPA"), left many convinced that expert administration was anything but. When the United States entered the First World War, Congress had established the War Industries Board ("WIB").⁵⁰³ Under the direction of Bernard Baruch, the WIB was supposed to coordinate the entire American economy so that it would meet the needs of a nation going to war.⁵⁰⁴ During and after the war, Progressives heaped praise on the WIB and touted it as a model for government management and control over the economy in peacetime.⁵⁰⁵ The laissez-faire political culture of the 1920s dashed their hopes for such a reform, but with the advent of the Depression the motive for widespread economic planning returned. The New Deal's attempt at such planning, the National Recovery Administration, was a colossal failure, but as the United States was drawn into the Second World War liberals' hopes for government economic planning returned.⁵⁰⁶

In contrast to the WIB, however, World War II's economic planning agency, the War Production Board, was a disaster. Headed by an uninspired former executive vice-president from Sears, Donald

⁵⁰¹ *New York v. United States*, 342 U.S. 882, 884 (1951) (Douglas, J., dissenting).

⁵⁰² For a more detailed discussion of this phenomenon, see Schiller, Reining, *supra* note 405, at 11–19.

⁵⁰³ See Robert D. Cuff, *The War Industries Board: Business Government Relations During World War I*, at 1–2, 100–10 (1973).

⁵⁰⁴ For the problems of coordinating the wartime economy, see *id.* at 86–112. Cuff then devotes three chapters to different aspects of the WIB's regulatory process. See *id.* at 148–240.

⁵⁰⁵ See Brinkley, *Liberalism*, *supra* note 473, at 80–81.

⁵⁰⁶ See *id.* at 81–82; Brinkley, *End of Reform*, *supra* note 416, at 175–76.

Sears, Donald Nelson, the WPB fought endless, and ultimately losing battles, with the military over the setting of production priorities. Unable to operate effectively, the Board came under attack from every side. Liberals alleged that it had been captured by industry and that it was, accordingly, more interested in generating profits for private companies than in helping the war effort.⁵⁰⁷ Conservatives condemned Nelson as a "traitor to his class" and argued that market mechanisms would provide for sufficient production for the nation's wartime needs.⁵⁰⁸ Congressmen from across the political spectrum accused the WPB of favoring large contractors at the expense of small businesses, and cliques of administrators within the WPB waged bureaucratic battles over the agency's priorities.⁵⁰⁹ The message that American policymakers drew from the WPB's three disastrous years of operation was not that administration led to fascism—though Harry Truman, then a Senator vigorously representing his small business constituents, once referred to the Board as "the Gestapo"⁵¹⁰—but that agencies were easily captured by the interests they were supposed to regulate and that economic planning by administrative experts was doomed to failure.⁵¹¹

If Nelson's dithering leadership of the WPB led to its terrible reputation, then the opposite was true of the OPA. Ultimately, its success at exerting considerable control over the economy soured people on expert administration. Responsible for wartime rationing and price controls, the OPA was probably the most intrusive government agency in the history of the United States and, unlike the WPB, it was, in fact, very effective.⁵¹² Its control over wages and prices affected the daily lives of every American. Naturally, business leaders and their agents in Congress expressed extreme hostility towards the OPA. In contrast, the public, spurred on by

⁵⁰⁷ See Brinkley, *End of Reform*, *supra* note 416, at 182–90.

⁵⁰⁸ *Id.* at 185; see John Morton Blum, *V Was for Victory: Politics and American Culture During World War II* 223–24 (1976).

⁵⁰⁹ See Blum, *supra* note 508, at 124–31; Brinkley, *End of Reform*, *supra* note 416, at 192–98.

⁵¹⁰ Brinkley, *End of Reform*, *supra* note 416, at 193 (quoting Truman letter to small-business constituents).

⁵¹¹ See *id.* at 198–200.

⁵¹² See Brinkley, *End of Reform*, *supra* note 416, at 147; Meg Jacobs, "How About Some Meat?": The Office of Price Administration, Consumption Politics, and State Building from the Bottom Up, 1941–46, at 84 *J. Am. Hist.* 910, 918–25 (1997).

patriotic propaganda emphasizing the importance of sacrifice during wartime, initially supported the work of the OPA.⁵¹³ By the end of the war, however, the agency managed to come across as both authoritarian—mandating the denial of goods that business insisted could be available to all on the open market—and incompetent—unable to supply consumers with the products they needed.⁵¹⁴ Accordingly, Americans' experiences with wartime administration at both the WPB and the OPA laid out an entire panoply of flaws with the administrative state: capture, incompetence, absolutism. Expertise had taken a considerable beating.

Thus, by the end of the 1940s fears of totalitarianism at home and abroad as well as instances of bureaucratic incompetence had changed the way that Americans looked at courts, legislatures, and administrative agencies. The police power was reconceptualized so as to give courts more power to protect the people from legislatures that might wish to take away their liberties. At the same time, administrative expertise, once a powerful rationale for exempting agencies from judicial oversight, became nothing more than an excuse for frightening excesses of governmental power. Administration had to be tamed by the judicial whip as well.

These changes were part of a broader shift in the nature of American liberalism that occurred during the 1940s. Starting in 1946, America embarked on a period of almost thirty years in which politics and policymaking was dominated by a Democratic Party invigorated by Franklin Roosevelt's successful attempts to bring together a coalition of Northeastern liberals, women, African-Americans, and working-class descendants of recent immigrants.⁵¹⁵ The platform of this Democratic Party, however, was different from that of the party that elected FDR in 1932. The return of prosperity and the fear of totalitarianism changed the way that reformers thought about the role of the state. Liberalism no longer stood for government planning and economically redistributive policies promoted by a party that viewed people's economic

⁵¹³ See Jacobs, *supra* note 512, at 921–28, 933–34.

⁵¹⁴ See Brinkley, *End of Reform*, *supra* note 416, at 147–48; Jacobs, *supra* note 512, at 938–41.

⁵¹⁵ See Badger, *supra* note 414, at 247–48, 251–52, 255–56; David Plotke, *Building a Democratic Political Order: Reshaping American Liberalism in the 1930s and 1940s*, at 131–33, 139–40 (1996).

class as their most salient characteristic. Instead, postwar liberalism rejected this class-based foundation for reform. It eschewed planning and redistribution and instead pledged to create prosperity for all through Keynesian fiscal policy.⁵¹⁶ It stressed the importance of civil liberties, thereby replacing class with race (and later gender) as the most salient factor in a person's political identity.⁵¹⁷ Thus, noneconomic individual rights became the lodestar of this postwar definition of liberalism. Liberalism's prewar affection for the state had diminished, the victim of frightening totalitarian ideologies, bureaucratic ineptitude, and economic prosperity.

It is these changes in political culture that explain the emergence of the modern, libertarian conception of the Free Speech Clause of the First Amendment. Both the transformation of the police power and the decline of expertise were by-products of the emergent postwar liberalism. At root, both stemmed from fears of authoritarianism and disillusionment with the activist state. The judiciary was set up as the guardian of this new order—a protector of individual rights against majoritarian legislatures that wished to persecute minorities and unaccountable, autocratic administrators who wished to remake the world in their own image regardless of the rights of individuals.

VII. THE CURIOUS CASE OF RADIO REGULATION

In a ten-year period, corresponding roughly to the 1940s, the federal judiciary took upon itself the job of regulating speech, a task that before had largely been performed by administrative officials. Responding to a changed political culture, the courts had re-

⁵¹⁶ See Brinkley, *End of Reform*, *supra* note 416, at 7–8, 37–66, 265–71. The existence of this shift is the thesis of Brinkley's book. Many other historians of the New Deal chronicle the increasing affection that the Roosevelt administration had for Keynesian fiscal policy. See, e.g., Badger, *supra* note 414, at 115–16, 151; Leuchtenburg, *New Deal*, *supra* note 409, at 245–46; Plotke, *supra* note 515, at 172–73; Rosenof, *supra* note 473, at 157, 161.

⁵¹⁷ See Brinkley, *End of Reform*, *supra* note 416, at 164–70, 268–70; Brinkley, *Liberalism*, *supra* note 473, at 97–102; Gerstle, *supra* note 413, at 301–02; Polenberg, *One Nation*, *supra* note 413, at 69–78; Richard Polenberg, *War and Society: The United States, 1941–1945*, at 94–98 (1972); Nelson, *supra* note 413, at 4–5, 19–28. For examples of the postwar belief in a classless society, see Richard H. Pells, *The Liberal Mind in a Conservative Age: American Intellectuals in the 1940s and 1950s*, at 133–35, 140–42, 220 (1985); Polenberg, *One Nation*, *supra* note 413, at 63–65, 139–40.

jected prescriptive assumptions about freedom of expression—that regulating speech was a matter best left to expert administrators—and had elevated it to a preferred position that required heightened judicial scrutiny of legislative and administrative acts that impacted upon speech. The same pattern of events did not occur in broadcast regulation. No case or series of cases in the 1940s stopped the FCC from judging the content of radio or television broadcasts when making licensing renewal decisions. The FCC did not have its prescriptive powers taken away from it by the courts. Thus, as other administrative agencies were losing their power to engage in content-based regulation of speech, not only did the FCC continue to retain its power, but the courts actively encouraged the agency to exercise its authority.⁵¹⁸ The standard constitutional justification for this different treatment has been the notion of scarcity: Because of the natural limitation on the number of broadcast stations, the Supreme Court has reasoned that the government must have the power to ensure that a diversity of voices are represented on the airwaves.⁵¹⁹ Thus scarcity has protected the agency from the type of constitutional scrutiny that others have been subjected to since the late 1940s. Wrapped up in this scarcity justification has been the notion of expertise. The technological nature of the regulatory issue preserved the expertise-based rationale for speech regulation that fell by the wayside in other areas of administrative censorship.

⁵¹⁸ For example, disputes often arose over whether the FCC's authority under the fairness doctrine to require that stations broadcast opposing viewpoints on important public issues extended to commercial advertising. The courts often authorized such extensions of the FCC's authority, even on occasion pushing it to consider such challenges against its will. See *Friends of Earth v. FCC*, 449 F.2d 1164, 1167–71 (D.C. Cir. 1971); *Retail Store Employees Union, Local 880 v. FCC*, 436 F.2d 248, 256–59 (D.C. Cir. 1970); *Banzhaf v. FCC*, 405 F.2d 1082, 1085 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969). Only in *Banzhaf* had the FCC sought to exert such authority. For other examples of the FCC's content-based regulatory activities during the 1960s and 1970s, see Einord, *supra* note 247, at 142–70.

⁵¹⁹ See, e.g., Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 Colum. L. Rev. 905, 909 (1997). The most famous statement of this theory was in *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 376 (1969) (“[B]roadcast frequencies constitute[] a scarce resource whose use [can] be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacaphony [sic] of competing voices, none of which could be clearly and predictably heard.”). Contemporary scholars reject the notion that the useable broadcast spectrum is actually finite. See Einord, *supra* note 247, at 190–93.

Two cases from the early 1940s, *FCC v. Pottsville Broadcasting Co.*⁵²⁰ and *National Broadcasting Co. v. United States*,⁵²¹ illustrate this phenomenon. *Pottsville* involved a challenge to the FCC's power to deny a license because the Commission thought that the broadcaster lacked the financial qualifications and "did not sufficiently represent local interests in the community which the proposed station was to serve."⁵²² *Pottsville* argued that in rejecting its application, the FCC ignored specific instructions from the Court of Appeals for the District of Columbia on how to proceed with the case.⁵²³ A prior opinion of the court of appeals had corrected the FCC's interpretation of Pennsylvania law concerning financial qualifications.⁵²⁴ Before the Supreme Court, *Pottsville* argued that the appeals court decision required the FCC to reverse its previous order and grant *Pottsville*'s application.⁵²⁵ Writing for a unanimous Court, Justice Frankfurter rejected this argument. The FCC was free to hold a new licensing hearing, even if it involved considering applications filed after the initial, erroneous *Pottsville* decision. The FCC, Frankfurter wrote, required considerable flexibility in establishing "the subordinate questions of procedure in ascertaining the public interest" because of the complex and technical nature of broadcasting.⁵²⁶ According to Justice Frankfurter, Congress acted "to protect the national interest . . . in the new and far-reaching science of broadcasting."⁵²⁷ The Communications Act of 1934⁵²⁸ recognized "the rapidly fluctuating factors characteristic of the evolution of broadcasting" and thus sought "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission."⁵²⁹ The language that Frankfurter used in *Pottsville* indicated that radio regulation was something dif-

⁵²⁰ 309 U.S. 134 (1940).

⁵²¹ 319 U.S. 190 (1943).

⁵²² *Pottsville*, 309 U.S. at 139.

⁵²³ See id. at 140. For the court of appeals's instructions to the FCC, see *Pottsville Broad. Co. v. FCC*, 105 F.2d 36, 38 (D.C. Cir. 1939), rev'd, 309 U.S. 134 (1940).

⁵²⁴ See *Pottsville Broad. Co. v. FCC*, 98 F.2d 288 (D.C. Cir. 1938).

⁵²⁵ See *Pottsville*, 309 U.S. at 140.

⁵²⁶ Id. at 138; see id. at 137-41.

⁵²⁷ Id. at 137.

⁵²⁸ Act of June 19, 1934, ch. 652, 48 Stat. 1064 (codified as amended at 18 U.S.C. §§ 1304, 1464 and 47 U.S.C. §§ 151-614 (1994 & Supp. III 1997)).

⁵²⁹ *Pottsville*, 309 U.S. at 138.

ferent than the regulation of movies, or mails, or speech in a public forum. Movie censors might be ridiculed as out of touch Victorian prudes and Mayor Hague could be portrayed as a political thug,⁵³⁰ but nobody would question that radio regulation was about science and technology, pure and simple. Here was an area where expertise was still needed.

Indeed, in 1943, when NBC attacked the FCC's powers on free speech grounds in *National Broadcasting Co.*, the scientific nature of broadcasting helped to shield the Commission's acts from constitutional scrutiny. The NBC case involved a challenge to the FCC's Chain Broadcasting Regulations, which limited the control that radio networks could have over their affiliates.⁵³¹ NBC attacked the regulations on both statutory and constitutional grounds⁵³² losing a five-to-two decision written by Justice Frankfurter.⁵³³ The dissent, written by Justice Murphy, sounded remarkably like the majority opinions that the Court was handing down contemporaneously in other areas of administrative censorship. Not even reaching the constitutional issue, Murphy demanded that the Court require that the FCC demonstrate that Congress explicitly gave it the powers it was exercising.⁵³⁴ Failure to do so could have frightening consequences:

⁵³⁰ Morris Ernst wrote several books during the 1930s and 1940s attacking through ridicule the expertise of movie censors. See Morris L. Ernst & Pare Lorentz, *Censored: The Private Life of the Movies* (1930); Morris L. Ernst & Alexander Lindey, *The Censor Marches On: Recent Milestones in the Administration of the Obscenity Law in the United States* (1940); Morris L. Ernst, *The Best Is Yet . . .*, at 155-60 (1945). Similarly, during the late 1930s the popular press ran stories suggesting that municipal officials' decisions about who could use public spaces were based not on expertise but on those officials' desire for power. Jersey City's Mayor Hague was one of the most frequent targets of this sort of article. See, e.g., Wholly Imaginary Anecdote, *N.Y. Times*, Feb. 5, 1938, at 14; Russell B. Porter, Portrait of a "Dictator," *Jersey City Style*, *N.Y. Times*, Feb. 13, 1938, § 8 (Magazine), at 5; E.T. Buehrer, Jersey's Little Hitler, *Christian Century*, June 29, 1938, at 810. Even the conservative *Reader's Digest* ran a piece about Mayor Hague entitled "Dictator—American Style." See Marquis W. Childs, Dictator—American Style, *Reader's Dig.*, Aug. 1938, at 73 (condensed from *St. Louis Post-Dispatch*, Feb. 20, 1938).

⁵³¹ See *National Broad. Co.*, 319 U.S. at 193-209 (describing the history of and summarizing Chain Broadcasting Regulations).

⁵³² See *id.* at 209-10.

⁵³³ See *id.* at 193, 227, 238. Justices Black and Rutledge did not participate in the decision. See *id.* at 227.

⁵³⁴ See *id.* at 228, 230-31 (Murphy, J., dissenting).

[B]ecause of its vast potentialities as a medium of communication, discussion and propaganda, the character and extent of control that should be exercised over it by the government is a matter of deep and vital concern. Events in Europe show that radio may readily be a weapon of authority and misrepresentation, instead of a means of entertainment and enlightenment. It may even be an instrument of oppression.⁵³⁵

Justice Murphy's attack on expertise—an attack that proved quite effective in ending other areas of administrative censorship—had little effect on the majority. Frankfurter buried Murphy under a flurry of economic, scientific, and technological rhetoric. Justice Frankfurter began the Court's opinion with a detailed fourteen-page description of the Chain Broadcasting Regulations and the economic and technological rationales that the FCC proffered for each of them.⁵³⁶ He followed that section with a seven-page discussion of the conditions that led to the advent of broadcast regulations, including a brief summary of the natural limitations on frequency availability.⁵³⁷ Only then did Frankfurter turn to the legal issues. In doing so Frankfurter emphasized the complexity of the FCC's task. Broadcasting was a field, "the dominant characteristic of which was the rapid pace of its unfolding."⁵³⁸ It was "fluid and dynamic"⁵³⁹ and required an agency that would conduct a "long investigation" and would "test[] by experience" the "wisdom of any action it took."⁵⁴⁰ Justice Frankfurter then directly addressed the free speech issue by making a scarcity argument, an argument itself based on a scientific truth: the "inherent[]" limitation on the availability of the airwaves.⁵⁴¹ Radio regulation was thus insulated from the constitutional concerns that undermined other areas of administrative censorship. It was genuine science, so the courts

⁵³⁵ *Id.* at 228 (Murphy, J., dissenting).

⁵³⁶ *See id.* at 196–209.

⁵³⁷ *See id.* at 210–16.

⁵³⁸ *Id.* at 219.

⁵³⁹ *Id.*

⁵⁴⁰ *Id.* at 225.

⁵⁴¹ *Id.* at 226.

would permit the FCC to make regulatory decisions based on expertise.⁵⁴²

VIII. CONCLUSION

When the FCC abolished the fairness doctrine on its own accord in 1987,⁵⁴³ its was engaged in a constitutional action of a different generation. The agency had balanced the constitutional value of freedom of expression with the requirements of the public interest and found that the former predominated. The FCC, not the judiciary, acted as the constitutional decisionmaker. Indeed, as the persistence of administrative censorship at the FCC and other agencies⁵⁴⁴ illustrates, expertise still protects administrative agencies from constitutional scrutiny in certain instances. It allows agencies to act as constitutional decisionmakers. The persistence of a faith in expertise also demonstrates that the rise of free speech libertarianism was a two-step process. Courts had to recognize the importance of the right of freedom of expression. Additionally, they had to apply this new right to administrators, whose prerogatives were protected by a societal belief in expertise. Even today, in areas of public policy where this belief is still strong, freedom of expression remains limited. Only when both conditions are met—when the right is recognized by the courts and the administrator's expertise is questioned—can free speech libertarianism exist.

Too often contemporary Americans assume that the judiciary's current role as the guardian of civil liberties stems from an inherent ability that the other branches of government do not possess. The

⁵⁴² Frankfurter's analysis of scarcity was expressed in technological language. See *id.* at 210–14. Justice Byron White later used similar technological language to explain scarcity. See *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 388–89 (1969).

⁵⁴³ See *Syracuse Peace Council*, 2 F.C.C.R. 5043, 5043, 5047, 5057–58 (1987), *aff'd* sub nom. 867 F.2d 654, 656 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990); *Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 145, 147–48 (1985).

⁵⁴⁴ Consider, for example, the SEC's power to preapprove prospectuses, see Aleta G. Estreicher, *Securities Regulation and the First Amendment*, 24 Ga. L. Rev. 223, 278–85 (1990), or the National Labor Relations Board's power to require new elections if unions or employers upset "laboratory conditions" because of things that they say, see *General Shoe Corp.*, 77 N.L.R.B. 124, 126–27 (1948). For a recent example of deference to administrative expertise, shielding agency action from constitutional infirmity, see *National Endowment for the Arts v. Finley*, 524 U.S. 569, 584–86 (1998).

history of how the judiciary came to protect free speech rights suggests that this assumption is wrong. Different generations have different beliefs about which governmental institutions can best protect civil liberties. Before the Second World War, Americans had a great deal of faith in expert administration and considerably less faith in the judiciary. The former, they believed, could scientifically weigh constitutional freedoms against the necessities of the time and arrive at a correct balance between the two. Courts, on the other hand, seemed to do nothing more than thwart the will of the majority by striking down legislation necessary to protect Americans from greedy plutocrats and, by the 1930s, economic collapse. It was events that occurred in the 1940s—particularly the rise of fascism in Europe and the disillusionment with administration in the United States—that resulted in the judiciary taking on an institutional role as the protector of civil liberties. These events, not some inherent ability of the judiciary or some rational decision, created the institutional arrangements that now exist.