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The Esquire Case: A Lost Free Speech Landmark

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During the Second World War, one of the most highly publicized cases implicating speech and press freedoms did not involve political dissent. It did not involve opposition to the war, socialism, Communism, pacifism, anarchism, or any political matter whatsoever. Instead, it involved pin-up girls and a popular men's magazine. The First Amendment *cause célèbre* of the first half of the 1940s was the Post Office Department's seemingly arbitrary denial of second-class mailing privileges to *Esquire* magazine, on grounds that it did not "contribute to the public good."[1] Although reduced, second-class mailing rates had historically been granted to nearly all periodicals irrespective of their content, Postmaster General Frank Walker—a conservative moralist determined to eradicate so-called dirty magazines from the mails—creatively interpreted the second-class mail privilege as a "badge of good conduct." According to Walker, whether a magazine received the second-class rate was contingent on whether the magazine, in his view, contributed to the "public good."[2] To Walker, *Esquire* magazine, with its sexy jokes and pin-ups, was up to no good. Given prohibitively expensive first-class mailing rates, the loss of the second-class privilege portended the effective death of the magazine, and was described, rightly, as a form of censorship.[3]

The Postmaster General's 1943 decision barring *Esquire* from second-class mails led to a massive public protest.[4] The outcry around Walker's decision attested not only to the popularity of *Esquire*, but an emergent free speech sensibility in the culture of the time. Over the previous fifteen years, the American public had moved toward greater tolerance of a variety of expression, and intolerance of heavy-handed government attempts to quash speech on moral and political grounds.[5] This stance marked the reversal of decades of conservatism, in which much of the public had approved government restraints on expression, restrictions that were routinely upheld by the courts under prevailing free speech doctrines.[6] The Great Depression era, with its

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[1] Hannegan v. Esquire, Inc., 327 U.S. 146, 149–50 (1946).

[2] *See id.* at 149.

[3] *See id.* at 151 n.7.

[4] *See* discussion *infra* Part VI.

[5] *See* discussion *infra* Section VI.C.

[6] *See* discussion *infra* Section II.B.

economic turmoil and social unrest, ushered in a new spirit of openness toward alternative views and the marketplace of ideas.[7] Spurred by liberal First Amendment decisions of the Supreme Court in the 1930s, freedom of speech ascended to the position of a cherished liberty, the symbol of American pluralism and democracy.[8] In the wartime context, the Postmaster General's edict against *Esquire* seemed especially egregious. Fighting to end dictatorship overseas, Americans confronted what appeared to be tyranny on their own soil.

The "*Esquire* Affair" reflected the public's nascent commitment to a more robust view of free expression, and its growing opposition to censorship and authoritarian controls over speech, beliefs, and morals. It marked an important moment in the social history of free speech, and a legal milestone as well. After Walker's denial of the second-class privilege was upheld by a federal district court in Washington, D.C.,[9] it was reversed by the Circuit Court of Appeals,[10] and the reversal was affirmed in a unanimous 1946 Supreme Court decision, *Hannegan v. Esquire*,[11] in which the Court placed free speech limitations on the nearly unfettered power of the Post Office Department to restrict and censor the mail.[12]

The Supreme Court's decision in *Hannegan v. Esquire* was also notable in that it signaled the beginning of the expansion of the First Amendment beyond its traditional domains of political and religious speech. With its oft-cited dicta praising the "uncensored distribution of literature"—"what seems to one to be trash may have for others fleeting or even enduring values" . . . "[f]rom the multitude of competing offerings the public [must] pick and choose"[13]—the Court in *Esquire* both reaffirmed and extended the free speech principles it had articulated in recent cases involving political and religious expression.[14] Major First Amendment cases of the late 1930s and early 1940s had protected the rights of labor protesters, political dissidents, and religious minorities to express their contrarian views.[15] Participatory democracy, the Court opined, depended on the free and candid exchange of a diversity of perspectives on the public issues of the day.[16] The application of these free speech principles to a pin-up magazine represented a significant leap. With the *Esquire* decision, the Court took freedom of speech beyond the lofty realms of political

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[7] *See* discussion *infra* Section III.A.

[8] *See* discussion *infra* Section III.B.

[9] Esquire, Inc., v. Walker, 55 F. Supp. 1015 (D.D.C. 1944).

[10] Esquire, Inc., v. Walker, 151 F.2d 49 (D.C. Cir. 1945).

[11] 327 U.S. 146 (1946).

[12] *See Hannegan*, 327 U.S. 158–59. The Post Office Department was the predecessor to the U.S. Postal Service. The U.S. Postal Service began operations when the Postmaster General was removed as a cabinet-level position. *The United States Postal Service: An American History 1775–2006*, USPS (May 2007), https://about.usps.com/publications/pub100.pdf.

[13] *Hannegan*, 327 U.S. at 158.

[14] *See id.*; *see also infra* note 614.

[15] *See* discussion *infra* Section VI.C.

[16] *See* discussion *infra* Section VI.C.

commitment and religious faith to the decidedly more pedestrian terrain of popular entertainment and culture.

This Article tells the story of the *Esquire* case, a critical and largely underrecognized case that shaped both the law and culture of freedom of expression in the mid-twentieth-century United States.[17] In its articulation of the perils of government censorship and top-down control over thought and expression—not only political expression, but literature, entertainment, and culture—*Hannegan v. Esquire* represents one of the building blocks of the modern civil libertarian free speech canon. Born of the World War II era, a time of heightened popular and judicial sensitivity to civil liberties, the *Esquire* case registered a commitment on the Supreme Court, and among the public more broadly, to freedom of choice in the expression and consumption of ideas, and it contributed to the demise of film and literary censorship after the war.[18] Often overshadowed by other important free speech cases of the time, the *Esquire* case deserves a prominent place in the history of the First Amendment and the public's relationship to freedom of expression.

The Postmaster General's crackdown on *Esquire* grew from a longstanding campaign against allegedly immoral magazines led by a Catholic reform group called the National Organization for Decency in Literature (NODL).[19] As Part I describes, in 1941 Postmaster General Frank Walker, a devout Catholic, pledged to assist the NODL by eliminating indecent material from the mails. This was not hard to do, since there were practically no constitutional limitations on the Postmaster General's authority. As explained in Part II, Supreme Court rulings between the 1880s and 1920s had rendered the Post Office Department a largely First Amendment–free zone. By the 1930s, however, as Part III illustrates, these rulings had become out of step with the Supreme Court's more speech-protective First Amendment doctrines, as well as more liberal public attitudes toward freedom of speech.

In 1942, Walker launched his "decency campaign" by revoking the second-class mailing privileges of several dozen magazines, mostly pulp and "girlie" magazines, as told in Part IV. The campaign gained national attention when Walker turned his wrath against *Esquire*, described in Part V. *Esquire* had earned acclaim for its "pin-up girls," popular among GIs overseas and widely regarded as a symbol of the

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[17] The case has been almost entirely overlooked in legal and historical scholarship. For an extensive account of the case, see ZECHARIAH CHAFEE JR., 1 GOVERNMENT AND MASS COMMUNICATIONS 276–368 (1947) [hereinafter CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS]. *See also* Jean Preer, Esquire v. Walker: *The Postmaster General and "The Magazine for Men,"* 23 PROLOGUE MAG. 7 (1990); Nate Sullivan, The "Varga Girl" Trials: The Struggle between *Esquire* Magazine and the U.S. Post Office, and the Appropriation of the Pin-Up As a Cultural Symbol (May 2013) (unpublished Ph.D. dissertation, University of Nebraska) (available online at PQDT Open). The records of the Post Office Department hearing are held at the National Archives in Washington, D.C.

[18] *See* discussion *infra* Section VIII.E.

[19] *See* discussion *infra* Section I.B.

American home front. Walker declared *Esquire* too risqué for public consumption and cut off its second-class mailing privileges. Not only did Walker punish *Esquire*, but claimed authority under an 1879 postal statute to deny second-class mailing privileges to any publication that did not, in his opinion, "contribute to the public good."[20] The arbitrary decision against a respected, widely circulated magazine—not to mention the chilling implications of Walker's edict for the entire press—produced a public outcry. *Esquire*, assisted by the American Civil Liberties Union, appealed the decision, described in Parts V and VI. For two years, as the case wound its way through the federal courts, the public watched intently, wondering whether the autocratic leadership they were fighting to defeat abroad would be tolerated in their own country.

In the 1946 decision in *Hannegan v. Esquire*, the Supreme Court overruled the ban, restored *Esquire*'s mailing privileges, negated Walker's interpretation of the postal statute, and averted what could have been a disaster for the press.[21] As Part VIII explains, *Esquire* was a victory for free expression on many levels. The opinion by Justice William Douglas channeled the pro-speech, anti-censorship sentiments held by much of the public, linked free expression and freedom of choice to democracy and the nation's war efforts, and extended freedom of speech into new terrain. With its assertion that "a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system,"[22] the *Esquire* decision registered an eloquent commitment to emerging, civil libertarian ideals and pointed toward a new direction in free speech history.

I. THE CAMPAIGN AGAINST INDECENT LITERATURE

A. The Morals Crusade

The story of the *Esquire* case is part of the long history of "morals censorship" in the United States—restrictions on speech, especially literature and popular entertainment, for its supposedly immoral content. Beginning in the late nineteenth century, church groups, women's groups, and other social reform organizations—many affiliated with Protestant churches—had mobilized to censor or eradicate purportedly indecent art, culture, and entertainment.[23] Pulp novels, motion pictures, popular music, and books and magazines featuring themes of sex and violence allegedly tainted the nation's moral fabric, corrupted youth, and led to crime, debauchery, and sin.[24]

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[20] *See generally* Hannegan v. Esquire, Inc., 327 U.S. 146, 150 (1946) (reproducing the Postmaster General's own words).

[21] *See generally id.*

[22] *Id.* at 158.

[23] *See infra* notes 25–26 and accompanying text.

[24] *See* NICOLA BEISEL, IMPERILED INNOCENTS: ANTHONY COMSTOCK AND FAMILY REPRODUCTION IN VICTORIAN AMERICA (1997); ANDREA FRIEDMAN, PRURIENT INTERESTS: GENDER, DEMOCRACY, AND OBSCENITY IN NEW YORK CITY, 1909–1945 (2000); MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: "INDECENCY," CENSORSHIP, AND THE INNOCENCE OF

National reform groups such as the Ward and Watch Society, along with hundreds of smaller, local organizations, pressured authorities to pass laws banning "dirty" books, films, and magazines, and to prosecute the makers and sellers of such material under obscenity and indecency laws.[25] They called to strengthen obscenity laws, and in some states were behind the passage of laws criminalizing violent literature describing "bloodshed, lust, and crime."[26] Between 1900 and 1915, reform organizations spurred the passage of film censorship laws that required filmmakers and theater owners to go before government boards to approve movie content before exhibition.[27] These restrictions did not offend prevailing free speech doctrines, either under the First Amendment or similar state constitutional provisions. The government had broad authority to suppress speech that had a "bad tendency"[28]—that which had the possibility of harming the public's welfare, however remote or slight the potential harm.[29] Such authority was said to be a legitimate exercise of the state's police powers to undertake state action on behalf of public safety, health, and morals.[30]

In the late nineteenth and early twentieth centuries, the work of the cultural reformers resonated broadly with the conservative moral views held by much of the middle-class populace.[31] During the 1920s, however, the censors' aims and perspectives began to diverge more substantially from the mainstream.[32] In the more free-wheeling, cosmopolitan social milieu of the 1920s—an age of cultural liberalization marked by urbanization, the rise of consumer culture, the declining influence of religion, and more permissive attitudes toward sex—Victorian-era proprieties began to seem outmoded, especially to young, urban members of society, and reformers were mocked as bluenoses and prudes.[33] Freedom of thought and expression assumed new

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YOUTH (2007); LEIGH ANN WHEELER, AGAINST OBSCENITY: REFORM AND THE POLITICS OF WOMANHOOD IN AMERICA, 1873–1935 (2004); 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 (1992).

[25] *See* PAUL S. BOYER, PURITY IN PRINT: THE VICE-SOCIETY MOVEMENT AND BOOK CENSORSHIP IN AMERICA 1–22 (1968).

[26] *See, e.g.*, State v. McKee, 46 A. 409, 410 (Conn. 1900) (noting that McKee was convicted under such a law for selling a newspaper containing stories of "bloodshed, lust and crime").

[27] *See* Samantha Barbas, *How the Movies Became Speech*, 64 RUTGERS L. REV. 665, 672–78 (2012) (detailing the origins of movie censorship).

[28] DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 132 (1997).

[29] *Id.* at 132–46.

[30] *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 572–74 (1868); ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 3–7 (1904); Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 11–13 (2000).

[31] *See supra* notes 23–30 and accompanying text.

[32] *See* Blanchard, *supra* note 24, at 768–81 (detailing the change in censorship following World War I).

[33] *See, e.g.*, *id.* at 770–71 (noting that the Boston branch of the Watch and Ward Society "became a national laughingstock" for its censorship practices).

importance, and efforts to censor literature were met with greater resistance.[34] With the cultural zeitgeist turning against them, the reformers found that their crusade to purge society of so-called "dangerous" media had become more challenging. With movie censorship well-established in the states, and book censorship becoming disfavored, the reformers focused on what they saw as a new, pernicious social menace: pulp magazines.

B. The Pulps

The late 1920s and early 1930s saw the proliferation of cheap magazines. Decreases in the cost of paper and printing led to a staggering increase in the volume of so-called "pulp" publications.[35] With their bright covers, titillating illustrations, bold headlines and lurid teasers, the "pulps"—with titles like *Spy Stories*, *Love Story*, *Saucy*, *Spicy Mystery*, and *New York Nights*—appealed to a Depression-era populace hungry for inexpensive, escapist entertainment.[36] Many of the pulps were fiction-oriented, offering romance, detective, adventure, and true confession stories.[37] Some focused on horror stories or the escapades of cowboys and gangsters.[38] "Girlie magazines" were an especially popular genre, featuring illustrations of scantily clad women.[39] Most of the pulps had strong overtones of sex; they were highly suggestive, and some bordered on the pornographic.[40]

The pulps were wildly popular. In 1935, according to one source, 125 pulp magazine publishers shipped out 2,000 carloads of magazines each month.[41] One reform organization alleged that 365 pulps had come into being since the beginning of the Great Depression in 1929.[42] In March 1939, a pastor of one Iowa town alleged that "off-color" magazines had an estimated 60 million readers.[43] "A torrent of smutty

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[34] *See id.* at 771–81 (explaining the fierce debate in the Senate on Bronson Cutting's (Republican from New Mexico) proposal to rid the tariff bill of its political and obscenity exclusions).

[35] *See* THEODORE PETERSON, MAGAZINES IN THE TWENTIETH CENTURY 49–51 (1956); *Pulp Illustration*: *Pulp Magazines*, NORMAN ROCKWELL MUSEUM, https://www.illustrationhistory.org/genres/pulp-illustration-pulp-magazines [http://perma.cc/5X9N-HPQJ] (last visited Nov. 29, 2018) [hereinafter *Pulp Illustration*].

[36] *See Pulp Illustration*, *supra* note 35.

[37] PETERSON, *supra* note 35, at 308. The major categories of pulp magazine publishing in the 1930s, according to magazine historian Theodore Peterson, were "adventure, love, detective, and Western." *Id.*

[38] *See* Una M. Cadegan, *Guardians of Democracy or Cultural Storm Troopers? American Catholics and the Control of Popular Media, 1934–1966*, 87 CATH. HIST. REV. 252, 258 (2001) [hereinafter Cadegan, *Guardians of Democracy*].

[39] *See id.* ("'Girlie' magazines displayed suggestive photographs and cartoons.").

[40] For an in-depth analysis of the different genres of pulp magazines, see TONY GOODSTONE, THE PULPS: FIFTY YEARS OF AMERICAN POP CULTURE (1976).

[41] PETERSON, *supra* note 35, at 309.

[42] *Wants Decent Magazines*, MASON CITY GLOBE-GAZETTE (Utah), Mar. 15, 1939, at 13.

[43] *Id.*

magazines is flowing across the news stands of the nation," warned one author.[44] "In the past decade the growth of salacious literature has been the most rapid in history."[45] Law enforcement officials linked the pulps to an increase in crime.[46] FBI director J. Edgar Hoover declared that "the circulation of periodicals containing salacious material" played "an important part" in the formation of juvenile delinquents.[47] Reformers described the pulps as a moral cancer spreading insidiously through communities; "their contents [were] revolting slime, nauseating to the normal adult but dangerously appealing to weak or impressionable mentalities."[48]

In 1938, Catholic bishops founded The National Organization for Decent Literature (NODL) to deal specifically with the problem of the pulps.[49] This was not the Catholic community's first large-scale attempt to reform popular culture. In 1933, Catholics devoted to eradicating "indecency" from motion pictures had organized the Legion of Decency, an activist group that would go on to exert major influence over the content of Hollywood films.[50] Bishop John F. Noll of Fort Wayne, Indiana, who headed the NODL, believed that the traffic in pulp magazines was "an evil of such magnitude as seriously to threaten the moral, social and national life of our country."[51] He saw "diabolical intent" on the part of magazine publishers "to weaken morality and thereby destroy religion and subvert the social order."[52] Noll believed that it was the Catholic Church's duty "to organize and set in motion the moral forces of the entire country" to protect Americans, especially the young, from the menace of immoral magazines.[53]

Under Noll's leadership, the NODL planned a systematic national campaign, to be executed in all American dioceses, against the publication, distribution, and sale of "salacious literature."[54] One of the NODL's first tasks was the creation of a list of publications disapproved by the organization, which would be determined by a moral

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[44] Editorial, *Salacious Literature*, AIKEN STANDARD & REV. (South Carolina), Feb. 14, 1940, at 4.

[45] Don Packard, *Sex Crimes Increase*, MORNING CALL (Pennsylvania), May 20, 1940, at 6.

[46] *Sex Magazines and Sex Crimes*, OREM-GENEVA TIMES (Utah), Oct. 17, 1957, at 2.

[47] *Id.*

[48] Courtney Ryley Cooper, *This Trash Must Go!* 36 READER'S DIG. 20, 21 (1940).

[49] Thomas F. O'Connor, *The National Organization for Decent Literature: A Phase in American Catholic Censorship*, 65 LIB. Q. 386, 390 (1995) (explaining the origins of the foundation and its purpose). *See also* UNA M. CADEGAN, ALL GOOD BOOKS ARE CATHOLIC BOOKS: PRINT CULTURE, CENSORSHIP, AND MODERNITY IN TWENTIETH-CENTURY AMERICA (2013) (discussing the Catholic literary culture).

[50] RUTH A. INGLIS, FREEDOM OF THE MOVIES: A REPORT ON SELF REGULATION FROM THE COMMISSION ON FREEDOM OF THE PRESS 120–21 (1974).

[51] O'Connor, *supra* note 49, at 390. On Bishop Noll and the NODL's crusade against indecency, see Cadegan, *Guardians of Democracy*, *supra* note 38.

[52] O'Connor, *supra* note 49, at 390.

[53] *Catholics Start Drive to Curb Obscenity*, COURIER-J. (Kentucky), Feb. 12, 1939, at 15 (quoting Noll describing the committee's campaign).

[54] *Id.* at 15.

code.[55] The NODL code identified indecent literature as that which "1-glorifie[d] crime and the criminal; 2-[was] predominantly 'sexy'; 3-feature[d] illicit love; 4-contain[ed] indecent or objectionable pictures; and 5-carrie[d] disreputable advertis[ing]."[56] Priests and laymen, coordinated by Noll's assistant in Washington, D.C., reviewed hundreds of magazines against the code.[57] The list of objectionable publications was printed in the official organ for the NODL, the *Acolyte*.[58] NODL members pressured newsstands and bookstores to remove magazines on the list, on the threat of boycotts or prosecutions for obscenity.[59] The group denied that it was pursuing censorship, claiming that it was merely supplementing the work of the police and other organizations that prosecuted actionable materials.[60]

Though the NODL was widely criticized for its repressive tactics and intolerant views, the organization struck a chord among many conservative Catholics, particularly in the Midwest.[61] By 1940, the group had the cooperation of one hundred dioceses.[62] Forty thousand Catholics in Binghamton, New York, offered their support.[63] In Detroit, within a month of the NODL's founding, thousands of Catholics boycotted newsstands and bookstores that sold "objectionable" reading matter.[64] Throughout the country, volunteers armed with the NODL list canvassed newsstands, pharmacies, and other stores selling pulp magazines.[65] Some of the local NODL groups offered certificates of approval that cooperative newsdealers could display: "We are cooperating with the National Organization for Decent Literature."[66]

According to the NODL, within its first two years it had cut the number of "disgusting publications" in the country from 175 to 45.[67] It allegedly forced at least thirty publications out of business and compelled others to clean up.[68] In one city, NODL

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[55] *See* Cadegan, *Guardians of Democracy*, *supra* note 38, at 258.

[56] *Id.* at 258–59.

[57] O'Connor, *supra* note 49, at 395.

[58] *See* JOHN F. NOLL, MANUAL OF THE NODL 10 (n.d.).

[59] O'Connor, *supra* note 49, at 396.

[60] *See A Council for Decency in Magazines*, 147 CATH. WORLD 494, 494 (1938).

[61] O'Connor, *supra* note 49, at 390, 393 (noting that NODL formed and opened their national office in Chicago).

[62] Alvin W. Forney, *For Decent Literature*, PITT. PRESS, Mar. 23, 1940, at 4.

[63] *Council to Get Bill Calling for Cooperation*, BINGHAMTON PRESS (New York), Mar. 28, 1939, at 5.

[64] *Church Starts Book Boycott*, DETROIT FREE PRESS, Mar. 25, 1939, at 8. At masses, the laity were asked to pledge, "I promise to refrain from purchasing and reading all reading matter which violates" the NODL code, and "I promise not to enter places where such literature continues to be sold." *Id.*

[65] *See, e.g.*, *Diocese Catholics Start Drive Against Indecent Literature*, BINGHAMTON PRESS (New York), Mar. 7, 1939, at 5.

[66] A.D., Letter to the Editor, *Time to Keep Morals on High Plane Here*, RACINE J. TIMES (Wisconsin), Dec. 29, 1950, at 12.

[67] *Times Herald Column Printed in State Catholic Publication*, PORT HURON TIMES HERALD (Michigan), May 21, 1941, at 5.

[68] *Id.*

members persuaded thirty-seven drugstores and newsstands that it was better to forego sales and remove offending magazines than incur the wrath of the organization.[69]

Public officials representing conservative or religious constituencies often lent their assistance to the NODL. One NODL-affiliated priest in Albany, New York convinced the local district attorney to put pressure on magazine distributors.[70] By 1940, the power of the NODL was so great in the Midwest and parts of the east that several cities officially banned magazines on the list.[71] A prosecutor in Indiana sent the NODL list to magazine distributors with the warning: "[I shall] view [as] criminally unlawful the possession and sale of . . . any publication listed as disapproved by this Decent Literature organization and I shall prosecute accordingly."[72] New York's Catholic Mayor Fiorello LaGuardia threatened to order city garbage trucks to remove forty-two magazines on the NODL list from newsstands and trash them.[73] LaGuardia also threatened newsdealers with the loss of their licenses if they continued to sell "objectionable" magazines.[74] Mayors in Philadelphia, St. Louis, Detroit, Cleveland, and Chicago took similar actions.[75]

Magazine publishers worried about the NODL's threat to their livelihood, and civil libertarians were concerned with the organization's threat to publishing freedom. In May 1941, the chief executive of a major magazine distributor wrote to Roger Baldwin, head of the ACLU.[76] "They are getting wider and wider publicity and wider and wider power, threatening retailers and wholesalers . . . and absolutely nothing has been done to combat this autocratic censorship," he wrote.[77] The organization "seems to be getting more active," wrote Raymond Smith, a news dealer from Port Huron, Michigan, to his distributor.[78] According to Smith, there were thirty-seven church members in Port Huron who "make the rounds" among newsstands weekly.[79] They posted cards "in the vestibules of . . . churches with the name of every store handling allegedly [objectionable] magazines," and were successful in convincing many news dealers to keep those publications off newsstands.[80] "From their standpoint, they

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[69] *Id.*

[70] *Stepped-Up Drive Mapped by Literature Organization*, ELMIRA ADVERTISER (New York), Jan. 31, 1958, at 11.

[71] *See infra* notes 72–82 and accompanying text.

[72] *Drive on Magazines to Start Wednesday*, TIMES (Indiana), Aug. 13, 1944, at 13.

[73] *See LaGuardia Asks Newsdealers War on Indecent Magazines*, BROOK. DAILY EAGLE (New York), July 11, 1940, at 26.

[74] *See id.*; *Get Rid of Dirty Magazines or I'll Do It As Disposal of Sewage*, DAILY NOTES (Pennsylvania), July 24, 1940, at 4.

[75] NOLL, *supra* note 58, at 108, 112.

[76] Letter from Hunter Leaf to Roger Baldwin (May 1, 1941), *in* 2436 ACLU PAPERS, 11–12, Princeton University (microfilm, University of Washington).

[77] *Id.*

[78] Letter from Raymond C. Smith to Hunter Leaf (May 17, 1941), *in* 2436 ACLU PAPERS, 18–19, Princeton University (microfilm, University of Washington).

[79] *Id.*

[80] *Id.*

really have accomplished something in this district and with the callers for NODL threatening boycotting this particular store you can see how difficult it is to persuade the merchant to have anything to do with those they are asked not to place on their stands," Smith wrote.[81] By mid-1941, the organization had persuaded all but two newsdealers in Port Huron, Michigan, to ban the magazines on its list.[82]

C. The NODL and the Post Office Department

In 1940, Bishop Noll made a shrewd and strategic move when he contacted the United States Post Office Department, hoping to enlist its cooperation in the campaign. The Post Office Department had long been a friend of the "decency crusaders"; in the 1860s, Congress had granted the Department broad statutory authority to ban obscene publications from the mail.[83] There was no clear definition of obscenity in the anti-obscenity law, and the determination of whether a publication was obscene was largely a matter of the Postmaster General's discretion.[84] The Post Office Department used its power to ban purportedly obscene material frequently and arbitrarily. Under the Department's interpretation of an 1879 statute, it also had the authority to deny reduced, second-class mailing rates to obscene publications.[85] The denial of second-class mailing privileges was used less frequently than the outright ban; it was more effective to deny publications access to the mail than to inflict the lesser, but nonetheless serious penalty of cutting off reduced mailing rates.

Noll wrote to then–Postmaster General James Farley, alerting him to the NODL campaign and asking that the "Department do all in its power to make it more difficult for publishers who outrage decency to procure the second class mail privilege."[86] The chief lawyer of the Post Office Department assured Noll that the Postmaster General "desires to cooperate with your Committee in every way possible under the existing law to make your most worthy campaign a success."[87] Later that year, Farley resigned and President Roosevelt appointed Frank Walker—an influential Roman Catholic, prominent in Catholic charity work—to head the Post Office Department.[88] Noll found a willing partner in this devout and morally conservative new Postmaster General.[89]

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[81] *Id.*

[82] *Id.*

[83] Act of Mar. 3, 1865, ch. 89, 13 Stat. 504, 507.

[84] *See* JAMES C. N. PAUL & MURRAY L. SCHWARTZ, FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL 71 (1961).

[85] *See* discussion *infra* Section II.B.

[86] NOLL, *supra* note 58, at 59–60.

[87] *Id.* at 62.

[88] FRANK C. WALKER & ROBERT H. FERRELL, FDR'S QUIET CONFIDANT: THE AUTOBIOGRAPHY OF FRANK C. WALKER 134 (1997). *See also* Timothy Walch, *Walker, Frank Comerford*, *in* 22 AMERICAN NATIONAL BIOGRAPHY 494, 494 (John A. Garraty & Mark C. Carnes eds., 1999).

[89] *See id.*

Walker was one of Roosevelt's most trusted advisors, and one of the wealthiest men connected with the New Deal.[90] The son of a miner, Walker had grown up in poverty in Butte, Montana, at the turn of the century.[91] Walker received a law degree from Notre Dame in 1909 and returned to practice law in Montana.[92] In 1925, Walker moved to New York to become manager and general counsel of a chain of movie theaters owned by his uncle.[93] Within two decades, Walker had moved from his working-class roots to the upper echelons of corporate leadership.[94]

Walker contributed generously to Roosevelt's gubernatorial and presidential campaigns.[95] When Roosevelt took office in 1932, Walker was named executive secretary of the President's Council, a group that acted as a contact point between the cabinet and newly created recovery agencies.[96] Nine months later, he was made head of the National Emergency Council.[97] Dissatisfied with his work in government, he returned to the theater business in 1934.[98] After raising funds for the Democrats for the 1936 election and becoming part of an inner circle that shaped strategy for Roosevelt's 1940 third-term campaign, Walker was appointed Postmaster General in August 1940.[99] The Postmaster General was traditionally the political representative of the party in power, and simultaneously chairman of the National Committee.[100] In 1942, at Bishop Noll's urging, Walker began a "decency campaign" in the Post Office Department, denying second-class mailing rates to dozens of allegedly obscene and "immoral" publications on the NODL's list, including *Esquire* magazine.[101]

II. THE POSTAL POWER TO CENSOR

The authority of Congress and the Post Office Department over the circulation of the mails was virtually unfettered. Under the power granted in Article 1, Section 8 of the Constitution, and Supreme Court interpretations of the postal power, Congress had expansive, police-power-like authority to determine what could be sent through the mails,[102] and the Post Office Department had broad discretion to execute statutory

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[90] *See* Walch, *supra* note 88, at 494.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *See id.*

[95] *See id.* (noting Walker contributed "tens of thousands of dollars" to Roosevelt's presidential campaign).

[96] *Id.*

[97] *See id.*

[98] *See* WALKER & FERRELL, *supra* note 88, at 92.

[99] *See* Walch, *supra* note 88, at 494.

[100] KATHARINE GRAHAM, KATHARINE GRAHAM'S WASHINGTON 216 (2002).

[101] *See* discussion *infra* Section IV.A.

[102] *See* Schiller, *supra* note 30, at 39 ("The scope of the police power defined the constitutional limits of Congress's power regardless of the First Amendment. So long as Congress's

restrictions on the mails.[103] In several cases between 1880 and 1910, the Supreme Court declared that the Postmaster General's decisions to bar materials from the mails were to be reviewed under deferential administrative law standards and could be overturned only if they were arbitrary and capricious or "clearly wrong," even if based on the content of speech.[104] In this domain, the First Amendment had virtually no application.

A. The Mail and the First Amendment

Other than regulating the weight and size of mailable matter, Congress did not impose limitations on the use of the mails until the post–Civil War period.[105] In the 1860s and 1870s, it enacted a series of statutes criminalizing the mailing of certain types of material deemed dangerous to the public, including fight films, advertisements for lotteries, and obscene matter.[106] The prohibition on obscene matter dates back to 1873 and the infamous Comstock Law, named after Anthony Comstock, the notorious anti-vice reformer who was a major force behind its passage.[107] The law declared every "obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character" to be nonmailable.[108] Mailing obscene material was punishable by fines and imprisonment.[109]

While the original wording of the Comstock Law was penal,[110] the Post Office Department inferred from it independent civil authority to restrain the mailing of obscene matter. By the 1890s, the practice of banning obscene publications from the mails was well-established.[111] The reigning definition of obscenity used in the courts, and by the Post Office Department, came from the 1868 English decision in *Regina v. Hicklin*.[112] Whether or not material was obscene was judged by its effects on children—"whether the tendency of the matter charged as obscenity is to deprave

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goal was to exclude materials that would be injurious to public morals, the Court would find the exclusion constitutional.").

[103] *See* J. EDWARD GERALD, THE PRESS AND THE CONSTITUTION, 1931–1947 129 (1948) ("The postmaster general, in the course of nearly seventy years of encouragement from the courts and Congress, had created an administrative tradition of great power, which could easily decide the financial fate of any publication making heavy use of the mails.").

[104] *See, e.g.*, Public Clearing House v. Coyne, 194 U.S. 497, 509 (1904) (noting that the Postmaster General has broad authority to remove materials from the mails provided such action is not undertaken in a "palpably wrong" manner).

[105] Comment, *The Esquire Case—A Novel Extension of the Postmaster-General's Powers of Classifying Mail*, 53 YALE L.J. 733, 733 (1944).

[106] Eberhard P. Deutsch, *Freedom of the Press and of the Mails*, 36 MICH. L. REV. 703, 726–27 (1938).

[107] *See* Patrick J. Kelly, *Victorian Vice*, 26 REV. AM. HIST. 717, 717 (1998) (reviewing BEISEL, *supra* note 24).

[108] Act of Mar. 3, 1873, ch. 258, 17 Stat. 598, 599.

[109] *Id.*

[110] *See id.*

[111] *See* PAUL & SCHWARTZ, *supra* note 84, at 34.

[112] [1868] 3 LRQB 360, 371 (Eng.).

and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[113] Postal officials determined whether material was obscene based on a cursory visual inspection of the material.[114]

When these statutory limitations on the mail began to be tested in the courts on First Amendment grounds, they were universally sustained on the rationale that Congress had broad authority to "refuse facilities for the distribution of matter deemed injurious to the public morals."[115] In *Ex parte Jackson,*[116] the Supreme Court upheld, against First Amendment challenge, a conviction under the statute penalizing mailing lottery advertising.[117] The use of the mails, the Court declared, was a privilege that Congress could grant or withhold under any conditions it pleased.[118] Although the holding was directed at the lottery exclusion, the "privilege doctrine" "expanded to cover all regulations of the Post Office Department by Congress."[119]

The Postmaster General was charged with determining whether publications fell into one of the statutory proscriptions and barring them accordingly.[120] The courts reviewed the Postmaster General's decisions deferentially, even though the exclusions were almost always content-based. In *Public Clearing House v. Coyne,*[121] the Supreme Court articulated highly permissive standards for judicial review of the Postmaster General's decisions.[122] Persons who thought they were wronged by the actions of the Postmaster General could obtain redress from the courts only if the Postmaster General had been "palpably wrong."[123] A handbook on *Administrative Procedures in Government Agencies* issued by the Department of Justice in 1940 summarized the nearly unbounded discretion of the Post Office Department to censor the mails:

> The peculiar nature of the postal service as a Federal enterprise intended for the convenience of the public, and to produce revenues, has made this a fertile field for Federal supervision, apparently unencumbered by such constitutional restraints as freedom of speech or of the press . . . . Congress has a proprietary interest in

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[113] *Id.*

[114] Patricia Robertus, Obscenity in the Mails: Controls on Second-Class Privileges 1942–1957 at 6 (Aug. 1974) (unpublished Ph.D. dissertation, University of Washington) (available at eric.ed.gov).

[115] *Ex parte* Jackson, 96 U.S. 727, 736 (1877).

[116] 96 U.S. 727 (1877).

[117] *Id.* at 737.

[118] *See id.* at 736.

[119] Theodore Kadin, *Administrative Censorship: A Study of the Mails, Motion Pictures, and Radio Broadcasting*, 19 B.U. L. REV. 533, 541 (1939). *See also* Deutsch, *supra* note 106, at 740 ("So well entrenched by this time had become the principle that the use of mails is a privilege to which Congress may attach practically any conditions it sees fit. . . .").

[120] *See* Kadin, *supra* note 119, at 548.

[121] 194 U.S. 497 (1904).

[122] *See id.* at 509.

[123] *Id.*

> the postal service; use of the mails, accordingly, is a privilege which can be withheld, and not a constitutional right . . . . Not only are constitutional restraints inapplicable, but judicial restraints also are, for the most part, absent . . . . [S]ince the Postmaster General is an executive officer vested with broad discretion . . . courts have been singularly loath to interfere.[124]

B. The Second-Class Mails

In addition to excluding material from the mails, the Post Office Department had another method of preventing the circulation of matter it deemed obscene or otherwise nonmailable—the denial of second-class mailing privileges. Since the beginnings of the Postal Service, newspapers and periodicals had enjoyed low mailing rates,[125] essentially a government subsidy to promote the wide dissemination of knowledge to the public. In 1792, educational and informational matter, including newspapers, was granted a rate about one-sixth that of letter postage.[126] Mailable matter was divided into three classes: letters in the first-class, printed periodicals in the second-class, and miscellaneous articles in the third-class.[127] For the vast majority of periodicals, dependent on subscription revenue, second-class rates were essential to survival—they were "basic to a free press."[128]

There were two ways the Post Office Department could deny a publication second-class mailing rates.[129] One was to claim that it was nonmailable for obscenity or another violation of a federal postal statute, and deny it second-class privileges on that basis, as will be discussed in the next section.[130] Another way was to deem a publication noncompliant with the Classification Act.[131] The Classification Act, passed in 1879, imposed four conditions for the admission of mailable periodicals to the second-class rate.[132] The first and second conditions required, respectively, that a periodical "must regularly be [published] at stated intervals," must "be numbered consecutively," and "must be issued from a known office."[133] The third condition stated that the periodical must consist of "printed paper sheets, without board, cloth, leather, or other substantial binding," which distinguished it from a book.[134] Under the fourth condition,

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[124] Administrative Procedure In Government Agencies, Monograph of The Attorney General's Committee on Administrative Procedure, S. Doc. No. 186, at 2 (3d Sess. 1940).

[125] Act of Feb. 20, 1792, ch. 7, 1 Stat. 232, 238.

[126] *See id.* at 235, 238 (noting that the mailing rate for letters was $0.06 to $0.25).

[127] Act of June 8, 1872, ch. 335, § 7, 17 Stat. 283, 358.

[128] Kadin, *supra* note 119, at 538; GERALD, *supra* note 103, at 132 ("[T]he power of life or death to many publications.").

[129] *See infra* notes 130–44 and accompanying text.

[130] *See* discussion *infra* Section II.C.

[131] Postal Classification Act of 1879, ch. 180, 20 Stat. 355.

[132] *Id.* at 359.

[133] *Id.*

[134] *Id.*

the publication "must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers . . . ."[135] The publication, in other words, had to be a true periodical rather than an advertising circular; Congress included the fourth condition to address the problem of advertising sheets, in the guise of magazines, seeking reduced mailing rates.[136] In 1913, the Supreme Court declared that the power to deny or revoke second-class mailing rates to publications that did not meet the statutory requirements of the Classification Act did not violate the First Amendment.[137] Reduced mailing rates were said to be a "great and exclusive privilege" that could be granted or denied at the Post Office Department's discretion.[138]

C. The Milwaukee Leader *Case*

The immediate post–World War I era saw the first major challenges to the Postmaster General's authority to restrict the second-class mails. During the war, the federal government and the states had moved to quash dissent by criminalizing allegedly radical, subversive, or disloyal expression.[139] Members of the Industrial Workers of the World (IWW), socialists, conscientious objectors, and other dissenting groups were prosecuted under broad, hastily enacted sedition laws.[140] In 1917, Congress passed the Espionage Act,[141] which made it a felony to cause or attempt to cause "insubordination, disloyalty, mutiny, or refusal of duty in the military . . . forces, or . . . [to] obstruct . . . recruiting or enlistment into the armed services.[142] Title XII made any matter in violation of the Act nonmailable.[143]

Postmaster General Burleson used the Espionage Act to cut off the mailing privileges of publications containing allegedly seditious matter.[144] Not only did he exclude from the mails single issues of publications containing anti-war propaganda,[145] but he also revoked the second-class mailing privileges of publications he deemed to be in violation of the Espionage Act,[146] even though the Act did not explicitly authorize such revocation.[147] One of the publications that had its second-class privileges revoked

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[135] *Id.*

[136] *See* PAUL & SCHWARTZ, *supra* note 84, at 35.

[137] *See generally* Lewis Publ'g Co. v. Morgan, 229 U.S. 288 (1913).

[138] *Id.* at 300.

[139] *See* MARGARET A. BLANCHARD, REVOLUTIONARY SPARKS: FREEDOM OF EXPRESSION IN MODERN AMERICA 72 (1992).

[140] *See id.*

[141] Espionage Act of 1917, ch. 30, 40 Stat. 217.

[142] *Id.* at 219.

[143] *Id.* at 230–31; United States *ex rel*. Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407, 409 (1921).

[144] *Milwaukee Leader*, 255 U.S. at 412.

[145] *See id.*

[146] *Id.* at 408–09.

[147] *See* Espionage Act of 1917, ch. 30, 40 Stat. 217; *Burleson*, 255 U.S. at 428–29 (Brandeis, J., dissenting).

was the *Milwaukee Leader*, a socialist newspaper published by Victor Berger, founder of the Socialist Party of America.[148] According to Burleson, several issues of the *Leader* contained editorials declaring the war "unjustifiable and dishonorable" and encouraged readers to resist the draft.[149] Burleson deemed such material nonmailable and revoked the second-class permit.[150] Berger brought an action before the Supreme Court to compel the restoration of the permit, declaring that the Postmaster General's reading of the statute violated the First Amendment.[151] The exclusion of future issues of periodicals from second-class rates on the basis of past issues, Berger argued, was a prior restraint—advance censorship of a publication—widely agreed to be constitutionally suspect, even under the restrictive free speech doctrines of the time.[152] The government contended that the Postmaster General's conclusions were unreviewable and the First Amendment inapplicable.[153] Use of the mails, including reduced-rate mailing, was a privilege that could be withdrawn at will.[154]

Justice Clarke, writing for a majority, agreed with the government.[155] The majority based its decision on the purportedly privileged nature of the second-class mailing rate and deference to the Postmaster General's conclusions.[156] The majority held that since revocation did not exclude the paper from the mails nor preclude its reentry to the second-class rate, its First Amendment rights were not infringed.[157] The Postmaster General's conclusion that the *Leader* would likely violate the Espionage Act's provisions in the future, based on past issues, was not unjustified or clearly wrong.[158] The prior restraint nature of the revocation was justified by a bootstrap argument—an issue violating the Espionage Act was nonmailable; since the periodical had missed an issue, it was not "regularly issued" within the purview of the Classification Act and therefore not entitled to second-class rates.[159]

Justice Louis Brandeis, who had recently dissented with Justice Oliver Wendell Holmes in *Abrams v. United States*,[160] affirming an Espionage Act conviction under the

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[148] ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 247 (1967) [hereinafter CHAFEE, FREE SPEECH IN THE UNITED STATES].

[149] *Milwaukee Leader*, 255 U.S. at 413.

[150] *Id.* at 412.

[151] *See id.* at 409 ("The grounds upon which the relator relies, are, in substance, that, to the extent that the Espionage Act confers power upon the Postmaster General to make the order entered against it, that act is unconstitutional, because . . . the order deprives relator of the right of free speech, [and] is destructive of the rights of a free press . . . .").

[152] For an explanation of the prior restraint doctrine, see Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955).

[153] *Milwaukee Leader*, 255 U.S. at 420 (Brandeis, J., dissenting).

[154] *Id.* at 415 (majority opinion).

[155] *Id.* at 416.

[156] *See id.* at 408–16.

[157] *See id.* at 416.

[158] *See id.*

[159] *See id.* at 425–26.

[160] 250 U.S. 616 (1919).

newly formulated First Amendment "clear and present danger" test,[161] issued a scathing dissent.[162] He saw in the issue of second-class mailing rates a critical question of freedom of the press: "what we decide may determine in large measure whether . . . our press shall be free."[163] In denying publications the steeply reduced rates that made large-scale circulation possible, the majority impeded "liberty of circulation"[164]:

> If such power were possessed by the Postmaster General, he would, in view of the practical finality of his decisions, become the universal censor of publications. For a denial of the use of the mail would be for most of them tantamount to a denial of the right of circulation.[165]

Brandeis declared that there was nothing in the Espionage Act or its history that granted the Postmaster General the power to revoke the second-class rates of nonmailable publications.[166] More broadly, Brandeis argued for the abolition of the privilege doctrine.[167] He rejected the government's position that the use of the second-class mails was a privilege that may "be granted or withheld at the pleasure of Congress."[168] Burleson's actions constituted a prior restraint and should be invalidated on First Amendment grounds.[169] The Postmaster General's revocation order, and the majority's deference to his asserted authority, "raise[d] not only a grave question, but a 'succession of constitutional doubts'".[170]

Like Brandeis, Justice Holmes, in his dissent, recognized the constitutional implications of the second-class permit denial.[171] The use of the mails at reduced rates was almost "as much a part of free speech as the right to use our tongues . . . it would take very strong language to convince me that Congress ever intended to give such a practically despotic power to any one man."[172] "To refuse the second-class rate to a newspaper [was] to make its circulation impossible."[173] What happened to the *Leader* "was a serious attack upon liberties that not even the war induced Congress to infringe."[174]

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[161] *See id.* at 624–31; *see also* Gilbert v. Minnesota, 254 U.S. 325, 334–43 (1920) (Brandeis, J., dissenting).
[162] *Milwaukee Leader*, 255 U.S. at 417–36 (Brandeis, J., dissenting).
[163] *Id.* at 417.
[164] *Id.* at 431.
[165] *Id.* at 423.
[166] *Id.* at 428–29.
[167] *See id.* at 428.
[168] *Id.* at 433.
[169] *See id.* at 436.
[170] *Id.* at 429.
[171] *See id.* at 438 (Holmes, J., dissenting).
[172] *Id.* at 437.
[173] *Id.*
[174] *Id.* at 438.

Holmes agreed with Brandeis that the revocation constituted a prior restraint and urged rejection of the privilege doctrine.[175] Holmes and Brandeis had an influential ally in Zechariah Chafee, the Harvard Law School professor whose writings on free speech, including his treatise *Freedom of Speech in Wartime*,[176] had greatly influenced both Holmes and Brandeis.[177] In an article in the *Nation* shortly after *Milwaukee Leader*, Chafee observed that "[n]o decision of the United States Supreme Court has gone so far in sustaining governmental powers over the press. . . ."[178]

D. Inclusion and Exclusion

Despite the Supreme Court's validation of the Post Office Department's authority to revoke the second-class privileges of nonmailable material, the Department rarely exercised that power in the 1920s and 30s. Typically, it excluded single issues of publications from the mails on grounds of sedition or fraud, or more commonly, for obscenity.[179] The Post Office Department continued to use the *Hicklin* standard, judging works obscene based on their likely impact on children, even though federal courts were adopting more permissive standards.[180] In 1934, the federal district court and the Circuit Court of Appeals in New York ruled in *United States v. One Book Called Ulysses*[181] that James Joyce's work was not obscene because the book, taken as a whole, "did not tend to excite sexual impulses or lustful thoughts" in the adult with "average sex instincts."[182] In *Parmelee v. United States*,[183] a federal district court adopted a "community standards" test for obscenity, recognizing that obscenity was an elusive moral concept that "[varies] in meaning from one period to another."[184] What was obscene was to be judged by "the present critical point in the compromise between candor and shame at which the community may have arrived here and now."[185]

When a magazine was banned from the mails on grounds of obscenity, there was no administrative review, formal or informal.[186] The decisions to ban were made

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[175] *See id.* at 437.

[176] Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919).

[177] *See* 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, 42–45 (1971).

[178] Zechariah Chafee, Jr., *The Milwaukee Leader Case*, 112 NATION 428, 428 (1921). *See also* CHAFEE, FREE SPEECH IN THE UNITED STATES, *supra* note 148, at 199 ("A newspaper editor fears being put out of business by the administrative denial of the second-class mailing privilege much more than the prospect of prison subject to a jury trial.").

[179] *See* Robertus, *supra* note 114, at 7–8, 12 (noting that prior to losing second-class mailing privileges, individual *Esquire* issues were excluded).

[180] *See supra* notes 113–28 and accompanying text.

[181] 72 F.2d 705 (2d Cir. 1934); 5 F. Supp. 182 (S.D.N.Y. 1933).

[182] *One Book Called Ulysses*, 5 F. Supp. at 184–85.

[183] 113 F.2d 729 (D.C. Cir. 1940).

[184] *Id.* at 731–32.

[185] *Id.* at 732.

[186] PAUL & SCHWARTZ, *supra* note 84, at 38.

by the head lawyer of the Post Office Department, based on recommendations of subordinate lawyers.[187] There was no obligation on the part of any Department officials to hear competing views on the work, or to obtain the opinions of experts qualified to discuss the material's social value or its likely effect on viewers.[188] The publisher denied access to the mails could go to court if prepared to pay the cost, but the courts continued to defer to postal authorities.[189] Despite the Post Office Department's expansive authority to exclude periodicals for obscenity, Postmaster General James Farley, channeling the more permissive mood of the times and the liberal bent of the Roosevelt administration, seems to have been less vigilant about bans on obscenity than his predecessors, and they declined during the 1930s.[190]

When it came to second-class permit denials of obscene material, the Postmaster General's powers were also sparingly used. In the 1930s, the Post Office Department generally did not revoke a publication's second-class rate until a few issues had been deemed nonmailable for obscenity, and even then, this was rarely done.[191] In the middle of the decade, the Department developed a program of "voluntary censorship," in which it warned publishers of allegedly obscene periodicals that they would lose their second-class privileges if they continued to produce nonmailable matter.[192] This was part of the Department's new, more liberal policy. The Post Office Department's chief lawyer encouraged publishers to submit proofs in advance of mailing to obtain an advisory opinion;[193] Post Office Department officials would sometimes meet with publishers in person to work out changes before a publication was mailed.[194] In the 1930s, the Post Office Department deemed several issues of *Esquire* obscene and warned the publisher that the magazine would lose its second-class rate unless it "cleaned up."[195] The publisher recalled:

> I was making monthly trips to Washington, taking the dummy of the next issue of Esquire to go to press, and going over it page by page . . . to get [the head lawyer's] clearance prior to publication.

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[187] *Id.*

[188] *Id.*

[189] *Id.* at 39.

[190] *See* CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS, *supra* note 17, at 340 (explaining that the Post Office Department, under Postmaster General James Farley, had a program in place whereby publishers could have their issues screened by the Department prior to publication to determine if the issue contained obscene content). Postmaster General James Farley was replaced by Frank C. Walker who ended the screening program. Robertus, *supra* note 114, at 6.

[191] *See* Robertus, *supra* note 114, at 7–8, 12 (noting that in the late 1930s to early 1940s *Esquire* had four of its issues deemed nonmailable but did not have its second-class rate revoked until after the Post Office Department implemented new standards on April 21, 1942).

[192] *See supra* notes 190–203 and accompanying text.

[193] S*ee* CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS, *supra* note 17, at 340.

[194] *See* Robertus, *supra* note 114, at 8.

[195] *See id.* at 7.

> I hated doing [this] . . . but it seemed the only safe way to stay out of trouble.[196]

Despite the slight relaxation of the policies around exclusion and second-class permit denials, the Post Office Department's censorship of the mails attracted increasing criticism in the 1930s. Many lawyers, scholars, and activists concerned with civil liberties began to question the Department's extraordinary power over circulation of the printed word.[197] Wrote lawyer Theodore Kadin in 1939, channeling Holmes and Brandeis, the Post Office Department's authority over "effective communication of the written word without judicial review" raised social and constitutional issues "of unquestioned magnitude and importance."[198] One lawyer writing in the *Michigan Law Review* in 1938 described the Supreme Court's earlier decisions on the postal power as "clear infringement[s] of the freedom of the press."[199] "Pre-censorship . . . has firmly entrenched itself within the citadel," wrote Kadin.[200] "Before . . . written idea[s] may pass from the thinker to the people, [they] must be judged by the appointee of the political majority. . . . As a practical matter, therefore, the most extensive medium of communication may be dominated by a very few men."[201]

III. THE RISE OF FREE SPEECH

The period between *Milwaukee Leader* and the end of the 1930s witnessed a revolution in the law of free speech, and public attitudes toward freedom of speech, that must be understood in order to contextualize the dialogue that would ensue around the *Esquire* case. In the span of less than 20 years, the deferential police power review of speech restrictions had begun to be replaced by a civil libertarian approach characterized by heightened judicial scrutiny of restraints on expression.[202] In a series of cases in the 1930s, the Supreme Court struck down content-based restrictions of speech[203] and began to articulate what became the doctrinal and philosophical foundations of modern First Amendment law, based on the centrality of free expression to participatory democracy.

Among the public, free speech ascended to the position of a "national cause" and a symbol of the American way of life.[204] One historian has written of the public's

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[196] ARNOLD GINGRICH, NOTHING BUT PEOPLE: THE EARLY DAYS AT ESQUIRE A PERSONAL HISTORY 1928–1958 158 (1971). "I would make all the required revisions on the spot, and some of the things I had to 'tone down' seemed to me to be a case of bending over backward to avoid offending even the most sensitive of sensibilities to a degree that was nearly ludicrous." *Id.*

[197] *See* RICHARD W. STEELE, FREE SPEECH IN THE GOOD WAR 11 (1999).

[198] ADMIN. PROC. IN GOV. AGENCIES, 76TH CONG., 10 (1940).

[199] Deutsch, *supra* note 106, at 704.

[200] Kadin, *supra* note 119, at 548.

[201] *Id.*

[202] *See* discussion *infra* Section III.B.

[203] *See* discussion *infra* Section III.B.

[204] STEELE, *supra* note 197, at 11.

"celebration of free expression in the decade leading up to World War II."[205] To many Americans, free expression became a "lodestar," the shining star in the constellation of constitutional rights.[206] It was in the 1930s, in the words of First Amendment scholar Harry Kalven, that speech "start[ed] to win."[207]

A. Changing Social Perspectives on Free Expression

The government's intense suppression of dissent during the First World War led to a cultural backlash. By the mid-1920s, many Americans had come to realize that the wartime repression had been excessive and unjustified, and that the dissenters had not been as threatening to national security as the Wilson administration had suggested.[208] Although much of the public continued to hold conservative views on speech, insisting that the protection of the common welfare required the suppression of dangerous or dissenting ideas, there was at the same time increasing hostility toward the efforts of authorities and self-appointed "reformers" to enforce their visions of the public good.[209] As mentioned earlier, the 1920s saw the relaxation of repressive, Victorian-era moral strictures, particularly around sex, and the ascendance, among many sectors of the populace, of a more liberal, cosmopolitan orientation.[210] Freedom of expression assumed greater importance at a time when an increasing number of Americans—epitomized by the so-called "lost generation"—were seeking personal, social, and sexual liberation.[211]

Teachers began to rebel against interference in course content by religious zealots, resistance that culminated in the infamous 1925 Scopes "Monkey" Trial.[212] Reproductive rights advocates fought for the right to disseminate birth control information, using the justification of freedom of speech.[213] Book publishers, movie producers, and radio broadcasters grew increasingly concerned with content-based restrictions that affected not only their creative liberties but also their bottom line.[214] For the first time, freedom of speech became the focal point of major social debate.[215] This concern with free expression was fostered, in part, by the ACLU, formed in 1917 to protest

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[205] Geoffrey R. Stone, *Free Speech in World War II: "When Are You Going to Indict the Seditionists?"*, 2 INT'L J. CONST. L. 334, 367 (2004).

[206] *See supra* notes 204–17 and accompanying text.

[207] HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 167 (Jamie Kalven ed., 1989).

[208] Stone, *supra* note 205, at 334.

[209] PAUL L. MURPHY, THE MEANING OF FREEDOM OF SPEECH: FIRST AMENDMENT FREEDOMS FROM WILSON TO FDR 102–03 (1976).

[210] *See id.* at 107–08.

[211] *Id.* at 109.

[212] *See id.* at 112.

[213] *Id.* at 119–20.

[214] *See id.* at 119.

[215] *See id.* at 119–21.

the persecution of wartime dissenters.[216] During the 1920s, the ACLU became an influential national organization engaged in publicity, litigation, and lobbying on civil rights and civil liberties issues, especially freedom of speech.[217] Perhaps more than any other force in American society in the 1920s, the ACLU was responsible for the "spread of the gospel of free expression."[218]

The Great Depression triggered unprecedented popular support for freedom of expression and civil liberties more broadly. The economic crisis precipitated intense critiques of the prevailing order and massive social unrest.[219] Communism, Socialism, and other radical ideologies gained large and receptive audiences.[220] Recent memories of wartime repression and hysteria made intellectuals and the growing civil libertarian community vigilant to prevent persecution of contrarian views.[221] The dire economic circumstances had a leveling effect, spurring many previously unconcerned Americans to contemplate issues of social justice and equality.[222] As Americans of all backgrounds and races stood in breadlines, the earlier notion of social hierarchies and divisions as natural and immutable began to collapse.[223] The contingency and precariousness of social privilege was revealed, engendering greater sympathies toward the poor and oppressed.[224] Membership in the ACLU increased as the organization gained favorable publicity and came to be regarded as an advocate of freedom, equality, and "human relief at a time in which such relief was a crying need."[225] The ACLU became the nation's premiere civil liberties activist group, and it was involved in several prominent free speech cases, including many before the Supreme Court.[226]

It was in this milieu that the Court began to retreat from its perfunctory and generally dismissive treatment of free speech issues. Beginning in 1931, it began to incorporate into First Amendment doctrines the more liberal views on free expression that much of the public already embraced.[227]

B. The Supreme Court on Speech

The doctrinal origins of modern First Amendment law, as is well-known, can be traced to the series of opinions, concurrences, and dissents in the immediate

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[216] SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 16–20 (1990).

[217] *See id.* at 51–92.

[218] STEELE, *supra* note 197, at 10.

[219] *See* MURPHY, *supra* note 209, at 220–36.

[220] *See id.* at 229–30.

[221] *See id.* at 232–34.

[222] *See id.* at 229.

[223] *See id.*

[224] *See id.* at 229–30.

[225] *Id.* at 230.

[226] *See generally* WALKER, *supra* note 216 (detailing the accomplishments of the ACLU leading into the twenty-first century).

[227] *See* MURPHY, *supra* note 209, at 7.

post–World War I era in which Justices Holmes and Brandeis attempted to replace the "bad tendency" test with a more speech-protective standard.[228] In *Abrams v. United States*,[229] Holmes, dissenting from a majority opinion upholding a conviction under the Espionage Act, enunciated a "clear and present danger" test, condemning government "attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."[230] Whether speech had a "tendency" to cause harm, however remote, was not the appropriate inquiry in cases involving criminal punishment for seditious utterances; rather, the test should be the actual likelihood of the speech causing imminent harm.[231] According to Holmes, the First Amendment protects utterances that seek acceptance through the democratic processes of public discussion—"falsely shouting fire in a theater and causing a panic" was the antithesis of democratic speech.[232]

While the Court's conservative majority continued to analyze speech claims under the bad tendency rule, Holmes and Brandeis kept clear and present danger alive in a series of concurring and dissenting opinions.[233] In his well-known concurrence in *Whitney v. California*,[234] Brandeis strengthened "clear and present danger"; the portended harm must be extremely serious to justify the suppression of speech and so imminent that there was no opportunity to avert it by discussion.[235] Brandeis offered justifications for protecting free speech that judges and theorists over the coming decades would develop into principal rationales. Freedom of expression was a necessary precondition of "public discussion," which Brandeis described as central to democratic self-governance.[236] Through the process of freely discussing and debating social issues, the public would discern the "common good" and govern itself accordingly.[237]

After sustaining sedition and syndicalism convictions with little debate, the Court began reversing convictions and interpreting the First Amendment to require heightened scrutiny of laws that restricted speech. Within ten years of the appointment of Chief Justice Charles Evans Hughes in 1930, the Court had dramatically reshaped the boundaries of the First Amendment and the police power.[238] Drawing on Brandeis's rationale linking free speech to self-governance through "public discussion," it

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[228] *See infra* notes 229–74 and accompanying text.

[229] 250 U.S. 616 (1919).

[230] *Id.* at 627, 630 (Holmes, J., dissenting).

[231] *See id.* at 630.

[232] Schenk v. United States, 249 U.S. 41, 52 (1919).

[233] *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting); Gilbert v. Minnesota, 254 U.S. 325, 338 (1920) (Brandeis, J., dissenting).

[234] 274 U.S. 357 (1927).

[235] *Id.* at 377 (Brandeis & Holmes, JJ., concurring).

[236] *See id.* at 375.

[237] *See* Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653, 694–95 (1988).

[238] *See* KALVEN, *supra* note 207, at 167–78.

issued a series of decisions in which it expressed that speech was an especially important liberty that deserved judicial solicitude because of the "indispensable connection" between speech rights and democracy.[239] By the mid-1930s, the Court had fashioned a dual standard of constitutional review in which judges would defer to legislative regulation of the economy but scrutinize regulation of non-economic rights, including the right to free speech.[240] Speech rights were to be given greater protection than rights associated with economic activity because speech was believed to be more closely connected to the process of democratic self-governance.[241]

Near v. Minnesota[242] was a milestone in this transformation. *Near* involved the judicial injunction of an anti-Semitic newspaper under a Minnesota gag law that permitted state authorities to restrain a "malicious, scandalous and defamatory newspaper, magazine or other periodical."[243] The law had been passed to curb the tide of "scandal sheet[s]" flooding the state's major cities.[244] A majority of the Supreme Court reversed the injunction on First Amendment grounds.[245] The gag law functioned as a prior restraint, the majority concluded, by allowing a single judge to restrain all future issues of the publication based on one issue.[246] The majority constitutionalized the common law rule against prior restraints, noting that such restraints were the "essence of censorship."[247] For the first time, the Court rejected, on First Amendment grounds, an action of the legislature that was clearly within the scope of its police power.[248] The *Near* decision, which generated almost no public criticism, marked a historic turn and "indicated a deeper change in public attitudes."[249]

In *Near* and *Grosjean v. American Press Company*,[250] the next major case involving the First Amendment rights of newspapers, the Court emphasized the importance of the press to democracy.[251] The *Near* majority had spoken of the importance of prohibitions on prior restraints in fostering a "vigilant and courageous press," which was essential to exposing official "malfeasance and corruption."[252] In *Grosjean*, a unanimous Court invalidated a Louisiana "license" tax imposed only on newspapers with a certain minimum circulation.[253] This indirect restriction on the press was unduly

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[239] G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 149 (2000).

[240] *See* United States v. Carolene Products Co., 304 U.S. 144, 152–53 n.4 (1938).

[241] WHITE, *supra* note 239, at 144, 149.

[242] 283 U.S. 697 (1931).

[243] *Id.* at 701–03.

[244] *Id.* at 731 (Butler, J., dissenting).

[245] *Id.* at 722–23 ("[W]e hold the statute . . . to be an infringement of the liberty of the press. . . .").

[246] *See id.* at 713.

[247] *Id.*

[248] *See id.* at 722–23.

[249] WALKER, *supra* note 216, at 91.

[250] 297 U.S. 233 (1936).

[251] *See id.* at 243; *Near*, 283 U.S. at 719–20.

[252] *Near*, 283 U.S. at 719–20.

[253] *Grosjean*, 297 U.S. at 240, 251.

restrictive of an "untrammeled press as a vital source of public information."[254] Justice Sutherland observed, "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."[255]

By 1937, a majority of justices agreed that laws that had the potential to punish or restrain speech should be reviewed with heightened scrutiny.[256] The police power analysis had been replaced by a presumption in favor of protecting expression.[257] Members of the Court began to speak of freedom of speech as being in a "preferred position" in the scheme of constitutional rights.[258] In the words of Justice Cardozo, writing in *Palko v. Connecticut*,[259] freedom of speech "is the matrix, the indispensable condition, of nearly every other form of freedom."[260] Doctrinally, the demise of bad tendency was achieved through the use of clear and present danger.[261] *De Jonge v. Oregon*[262] and *Herndon v. Lowry*[263] invoked clear and present danger to invalidate convictions under criminal-syndicalist statutes under circumstances where a bad tendency analysis would have sustained them.[264] The Court emphasized that the proper way to defuse incitements to overthrow the government was not through the suppression of speech, but "free political discussion," which could only be preserved through protecting the constitutional right of free speech.[265]

C. Free Expression and Democracy

This shift in free speech doctrine, and the emerging rationales for protecting free speech, cannot be understood apart from mounting concerns with the rise of fascist dictatorships in Germany and Italy. Americans responded to the atrocities perpetuated by these regimes by working diligently to differentiate the American way of life and

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[254] *Id.* at 250.

[255] *Id.*

[256] *See* G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 229, 330 (1996).

[257] *See* Herndon v. Lowry, 301 U.S. 242, 258 (1937) ("The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule . . . .").

[258] *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888–1986 269–70 (1990) (noting Justice Murphy's confirmation of laws limiting freedom of expression being scrutinized much more strictly than those limiting economic interests).

[259] 302 U.S. 319 (1937).

[260] *Id.* at 327.

[261] *See* White, *supra* note 256, at 337.

[262] 299 U.S. 353 (1937).

[263] 301 U.S. 242 (1937).

[264] *Compare* Whitney v. California, 274 U.S. 357 (1927) (holding that under the "bad tendency" test conviction for one's association with the Communist Labor Party in violation of state syndicalism law did not violate the Constitution), *with* De Jonge v. Oregon, 299 U.S. 353 (1937) (holding that a conviction under state syndicalism laws for association with the Communist Party was unconstitutional under the "clear and present danger" test), *and* Herndon v. Lowry, 301 U.S. 242 (1937) (holding state syndicalism laws to be unconstitutional under the "clear and present danger" test).

[265] *De Jonge*, 299 U.S. at 365.

protecting personal freedoms at home.[266] Intellectuals and other thought leaders of the 1930s 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."[267] There was an emphasis on the "cultural[ly] and political[ly] pluralis[t]" nature of American democracy, in contrast to fascism and Nazism.[268] In the 1930s, "the idea of America as a democracy dramatically expanded its cultural meaning."[269] It signified "not only a society based on freedom, but a society opposed to tyranny and arbitrariness; an antitotalitarian society that represented the world's last best hope for rationality and truth."[270]

The public looked to the judiciary to protect the rights of individuals and minorities, especially their free expression rights, and in so doing, stave off totalitarianism.[271] The relationship between the suppression of speech and fascism was frequently raised in litigation involving restrictions on free expression.[272] The Committee for Industrial Organization (CIO), challenging the efforts of Jersey City Mayor Frank Hague to prevent the union from organizing in the city, likened his actions to European totalitarianism, arguing "the parallel between this process and those current in the despotisms abroad is too plain to be labored."[273] In upholding the district court's ruling in favor of the CIO, the Third Circuit noted that Hague's policy of suppressing dissent "would result eventually in the existence of but one political party as is now the case under totalitarian governments."[274] The Supreme Court's decision[275] upholding the Third Circuit in *Hague* coincided with the 150th anniversary of the Bill of Rights.[276] The nation's leaders "hailed the principles of the Bill of Rights, particularly tolerance for minorities, as the essence of American democracy."[277]

With book burnings in Nazi Germany and the suppression of literary freedom in Mussolini's Italy, "censorship" acquired a "dirty word" quality.[278] Joseph Goebbel's 1933 bonfire of "un-German" and "immoral" books led to a public outcry and marches in American cities.[279] Newspapers reported it on front pages, and more than 100,000 people in New York City joined in a mass protest to coincide with the event.[280] "Censorship" became something to be abhorred in a free society, something "inherently

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[266] *See* Schiller, *supra* note 30, at 75.
[267] *Id.* at 77.
[268] *See id.* at 78.
[269] White, *supra* note 256, at 331.
[270] *Id. See also* WALKER, *supra* note 216, at 112.
[271] *See* Schiller, *supra* note 30, at 80.
[272] *See id.* at 81.
[273] Respondents' Brief at 7, Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939) (No. 651).
[274] Hague v. Comm. for Indus. Org., 101 F.2d. 774, 784 (3d Cir. 1939).
[275] Hague v. Comm. for Indus. Org., 307 U.S. 496, 518 (1939).
[276] WALKER, *supra* note 216, at 112.
[277] *Id.* at 110.
[278] *See infra* notes 279–99 and accompanying text.
[279] *See* BOYER, *supra* note 25, at 270.
[280] *Id.*

related to totalitarianism."[281] After the Nazi book burning, the American anti-censorship movement was infused with new intensity.[282] The *Ulysses* decision, handed down that year, was seen by many as "America's answer to Hitler's repressions."[283]

As tyranny worsened in Europe, facilitating participatory democracy and "public discussion" became, more than ever, the Supreme Court's rationale for protecting speech rights. In *Thornhill v. Alabama*,[284] Justice Murphy based his decision to strike down an antipicketing ordinance on the importance of speech for self-governance: "[T]he safeguarding of these rights to the ends that men may speak as they think on matters vital to them . . . is essential to free government."[285] Justice Roberts used similar logic in *Cantwell v. Connecticut*,[286] overturning 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."[287] In *Bridges v. California*,[288] a majority on the Court, led by Justice Roberts, employed "clear and present danger" to overturn a newspaper's conviction of contempt by publication of critical editorials on a pending court case.[289] The whims, "preferences or beliefs" of legislators or officials, "cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression."[290] The First Amendment's prohibitions on abridgements of speech "must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."[291]

D. Free Expression in Wartime

The transformation in popular and official attitudes toward free speech was reflected in the nation's responses to wartime dissent. Though the outbreak of hostilities in Europe in 1939 had created a mood of high anxiety in the United States and a temporary wave of violence against communists, German-Americans, and Jehovah's Witnesses, the repression was often stanched by local officials.[292] Public opinion castigated political and religious intolerance and blatant abuses of civil rights.[293]

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[281] Cadegan, *Guardians of Democracy*, *supra* note 38, at 270.
[282] *See* Schiller, *supra* note 30, at 102.
[283] BOYER, *supra* note 25, at 272.
[284] 310 U.S. 88 (1940).
[285] *Id.* at 95.
[286] 310 U.S. 296 (1940).
[287] *Id.* at 310.
[288] 314 U.S. 252 (1941).
[289] *See id.* at 262, 274–75.
[290] *Id.* at 263 (citing Schneider v. State, 308 U.S. 147, 161 (1939)).
[291] *Id.* at 263.
[292] Theodore Irwin, *Control: Freedom and Censorship*, 4 PUB. OP. Q. 523, 523 (1940).
[293] *See* STEELE, *supra* note 197, at 79; Stone, *supra* note 205, at 366–67.

The public, the courts, the media, and the government expressed an overwhelming desire to avoid the civil liberties disasters of the previous war.[294] Even before the attack on Pearl Harbor, the Roosevelt administration worked hard to assuage the public that in the event of war, freedom of speech would be protected at all costs.[295] In 1940, Roosevelt proclaimed, "Free speech and a free press are still in the possession of the people . . . and it is important that it should remain there. For suppression of opinion and censorship of news are among the mortal weapons that dictatorships direct against their own peoples. . . ."[296] Freedom of expression had become such an important public issue that in his January 6, 1941 speech rallying Americans to prepare for likely war, Roosevelt invoked "four essential human freedoms," with the first being "freedom of speech and expression."[297] After Pearl Harbor, Attorney General Francis Biddle, in a speech commemorating the 152nd anniversary of the Bill of Rights, reminded the nation that "[e]very man . . . who cares about freedom must fight [to protect it] for the *other* man with whom he disagrees."[298] The Department of Justice was praised for sparingly prosecuting dissenters for sedition, and there were far fewer prosecutions for seditious expression than during the First World War.[299] In 1941, the *New York Times* praised Biddle for dismissing complaints lodged against three men for seditious utterances.[300] Commending Congress, the people, and the courts for their absence of hysteria in regard to the war, the *Times* urged a "deeper toleration of the 'thought we hate.'"[301]

This anti-censorship, free speech mentality mapped less completely onto the realm of culture. While the war and Nazi brutalities pushed many Americans to deepen their commitment to anti-censorship principles and to oppose official restrictions on art, literature, and film, some were less wary about content-based regulations of popular culture.[302] They believed that movies, magazines, and novels were unrelated to the processes of democracy and could pose moral threats to society, especially to youth.[303] Social conservatives, alarmed by more permissive views on sex and more sexually explicit material in popular culture, ramped up their efforts to eradicate "indecent" culture through both legal and extralegal means.[304] During the war, the pulp magazine craze rose to new heights, fueled by the disposable income of a more prosperous

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[294] *See infra* notes 295–309 and accompanying text.

[295] *See* MURPHY, *supra* note 209, at 279.

[296] *Id.*

[297] The Annual Message to the Congress, 1940 PUB. PAPERS 663, 672 (Jan. 6, 1941).

[298] GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 255 (2004).

[299] *See* STEELE, *supra* note 197, at 230.

[300] *See Civil Liberties,* N.Y. TIMES, Dec. 21, 1941, at E6.

[301] *Id.*

[302] On the broad support for anti-censorship principles, see BOYER, *supra* note 25, at 128–67.

[303] *See* HEINS, *supra* note 24, at 50.

[304] *See generally* Kimball Young, *Censorship in Wartime*, 38 ALA. BULL. 439 (1944).

populace (the war had ended the Depression);[305] demand for pin-ups and men's magazines was especially high among GIs overseas.[306] The NODL continued to combat what it saw as the rising tide of "indecent literature."[307] By the end of the war, amidst nationwide calls for tolerance in the political sphere, civil libertarians were reporting an increase in efforts to suppress entertainment and literature on moral grounds.[308] This was the social and legal environment in which the *Esquire* case unfolded.

IV. THE POST OFFICE DEPARTMENT'S "DECENCY CRUSADE"

A. The Crackdown on Magazines

In 1942, Postmaster General Frank Walker began his crackdown on pulp magazines.[309] This started in April, when the Post Office Department announced that it was initiating a new policy with regard to second-class mailing privileges.[310] In response to criticism of the Department's practices, it declared that it would now offer publishers hearings before revoking their second-class privileges.[311] Under its new rules, hearings would be offered to all publishers whose second-class privileges were to be terminated for nonmailability.[312] At the same time, the Department announced that it would no longer rule in advance on the mailability of material.[313] The Department further stated that, rather than relying on its advisory opinions, publishers should be guided by a sense of "decency and good morals" in determining whether or not to deposit material in the mail.[314]

Immediately after the declaration of the new policy, the Post Office Department informed dozens of publishers, mostly small-scale publishers of pulp and "girlie" magazines, that they were losing their second-class permits.[315] The basis for the decision, in most cases, was that two or three previous issues had been deemed nonmailable on account of obscenity.[316] Publishers received letters informing them that past issues were nonmailable, and that unless they appeared at a hearing to "show cause" why their publications were not obscene, their second-class privileges would be denied.[317]

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[305] *See generally* Thomas K. Duncan & Christopher J. Coyne, *The Origins of the Permanent War Economy*, 18 INDEP. REV. 219 (2013).

[306] *See* MARIA ELENA BUSZEK, PIN-UP GRRRLS: FEMINISM, SEXUALITY, POPULAR CULTURE 185 (2006) (noting that soldiers were posting images of pin-ups all around their surroundings).

[307] *See* CADEGAN, *supra* note 49, at 136.

[308] *See id.* at 142.

[309] *See* Robertus, *supra* note 114, at 11.

[310] *Id.* at 12.

[311] *Id.*

[312] *Id.*

[313] *See id.* (declaring that the hearing officers would, on the arguments and briefs, prepare a report for the Postmaster General).

[314] *Id.* at 14.

[315] *See id.* at 15–19.

[316] *Id.* at 18.

[317] *Id.* at 12.

Noll regularly communicated with Walker, asking him to revoke the privileges of publications on the list.[318] "The new Postmaster General," Noll wrote to his colleagues, "has been cooperating with me splendidly."[319]

The "hearings" were a sham. Post Office Department officials served as both prosecutors and judges.[320] The hearings officers were senior postal employees; "[a]ll were normally assigned to other duties and none was . . . trained for judging obscenity."[321] Both sides were allowed to offer arguments, briefs, and evidence.[322] At the conclusion of the hearing, the officers prepared a report for the Postmaster General, but the recommendations of the hearing officers were not binding.[323] "The [P]ostmaster [G]eneral might accompany his [final decision] with a statement of opinion or reasons" but was not required to offer an explanation for his decision.[324] Most magazines, unable to afford the cost of travel to Washington for what was generally recognized to be a futile exercise, declined the hearing and forfeited their second-class privileges.[325]

One of the first magazines to lose its second-class permit under the crackdown was *Real Screen Fun*, a low-budget pulp magazine featuring pictures of scantily clad women.[326] The publisher did not respond to the "show cause" order, and its second-class privileges were revoked.[327] A men's magazine called *Argosy* did not appear at a hearing and as a result lost its permit.[328] Stories that were cited as objectionable included 'Sex Outrages by Jap Soldiers,' 'The G-String Murders' and 'How Paris Apaches Terrorize Nazis in Girl Orgies.'[329]

Romantic Story, *Real Detective* and *Laff* lost their mailing permits.[330] The magazine *Front Page Detective* was issued a "show cause" order citing several stories that made it allegedly nonmailable, including "Mystery of the Beheaded Bride" and "He Crawled Through the Window and into My Bed."[331] *Sleek* magazine, cited for stories such as "Female Beauty Around the World," skipped its revocation hearing, lost its second-class privileges, and shut down.[332] Between May and August 1942, thirty-nine

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[318] *See* Cadegan, *Guardians of Democracy*, *supra* note 38, at 264–65.
[319] *Id.* at 265.
[320] *See* Robertus, *supra* note 114, at 6.
[321] *Id.* at 12.
[322] *Id.*
[323] *Id.* at 12–13.
[324] *Id.* at 13.
[325] *See id.* at 6, 12.
[326] *See id.* at 11, 17.
[327] *Id.* at 17.
[328] *Id.*
[329] *Id.*
[330] *Id.*
[331] *Id.*
[332] *Id.* Other magazines that lost their second-class mailing privileges in 1942 included *All Story Love*, *Crime Confessions*, *Headline Detective*, *Headquarters Detective*, *Film Fun*, *Secret Detective Cases*, *Smiles*, *Intimate Detective Cases*, *Pictorial Movie Fun*, *Crime Detective*, and *Special Detective Cases*. *See id.* at 19.

magazines were denied second-class privileges for their purported obscenity.[333] It's unlikely that any of these the publications would have been obscene under the *Ulysses* or *Parmelee* tests[334] or even the restrictive *Hicklin* test.[335] Operating without clear statutory commands or oversight from the courts, postal officials censored a wide swath of nonobscene material that violated the NODL's moral code.[336]

Postal officials knew that the loss of second-class privileges meant the end for most publications. Using first-class mail was too expensive, the third class included only matter that weighed less than eight ounces, and fourth class was prohibitively costly and slow.[337] As commentators observed, revocation of second-class mailing rates meant life or death for a magazine.[338]

B. The Crackdown Attracts Criticism

The ACLU and its anti-censorship subcommittee, the National Council for Freedom from Censorship, which had long been monitoring the activities of the NODL, registered immediate concerns with the decency crackdown.[339] In May 1942, ACLU leaders contacted the Department of Justice with complaints about the permit revocations—the seemingly arbitrary decisions to revoke, the meaningless hearings, and the Department's broad and vague definition of obscenity.[340] The organization also looked for a test case to challenge the revocations in court.[341] ACLU lawyers wrote to several magazines that had their privileges revoked, encouraging them to seek judicial review.[342]

In the summer of 1942, the decency campaign gained national attention when the legendary tabloid *The National Police Gazette* lost its second-class privileges.[343] Started in 1845, the *Gazette* was infamous for its sporting news, lurid crime stories,

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[333] Leo P. Culliane, *Criticism Fails to Halt 2d-Class Mail Clean-Up*, N.Y. HERALD TRIB., Sep. 24, 1942.

[334] *See supra* notes 193–97 and accompanying text.

[335] *See supra* notes 184–97 and accompanying text.

[336] *See* Cadegan, *Guardians of Democracy*, *supra* note 38, at 252–53.

[337] *See* Robertus, *supra* note 114, at 16.

[338] Culliane, *supra* note 333.

[339] *See* Letter from Glenn L. Moller to Hazel L. Rice (May 27, 1941), *in* 2436 AMERICAN CIVIL LIBERTIES UNION PAPERS 62–63, Princeton University (microfilm, University of Washington).

[340] *See* Letter from Roger Baldwin to James Rowe, Jr., May 29, 1942), *in* 2436 AMERICAN CIVIL LIBERTIES UNION PAPERS 70, Princeton University (microfilm, University of Washington).

[341] *See, e.g.*, Letter from Elmer Rice to Jerry Bune (Oct. 27, 1942), *in* 2436 AMERICAN CIVIL LIBERTIES UNION PAPERS 90, Princeton University (microfilm, University of Washington); Letter from Elmer Rice to Louis Silverkleit (Oct. 27, 1942), *in* 2436 AMERICAN CIVIL LIBERTIES UNION PAPERS 97, Princeton University (microfilm, University of Washington).

[342] *See supra* note 341.

[343] The *National Police Gazette* lost its second-class privileges on September 19, 1942. *See* Robertus, *supra* note 114, at 19.

and provocative pictures of women.[344] It was generally regarded as harmless entertainment, ubiquitous in barbershops and other public places where men congregated.[345] In August of 1942, the Post Office Department announced that it was going to revoke the *Gazette*'s privileges because it was "profitably pandering to the lewd and lascivious."[346] After a hearing, in which postal officials refused to put into the record a key piece of evidence introduced by the publisher, the tabloid's second-class status was revoked.[347] The decision elicited a wave of protest.[348] Throughout the country, newspapers published articles in disbelief;[349] the *Gazette* was racy, but in no way obscene. The *Police Gazette* revocation made clear that the Post Office Department defined obscenity without regard to public norms and standards.

The day after the *Police Gazette*'s revocation, the ACLU held a conference with a large group of magazine publishers on the possibility of "joint action" against the Post Office Department.[350] The ACLU also wrote to Senator Kenneth McKellar, Chairman of the Committee on Post Offices and Post Roads, calling to his attention that:

> [E]xtraordinary drive being undertaken by the Post Office Department against allegedly obscene magazines[.] We are, of course, in favor of excluding from the mails any matter which is in fact obscene, but we are wholly opposed to an arbitrary system of exclusion which permits a few postal officials to exercise their unreviewed judgment in so debatable a field.[351]

The ACLU proposed a bill adopting the system then effective in the Customs Department;[352] under the Tariff Act of 1930, Customs officials had to go to a federal

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[344] *See* Matthew Huttner, *The Police Gazette*, 67 AM. MERCURY 15*,* 16–18 (1948).

[345] *See id.* at 15.

[346] 78 CONG. REC. 3822 (1943) (citing *Exit the Police Gazette*, CHICAGO DAILY NEWS*,* Sept. 23, 1942).

[347] Press Release, American Civil Liberties Union, P.O. Department Continues Obscenity Crusade (Sept. 28, 1942), *in* AMERICAN CIVIL LIBERTIES UNION PAPERS 88, Princeton University (microfilm, University of Washington).

[348] *See* Culliane, *supra* note 333 (noting the Postmaster's actions "aroused more criticism than any similar action in a long while").

[349] *See* 79 CONG. REC. 3822 (1943) (citing various newspaper criticisms).

[350] Letter from Roger Baldwin to Joseph Fulling Fishmen (Sept. 30, 1942), *in* 2436 AMERICAN CIVIL LIBERTIES UNION PAPERS 93, Princeton University (microfilm, University of Washington).

[351] Letter from Elmer Rice to Hon. Kenneth McKellar (Sept. 25, 1942), *in* 2436 AMERICAN CIVIL LIBERTIES UNION PAPERS 86–87, Princeton University (microfilm, University of Washington).

[352] *See* Press Release, American Civil Liberties Union (Apr. 21, 1943), *in* 2436 AMERICAN CIVIL LIBERTIES UNION PAPERS 149, Princeton University (microfilm, University of Washington).

district court to obtain permission to ban an allegedly obscene item from the country.[353]

The second-class privilege denials continued into 1943 with no signs of abating.[354] By the middle of 1943, Walker had denied second-class rates to more than seventy periodicals.[355] Walker's crackdown was exerting a chilling effect on all magazines, not only the pulps. Afraid of having their mailing privileges denied, publishers were eliminating articles with references to sex; they put more clothes on their female models, and got rid of ads that could be considered suggestive.[356] According to one source, "The Post Office Department's banning action has reached such tremendous proportions that many American newspaper and magazine publishers are today definitely intimidated."[357]

C. The American Way of Life

The controversy over the second-class permit denials escalated in March 1943 when the popular syndicated columnist Drew Pearson obtained information about, and subsequently revealed in his column, Walker's cooperation with Bishop Noll:

> Efficient Postmaster General Frank Walker has got himself into a situation whereby certain zealots of the church to which he belongs have become unofficial censors of American magazines.
>
> . . . .
>
> The situation has gone so far that scores of American magazines, before going to press, send their manuscripts to the representative of Bishop John F. Noll of the [NODL], where they are examined . . . .
>
> . . . .
>
> Through the powerful weapon of removing magazines from the second class mailing list, a most effective censorship is being used daily.[358]

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[353] *See* Press Release, American Civil Liberties Union: Union Asks Senate Investigate P.O. "Decency Crusade," (Apr. 26, 1943), *in* 2436 AMERICAN CIVIL LIBERTIES UNION PAPERS 150–51, Princeton University (microfilm, University of Washington).

[354] Robertus, *supra* note 114, at 15.

[355] *See id.*

[356] *See id.* at 18, 21.

[357] 78 CONG. REC. 3821 (1943).

[358] Drew Pearson, *Washington Merry-Go-Round*, MICH. DAILY, Mar. 25, 1943, at 2.

Members of the ACLU wrote to twenty-six Senators suggesting an investigation of "the present censorship by the Post Officer Department of magazines alleged to be obscene," pointing out that Walker's target list closely paralleled the list of the NODL.[359]

Pearson's revelations attracted the attention of cigar-chewing, bull-voiced North Dakota Republican Senator William "Wild Bill" Langer, who damned the second-class permit revocations as undemocratic and called the "so-called hearings" a "mockery of justice."[360] "[I]f th[is] policy of censorship is permitted to continue, there is nothing to prevent the Postmaster General, who is also chairman of the National Democratic Committee, from using the second-class mailing privilege as a political plum," he warned.[361] Langer introduced what would become a recurring theme in the later debate over *Esquire* when, on the floor of the Senate, he made the connection between Walker's actions and fascist dictatorship:

> Today we are fighting a global war for the purpose of protecting our God-given privileges as cited in the Bill of Rights. . . . Our boys on every front are dying so that we at home may enjoy freedom of the press, freedom of speech, and freedom of religion which constitute the American way of life. It is cruel to think that here at home these freedoms are threatened.[362]

Langer submitted a resolution directing the Committee on Post Offices to conduct an investigation of the Post Office Department.[363] Langer also introduced legislation, modeled on Tariff Act, which would "require the Post Office Department to go to court" every time it wanted to ban or deny second-class rates to purportedly obscene material.[364]

Walker retaliated bitterly against his critics. Although Walker had been carrying out the wishes of Noll and the NODL,[365] the organization's campaign clearly resonated with his own principles and beliefs.[366] Zechariah Chafee, one of Walker's contemporaries, described Walker as a man sincerely interested in bettering "the morals of the country," who felt he had "an obligation to do something about it when the opportunity is right before him."[367] For Walker, the "decency campaign"

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[359] *Seeks Probe of Ban on Many Magazines*, GAZETTE & DAILY (Pennsylvania), Apr. 24, 1943, at 29.
[360] 78 CONG. REC. 3820 (1943).
[361] *Id.*
[362] *Id.*
[363] *Id.*
[364] *See* PAUL & SCHWARTZ, *supra* note 84, at 73.
[365] *See* Pearson, *supra* note 358, at 2.
[366] *See* CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS, *supra* note 17, at 300.
[367] *Id.*

had become a personal crusade.[368] Shortly after Langer's tirade in the Senate, Walker declared that he would continue his policy despite the criticism.[369] With "his blue eyes gleam[ing] and his . . . hands knotted . . . into hard fists," he told the newspaper the *Catholic Advance*, "I'm going ahead with the enforcement of post office regulations—let the chips fall where they may. In public office you have to expect controversies."[370] For the first time, Walker offered a rationale for the permit denials, a "subsidy" view of the second-class rate: "I'm not a censor, and that is not the function of my office. But I don't think Congress ever intended to subsidize some of the stuff that is being carried at huge cost to the government."[371]

V. *ESQUIRE*

Walker's success in shutting down several of the smaller pulps emboldened him to go after bigger targets. In September 1943, Walker issued the popular men's magazine *Esquire* an order of revocation, informing the publishers of the magazine that unless they could "show cause" why *Esquire* was not obscene, their second-class permit would be revoked.[372] *Esquire* had a circulation of over 600,000, with GIs overseas representing a substantial portion of its readership.[373] The monthly cost of mailing *Esquire* at second-class rates was about $9,500, approximately $100,000 annually.[374] If the magazine lost its second-class rates, mailing costs would exceed $600,000 a year.[375]

While *Esquire* had been on the NODL's banned list for several years,[376] Bishop Noll removed it in 1942, over a year before Walker issued his revocation order.[377] According to Noll, Walker had initiated the order against *Esquire* on his own accord, without any prompting.[378] Noll publicly denied that he had anything to do with Walker's decision to go after *Esquire*.[379] There was "no collusion, no correspondence," Noll told *Time* magazine.[380] "As far as I know [Walker] doesn't think of me in connection with this *Esquire* business."[381]

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[368] *See Resents Charges Against Church: Walker Means Business in Fight on Dirty Magazines*, CATH. ADVANCE (Kansas), Apr. 9, 1943, at 5.
[369] *See id.*
[370] *Id.*
[371] *Id.*
[372] Respondent's Brief at 4, Hannegan v. Esquire, Inc., 327 U.S. 146 (1946) (No. 399).
[373] HUGH MERRILL, ESKY: THE EARLY YEARS AT ESQUIRE 93 (1995).
[374] *See* Robertus, *supra* note 114, at 29.
[375] *See* Respondent's Brief, *supra* note 372, at 38.
[376] *See* NOLL, *supra* note 58, at 217.
[377] *See Esquire Banned*, TIME, Jan. 10, 1944, at 46.
[378] *See id.*
[379] *See id.*
[380] *Id.*
[381] *Id.*

A. Esquire Magazine

Esquire magazine was launched in Chicago in 1933.[382] It was the nation's first "men's lifestyle" magazine, featuring articles on food, drink, fashion, home décor, and etiquette, aimed at an audience of upwardly mobile men.[383] The magazine also featured "high culture," offering articles on art, sophisticated music, and current affairs.[384] Some of the nation's most highly regarded writers, including F. Scott Fitzgerald, Ernest Hemingway, Langston Hughes, Theodore Dreiser, and John Steinbeck published short stories in *Esquire*.[385] The magazine's publisher wanted an audience interested in high culture because his advertisers needed to appeal to men with disposable income.[386] At the same time, he wanted a "manly" emphasis, which was provided by sex—scantily clad pinups and bathroom humor were the most popular features of the magazine.[387] When the magazine's fortunes began to decline in the late 1930s, publisher David Smart upped its sexually themed content.[388] In the words of one historian of *Esquire*, "[l]iterature, and everything else . . . took a back seat to sex."[389]

In 1940, the "Varga girl" first appeared in *Esquire*.[390] The Varga girl was a painted illustration of a busty "pin-up girl" by the illustrator Alberto Vargas.[391] She was "usually blonde or red-haired, long-legged . . . and sultry."[392] The Varga girl was intended to represent the idealized female sex symbol—her bust and hips were exaggerated; she wore a pouty look, and was often portrayed reclining or in other sexually suggestive poses.[393] Varga girl illustrations usually appeared as full page features or gatefolds.[394] The images were often accompanied by short captions or verses containing sexual double entendres.[395] The Varga girls boosted *Esquire*'s popularity and made it one of the nation's bestselling magazines.[396]

Esquire's fortunes surged even higher when it made a profitable alliance with the U.S. government at the beginning of the war.[397] The publisher "convinced the military that a magazine filled with pin-ups, racy cartoons, and camp humor was

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382 Sullivan, *supra* note 17, at 33.
383 *See id.* at 33.
384 *Id.* at 36.
385 *See* MERRILL, *supra* note 373, at 155–56.
386 *See* Sullivan, *supra* note 17, at 36 (noting *Esquire* sold for an "outrageous fifty cents" due to its marketing as a "sophisticated magazine for the urban, well-to-do, fashion-forward man").
387 *Id.*
388 *See* MERRILL, *supra* note 373, at 81.
389 *Id.*
390 *See* Sullivan, *supra* note 17, at 46–47.
391 *Id.* at 44, 47.
392 *Id.* at 47.
393 *Id.* at 47–49.
394 *Id.* at 44.
395 *See* MERRILL, *supra* note 373, at 89.
396 *See id.* at 87.
397 *See id.* at 93.

essential for military morale."[398] *Esquire* was selling 69,000 subscriptions to servicemen by 1943 and an additional 30,000 were distributed to military bases in Europe.[399] *Esquire* sold most of its copies to the U.S. government.[400] GIs put Varga girl pictures in their lockers; the pin-up girl became the symbol of the "girl left behind," and the American Dream of home, marriage, and family that soldiers fought for.[401] The ties between the Second World War and *Esquire* were strong. Comedian Bob Hope once commented, "Our American troops are ready to fight at the drop of an *Esquire*."[402]

B. An "Obscene, Lewd, and Lascivious Character"

According to the "show cause" order, nine of *Esquire*'s 1943 issues were nonmailable because of matters of an "obscene, lewd, and lascivious character."[403] Eighty-six out of a total of 1,972 pages of text and artwork were cited as obscene.[404] The Varga girl accounted for sixteen of twenty-three allegedly obscene items.[405] Phrases such as "son of a bitch," "whore" and "ass" were objected to, as were articles and cartoons with sexual overtones.[406] Cited pieces included a theatrical review of a bawdy Broadway musical called *Star and Garter*,[407] a series of articles exposing the tawdry world of the burlesque,[408] a report of a typical night court in New York, discussing prostitutes and venereal disease,[409] and an article about a merchant marine sailor who got drunk and used indelicate language.[410] One cartoon depicted a group of soldiers surrounded by a group of women with spears.[411] The caption read, "It's no use, Sarge, we are outnumbered. Yippee."[412] Another portrayed a girl who asked a soldier, "Would you like to see where I was operated on?" "No," the soldier quipped. "I hate hospitals."[413]

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[398] *Id.*
[399] *Id.*
[400] *See* Sullivan, *supra* note 17, at 51.
[401] *See* BUSZEK, *supra* note 306, at 185; Sullivan, *supra* note 17, at 53.
[402] Sullivan, *supra* note 17, at 50.
[403] Order of the Postmaster General Revoking Second Class Privileges, Order No. 23459, Dec. 30, 1943.
[404] *The Esquire Case—A Novel Extension of the Postmaster-General's Powers of Classifying Mail*, *supra* note 105, at 738 n.24.
[405] Order of the Postmaster General Revoking Second Class Privileges, Order No. 23459, Dec. 30, 1943.
[406] Transcript of Record at 273–74, 290–91, 349, Hannegan v. Esquire, Inc., 327 U.S. 146 (1946) (No. 399).
[407] *Id.* at 3.
[408] *Id.* at 39.
[409] *Id.* at 39–40.
[410] *Id.* at 40.
[411] *Id.* at 32.
[412] *Id.*
[413] *Id.* at 40.

When he received the "show cause" order, editor Arnold Gingrich retorted that *Esquire* was not obscene or lewd, and was a great "morale booster" for the nation.[414] Arnold Gingrich, Editor of *Esquire* did not agree that the drawings were as described by the Post Office Department, "[T]hey have been very popular with the armed forces, not only with the men but the officials in charge."[415] Gingrich filed an answer denying the charges, and his lawyers asked for a hearing.[416] Newspapers began a steady drumbeat of criticism against Walker and his "little Federal kangaroo court" in the Post Office Department.[417] Wrote the *Cincinnati Enquirer*, "With American fighting men in every clime calling for 'pin-up girls' to take their minds off the muck and horror of the war, must editors fear to publish the picture of a bathing girl lest they be the next to receive an imperious summons from Mr. Walker?"[418]

On October 14, 1943, Walker appointed a hearing board consisting of three senior Post Office Department officials.[419] To avoid charges of being arbitrary and undemocratic, Walker heeded the suggestion of the Department's critics and commissioned experts to weigh in on the issue of *Esquire*'s obscenity—the value of the magazine to society and its likelihood of corrupting youth.[420] *Esquire*'s publishers responded by commissioning their own witnesses, including Ivy League psychiatrists and some of the most prestigious writers and literary critics in the nation.[421] It was reported that *Esquire* paid some of the witnesses as much as $500 a day ($7,000 in 2017 dollars) for their testimony.[422]

Walker soon realized that he had underestimated the difficulty of taking on a large, well-funded publication like *Esquire*. While the fly-by-night pulps lacked the resources to challenge the revocations, *Esquire* had the money and determination to push back. *Esquire*'s publisher hired one of the most prestigious law firms in the country—Cravath, de Gersdorff, Swaine and Wood,[423] an elite New York firm that represented prominent industrial and media giants, including the publishing company Time, Inc.[424] Bruce Bromley of Cravath—a suave, dapper, seasoned litigator noted for his brilliant and "hardball" trial tactics—was *Esquire*'s lead counsel.[425]

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414 MERRILL, *supra* note 373, at 112.

415 '*Varga' Girl Stirs Up Row*, MINNEAPOLIS STAR J., Sept. 13, 1943, at 2.

416 *See* Transcript of Record, *supra* note 406, at 17–18.

417 *Bureaucratic Censorship*, CIN. ENQUIRER (Ohio), Sept. 14, 1943, at 4.

418 *Id.*

419 *See* Transcript of Record, *supra* note 406, at 19.

420 *See id.* at ii, vi–vii; *see also id.* at 1356 ("Based on your examination . . . knowledge and experience, will you tell the Board whether . . . anything in the material . . . in your opinion [is] tending to corrupt morals of youth . . . ?").

421 *See* GINGRICH, *supra*, note 196, at 161.

422 *See* Memorandum for Mr. O'Brien, November 9, 1943, Case File Relating to Esquire Magazine, NARA.

423 MERRILL, *supra* note 373, at 109.

424 ROBERT T. SWAINE, 2 THE CRAVATH FIRM AND ITS PREDECESSORS 1891–1948 611 (1948).

425 *See* GINGRICH, *supra* note 196, at 159; *That Wasn't No Lady*, NEWSWEEK, July 24, 1944, at 4.

The magazine spent $40,000 in lawyers' fees and $10,000 for stenographic transcripts, in addition to thousands of dollars in witnesses' fees.[426] The hearings, which stretched out for over two weeks and produced 1998 pages of testimony and hundreds of pounds of exhibits,[427] became a fiasco for the Post Office Department and its counsel, who were clearly outmatched by *Esquire*'s superior lawyers. The charges against the beloved magazine attracted substantial public interest, and the hearings were reported daily in the nation's press.[428]

C. Hearings

Esquire was represented in the hearings by Bromley;[429] the Post Office Department's lawyers were William O'Brien, a longtime assistant to the Solicitor, and Calvin Hassell, who was a former postal carrier.[430] In his opening statement to the hearing board, Bromley insisted that if *Esquire* were deemed obscene, it would create a "very dangerous precedent" that will go "directly to the . . . guaranty of the freedom of the press."[431] Bromley condemned the Post Office Department for using the outdated *Hicklin* test;[432] under the recently articulated "community morals" standard,[433] no obscenity, lewdness, or lasciviousness was involved, since the publication was completely "in step with the times."[434] "What would our Victorian forefathers have thought . . . about the girls on the beaches at Coney Island or Newport? We have to put our minds in tune with what the public generally thinks today."[435]

The Post Office Department called nine witnesses to testify to the alleged obscenity of the material and its supposedly adverse effects on readers.[436] Several of the witnesses were elderly, and a number of them were clergy.[437] The Post Office Department's witnesses included a Methodist bishop, a rabbi, the Assistant Superintendent of Schools of the District of Columbia, a psychiatrist at a federal psychiatric institution,

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[426] On Esquire's preparation for the case, see GINGRICH, *supra* note 196; MERRILL, *supra* note 373.

[427] *See generally* Transcript of Record, *supra* note 406 (covering 1,998 pages).

[428] *See, e.g.*, George Dixon, *Clergymen Declare Esquire Stirred Readers' Indigestion*, DAILY NEWS, Nov. 5, 1943, at 392; George Dixon, *Now Nobody's Safe From P.O.*; *Home Journal Is Called No Lady,* DAILY NEWS, Nov. 4, 1943, at 255; *Esquire Trial Nearing Close,* NEWS-J. (Ohio), Nov. 6, 1943, at 2.

[429] GINGRICH, *supra* note 196, at 159.

[430] *See* Transcript of Record, *supra* note 406.

[431] Transcript of Record, *supra* note 406, at 32.

[432] *Id.* at 1785.

[433] *See* Parmelee v. United States, 113 F.2d 729 (1940) (holding that the test for obscenity should evolve with the times).

[434] Transcript of Record, *supra* note 406, at 1807.

[435] *Id.* at 37.

[436] As rebuttal witnesses the Post Office Department called Benjamin Karpman, John Keating Cartwright, Peter Marshall, Solomon H. Metz, Chester W. Holmes, John W. Rustin, Harvey W. Wiley, Edwin Holt Hughes, and Thomas Verner Moore. *Id.* at vi–vii.

[437] *See infra* notes 439–62 and accompanying text.

and a grey-haired former woman suffragist.[438] Staring at a Varga girl centerfold, Bishop Edwin Holt Hughes opined, "I wouldn't care to exhibit it in my Sunday schools."[439] A rabbi of the Adas Israel Congregation in Washington, D.C., told the board, "[i]t seems to me that the whole atmosphere of this publication is such as to reduce the main interest of living to sex, and then degrade sex to its lowest vulgar expressions . . . such publication[s] [are] preparing the ground for the downfall of our democratic system."[440] The Rev. Peter Marshall of Washington D.C.'s New York Avenue Presbyterian Church testified that *Esquire* was "definitely indecent," and "calculated to lower the moral tone and degrade."[441] "I can't see how such information can *add anything to public enlightenment or can make any contribution to public morals*."[442] In his brutal cross-examination of the Post Office Department's witnesses, Bromley got each of them to confess that none of them had read a single issue of *Esquire*.[443] Most had never heard of *Esquire*'s esteemed literary contributors, including Theodore Dreiser, F. Scott Fitzgerald, and Ernest Hemingway.[444]

"With the skill of a master of the leading question . . ." and a "wicked leer that he himself characterized as 'making him look like a dishonest Lincoln,'" Bromley tricked several of the witnesses into labeling as "indecent" passages from respected, innocuous magazines.[445] He would present the witness with an image or a joke, and the witness, assuming it was from *Esquire*, would immediately declare it obscene.[446] Bromley would then reveal that it had been published in another magazine such as *Life* and *Reader's Digest*.[447] On several occasions Bromley "coaxed [witnesses] to speak in glowing terms of various religious figures, only to [point out] that they had contributed to *Esquire*."[448] The press cheered Bromley's successful efforts to make the Department's witnesses look like prudes, out of touch with present-day morals.[449]

The highlight of Bromley's cross-examinations came when he played a trick on feminist and suffragist Anna Kelton Wiley.[450] Bromley, who was not above pulling a fast one when the occasion seemed to merit it, asked Wiley, an elderly woman of Victorian sensibilities, her opinion of a photograph of a woman in a swimsuit standing

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[438] *See infra* notes 439–62 and accompanying text.

[439] Transcript of Record, *supra* note 406, at 1703.

[440] *Id.* at 1594–95.

[441] *Id.* at 1573, 1759.

[442] *Id.* at 1569.

[443] For the complete cross-examination of each witness, *see id.* at 1469–1549, 1557–66, 1569–88, 1595–1624, 1636–51, 1669–79, 1689–97, 1724–58.

[444] *See id.* at 1726. On cross-examination, Thomas Verner Moore testified to having never heard of Theodore Dreiser, F. Scott Fitzgerald, Ernst Hemingway, and many others. *See id.*

[445] GINGRICH, *supra* note 196, at 161.

[446] *See* Sullivan, *supra* note 17, at 69.

[447] *See id.*

[448] *Id.* at 68.

[449] *See* articles cited *supra* note 428.

[450] *See The Shapely Annette Shocks, Unshocks a Feminist Leader*, DAILY NEWS (New York), Nov. 6, 1943, at 4.

on the beach.[451] Wiley said that she did "not like the pose of her head, or attitude."[452] Bromley then revealed that the photograph had been taken thirty years prior and was of the renowned, highly respected swimmer and feminist icon Annette Kellerman.[453] "Well, you should have seen Mrs. Wiley trying to back water," the *New York Daily News* quipped.[454]

Thirty-eight witnesses—distinguished psychiatrists, authors, educators, publicists, advertising executives and agents, and art specialists—testified for *Esquire*.[455] Under Bromley's skillful guidance, the witnesses attested that the magazine did not incite indecent thoughts in average adult readers and was wholly in step with contemporary sensibilities.[456] During the first week of testimony, the influential journalist Raymond Gram Swing opined that *Esquire* published "first rate" fiction and some of the finest writing in American periodical literature.[457] Principal Herbert Smith of Chicago's Francis Parker School claimed that *Esquire* was no more bawdy than other magazine literature, and that he had found such words as "whore" in Shakespeare and "son of a bitch" in the *Chicago Tribune*.[458] Harvard psychiatrist Kenneth Tillotson insisted that the Varga girl did not incite lascivious reactions, and that she was a "good, clean picture as glorifying a good physique and good American womanhood."[459] Clement Fry, a leading mental health expert, alleged that *Esquire*'s pictures were no more likely to arouse "libidinous thoughts" than the Bible.[460] Louis J. Croteau, executive secretary of the Watch and Ward Society, a social reform group in Boston long active in the book and theater censorship movement,[461] testified that he found nothing lewd in *Esquire* and that it is "in the spirit of good, clean slap-stick humor, and . . . we could all use a little more of it right now."[462]

After the first week of testimony, the inept and overwhelmed Post Office Department lawyers recognized that things were going poorly. The charge of obscenity was backfiring, if not entirely destroyed. They then decided to change their tactics. On October 25, 1943, at the beginning of the second week of the hearings, they inserted a new charge against *Esquire*—that even if not "obscene," *Esquire* did not meet the fourth condition of the second-class mail statute, the requirement that a periodical must be "originated and published for the dissemination of information

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[451] *Id.*
[452] *Id.*
[453] *Id.*
[454] *Id.*
[455] *See* Transcript of Record, *supra* note 406, at 1837.
[456] *See, e.g.*, *id.* at 77.
[457] *Id.* at 881.
[458] *Id.* 273–74, 278–79.
[459] *Id.* 136.
[460] *See id.* at 593 ("[Boys] get stimulation from a lot of things. They get stimulation from the Bible.").
[461] *Id.* at 396.
[462] *Id.* at 451.

of a public character or devoted to literature, the sciences, arts, or some special industry."[463] *Esquire*, they alleged, was not of a "public character"—it was not contributing to the "public good."[464] This charge, and this interpretation of the Classification Act, was completely novel. As earlier mentioned, the fourth condition and the "public character" requirement had been included in the Classification Act of 1879 for the purpose of distinguishing advertisements from periodicals (advertisements were not of a "public character"), not as a measure of a publication's social value or social contribution.[465] In the entire history of the Post Office Department, the fourth condition had never been given this reading, nor used to deny a publication second-class mailing rates.

This change posed a major problem for *Esquire*. Prior to the hearing, the Post Office Solicitor had promised *Esquire* that it would base the revocation charges only on the allegation that the publication was obscene.[466] The matter of whether the material met the fourth condition had not been briefed, or ever defined or litigated in a previous case. After this alteration, which was profusely objected to by Bromley,[467] the hearings continued, and Bromley directed the witnesses to address the allegation, implied by the new charge, that *Esquire* did not "contribute to the public good."[468]

Reeves Lowenthal, President of the Associated American Artists, stated that in every one of the eleven issues containing allegedly obscene material, there had been "substantial art content of high value."[469] Fred Siebert, director of the University of Illinois School of Journalism testified that *Esquire* regularly published articles on affairs of public character.[470] The renowned writer H. L. Mencken, considered a master of social criticism and the English language, testified to *Esquire*'s non-obscene nature and its literary quality—"[p]ractically all the principal American authors have written for it in my time."[471]

"There is no conceivable obscenity in 'son-of-a-bitch,'" Mencken told the hearing board. "I have used it in my last book two or three times."[472] When asked about the words, "street-walker," "syphilis," and "prostitute," he replied, "I should say that they are all perfectly harmless words. If you have to refer to the things you have to indicate, you have to refer to them. I have seen them in the New York Times."[473] Commenting on a euphemism for the buttocks:

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[463] *Id.* at 1399.
[464] *See id.*
[465] *See supra* notes 131–51 and accompanying text.
[466] *See* Letter from Calvin W. Hassel, Assistant Postmaster, to John F. Harding, Cravath, DeGersdorff, Swaine & Wood (Oct. 9, 1943) (on file with the National Archives).
[467] *See* Transcript of Record, *supra* note 406, at 601–07.
[468] *See id.*
[469] *Id.* at 1137.
[470] *Id.* at 1189–91.
[471] *Id.* at 1152. *See also id.* at 1137–38.
[472] *Id.* at 1140.
[473] *Id.* at 1142.

> Q. Now, what about the use of the words "sunny south"?
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> A. It is not alleged that "sunny south" is obscene, is it?
>
> Q. I believe it is.
>
> A. I can't answer such a question. It is too absurd. Sunny south is obviously an attempt at humor. I myself in such a situation use the word "caboose", but then everybody has his favorites. You have to sometime in this life, living a biological life of mammals, refer to backside, and in humorous writing, which this is, there is an effort to invent charming and, if possible, euphemous backsides. There may not be enough euphemisms and this man is inventing sunny south. I never heard it before. The idea that it was obscene shocks me. I didn't know anybody was absolutely so indecent that he could consider it that way.[474]

He went to offer insight on the words "crap," "bawdy house," "ass," and "diddle."[475] Mencken had such an enjoyable time testifying that he refused to even accept carfare for his trip to Washington from his home in Baltimore, saying that he would gladly have paid to get in just for the entertainment value.[476]

Archibald M. Crossley, head of Crossley, Inc., an independent marketing and research firm that specialized in gauging public opinion,[477] testified that at the request of *Esquire* he had conducted a national poll on public perception of the Varga Girl.[478] In response to the question "do you consider these pictures to be obscene or of an indecent character?" 77.6% said "No."[479] Abe Blinder, *Esquire*'s Director of Circulation, stressed the connection between *Esquire* and the war effort.[480] He testified that 23% of subscribers were servicemen, and that the War Department regularly requested pin-up reprints.[481]

D. The Hearing Board's Decision

The testimony ended on November 6, 1943.[482] The hearing board deliberated for a few days, then issued its advisory opinion on November 11.[483] Two members of

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[474] *Id.* at 1145.
[475] *See id.* at 1138, 1141–42, 1144, 1150.
[476] GINGRICH, *supra* note 196, at 162.
[477] Transcript of Record, *supra* note 406, at 1107.
[478] *Id.* at 1109.
[479] *Id.* at 1112.
[480] *Id.* at 1391, 1393.
[481] *Id.* at 1394, 1397.
[482] *Id.* at 1857.
[483] *Id.* at 1836.

the board, Walter Myers, Fourth Assistant Postmaster General, and Frank Ellis, Chief Clerk, concluded that *Esquire* was not obscene.[484] "The proof was overwhelming that *Esquire* did not offend or violate the standards of the mores of our days," they wrote.[485] They also rejected the Post Office Department's lawyers' efforts to use the fourth condition against *Esquire*.[486] Myers and Ellis recommended that *Esquire* retain its second-class status and that the charges be dismissed.[487]

The third board member, Deputy First Assistant Postmaster General Tom Cargill, voted for revocation.[488] His dissent was based on the narrow ground that since one item in the August 1943 issue was in his opinion obscene, the whole issue was nonmailable.[489] Since *Esquire* was deemed not to have mailed any August issue, it "failed to issue at stated intervals a mailable issue" and therefore did not comply with the Classification Act.[490] Cargill added that he was not "satisfied to exonerate the magazine" because many of its past issues "either overstep or are of the borderline variety between the decent and the indecent."[491] If *Esquire* continued at the second-class rate, publishing indecent material would be an "accustomed practice" in the magazine industry, "aped by other borderline publications who look to Esquire as the pace setter."[492]

Cargill advised Walker to heed the interpretation of the fourth condition presented by the Post Office Department lawyers—as a "quality test" for publications. He wrote that he was deeply "troubled" by the suggestion that Congress intended to subsidize "matter of doubtful value to the public"[493]:

> I doubt that if the general public, who are not subscribers, would stand for this so-called subsidy if it was put to them in the light that part of their tax money was being given to the owners and stockholders of Esquire to the extent of a half-million dollars a year.[494]

In mid-November, Cargill sent his decision to Walker; Walker deliberated for over a month.[495]

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[484] *Id.* at 1838–39.

[485] *The Esquire Case—A Novel Extension of the Postmaster-General's Powers of Classifying Mail*, *supra* note 105, at 739 n.24.

[486] Transcript of Record, *supra* note 406, at 1839.

[487] *Id.*

[488] *See id.* at 1851–55.

[489] *See id.* at 1852–54 ("[O]ne page in a magazine which is part and parcel of that magazine makes the entire magazine unmailable.").

[490] *Id.* at 1855.

[491] *Id.* at 1851.

[492] *Id.* at 1853.

[493] *Id.* at 1854.

[494] *Id.*

[495] *Id.* at 1851, 1856.

E. Revocation

On December 30, 1943, Frank Walker—still determined to destroy *Esquire*—issued an order revoking the magazine's second-class privileges.[496] He conceded that *Esquire* was not technically obscene but, per Cargill's suggestion, concluded that the magazine had not met the criterion in the fourth condition of publishing "information of a public character" or "literature, the sciences, . . . or some special industry."[497] Declaring the language of the second-class statute "plain and specific," Walker asserted that, "A publication to enjoy these unique mail privileges and special preferences is bound to 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."[498]

Walker explained that he construed the words of the fourth condition in light of the passing observation of Justice Clarke in *Milwaukee Leader* that second-class rates were "a frank extension of special favors to publishers because of the special contribution to the public welfare [that] Congress believe[d] [wa]s derived from the . . . periodical press."[499] Walker transformed this statement into a draconian requirement that any periodical that sought to receive second-class rates had to demonstrate that it merited them. Since second-class rates were below cost, Walker's argument ran, they were in effect an indirect governmental subsidy to the periodical at the expense of every person mailing a letter or paying federal taxes.[500] Drawing on *Milwaukee Leader*'s "privilege doctrine,"[501] Walker declared second-class mailing rates to be an "extraordinary privilege" from the government; publishers that received it had to prove that they were making an affirmative contribution to the public good.[502] In Walker's opinion, *Esquire*—"indecent, vulgar, and risqué"—made no such contribution[503]:

> Writings and pictures may be indecent, vulgar, and risque and still not be obscene in a technical sense. Such writings and pictures may be in that obscure and treacherous borderland zone where the average person hesitates to find them technically obscene, but still may see ample proof that they are morally improper and not for the public welfare and the public good.
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496 *Id.* at 1856.
497 *Id.* at 1864.
498 *Id.* at 1862–63 (emphasis added).
499 *Id.* at 1858.
500 *Id.* at 1859.
501 *See* discussion *supra* Section II.C.
502 Transcript of Record, *supra* note 406, at 1863–64.
503 *Id.*

> When . . . they become a dominant and systematic feature they most certainly cannot be said to be for the public good, and a publication which uses them in that manner is not making the "special contribution to the public welfare" which Congress intended by the Fourth condition.[504]

Walker insisted that the revocation was merely the denial of a subsidy and therefore did not involve "the right of freedom of speech, or of the freedom of the press."[505] However, Walker apparently had sufficient doubts about his novel construction of the fourth condition that he postdated his order to February 28, 1944, to permit a court to review and settle the matter.[506]

Walker's "far-reaching . . . decision"[507] "by which one man sets himself up to decide what is in the public welfare" represented a "sinister" blow[508] to freedom of the press, *Esquire* publisher David Smart told reporters. The ruling left Smart "speechless."[509] "The postmaster general has gone against his own board's decision and that is unbelievable."[510] Loss of second-class rates portended the "eventual economic death" of *Esquire*, "and that is one way to strangle a free press."[511]

VI. A CAUSE CÉLÈBRE

On New Year's Day 1944, the day Walker's order was reported in the press, the *Esquire* case became a "cause célèbre."[512] With Walker's interpretation of the fourth condition as sweeping authority to exclude material from second-class rates that he believed did not "contribut(e) to the public welfare," the *Esquire* case took on much deeper significance than just a conflict over the meaning of obscenity and old-fashioned versus modern views on sex. At a time when tyranny and dictatorship loomed on the nation's mind, the meaning of the case now revolved around what many saw as a more ominous and troubling question—"how far the American people are willing to allow one man . . . to go in suppressing a free press," in the

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[504] *Id.* at 1863.

[505] *Id.* at 1857.

[506] *See id.* at 1865 ("In order to provide [*Esquire*] ample opportunity to appeal this order to a court . . . to fully review and settle this matter . . . the order . . . will not become effective for 60 days.").

[507] Mildred Miller, *Periodical*, CIN. ENQUIRER (Ohio), Jan. 8, 1944, at 5.

[508] *Ruling Against Esquire Hit By Editor and Publisher In Commenting Editorially*, CIN. ENQUIRER (Ohio), Jan. 8, 1944, at 3.

[509] *Speechless Esquire*, TIME, Jan. 10, 1944, at 71.

[510] *Bar Esquire from Second Class Mail*, ALTON EVENING TELEGRAPH (Illinois), Dec. 31, 1943, at 11.

[511] *Ruling Against Esquire Hit By Editor and Publisher In Commenting Editorially*, *supra* note 508, at 3.

[512] B. Alsterlund, *Literary By Degrees*, 18 WILSON LIB. BULL. 420, 420 (1944).

words of critic Bennett Cerf.[513] The *Esquire* Affair had become an important "test case in the fateful struggle now under way between popular government and bureaucratic power."[514]

Walker's ruling produced an outpouring of criticism from a wide and varied cross-section of the populace.[515] In recent years, few issues involving freedom of speech and press had moved Americans so unanimously and deeply as Walker's decision. The response to Walker's ruling was a testament not only to the popularity of *Esquire*, but the strength of the public's antipathy toward government censorship of speech and ideas. Editorials blasted Walker's "arbitrary action" as an infringement of the "inalienable rights of press and public."[516] Walker was denounced as a self-proclaimed "super critic,"[517] "virtual dictator of the American press,"[518] and "No. I judge of what the U.S. public should read."[519] Walker's asserted authority was "too much power for one man to wield in a democracy," noted one editorial.[520] Such "arbitrary exercise[s] of power . . . should not go unchallenged in these days when millions of American boys are out over the world fighting for the free way of life."[521]

Comparisons to Hitler were frequent[522] and perhaps inevitable. Newspaper columnist Dorothy Thompson, who had made her name reporting from Germany on the collapse of the Weimar Republic, noted that Hitler had purged galleries of modern art, declaring that "any one who sees and paints a sky green and pastures blue ought to be sterilized."[523] "Similarly Mr. Frank Walker . . . has now ruled that the writings in the magazine Esquire are not literature and the reproductions not art," Thompson wrote.[524] Observed one newspaper, "[t]he next step in this sort of thing is book-burning such as the Nazis practiced when they came into power in Germany. And book-burning, if supplied on the grounds of decency, can be extended to racial and political grounds, just as it was in Germany."[525] The *Lewisburg Journal* compared Walker's actions to "Nazism in Germany during which time Goebbels stopped the dissemination of literature contrary to party policy and belief . . . ."[526] "The Nazis

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513 Bennett Cerf, *Trade Winds*, SAT. REV., Feb. 5, 1944, at 20–21.

514 E. Lyons, *Clinical Notes: The* Esquire *Affair*, 58 AM. MERCURY 317, 317–18 (1944) ("As long as one man remains the judge of any paper's or magazine's right to share in a general privilege, freedom of press is an empty phrase.").

515 *See id.* at 318.

516 *A Freedom on Trial*, ST. LOUIS DISPATCH (Missouri), Jan. 9, 1944, at 36.

517 *New High in Censorship*, MIAMI NEWS, Jan. 8, 1944, at 4.

518 Wm. T. Evjue, *Walker Infringes Press Freedom in Esquire Case*, DAILY TRIBUNE (Wisconsin), Jan. 5, 1944, at 4.

519 *Esquire Banned*, *supra* note 377, at 46.

520 Editorial, *One-Man Censor*, MARSHALL NEWS MESSENGER (Texas), Jan. 4, 1944, at 4.

521 Evjue, *supra* note 518, at 4.

522 *See infra* notes 523–38 and accompanying text.

523 Dorothy Thompson, *Walker's Ruling on Esquire*, BOS. GLOBE, Jan. 3, 1944, at 4.

524 *Id.*

525 *Book Burning Next*?, NEWS LEADER (Virginia), Apr. 25, 1944, at 4.

526 *Esquire Wins By Losing*, LEWISBURG JOURNAL (Pennsylvania), Aug. 3, 1944, at 6.

had a law against anything contrary to the public interest."[527] Representative Ranulf Compton, a Republican from Connecticut, feared that the ruling would be "a blow to morale . . . to the boys abroad . . . ."[528] "Most of them get a real laugh and a smile . . . from Esquire and, human nature being what it is, Postmaster General Walker had better look out lest the service boys blitz him along with [the Japanese]."[529] Compton alleged that he had received mail from soldiers overseas thanking him for sticking up for *Esquire*;[530] to them, the Varga girl was "a symbol of things left behind."[531]

Leaders of various religious denominations spoke out, sympathizing with Walker's desire to get rid of "dirty magazines" but deploring his heavy-handed methods.[532] Military leaders and personnel registered vehement protests.[533] The usually staid *Army and Navy Register* editorialized that "[t]he men in the foxholes, rather than 'well-fed' Washington bureaucrats, should decide whether the Varga girl is lascivious and obscene."[534] One private in the Women's Air Corps alleged that a number of WACs were against the ban "because the Varga girl is not really vulgar in this day and age, and it seems like an infringement of the freedom of the press."[535] "Most people will probably resent the arbitrary manner in which the decision was handed down . . . if one periodical can be banned in that fashion, we can expect others to get the same treatment."[536]

Predictably, the most vocal critics of the ruling were members of the press. For the nation's newspaper, book, and magazine publishers, the *Esquire* case had gone beyond the question of "smut v. good, clean fun" and had taken on an existential, life-or-death quality.[537] *Editor and Publisher*, the respected trade journal and preeminent

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[527] CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS, *supra* note 17, at 308.

[528] *Ban on Esquire Termed As Blow to War Morale*, CIN. ENQUIRER (Ohio), Jan. 1, 1944, at 5.

[529] *Id.*

[530] 90 CONG. REC. A118 (1944).

[531] *Who Doesn't? . . . Soldiers Want Varga Girl*, NEOSHO DAILY NEWS (Missouri), Feb. 8, 1944, at 2.

[532] *See Postmaster General Penalizes Esquire*, CHRISTIAN CENTURY, Jan. 12, 1944, at 37 (opining that "the whole system of passing on mailing privileges needs ventilation and revision").

[533] *See Army, Navy Register Defends Varga Girl*, ST. LOUIS STAR & TIMES (Missouri), Nov. 27, 1943, at 2; *Right to Vote is Preferred to Varga Girl*, PITT. PRESS (Pennsylvania), Jan. 5, 1944, at 5.

[534] *Army, Navy Register Defends Varga Girl*, *supra* note 533, at 2.

[535] *Right to Vote is Preferred to Varga Girl*, *supra* note 533, at 5.

[536] Peggy Weekly, *She Says:*, STAR TRIBUNE (Minnesota), Jan. 5, 1944, at 11. Zechariah Chafee, longtime critic of *Milwaukee Leader*, denounced Walker's order, declaring that the work of "raising morals" was not the "function of government officials, especially in the Post Office. Should the Postmaster General take over the work of churches and schools and critics of life? Is a system of regulating a great business activity like the Post Office a mechanism well adapted to the task of moral elevation?" The "'public good' test" was frighteningly vague and subjective; "the only yardstick" of measurement is "in somebody's mind." CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS, *supra* note 17, at 307, 312–13.

[537] *Esquire Banned*, *supra* note 377, at 46.

voice of the press, urged *Esquire* to "press their case to a final decision, so that not within the memory of this generation will another Postmaster General assume to reject any publication on such flimsy grounds as those Mr. Walker announced."[538] The press had "better stand up and fight," warned the *Daily News*, or it will "cease to be a free press."[539]

So pressing was the issue that literary, publishing and journalism organizations called emergency conferences to draft resolutions against Walker's order.[540] The Authors' League declared that censorship by a sole appointed official was "intolerable in the American scene."[541] The Montgomery Bucks Pennsylvania Newspaper Association pronounced, "Be it resolved, that . . . the Postmaster General . . . has arrogated to himself a potential control over the printed word in the United States as absolute as that exercised by any dictator in Europe."[542] Its members resolved "to take [any and all] such action as it deems right and proper to render abortive the action by the Postmaster General in his effort to destroy freedom of the press. . . ."[543]

A. The First Appeal

In the first week of January 1944, as the press roared with condemnations, *Esquire*'s lawyers filed papers in the U.S. District Court of the District of Columbia seeking to have Walker's order invalidated on the grounds that the decision was arbitrary and capricious, clearly erroneous in light of the evidence introduced at trial and the hearing board's conclusions.[544] Shortly afterwards, Alfred Smart sent a letter to ACLU staff counsel Clifford Forster acknowledging the organization's offer of assistance in an appeal.[545] Harding wrote personally to Forster expressing his hope that the organization would submit an amicus curiae brief as "I anticipate many organizations and publishers are going to do this and it should have its influence with the Court."[546] Two weeks later, *Esquire*'s lawyers filed a supplemental complaint alleging that the order was not only arbitrary and capricious but also unconstitutional in that it

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[538] *Ruling Against Esquire Hit By Editor and Publisher in Commenting Editorially*, *supra* note 508, at 3.

[539] *Esquire Barred From the Mails*, DAILY NEWS, Jan. 1, 1944, at 9.

[540] *See, e.g.*, Brief of the Pennsylvania Newspaper Publishers Association as Amicus Curiae, Esquire, Inc. v. Walker, 55 F. Supp. 1015 (1944) (No. 22822) [hereinafter Pennsylvania Newspaper Brief].

[541] Brief, Authors' Guild, Esquire, Inc. v. Walker, 55 F. Supp. 1015 (1944).

[542] Pennsylvania Newspaper Brief, *supra* note 540, app. at 13.

[543] *Id.*

[544] Plaintiff's Brief, Esquire, Inc. v. Walker, 55 F. Supp. 1015 (1944) (No. 22822).

[545] Letter From Alfred Smart to Clifford Forster (Jan. 19, 1944), *in* 2548 AMERICAN CIVIL LIBERTIES UNION PAPERS 87, Princeton University (microfilm, University of Washington).

[546] Letter from John Harding to Clifford Forster (Jan. 29, 1944), *in* 2548 AMERICAN CIVIL LIBERTIES UNION PAPERS 88, Princeton University (microfilm, University of Washington).

amounts to an "unlawful interference with, and abridgement and denial of, the freedom of the press."[547] According to the magazine *PM*, this shift in tactics was a response to Walker's repeated insistence that because the second-class mail was an "extraordinary privilege," *Esquire* had not been deprived of its First Amendment rights.[548]

Since the 1930s, major newspaper and magazine publishers and their highly active trade association the American Newspaper Publishers Association had intervened in important freedom of the press cases, particularly at the appellate level.[549] The free press principles involved in the *Esquire* litigation, not to mention its potentially enormous financial consequences for the press, led publishers, journalism interest groups, and trade organizations to file amicus briefs with the district court. As most mainstream newspapers were not concerned with having their privileges revoked for obscenity, the publishers' briefs focused on the implications of Walker's order for political censorship of the press. Noted the American Newspaper Publishers Association, "[s]ince the turn of the century, no President ha[d] named as Postmaster General any person who did not actively participate in the campaign for the successful nominee."[550]

Esquire's brief and the ACLU's amicus brief made arguments based on statutory interpretation, administrative law, and constitutional law.[551] They claimed that Walker's interpretation of the fourth condition was contrary to the history and purpose of the Classification Act, which had been intended to distinguish periodicals from advertisements, rather than to authorize inquiries into the quality of publications.[552] Walker's "novel and unwarranted" construction of the fourth condition as a morals test or badge of good character had never been adopted or suggested by any previous Postmaster General.[553]

The ACLU and *Esquire* also alleged that Walker's reading of the statute violated the First Amendment by giving the Postmaster General "despotic powers of control over access to the mails."[554] Since questions of fundamental rights were at issue, they argued, Walker's conclusion was not entitled to the deferential review usually attached to administrative findings.[555] The rationale for judicial deference to administrators

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[547] Charles A. Michie, *That Varga Maiden Becomes A Freedom-of-the-Press Issue*, PM, Feb. 18 1944.

[548] *See id.*

[549] For a detailed look at the history and actions of the American Newspaper Publishers Association, see EDWIN EMERY, HISTORY OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION (1950).

[550] Brief of the American Newspaper Publishers' Association As Amicus Curiae at 3–4, Esquire, Inc. v. Walker, 55 F. Supp. 1015 (1944) (No. 22822).

[551] *See infra* notes 552–71 and accompanying text.

[552] *See* Brief on Behalf of the American Civil Liberties Union as Amicus Curiae, Esquire, Inc. v. Walker, 55 F. Supp. 1015 (1944) (No. 22822) [hereinafter ACLU Brief].

[553] *Id.* at 2.

[554] *Id.*

[555] ACLU Brief, *supra* note 552, at 36.

was administrators' presumed expertise in their field; the Postmaster General did not have special expertise in "evaluating the literary or other merits of publications."[556]

The ACLU urged the court to reject the privilege doctrine on which Walker based his order.[557] Though it admitted that the order could be reversed on the grounds that the Postmaster General exercised authority not conferred by the statute, it urged the court to "take this opportunity to reassess broadly the validity of the 'privilege doctrine.'"[558] The doctrine was a "constitutional anachronism," in clear violation of the new judicial outlook on First Amendment rights.[559] The ACLU reminded the court of the Supreme Court's "recent vigilance to protect individual speech," the "active judicial enforcement" of civil liberties in the past twenty-five years "to protect the public's interest in the spread, discussion, and evaluation of differing points of view."[560] Channeling Holmes and Brandeis, they asserted that the power of the Post Office Department must be limited by modern First Amendment doctrines, including the clear and present danger test.[561] The proper view of the relationship of the postal power and the First Amendment was stated in the dissents of Holmes and Brandeis in the *Milwaukee Leader* case.[562]

B. The Traditions of Our People

T. Whitfield Davidson, a "hard-headed and dead-pan" 69-year-old judge, heard *Esquire*'s appeal.[563] Davidson usually sat on the U.S. District Court in Texas but had been temporarily assigned to the District of Columbia bench.[564] In his temperament and moral outlook, he was the spitting image of Frank Walker.[565]

Davidson was, in the words of writer Hugh Merrill, an "American classic."[566] Born in a log cabin in East Texas Hills in 1876, he studied history, law, and the Bible by firelight while he made a living splitting rails.[567] With almost no formal education, he was admitted to the bar in 1903, was later elected to the state senate, and served as lieutenant governor of Texas.[568] In 1936, he was appointed to the federal bench by President Roosevelt.[569]

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[556] *Id.*

[557] *See id.* at 38 ("[Walker's] order should be held invalid and the revocation of plaintiff's second class mail entry enjoined.").

[558] *Id.* at 4.

[559] *See id.* at 3–12.

[560] *Id.* at 4–5, 7.

[561] *See id.* at 12.

[562] *Id.* at 19.

[563] *That Wasn't No Lady*, *supra* note 425, at 84, 86.

[564] MERRILL, *supra* note 373, at 115.

[565] *See infra* notes 566–617 and accompanying text.

[566] MERRILL, *supra* note 373, at 115.

[567] *T. Whitfield Davidson Dead, Senior Federal Judge Was 97*, N.Y. TIMES, Jan. 27, 1974, at 49.

[568] *Id.*

[569] *Id.*

During the oral arguments, Bruce Bromley was again in fine form. Bromley brought into the courtroom stacks of pulp magazines such as *I Did it for Love*, and *I Married a Fiend* in an attempt to convince the judge that *Esquire* was far more benign than other publications that held the second-class privilege.[570] "[This is] the type of book[ ] we try to keep from our children, yet it goes through the mail," said Bromley, waving the magazines in the air.[571] Davidson thumbed through the issues without comment.[572] Bromley described Walker's actions as "the most autocratic control that any public official ever assumed for himself."[573] Benedict Deinard, Justice Department Counsel, emphasized that the magazine's real purpose was the circulation of "nude women and salacious cartoons" and that the literary material was just a filler.[574] "Waving a January issue with the familiar Varga girl . . . [he] shouted, 'Is that what Congress [issued] a bounty for?'"[575]

Three weeks later, Davidson upheld Walker's order.[576] Davidson concluded that there was no justification for interference with Walker's decision.[577] Citing *Milwaukee Leader*, Davidson asserted that "[t]he conclusion of [the] head of an executive department [on] a matter of fact within his jurisdiction [should] not be disturbed. . . unless [it was] clearly wrong."[578] The revocation of *Esquire*'s permit was neither arbitrary nor capricious, since many other magazines had lost their permits for similar reasons.[579] According to the judge's flawed reasoning, an arbitrary or capricious act became less so when it was applied to a large number of parties.

The bulk of the opinion addressed Walker's interpretation of the second-class statute.[580] In a laudable but ultimately pathetic effort at historical recreation, Davidson attempted to determine the purpose of the Classification Act by "envision[ing] as far as possible the things [the drafters of the law] saw and the emotions that [they] felt."[581] What was contemplated by Congress when it issued the qualification was that "[t]he publication must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry."[582] Congress, he concluded, "had a purpose."[583]

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[570] *Esquire Fights for Mail Rights,* DES MOINES REGISTER, July 11, 1944, at 3.
[571] *Id.*
[572] *Id.*
[573] *Id.*
[574] *That Wasn't No Lady*, *supra* note 425, at 86.
[575] *Id.*
[576] *See generally* Esquire, Inc. v. Walker, 55 F. Supp. 1015 (1944).
[577] *See id.* at 1022 (holding there was "no logical ground to enjoin [Walker's] action").
[578] *Id.* at 1016–17.
[579] *Id.* at 1021–22.
[580] Justice Davidson begins by examining the statutory language and then proceeds to attempt to determine Congress's frame of mind when passing the Act. *See id.* at 1017–19.
[581] *Id.* at 1018.
[582] *Id.*
[583] *Id.*

In 1879, when the statute was drafted, "the nation was in the midst of what may be known as the Victorian era . . . under the then living influences of men like Lincoln, Lee and William McGuffey."[584] William McGuffey, the chair of moral philosophy in the University of Virginia, was famous for his McGuffey's Readers, a series of textbooks, used in elementary schools throughout the country, that attempted to impart moral lessons along with basic reading skills.[585] The McGuffey's Readers were renowned for their platitudes—"[one] must be honest and just . . . revere and respect his parents"—and their homespun parables, such as the famous myth of George Washington telling the truth after cutting down a cherry tree.[586]

It was men "brought up under [such] ethics and standards" who wrote the Classification Act, according to Davidson[587]:

> May the Postmaster General, therefore, have not been warranted in reaching his conclusions that the literature referred to was literature of desirable type of an educational value? The Postmaster General had to make his conclusions. He had to test the contents of the magazine by some standard.[588]
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> . . . .
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> [W]e conclude that the Postmaster General was warranted in taking the view that Congress meant for second class mail to be a contribution toward public education and therefore, that the literature given such low rate should possess merit and be of educational value. The defendant Walker has some basis for his findings in the nation's background and the traditions of our people.[589]

Davidson brushed off the suggestion that *Esquire*'s First Amendment rights had been violated; the magazine was still able to circulate, albeit at higher rates, he noted.[590] The judge rejected the characterization of Walker's order as "censorship."[591] In deeming *Esquire* "not of a public character," Walker had not censored it, but rather "group[ed]" and "classif[ied]" it, Davidson wrote.[592] "There is a very decided

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[584] *Id.*

[585] *See id.* at 1018–19. For a history of the McGuffey Readers, see HENRY H. VAIL, A HISTORY OF THE MCGUFFEY READERS (1911).

[586] *See Esquire*, 55 F. Supp. at 1019.

[587] *Id.*

[588] *Id.* at 1019.

[589] *Id.* at 1020.

[590] *See id.* at 1020 (noting that *Esquire* had "not been stripped of any vested right" and was free to apply for reinstatement after complying with the Classification Act).

[591] *See id.* at 1021.

[592] *Id.*

difference between grouping and classifying and that of censoring. Censoring deals more with the specific article, the deleting of objectionable portions. Classifying means grouping."[593]

The rambling, confused opinion collapsed into a terse conclusion:

> Having thus in good faith performed the duty of his office as he saw it, we find no logical ground to enjoin his action, or stated otherwise, no valid, legal basis can be had for the substitution of the court's views for those of the executive officer. His findings like those of the Master or the Jury must be upheld by the court.[594]

"Tyranny and Esquire" thundered *Colliers'* magazine.[595] The decision "savors . . . of dictatorial government, such as Hitler exemplified in suppressing in Germany all publications that presented information not in accord with the Nazi philosophy," wrote the *Hartford Courant*.[596] If the *Esquire* case were to set a precedent, "politicians will go on from there to extend political control over the press . . . until presently there will be no paper forums in which any but the views of the party in power can get a hearing."[597] "Out the window with freedom of the press will go most [of the] other American liberties."[598] Davidson's suggestion that the standards for the second-class mailing privilege should be based on a Victorian-era children's primer sparked both mockery and horror.[599] If Davidson's test were to be taken literally, wrote the *New York Times*, "the consequences would be picturesque and perhaps appalling."[600]

Esquire appealed to the Circuit Court of Appeals for the District of Columbia.[601] The ACLU and American Newspaper Publishers Association filed amicus briefs, as did the Authors' League of America.[602] So intense was the interest in the case that two major publishing companies filed briefs on behalf of *Esquire*—the Curtis Publishing Company and the Reader's Digest Association, publisher of one of the

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[593] *Id.*

[594] *Id.* at 1022.

[595] *See Tyranny and Esquire*, COLLIERS', Sept. 16, 1944, at 82.

[596] *The Esquire Decision*, 45 READER'S DIGEST 64, 64 (1944) (citing an editorial in the *Hartford Courant*).

[597] *Tyranny and Esquire*, *supra* note 595, at 82.

[598] *Id.*

[599] *See generally The Case of Esquire*, N.Y. TIMES, July 20, 1944, at 18.

[600] *Id.*

[601] *See Esquire, Inc. v. Walker*, 151 F.2d 49 (1945).

[602] *Id.* at 53 n.6 (listing Briefs Amicus Curiae filed by the Reader's Digest Association, Inc., The Curtis Publishing Company, The American Newspaper Publishers Association, the ACLU, and the Author's League of America).

largest circulation magazines in the country.[603] The appeals court heard the case in the spring of 1945.[604]

C. The "Preferred Position"

The three years between the start of Walker's "decency campaign" and the hearing before the Circuit Court of Appeals were extraordinary ones in the history of the First Amendment. Scholars have described this period, between 1942–1945, as the era of the "preferred position" doctrine, in which an influential majority on the Supreme Court agreed that speech rights merited heightened scrutiny because of their intimate connection to participatory democracy.[605] The Court heard an unprecedented number of speech cases, often deciding in favor of speech.[606] Clear and present danger became the "all purpose" First Amendment test, and it was applied to a range of speech restrictions beyond the subversive advocacy context for which it was originally intended.[607] Clear and present danger was used to invalidate prohibitions on labor picketing, contempt by publication, and restrictions on religious expression, including compulsory flag salutes.[608] A majority of the Court came to regard clear and present danger as the "touchstone of First Amendment policy."[609]

The elevation of speech to a near-sacred position was in many ways the logical progression of the doctrinal developments of the previous half-decade. It was also the consequence of a personnel change on the Court. Every seat on the Court changed occupants between 1937 and 1945.[610] Among those to join the Court were a group of younger justices who formed a liberal bloc—Hugo Black, William Douglas, Frank Murphy, and Wiley Rutledge.[611] This new generation regarded Holmes and Brandeis (who had resigned in 1935 and 1939, respectively) "with veneration," and sought to make their positions on the First Amendment law.[612] Harlan Stone, a staunch protector of civil liberties who had been on the Court since the early 1930s, was appointed Chief Justice in 1941.[613]

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[603] Judge Thurman Arnold, who would write the Circuit Court's opinion in the *Esquire* case, observed that the issue was causing "genuine anxiety in our most respectable publishing circles." *Id.*

[604] *Esquire,* 151 F.2d at 49.

[605] *See* David P. Currie, *The Constitution in the Supreme Court: The Preferred Position Debate, 1941–1946*, 37 CATH. U. L. REV. 39 (1987).

[606] *See, e.g.*, cases cited *infra* note 614; *see also* Currie, *supra* note 605 (discussing additional influential First Amendment cases heard by the Supreme Court during the "preferred position" era).

[607] *See* KALVEN, *supra* note 207, at 180.

[608] *See id.*

[609] *Id.* at 179.

[610] *Id.*

[611] *Id.*

[612] *Id.*

[613] *See id.*

The most important First Amendment cases heard by the Court involved challenges by Jehovah's Witnesses against the efforts of municipalities to limit the group's proselytizing activities. Decisions in the "Jehovah's Witness cases" broadened the range of First Amendment protected expression to include such activities as door-to-door leafleting, handing out religious pamphlets on the street, and playing phonograph records with religious messages.[614] In *Lovell v. Griffin*,[615] a unanimous Court declared a licensing law that required a permit from the city in order to distribute religious pamphlets to be an infringement on "liberty of circulation,"[616] which was the "very life blood of a free press."[617] In the Jehovah's Witness cases, the Court also extended the rationales for the protection of free speech beyond society's interest in "public discussion."[618] The First Amendment protects not only the public's interest in dialogue for the purpose of self-governance, but the liberty of the individual to foster and express his or her own personal beliefs—"freedom of the individual to be vocal or silent according to his conscience or personal inclination," particularly in matters of religious faith.[619] Wrote Justice Roberts for a unanimous Court in *Cantwell v. Connecticut*,[620] supporting the right of Jehovah's Witnesses to exercise nonviolent criticism of the Catholic Church, "the essential characteristic" of freedom of speech and freedom of religion was that "under their shield many types of life, character, opinion, and belief can develop unmolested and unobstructed."[621]

Members of the Court frequently invoked the specter of totalitarianism to justify limiting the police power to protect the First Amendment rights of the Jehovah's Witnesses.[622] Freedom of conscience, freedom of thought, and freedom to communicate to others were described as weapons against tyrannical government.[623] Forced speech and thought were the hallmarks of dictatorship, wrote Justice Robert Jackson in his majority opinion in *West Virginia v. Barnette*,[624] striking down a law, aimed at the Jehovah's Witnesses, that compelled students to salute the flag on threat of expulsion from school.[625] "If there is any fixed star in our constitutional constellation, it is that

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[614] West Virginia St. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940); Cantwell v. Connecticut, 310 U.S. 296 (1940); Lovell v. Griffin, 303 U.S. 444 (1938).

[615] 303 U.S. 444 (1938).

[616] *Id.* at 452.

[617] Jones v. Opelika, 316 U.S. 584, 616 (1942).

[618] *See* cases cited *supra* note 614.

[619] *Barnette*, 319 U.S. at 646 (Frankfurter, J., dissenting).

[620] 310 U.S. 296 (1940).

[621] *Id.* at 310.

[622] *See, e.g.*, cases cited *supra* note 614.

[623] *See infra* notes 624–45 and accompanying text.

[624] 319 U.S. 624 (1943).

[625] *Id.* at 642.

no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[626] "Compulsory unification of opinion achieves only the unanimity of the graveyard."[627]

The "preferred position" doctrine was not absolutism. In *Chaplinsky v. New Hampshire*,[628] a unanimous Court made clear that First Amendment rights applied only to speech within protected categories.[629] *Chaplinsky* upheld the conviction of a Jehovah's Witness arrested under a breach of peace law for uttering "fighting words"—speech with the likelihood of provoking imminent violence.[630] *Chaplinsky* designated fighting words, obscenity, and libel outside the scope of the First Amendment, explaining that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[631] Even the most speech-protective justices agreed that the First Amendment did not protect all expression, and that lines could be validly drawn.

In the fifteen years between *Near v. Minnesota* and the *Esquire* case, the Court had done substantial work articulating a doctrinal structure for the First Amendment, as well as philosophical rationales for the constitutional protection of speech. Implicitly and explicitly, the Court had designated political dissent and expressions of religious belief to be at the "core" of the First Amendment's free speech protections because of their essential connection to self-governance, and to the democratic ideal of personal autonomy in matters of conscience and faith.[632] "Low-value" speech such as obscenity and libel did not contribute to public discussion or worthwhile self-expression and could be validly regulated under the police power.[633] The Court had yet to determine the level of scrutiny that applied between the First Amendment's core and its periphery. Freedom of expression protected both collective and individual goals: society's right to receive and discuss information for the purpose of public discussion, and the autonomy of individuals to choose what they would believe and utter—"intellectual individualism"[634] and "freedom of the mind."[635] The *Esquire* case, with its unique set of facts, would give the Court the opportunity to develop and fine-tune these rationales and distinctions.

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626 *Id.*

627 *Id.* at 641.

628 315 U.S. 568 (1942).

629 *See id.* at 571–72 (noting that speech that is "lewd and obscene, . . . profane, . . . libelous, . . . insulting or 'fighting' words" does not enjoy the same heightened protection).

630 *Id.* at 569, 574.

631 *Id.* at 572.

632 *See Barnette*, 319 U.S. at 624.

633 *See Chaplinsky*, 316 U.S. at 571–72.

634 *Barnette*, 319 U.S. at 641.

635 Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 605 (1940).

VII. THE MOST IMPORTANT OPINION ON CENSORSHIP SINCE *ULYSSES*

Bruce Bromley argued the *Esquire* case before the Circuit Court of Appeals in April 1945,[636] just weeks before Nazi Germany's surrender to the Allies.[637] Bromley's audience consisted of Judges Justin Miller, Henry Edgerton, and Thurman Arnold.[638] Arnold wrote the opinion overturning the District Court's decision and restoring the magazine's second-class privileges.[639] The opinion was heralded as a free speech landmark.[640] Short on formal reasoning but long on wit and invective, it reflected the character and temperament of the iconoclastic judge, remembered for his wit, disdain for pomposity, and a personality described as equal parts "Voltaire and the cowboy."[641]

A. Thurman Arnold

Thurman Arnold was one of the legal giants of his time, a "towering figure[ ] [in] twentieth century American law."[642] Arnold achieved success in an impressive array of endeavors; in addition to his position on the federal court, he served as mayor, state legislator, small-town law practitioner, law dean, Yale law professor, and Assistant Attorney General of the United States.[643]

Like Frank Walker and Judge T. Whitfield Davidson, Arnold hailed from humble roots. Arnold grew up in Laramie, Wyoming around the turn of the century.[644] After attending Princeton and obtaining a law degree from Harvard, he established a prosperous law practice in Laramie, then left to become dean of the University of West Virginia Law School.[645] Three years later he accepted an appointment to the law faculty at Yale University.[646] Arnold soon became known as a leader of legal realism, the new movement that aimed to create a pragmatic science of the law.[647] Arnold was appointed Assistant Attorney General in charge of the Antitrust Division of the Department of Justice in 1938,[648] which was credited with single-handedly reviving antitrust as a means of regulating industry.[649] Within three years the Department of Justice had

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[636] *See* Esquire, Inc. v. Walker, 151 F.2d 49 (D.C. Cir. 1945).

[637] *The Potsdam Conference, 1945*, OFF. HIST., https://history.state.gov/milestones/1937-1945/potsdam-conf [http://perma.cc/34UL-G53Z].

[638] *See Esquire,* 151 F.2d at 49.

[639] *See id.* at 49–50.

[640] *See* Spencer Weber Waller, *The Short Unhappy Judgeship of Thurman Arnold*, 3 WYO. L. REV. 233, 250 (2003).

[641] *See id.* at 234 n.1, 249–50.

[642] *Id.* at 233.

[643] *Id.*

[644] *Id.* at 235.

[645] *Id.* at 235, 237.

[646] *Id.* at 237.

[647] *Id.* at 238.

[648] PAULA K. BYERS ET AL., *Thurman Arnold*, *in* 1 ENCYCLOPEDIA OF WORLD BIOGRAPHY 314 (2d ed. 1998).

[649] Waller, *supra* note 640, at 234.

instituted more antitrust prosecutions than it had in the half century since the 1890 passage of the Sherman Act.[650] Arnold's enforcement decisions upset both the industries he attacked and their supporters within the Roosevelt administration, and he was pressured to resign from the Department of Justice in 1943.[651] Later that year, he was appointed associate justice of the U.S. Court of Appeals for the District of Columbia.[652]

Arnold was brilliant, but his personality was not suited for judging. He recalled in his memoirs that his "preference for partisan argument, rather than for impartial decision" made him dissatisfied with his career on the appellate court.[653] He doubted whether a person of his temperament could ever contribute to the bench: "I was impatient with legal precedents that seemed to me to reach an unjust result. I felt restricted by the fact that a judge has no business writing or speaking on controversial subjects."[654] Judging grew intolerable and Arnold left the bench in 1945, weeks after he issued the *Esquire* opinion.[655] Arnold's decision to part with the judiciary "opened the door to his later . . . success as . . . a private practitioner . . . and defender of civil liberties," representing the innocent victims of anticommunist hysteria during the early years of the Cold War.[656]

B. Neither Snow Nor Rain

Arnold's opinion in the *Esquire* case was widely acclaimed as his most impressive judicial opinion.[657] It was called a "masterpiece on government censorship"[658] and a triumph of freedom of the press.[659] The editors of the *Saturday Review of Literature* called Arnold's ruling "the most important American legal opinion on censorship since the *Ulysses* decision in 1933" and reprinted it in its June 16, 1945, issue.[660] The *Arizona Daily Star* described the ruling as one of "major importance" "[i]n a world which is today suffering the terrific pains of the hangover from dictatorial controls in many lands."[661] Arnold was lauded as "a champion of civil liberties," and many important figures in the literary and civil liberties communities, including H.L. Mencken, met with him personally to thank him for his ringing endorsement of free expression.[662]

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650 *See id.* at 241.
651 *See id.*
652 *Id.* at 242.
653 *Id.* at 251.
654 *Id.*
655 *See id.* at 250.
656 *Id.* at 234.
657 *See id.* at 248–49.
658 *Id.* at 248.
659 *Id.* at 250.
660 Jean Preer, *Esquire v. Walker: The Postmaster General and "The Magazine for Men" Part 3*, 23 NAT'L ARCHIVES (1990).
661 *The Esquire Opinion*, ARIZONA DAILY STAR, June 11, 1945, at 14.
662 Waller, *supra* note 640, at 250.

Though passionate and rhetorically appealing, as a work of legal analysis, Arnold's *Esquire* opinion was deeply flawed. It is better characterized as a petulant commentary on the evils of censorship, an editorial column, or a personal hate letter to Frank Walker. Sophisticated, witty, and urbane, Arnold had little tolerance for "prudes," and he had no qualms about using the opinion as a vehicle for his personal views. Drafts of the opinion in Arnold's personal papers reveal that he was even more forthright in early versions of the opinion but was persuaded by his colleagues to tone down his invective.[663] In his memoirs, Arnold recognized that the opinion was "frivolous," and a testament to his difficulties with judging.[664] The *Esquire* opinion, Arnold wrote, showed that "an advocate cannot make a dignified judge."[665]

The gist of the opinion was that the Classification Act did not grant the Postmaster General authority to make determinations about the content of publications seeking second-class status.[666] Arnold offered no discussion of the statute's purpose or history to support this, instead simply declaring, "[it] is inconceivable that Congress intended to delegate such power to an administrative official or that the exercise of such power, if delegated, could be held constitutional."[667] In a footnote, he cited several of the Supreme Court's recent free speech cases as supporting "broad principles" that made that conclusion "inescapable."[668] Referencing Holmes's dissent in *Abrams v. United States*, he noted that the "American way" of obtaining a contribution to the public good was by giving opportunity to the purveyors of different viewpoints to compete in the marketplace of ideas, not "compelling conformity to the taste or ideas of any government official."[669]

Arnold rejected the privilege doctrine,[670] but offered no constitutional rationale for doing so. He described Walker's characterization of second-class mailing rates as "unique privileges" as an "extraordinary contention."[671] Quipped Arnold:

> He appears to think of his duty under the statute, not as administration of nondiscriminatory rates for a public service, but as analogous to the award of the Navy E for industrial contributions to the war. The Navy E is an award for exceptional merit. The second-class mailing rate is conceived by the Post Office to be

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663 *See* notes in *Esquire v. Walker* Folder, Thurman Arnold Papers, University of Wyoming.

664 *See* THURMAN ARNOLD, FAIR FIGHTS AND FOUL: A DISSENTING LAWYER'S LIFE 170 (1965).

665 *Id.* at 160.

666 *See generally* Esquire, Inc. v. Walker, 151 F.2d 49 (D.C. Cir. 1945).

667 *Id.* at 50.

668 *Id.* at 50 n.2.

669 *Id.* at 50–51.

670 *See id.* at 51.

671 *Id.*

> an award for resisting the temptation to publish material which offends persons of refinement.
>
> But mail service is not a special privilege. It is a highway over which all business must travel. The rates charged on this highway must not discriminate between competing businesses of the same kind. If the Interstate Commerce Commission were delegated the power to give lower rates to such manufacturers as in its judgment were contributing to the public good the exercise of that power would be clearly unconstitutional. Such a situation would involve freedom of competitive enterprise. The case before us involves freedom of speech as well.[672]

The remainder of the opinion was devoted to reprinting humorous and embarrassing segments of the hearing transcript to mock the Post Office Department officials and their parade of prudish witnesses.[673] Wrote Arnold:

> [S]ince we hope that this is the last time that a government agency will attempt to compel the acceptance of its literary or moral standards relating to material admittedly not obscene, the voluminous record may serve as a useful reminder of the kind of mental confusion which always accompanies such censorship.[674]

The opinion quoted parts of the exchange between Bruce Bromley and Mrs. Harvey Wiley over the "obscenity" of swimmer Annette Kellerman, the colorful testimony of H.L. Mencken, and the colloquy between Bromley and the Post Office Department counsel:

> Mr. Bromley: I would like to know, Mr. Hassell, if you don't mind telling me now, just what it is in that article you don't like. I can't find it.
>
> Mr. Hassell: I would be glad to read it to counsel.
>
> Mr. Bromley: Thank you.
>
> Mr. Hassell: Third column at the bottom of page 144. 'He noticed how large the uniform made her behind look.'[675]

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[672] *Id.* at 51–52.
[673] *See id.* at 52–55.
[674] *Id.* at 52.
[675] *Id.* at 53.

"It may be that the above encourages the use of unscientific terms," wrote Arnold[676]:

> Or it may be that it is in the public interest to omit all comment on the part of the lady referred to. Yet it is difficult to make such judgments with the feeling of certainty which one should have when the result of one's decision is to cost a publication $500,000 annually.[677]

The limitless power claimed by Walker would be used to "bind modern periodical literature to the standards of a former generation."[678]

The concluding paragraph took the final jab:

> We intend no criticism of counsel for the Post Office. They were faced with an impossible task. They undertook it with sincerity. But their very sincerity makes the record useful as a memorial to commemorate the utter confusion and lack of intelligible standards which can never be escaped when that task is attempted. We believe that the Post Office officials should experience a feeling of relief if they are limited to the more prosaic function of seeing to it that "neither snow nor rain nor heat nor gloom of night stays these couriers from the swift completion of their appointed rounds."[679]

By then, Frank Walker had left the position.[680] He had resigned two months earlier to allow Harry Truman, who assumed the Presidency in April, to appoint his own candidate.[681] Robert Hannegan, chairman of the Democratic National Committee, was sworn into the position on June 30, 1945.[682] A little over a month later, the bombing of Hiroshima and Nagasaki brought an end to the war in the Pacific.[683]

VIII. *HANNEGAN V. ESQUIRE*

The *Esquire* case could have ended right there. Both sides, however, recognized the difficulty of concluding the case with the Circuit Court's decision. Arnold's

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[676] *Id.*

[677] *Id.*

[678] *Id.* at 54.

[679] *Id.* at 55.

[680] *Frank C. Walker (1945)*, MILLER CENTER, https://millercenter.org/president/truman/essays/walker-1945-postmaster-general (last visited Nov. 29, 2018).

[681] *Id.*

[682] *Four Cabinet Members Take Office Today*, BINGHAMTON PRESS, June 30, 1945, at 10.

[683] *Japan Surrenders*, MANHATTAN PROJECT, https://www.osti.gov/opennet/manhattan-project-history/Events/1945/surrender.htm (last visited Nov. 29, 2018) [http://perma.cc/2QNA-QEN4].

vague and muddled opinion left the Post Office Department with an uncertain understanding of its authority to limit second-class mailing privileges,[684] and *Esquire* and its supporters recognized that the privilege doctrine was still the law of the land unless the Supreme Court reversed *Milwaukee Leader*.

In September 1945, the Department of Justice filed a petition for a writ of certiorari, asking the Court to determine the power of Congress and the Post Office Department to limit the use of the second-class privilege.[685] Its brief asserted that Arnold's decision had left the Post Office Department "at sea" and cast doubts on the constitutionality of potential future legislation to limit second-class privileges.[686] In particular, the government sought clarification as to whether it was the Postmaster General's duty to determine whether a publication satisfied the fourth criterion of the Classification Act.[687]

The ACLU filed an amicus brief *supporting* the government's request. It criticized Arnold's opinion as "proceed[ing] on the level of moral instruction rather than constitutional argument," and consequently doing "little to settle the vexing and important question of how far Congress has gone or may constitutionally go in vesting in the Postmaster General the power to allocate differential postal rates to periodicals in light of his judgment as to their literary merits or moral correctness."[688] Though it believed Arnold's ruling should be sustained, the ACLU urged the Court to "take [the] opportunity to clarify the important constitutional questions . . . and to review the positions expressed . . . twenty-four years ago in [*Milwaukee Leader*]."[689] The second-class revocation—"a brutally effective, albeit an indirect, previous restraint on freedom of circulation"—must be reconsidered in light of "more recent pronouncements in other civil liberties cases."[690]

The importance of the constitutional and legal questions, the public's fascination with the proceedings, and the high-profile briefs by prominent interest groups and publishing houses virtually ensured that the Court would take the case. On October 22, 1945, the Court granted certiorari because of the "importance of the problem in the administration of the postal laws."[691] Oral argument was set for the following January.[692]

Given the egregious facts, the composition of the Supreme Court, and the tenor of its recent First Amendment rulings, there was no possible outcome other than a

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[684] *See* David Lawrence, *Need for High Court to Reverse Mail Privilege Decision Cited,* ARIZONA REPUB., June 7, 1945, at 14.

[685] *See* Petition for Writ of Certiorari at 2, Hannegan v. Esquire, Inc., 327 U.S. 146 (1945) (No. 399).

[686] *Id.* at 8.

[687] *See id.* at 2.

[688] Motion for Leave to File Brief as Amicus Curiae and Brief in Support Thereof at 3, Hannegan v. Esquire, Inc., 327 U.S. 146 (1946) (No. 399).

[689] *Id.*

[690] *Id.* at 4–5.

[691] Hannegan v. Esquire, Inc., 327 U.S. 146, 150 (1946).

[692] *See id.* at 146.

victory for *Esquire*. Whether the Court would take up the invitation to overrule *Milwaukee Leader*, and where it would set the boundary between the postal power and the First Amendment, were open questions.

A. A Vigorous and Independent Press

Briefs were filed in the fall of 1945.[693] The same publishing groups and companies that had presented amicus briefs to the Court of Appeals also filed briefs with the Supreme Court.[694] They were joined by a very distinguished party—the Bill of Rights Committee of the American Bar Association, an elite group of lawyers and academics, including Zechariah Chafee.[695] Many members of the Committee were conservative in their political orientation, and the group also had a conservative approach to its involvement in civil liberties litigation.[696] Distinguishing itself from the ACLU and its far-reaching involvement on behalf of a range of issues and clients, the Committee lent its name and expertise sparingly, only when it believed that questions of fundamental constitutional importance were involved, and "convinced that real assistance can be given the courts in arriving at a correct conclusion."[697] The Committee's intervention in the *Esquire* case was a testament not only to the perceived magnitude of the issues but also how uncontroversial they were. Like the ACLU, the Bill of Rights Committee believed that Arnold's decision was correct but sought to place the ruling on a broader basis than Arnold's "colorful and hortatory" opinion.[698] It urged the Court to make Brandeis and Holmes's dissents in *Milwaukee Leader* law—to establish "the right of the people to a free press . . . on broad grounds so that it will never again be threatened by such egregious administrative blunders as that which this record presents."[699] It noted that it "would be ironical, [if] indeed . . . after victory in a great war for human freedom, an administrative officer in the United States were permitted to imperil a free press by such action as he took in this case."[700]

Esquire repeated its earlier arguments—that the Post Office Department's reading of the statute was contrary to its framers' intent, and contrary to the First Amendment.[701] The Classification Act gave the Postmaster General limited powers of classification, not the power to deny second-class rates because the content of a periodical was not in his opinion "*good* information or *good* literature or *good* art."[702] The Postmaster General's asserted power to discriminate between periodicals based on his

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693 *See infra* notes 694–719 and accompanying text.

694 *See* Lawrence, *supra* note 684, at 14.

695 *See* Report of the Special Committee on Bill of Rights, 70 ANNU. REP. A.B.A. 276 (1945).

696 *See id.*

697 *Id.*

698 Motion for Leave to File Brief Amici Curiae and Brief In Support Thereof at 8, Hannegan v. Esquire, Inc., 327 U.S. 146 (1946) (No. 399).

699 *Id.* at 13.

700 *Id.* at 3.

701 *See* Brief for Respondents, Hannegan v. Esquire, Inc., 327 U.S. 146 (1946) (No. 399).

702 *Id.* at 3–4.

"personal likes and dislikes" would reduce the existence of the press "to the whims and fancies of changing holders of a highly political office."[703] "It is difficult to imagine any situation, conceivable in this country, which would be less favorable to the continued development of a vigorous and independent press."[704] The ACLU emphasized the tyrannical nature of Walker's actions; if his construction of the statute were sustained, the Postmaster General would be vested with "despotic . . . control over access to the mails."[705] Walker's order violated not only American tradition but "nearly all the basic rules of civil liberties law that have been laid down by this Court in interpreting the guarantees of the First and Fourteenth Amendments."[706]

B. Oral Argument

Oral argument was held before eight justices on January 11, 1946.[707] Justice Jackson was absent, having taken leave of absence to serve as prosecutor in the Nuremberg trials.[708] We do not have a recording or transcript of the argument, although brief accounts were published in several newspapers.[709] Bromley's argument before the Court in the *Esquire* case was considered the finest of his career. According to Justice Douglas, Bromley—with his easy, relaxed manner of presentation, his knack for "reducing a complicated case to one or two starkly simple issues," and for illuminating those issues with "homely illustrations"—was one of the greatest appellate advocates of the time.[710]

Government attorney Myron Taylor, who had argued the case before the Circuit Court of Appeals, held up a Varga Girl illustration for the Court's inspection.[711] According to news reports, the justices looked at the picture dispassionately, as if it "was just another legal brief."[712] The purpose of *Esquire*, Taylor insisted, was to "build up circulation by a salacious appeal."[713] "If a publication is filthy, vile, caters to salacious appetites; if its predominant quality is cheap and degrading and it makes

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[703] Brief of The American Civil Liberties Union as Amicus Curiae at 24, Hannegan v. Esquire, Inc., 327 U.S. 146 (1946) (No. 399).

[704] *Id.*

[705] *Id.* at 2.

[706] *Id.* at 25.

[707] *See* Hannegan v. Esquire, Inc., 327 U.S. 146 (1945).

[708] *See id.* at 159.

[709] *See, e.g.*, Allen Drury, *Varga Girl's Proportions Argued in Supreme Court,* PITT. PRESS (Pennsylvania), Jan. 12, 1946, at 9.

[710] LAWRENCE S. WRIGHTSMAN, ORAL ARGUMENTS BEFORE THE SUPREME COURT: AN EMPIRICAL APPROACH 19 (2008).

[711] *See* Drury, *supra* note 709, at 10.

[712] *Varga Girl Just Another Legal Brief to Supreme Justices*, CLARION LEDGER (Mississippi), Jan. 12, 1946, at 1

[713] *Varga Girl's Curves Fail To Upset Dignity of Court As Jurists Eye "Leggy" Beauty*, CIN. ENQUIRER (Ohio). Jan. 12, 1946, at 1.

fun of chastity, can it be said that a magazine with that editorial policy meets Congressional requirements for the second class mailing privileges?"[714]

"That purpose was bad," Taylor repeated.[715]

"By what standard?" asked Douglas.[716]

"By the ordinary standards of decent people . . . Cheesecake, leg art and illustrated girl gags aren't literature and aren't art."[717]

Bromley insisted that if the Court upheld Walker's decision, it would be setting up the Postmaster General as a censor.[718] "Congress had no intention of delegating 'to the individual who might enjoy the incumbency of the office of Postmaster General at any particular time, the right to pick and choose according to his personal taste and moral standards which periodicals were for the public good. . . .'"[719] "Walker's directive was an unconstitutional attempt to abridge freedom of the press according to his 'own moral yardstick.'"[720]

C. Hannegan v. Esquire

By all evidence, the decision was simple. Votes were taken right after the oral argument, and the opinion was assigned and written within only three weeks.[721] The unanimous, 8–0 decision was issued on February 4, 1946.[722] As the *Atlanta Constitution* aptly noted, the Court rarely made unanimous rulings, but when it did, "the chances are that all shades of opinion in the nation are in accord with the decision."[723]

The opinion was assigned to Justice William Douglas,[724] one of the members of the Court's liberal bloc.[725] Appointed to the Court by President Roosevelt in 1939,[726] a former Yale law professor and Chairman of the Securities and Exchange Commission,[727] Douglas was just beginning to develop and refine his views on freedom of speech. The Jehovah's Witness cases[728] had been critical in this regard. In several of those cases, Douglas had joined opinions with other members of the Court's liberal

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[714] *Id.*

[715] Drury, *supra* note 709, at 9.

[716] *Id.*

[717] *Id.*

[718] *Varga Girl's Curves Fail To Upset Dignity of Court As Jurists Eye "Leggy" Beauty*, *supra* note 713, at 1.

[719] *Id.*

[720] Drury, *supra* note 709, at 9.

[721] *See* Hannegan v. Esquire, Inc., 327 U.S. 146, 146 (1946).

[722] *Id.* Justice Jackson took no part in the decision.

[723] *Bar Is Lifted on Esquire*, ATLANTA CONST., Feb. 11, 1946, at 8.

[724] *Hannegan*, 327 U.S. at 147.

[725] Robert J. McKeever, *The Fall and Rise of Judicial Activism in the United States: The Case of Justice William O. Douglas*, 11 J. LEGAL. HIST. 437, 437 (1990).

[726] *Id.*

[727] L. A. Powe, Jr., *Evolution to Absolutism: Justice Douglas and the First Amendment*, 74 COLUM. L. REV. 371, 403 (1974).

[728] *See* cases cited *supra* note 614.

bloc stating that freedom of speech and religion were in a "preferred position."[729] The preferred position concept subsequently became the centerpiece of his approach to judicial review of state actions restricting speech.[730] Between 1945 and 1949, according to former law clerk Lucas Powe, Douglas's stance on speech grew increasingly protective—he "required a showing of significant danger to an important governmental interest before he would authorize any interference with expression."[731] The *Esquire* decision was a milestone in this development. *Esquire* signaled "Douglas' growing [enthusiasm] to protect freedom of speech and the press over [nearly any] asserted federal interests to the contrary."[732] According to Powe, *Hannegan v. Esquire* marked the emergence of a "new Douglas" on freedom of speech.[733]

The opinion, which drew heavily on *Esquire*'s brief and Bromley's oral argument, affirmed Arnold's decision.[734] The Court concluded that the Postmaster General had incorrectly interpreted the fourth condition and that the second-class privilege had never been intended as a merit badge for publications.[735] Walker's plan to use the fourth condition as a cleansing tool for the nation's mails had been quashed,[736] and the press averted what could have been a restriction. While vindicating *Esquire*, the holding was at the same time more limited than the magazine or its supporters wanted it to be. The Court did not overrule *Milwaukee Leader* and the privilege doctrine.[737] It did not take up the invitation to define, with specificity, the First Amendment's restrictions on the Post Office Department's authority, or the extent of the Postmaster General's power to revoke or deny second-class mailing privileges outside of the fourth condition of the Classification Act.[738] The holding was technically not based on the First Amendment, but rather on statutory interpretation, although the Court's reading of the statute was influenced by First Amendment principles.[739]

It is in the delineation of those principles that the opinion in *Hannegan v. Esquire* breaks new ground. Douglas's opinion reiterated recurring themes and rationales in the Court's recent free speech decisions: the importance of the freedom to circulate

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[729] Leon D. Epstein, *Justice Douglas and Civil Liberties*, 1951 WIS. L. REV. 125, 127.

[730] *See id.*

[731] Powe, *supra* note 727, at 384.

[732] *Id.* at 385.

[733] *Id.*

[734] *See generally* Hannegan v. Esquire, Inc., 327 U.S. 146 (1946).

[735] *See id.* at 156–58.

[736] *See id.*

[737] For discussion of *Milwaukee Leader* and the privilege doctrine, see discussion *supra* Section II.C. The Court in *Hannegan* focused its analysis on the revocation of second-class mailing rates under the Fourth condition of the Classification Act of 1879, distinguishing the case from the revocation in *Milwaukee Leader*. *See Hannegan*, 327 U.S. at 148.

[738] *See Hannegan*, 327 U.S. at 148 (focusing the analysis on the fourth condition of the Classification Act).

[739] *See* CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS, *supra* note 17, at 301 ("[T]he First Amendment did play a part in the *Esquire* case by shaping the Court's views of what the fourth condition in the statute really required.").

ideas to democratic dialogue and "public discussion"; censorship and paternalistic restrictions on speech as hallmarks of tyranny and totalitarianism; and freedom of thought, conscience, and choice as essential rights of individuals.[740] At the same time, the *Esquire* opinion extended those commitments in novel and forward-looking ways. It is in Douglas's musings, especially in dicta, on the scope and spirit of freedom of speech that the *Esquire* opinion opened up new horizons and made important contributions to the law and theory of free expression.

The opinion began by recounting *Esquire*'s path through the agency hearings and *Esquire*'s subsequent appeals.[741] Douglas characterized *Esquire* as specializing in a "smoking-room type of humor" and noted the inconclusive nature of the Post Office Department hearings as to the magazine's obscenity.[742]

Douglas then turned to Walker's revocation order.[743] Douglas did not mince words: Walker had censored *Esquire* and his deployment of the fourth condition was a pretext to cut off *Esquire* because he thought the magazine was "bad."[744] Such arbitrary exercises of authority were antithetical to democracy and the American tradition:

> An examination of the items makes plain, we think, that the controversy is not whether the magazine publishes "information of a public character" or is devoted to "literature" or to the "arts." It is whether the contents are "good" or "bad." To uphold the order of revocation would, therefore, grant the Postmaster General a power of censorship. Such a power is so abhorrent to our traditions that a purpose to grant it should not be easily inferred.[745]

Douglas devoted the majority of the opinion to an analysis of the history and purpose of the Classification Act.[746] Douglas reiterated that the Postmaster General's authority under the Act was merely to determine whether a publication was a periodical rather than an advertisement; it did not authorize inquiries into the social value of a magazine.[747] The framers of the Classification Act and the Post Office Department officials that later interpreted it "plainly adopted a strictly objective test and left no discretion to the postal authorities to withhold the second-class privilege from a mailable newspaper or periodical because it failed to meet some standard of worth or value or propriety"[748]:

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740 *See infra* notes 741–86 and accompanying text.
741 *See Hannegan*, 327 U.S. at 148–50.
742 *Id.* at 151.
743 *See id.*
744 *See id.*
745 *Id.* at 151.
746 *See id.* at 151–56.
747 *See id.* at 158–59.
748 *Id.* at 152.

> The policy of Congress has been clear. It has been to encourage the distribution of periodicals which disseminated "information of a public character" or which were devoted to "literature, the sciences, arts, or some special industry," because it was thought that those publications as a class contributed to the public good. . . [T]he experience of the post office has shown the impossibility of making a satisfactory test based upon literary or educational values. To attempt to do so would be to set up a censorship of the press.[749]

Any other reading of the statute, Douglas asserted, would violate freedom of speech and the nation's democratic traditions: "The provisions of the Fourth condition would have to be far more explicit for us to assume that Congress made such a radical departure from our traditions and undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country."[750]

Douglas then turned to the constitutional question.[751] "[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," Douglas wrote, referencing Brandeis's dissent in *Milwaukee Leader*.[752] The Postmaster General's power to classify the mail, he implied, was to some degree limited by the First Amendment.[753] Douglas went on to suggest, offhandedly, that it would be unconstitutional for the Postmaster General to deny second-class rates to a publication on the basis of constitutionally protected speech: speech dealing with "economic or political ideas."[754] Holmes and Brandeis had seemingly been vindicated.

But Douglas did not expand on this intriguing assertion. He conceded that there were certain kinds of material that could be legitimately kept out of the second-class mail without running afoul of the First Amendment.[755] Douglas suggested that second-class privileges could be denied to nonmailable material, including obscene material.[756] He declined to address whether the denial of the second-class permit to future issues of publications based on past determinations of nonmailability would constitute a prior restraint, as Holmes and Brandeis had argued. Douglas implied that such restrictions, especially on obscene material, were not constitutionally proscribed.[757]

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[749] *Id.* at 154–55.

[750] *Id.* at 156.

[751] *See id.*

[752] *Id.*

[753] *See id.* (commenting that the Postmaster General does not retain "the power to supervise the tastes of the reading public of the country").

[754] *Id.*

[755] *See id.* at 158.

[756] *See id.* ("The validity of the obscenity laws is recognition that the mails may not be used to satisfy all tastes, no matter how perverted.").

[757] Obscenity fell outside the scope of protected speech. *See* Chaplinsky v. New Hampshire, 315 U.S. at 568, 573–74 (1942).

This statement was a disappointment to those who hoped for a ruling that would stake out more expansive First Amendment terrain.

But then Douglas went on, in dicta, to make some of the most sweeping pronouncements about the scope of freedom of speech that had ever been uttered on the Court:

> Under our system of government there is an accommodation for the widest varieties of tastes and ideas. 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. There doubtless would be a contrariety of views concerning Cervantes' Don Quixote, Shakespeare's Venus and Adonis, or Zola's Nana.[758]

This paragraph is groundbreaking on many levels. Though not explicitly couched in terms of the First Amendment, it strongly implies that constitutional protections of free speech extend beyond the traditional domains of politics and religious expression to art, creative expression, and culture. Douglas suggested that not only news and public information, but literature and entertainment are within the scope of protected speech.[759] This was the first time the Court had ever broached, albeit indirectly, First Amendment protections for "nonpolitical" speech.[760] The First Amendment protected the expression not only of a wide variety of political and religious views, Douglas implied, but also contrarian views on issues of morality, taste, and culture.[761] The government had no more business telling people what entertainment they should enjoy and consume than it did compelling people to adhere to particular political or religious ideologies. Our "system of government" did not permit authorities to set and enforce standards of good taste or cultural refinement, Douglas wrote.[762] That choice was instead for the people.[763]

Douglas continued:

> [A] requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system. The basic values implicit in the requirements of the Fourth condition can be served only by uncensored distribution of literature. 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

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[758] *Hannegan*, 327 U.S. at 157–58.
[759] *See id.*
[760] *See id.*
[761] *See id.*
[762] *Id.* at 157.
[763] *See id.* at 158.

> 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.[764]

Again, Douglas implies, the freedom of choice that characterizes democratic societies goes beyond such weighty matters as the ability to decide whether or not to pledge allegiance to the flag. It includes the right to make choices about cultural preferences, including whether or not to look at a pin-up magazine. Freedom of speech and press protects the circulation of ideas and the public's access to a broad range of ideas. It protects the ability of citizens not only to decide for themselves what they will consume, but to have access to a "multitude of competing offerings," so that they may make the broadest and freest choices.[765] It is the individual's prerogative to pick and choose, not the picking and choosing of censoring authorities, that the Constitution protects. Discrimination in cultural consumption is not the job of officials but the right of the individual citizen, acting in concert with his or her own, non-coerced taste, judgment, and morals.

The passage is an extraordinary endorsement of autonomy in the expression and consumption of ideas as a democratic value, and potentially a First Amendment value. It celebrates respect for alternative cultural preferences and moral viewpoints as part of the "American way of life." America's tradition of tolerance extends beyond tolerance of "social or economic" views, according to Douglas.[766] The official condemnation of material as "trash," and off-limits to public consumption, was contrary to the nation's commitment to value pluralism and freedom of thought and choice.[767] In the passage's most expansive reading, Douglas seems to suggest that morality and taste are not appropriate matters for government regulation. This implication—that censorship of culture on moral grounds is contrary to the American tradition and possibly unconstitutional—contained radical potential.

Douglas's opinion in *Hannegan v. Esquire*, clearly influenced by the wartime context,[768] made an important addition to the Court's free expression jurisprudence. It not only alluded to the possibility of new forms of speech and subject matter as being within the First Amendment, but suggested new interests protected by freedom of expression: not only the right to speak but the freedom to consume both information

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[764] *Id.*

[765] *Id.*

[766] *Id.*

[767] *See id.* ("What seems to one to be trash may have for others fleeting or even enduring values.").

[768] *See* Thomas I. Emerson, *Freedom of Expression in Wartime*, 116 U. PA. L. REV. 975, 975 (1968) (noting that during war "the constitutional guarantee of free and open discussion is put to its most severe test").

and entertainment, and to make choices about that consumption in the broadest possible "marketplace" of ideas.[769] With his praise for the "uncensored distribution of literature,"[770] and his implication that officials could not proscribe nonobscene material, no matter how trashy,[771] Douglas invited the Court to address, and ultimately strike down, other forms of cultural censorship. The *Esquire* opinion pointed toward new aspirations in free speech law that would be realized in the Supreme Court's decisions in the subsequent two decades.[772]

D. "A Blow Against Dictatorship and for Free Speech"

Hannegan v. Esquire technically made no new law. It did not overturn *Milwaukee Leader* and the privilege doctrine. As Zechariah Chafee noted, *Hannegan v. Esquire* left the law exactly as it was after *Milwaukee Leader*.[773] "Of all the free speech cases where Holmes and Brandeis dissented," *Milwaukee Leader* was the only one that the Court had not "overruled or judicially discredited."[774] *Hannegan* said nothing conclusive about the Post Office Department's authority to revoke the second-class privileges of magazines that produced two or three consecutive issues that were clearly nonmailable on the grounds of obscenity.[775] There was nothing in the opinion suggesting that an attempt to withdraw the second-class rate entirely from nonmailable material would meet with any constitutional objections.[776] It did not broach the issue of whether the second-class mail rate was a privilege or a right.[777] The only clear rule to come out of the case was that the Fourth condition of the Classification Act did not allow the Postmaster General to deny second-class rates to mailable periodicals on the grounds of lack of contribution to the social good.[778]

Yet the Court did recognize the important legal status of a permit to mail at second-class rate. And although it declined to elaborate on the extent of the Constitution's limitations on the postal power, it did make clear that the postal power was

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[769] *See supra* notes 758, 764 and accompanying text.

[770] *Hannegan,* 327 U.S. at 158.

[771] *See id.*

[772] *See case*s cited *infra* note 801.

[773] CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS, *supra* note 17, at 304.

[774] *Id.*

[775] *See generally* 327 U.S. 146.

[776] *See generally id.*

[777] *See generally id.*

[778] *Id.* at 158–59. Justice Felix Frankfurter, one of the most conservative members of the Court, who espoused a philosophy of judicial restraint, and who was openly antagonistic toward the "preferred position" doctrine, concurred in a separate opinion. *Id.* at 159–60 (Frankfurter, J., concurring). Frankfurter wrote separately to emphasize that the ruling did not overturn *Milwaukee Leader*. *Id.* at 160. Frankfurter warned the Court that given the important issues at stake—the "huge subsidies" implicated in the second-class privilege—it might well be called on in the future to address the privilege doctrine head-on. *Id.* At some point, the Court could no longer escape the task of having to develop sound principles on which to determine "the basis on which the Government may grant or withhold subsidies through low postal rates." *Id.*

not free from First Amendment restrictions.[779] The most important consequence of *Hannegan v. Esquire* for freedom of expression was not what it held so much as where it pointed. The free speech principles and commitments Douglas delineated set up inevitable future confrontations with different kinds of censorship, and the Court's subsequent rejection of government controls over the content of non-obscene entertainment, art, and culture. There was also tremendous symbolic import to the *Esquire* opinion. When the Court speaks on behalf of a principle—and especially in a strong, unanimous voice—it powerfully validates that principle in the public's mind. *Hannegan v. Esquire* lent the Court's imprimatur to tolerance, antiauthoritarianism, autonomy, and value pluralism as American ideals, seemingly vindicating the principles for which the war had been fought.

The public and the press celebrated the decision. Newspapers reported it on front pages, and many ran triumphant editorials praising Douglas's opinion.[780] Commentators put the *Esquire* decision in the line of foundational modern freedom of the press cases starting with *Near v. Minnesota*. "Freedom of the Press Again Upheld in the Supreme Court" announced one headline.[781] "[The *Esquire* decision] indicates that the Supreme Court . . . still has a pretty sound concept of 'freedom of the press.'"[782] The decision affirmed that when it came to the rights of the press, "the . . . Supreme Court is a reassuring institution."[783]

Several commentators linked the decision to the outcome of the war.[784] *Esquire*'s publisher David Smart told reporters that the decision was "a blow against dictatorship and for free speech."[785] "A vital, traditional principle has been upheld by the Supreme Court," wrote one editorial.[786] "Demagoguery received a neat punch in the nose."[787] "[T]hanks to the U.S. Supreme Court, [America] is still a country where you can still look over Varga girls, Republicans, Socialists—and yes even Democrats, too—and decide for yourself what's fit."[788] The *Los Angeles Times* rejoiced that "the crafty forces of censorship have been decisively defeated on one more front."[789]

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[779] *See id.* at 158–59.

[780] *See, e.g.*, Editorial, *Court Against 'Censorship'*, ITHACA J. (New York), Feb. 8, 1946, at 6; *Protection of Liberties*, ESCABANA DAILY PRESS (Michigan), Feb. 6, 1946, at 4.

[781] *Freedom of the Press in the United States*, SALT LAKE TRIBUNE (Utah), Feb. 11, 1946, at 4.

[782] *Public Is the Real Censor*, EUGENE GUARD (Oregon), Feb. 7, 1946, at 8.

[783] *And That's That*, VIDETTE MESSENGER (Indiana), Feb. 7, 1946, at 4.

[784] *See, e.g.*, *Supreme Court Removes a Censorship*, L.A. TIMES, Feb. 5, 1946, at 16 ("[T]he crafty forces of censorship have been decisively defeated on one more front.").

[785] *2d Class Mail Bar on Esquire Voided by Court*, ST. LOUIS POST-DISPATCH (Missouri), Feb. 4, 1946, at 7.

[786] *Court Against 'Censorship'*, *supra* note 780, at 6.

[787] *Protection of Liberties*, *supra* note 780, at 4.

[788] *This or That*, EAU CLAIRE LEADER (Wisconsin), Feb. 7, 1946, at 10.

[789] *Supreme Court Removes a Censorship*, *supra* note 784, at 16.

E. Aftermath

Despite the limited holding in *Hannegan v. Esquire*, the decision had a direct and immediate impact on Post Office Department practice. *Esquire* was the first and last time the Post Office Department attempted to use the Fourth condition as a "merit badge" for publications.[790] After *Hannegan v. Esquire*, the Post Office Department also cut back on denials of second-class permits even to nonmailable material.[791] In the late 1940s, Roger Baldwin of the ACLU interviewed the Solicitor of the Post Office Department, who declared that second-class permits were no longer revoked when "a publisher put out a single 'non-mailable' issue or widely intermittent, non-mailable issues."[792] By the 1950s, the Post Office Department had virtually stopped the practice of denying second-class permits as an anti-obscenity sanction.[793]

The seeds Douglas planted in *Hannegan v. Esquire*, suggesting a broader scope for constitutionally protected speech, bore fruit within a year of the decision. The notion that the First Amendment protects nonpolitical speech, including popular culture, was mobilized by the Court in cases in the 1940s and 1950s invalidating government restrictions on literature and film.[794] In *Winters v. New York*,[795] a majority struck down, on First Amendment grounds, a New York law criminalizing the publication of material containing descriptions of "bloodshed, lust [and] crime."[796] The law had been applied against the seller of a pulp magazine called *Headquarters Detective*. Rejecting the state's contention that freedom of the press did not apply to entertainment, the opinion by Justice Reed relied on *Hannegan v. Esquire*:

> We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.[797]

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[790] Robertus, *supra* note 114, at 15, 38–39.

[791] *See id.* at 39 ("Since *Esquire*, the revocation power has been seldom used.").

[792] PAUL & SCHWARTZ, *supra* note 84, at 76–77.

[793] *See id.* at 77.

[794] Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (striking down state censorship of film); Winters v. New York, 333 U.S. 507 (1948) (protecting pulp magazines).

[795] 333 U.S. 507 (1948).

[796] *Id.* at 508, 520.

[797] *Id.* at 510.

Since *Winters* was a First Amendment holding (*Esquire* was reversed on statutory grounds),[798] this passage by Justice Reed, rather than Douglas's statements in *Hannegan v. Esquire*, came to stand for the proposition that the First Amendment protects popular culture and entertainment, no less than informational publications, against content-based restrictions, and that proscriptions on nonobscene speech on the basis of purported lack of social value ran afoul of constitutional guarantees of free expression. *Winters* was subsequently mobilized in *Burstyn v. Wilson*,[799] in which a unanimous Court struck down New York's film censorship law on First Amendment grounds.[800] In the next two decades, *Winters* and *Hannegan* were cited by state and federal courts in decisions that rejected content-based restrictions of film, art, and literature.[801] In suggesting new interests and forms of expression shielded by constitutional speech protections, *Hannegan v. Esquire* had set in motion a vision of the First Amendment as a broader charter of freedom.

Regarded as the most important freedom of the press case of its time, the *Esquire* case has been overlooked by legal historians. It has been the purpose of this Article to restore the case to the significant position it deserves. Coterminous with America's involvement in the Second World War, "the *Esquire* Affair" became an opportunity for the nation to collectively express and affirm its commitment to freedom of expression and to anti-censorship ideals. Through the discussion and dialogue that swirled around the case, Americans condemned arbitrary government controls over speech and publishing as antithetical to the "American way of life." The public and the Supreme Court affirmed the freedom to speak, to read, and to "pick and choose"—even in such areas of life as the consumption of popular culture and entertainment—as core principles of democratic societies, important values for which the war had been fought. The *Esquire* saga contributed to the expansion of the First Amendment's protections and to the continued liberalization of popular attitudes toward free expression after the war—to the flourishing, in postwar America, of a modern "free-speech society."[802]

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[798] *Id.* at 509–10. *See also* CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS, *supra* note 17, at 301.

[799] 343 U.S. 495 (1952).

[800] *Id.* at 506.

[801] Smith v. California, 361 U.S. 147, 147 (1959); Gelling v. Texas, 343 U.S. 901, 960 (1952) (Frankfurter, J., concurring); New American Library of World Literature v. Allen, 114 F. Supp. 823, 829 (N.D. Ohio 1953); Gill v. Hearst, 253 P.2d 441, 444 (Cal. 1953); People v. Richmond County News, Inc., 175 N.E. 2d 681, 683 (N.Y. 1961); Molony v. Boy Comics Pub's, 277 A.D. 166, 167 (N.Y. App. Div. 1950).

[802] Donald Downs, *Government Censorship Since 1945*, *in* 5 A HISTORY OF THE BOOK IN AMERICA 136 (2009).