From Spectacle to Speech: The First Amendment and Film Censorship from 1915–1952

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> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> – U.S. CONST. amend. I

Introduction

The First Amendment, often hailed as the great protector of free expression and speech, has not always meant what it means to us today. Though it boldly prohibits Congress from enacting any law "abridging the freedom of speech," the exact meaning of that phrase has changed over time. The modern First Amendment grants "special protection" to "speech on matters of public concern."[1] And though the United States Supreme Court recently referred to the First Amendment as "the essence of self-government,"[2] such a view was not always accepted.[3] In fact, for certain forms of speech, no kind

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1. Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011) (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985)).

2. *Id.* at 1215 (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)).

3. Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 2–3 (2000). *See generally*

of "special protection" applied despite their public, and even political, relevance. From the Civil War through to the middle of the twentieth century, both the state and federal government often regulated speech and expression through censorship.[4] As time passed, the law changed and now "the First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'"[5]

This Note will examine the transformation of the First Amendment in the context of the medium of film. When the Supreme Court first addressed censorship of moving pictures in 1915, the Court unanimously rejected films as mere "spectacle" unworthy of the protections granted to other "mediums of thought."[6] Then in 1952, the Court, again unanimously, overturned its prior ruling and held that "expression by means of motion pictures is included within the free speech and free press guarantee of the First and Fourteenth Amendments."[7] This Note seeks to understand this shift in perception of movies from "spectacle" to "speech."

Although there exists a robust historiography of film censorship in general,[8] there is a dearth of scholarship on why the Supreme Court changed its view on the application of the First Amendment to films. Some scholars have depicted the end of film censorship as "inevitable" and merely a "matter of time," while others have worked to highlight some of the social events or political personalities involved in bringing about the change.[9] Seeking to understand the parallel transformation of both film and the First Amendment, this Note argues that the Court's perspective of film changed as the

LEONARD LEVY, EMERGENCE OF A FREE PRESS (1985); PAUL L. MURPHY, THE MEANING OF FREEDOM OF SPEECH: FIRST AMENDMENT FREEDOMS FROM WILSON TO FDR (1972); DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997).

4. *Id.*

5. *Snyder*, 131 S. Ct. at 1215 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

6. Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 243–44 (1915).

7. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952).

8. LAURA WITTERN-KELLER, FREEDOM OF THE SCREEN: LEGAL CHALLENGES TO STATE FILM CENSORSHIP, 1915–1918, at 3–4 (2008). S*ee also* FRANCIS G. COUVARES, MOVIE CENSORSHIP AND AMERICAN CULTURE (1996); RICHARD S. RANDALL, CENSORSHIP OF THE MOVIES: THE SOCIAL AND POLITICAL CONTROL OF A MASS MEDIUM (1968).

9. Samantha Barbas, *How the Movies Became Speech*, 64 RUTGERS L. REV. 665, 666 (2012). *See also* RANDALL, *supra* note 8, at 25–28; Melville B. Nimmer, *The Constitutionality of Official Censorship of Motion Pictures*, 25 U. CHI. L. REV. 625, 627 (1958).

medium and industry of film changed. From 1915 to 1952, as film evolved and its relationship to society and politics shifted, so too did its relationship with the law. Section I describes the beginnings of film both as a medium and an industry: Soon after its invention, social reformers and government agencies intervened to regulate the public display of film. In a ruling that would go on to haunt the film industry for decades, the Supreme Court held that film was not a form of speech protected under the First Amendment. Section II traces the growth of film: New technology brought the medium of film new attention from audiences, government agencies, and businessmen, and the film industry transformed into a complex, yet effective self-regulating body. Section III examines the Supreme Court's understanding of the First Amendment between the two world wars: Though once limited to specific kinds of communication, the Court eventually extended protection to many different forms of expression. Finally, Section IV highlights the intersection of film and the First Amendment: The Court's view of both protected speech and film as a medium had transformed; that which was once mere spectacle, was now a powerful form of expression and speech.

I. The Birth of Film: Invention and Intervention

Motion pictures emerged as a part of American public entertainment in the late nineteenth century in vaudeville houses.[10] These "visual novelties" soon became "the first form of mass entertainment for an emerging mass public."[11] Beginning in 1902, special theaters made exclusively for the exhibition of films began to be built.[12] Within a decade, over 20,000 theaters were scattered throughout the United States.[13]

This rapid development and expansion of film as a form of entertainment was part of revolutionary changes in American society. During his campaign for presidency in 1912, Woodrow Wilson spoke of "the presence of a new organization of society" that was "nothing short of a new social age, a new era of human relationships, a new stage-setting for the drama of life."[14] This "new era"—now known as the Progressive Era and spanning from the late nineteenth to the

10. Barbas, *supra* note 9, at 672.

11. *Id.* at 672–73.

12. *Id.* (citations omitted).

13. *Id.*

14. WOODROW WILSON, THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE 7 (1918).

early twentieth century—was a period of social reform through political intervention.[15] Rejecting the classical economic ideas of *laissez-faire*, progressive interventionism turned to legislation to actively effect change in the world. Reformers believed that the government should work to protect society and improve American life.[16]

For some progressive reformers, the uncontrolled—and uncontrollable—rise of motion pictures as a form of mass entertainment "sparked a moral panic."[17] Though the content of movies offended reformers, it was the "spectacular" nature of the medium of film that terrified them.[18] More than newspapers, books, or even theater, movies stood out as a powerful form of social influence. Contemporary social scientists decried film as something "that stimulates man's . . . senses merely for the sake of the pleasure and excitement attendant upon the stimulation."[19] Contemporary writers likewise condemned movies as an "encouragement of wickedness" and recommended that "[t]he proper thing for city authorities to do is to suppress them at once."[20] For many of the more moderate reformers, movies were "a powerful new medium capable of influencing masses of people and manipulating thought and behavior."[21] Like alcohol or child labor, the movies needed to be controlled.

A. Early Film and Censorship: Policing Entertainment

In 1907, the City of Chicago issued the nation's first municipal ordinance censoring motion pictures.[22] The ordinance required motion picture exhibitors to obtain a permit prior to showing any film and allowed the chief of police to withhold permits "for the exhibition

15. *See generally* DANIEL T. ROGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE (1998). *See also* MORTON KELLER, REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA, 1900–1933 (1990); ALICE O'CONNOR, POVERTY KNOWLEDGE: SOCIAL SCIENCE, SOCIAL POLICY, AND THE POOR IN TWENTIETH-CENTURY U.S. HISTORY (2001).

16. *See generally* JOHN W. CHAMBERS II, THE TYRANNY OF CHANGE: AMERICA IN THE PROGRESSIVE ERA, 1900-1917 (1980).

17. Barbas, *supra* note 9, at 673.

18. *Id.*

19. *Id.*

20. 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, 761 (1992) (citations omitted).

21. CHAMBERS, *supra* note 16, at 122.

22. Blanchard, *supra* note 20, at 761.

of any obscene or immoral picture or series of pictures."[23] Film distributor Jake Block fought back, and the Supreme Court of Illinois issued the nation's first judicial ruling on film censorship.[24]

In *Block v. Chicago*, the Illinois Supreme Court rejected exhibitors' arguments that Chicago's municipal censorship ordinance violated their "constitutional rights by requiring a permit for moving pictures, while none is required for [other types of] pictures."[25] The court disagreed that "the ordinance is void because it discriminates against the exhibiters of moving pictures, delegates discretionary and judicial powers to the chief of police, takes the property of complainants without due process of law, and is unreasonable and oppressive."[26] Rather, according to the state court, the ordinance did not violate exhibitors' rights because a permit would be denied only if a moving picture was "immoral and obscene."[27] Under the ordinance, a "permit must be issued if the picture or series of pictures is not immoral or obscene."[28] The court pointed out that the purpose of the censorship ordinance was to "secure decency and morality in the moving picture business, and that purpose falls within the police power."[29]

Neither the exhibitors nor the court in *Block* addressed the First Amendment right of free speech. In fact, the First Amendment did not enter the debate over film censorship until 1915.[30] Earlier cases, such as *Block*, focused on the limits of due process and property rights.[31] Specifically, Block argued that requiring permits for motion picture exhibitors effectively robbed exhibitors of their property without due process.[32] However, the court reasoned that regulating motion pictures through a permit system fell within the city's "police powers."[33]

The United States Supreme Court explained in *Lochner v. New York* that the government has "police powers" to issue regulatory

23. Block v. City of Chi., 87 N.E. 1011, 1013 (Ill.1909).
24. *Id.*; *see also* WITTERN-KELLER, *supra* note 8, at 40.
25. *Block*, 87 N.E. at 1014.
26. *Id.* at 1013.
27. *Id.* at 1014.
28. *Id.*
29. *Id.* at 1013.
30. *See* Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 243–44 (1915).
31. *Block*, 87 N.E. at 1013.
32. *Id.*
33. *Id.*

laws so long as those laws are "for the purpose of preserving the public health, safety, or morals."[34] In *Block*, the Illinois Supreme Court placed the city's authority to censor films within the state's police power. Taking a paternalistic view of the public, the court noted that the audiences going to the "five and ten cent theaters" were of "those classes whose age, education, and situation in life especially entitle them to protection against the evil influence of obscene and immoral representations. The welfare of society demands that every effort of municipal authorities to afford such protection shall be sustained." [35]

Like Chicago, other cities and states began to issue their own film censorships laws.[36] As in *Block*, most of these regulations were based on the government's police power to regulate businesses.[37] For example, in 1908, the Mayor of New York City cited safety standard violations in order to revoke the licenses of every movie theater in the city.[38] However, as movies continued to increase in popularity and the film industry began to expand, distributors and exhibitors began to look for ways to avoid regulation. In 1915, lawyers argued the first case on film censorship—grounded on the First Amendment—to reach the United States Supreme Court.[39] The case marked the beginning of a new era in film history as well as a new discussion on the scope of constitutionally protected "speech."

B. Mutual Film: Film as Spectacle, Not Speech

Jake Block's attempt to combat the nation's first film censorship law ended within his home state. However, a group of independent film studios, collectively known as Mutual Film Corporation, soon pushed the issue of movie censorship up to the United States Supreme Court.[40] Unfortunately for distributors across the nation, the Supreme Court rejected Mutual Film's arguments against film censorship. But, the case introduced a new vision of film with its novel argument that moving pictures should be protected as speech under the First Amendment.

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34. Lochner v. New York, 198 U.S. 45, 66 (1905).

35. *Block*, 87 N.E. at 1013.

36. *See* Legislation, *The Legal Aspect of Motion Picture Censorship*, 44 HARV. L. REV. 113 (1930).

37. Blanchard, *supra* note 20, at 762.

38. *Id.*

39. *See* Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230 (1915).

40. WITTERN-KELLER, *supra* note 8, at 40.

In 1912, with the backing of New York financiers and investment bankers, Harry Aitken and John Freuler started the Mutual Film Corporation. The company produced short films, feature films, and newsreels, and quickly became one of the most prominent and profitable film distributors in the nation.[41] However, in addition to its role as a distributor, Mutual Film also had contracts and agreements with studios and exhibitors.[42] Even Charlie Chaplin and D. W. Griffith were affiliated with Mutual Film during its early years. By 1915, Mutual Film Corporation's net worth totaled $10 million.[43]

A large part of Mutual Film's marketing strategy was the "Mutual Program," which involved releasing a series of short films to all of Mutual Film's affiliated exhibitors at the same time. In 1915, Mutual Film worked with seven to eight thousand theaters across the United States and the Mutual Program sought to release new films on the same day, in as many of those locations as possible.[44] Censorship posed a real threat to the Mutual Program because of the delays brought about by censorship review. Although Mutual Film was not necessarily worried that their films would fail local censorship tests, the distributor was worried that every one of their films would need to be reviewed.[45] Moreover, in addition to time, film censorship costs distributors money. For example, Ohio's board charged a one-dollar censorship fee for every reel of film not exceeding 1,000 feet.[46] Any copy of a film was likewise subject to the fee. For Mutual Film, one reel of film was generally worth about one hundred dollars; Ohio's censorship laws added a one percent surcharge on every reel Mutual Film sought to bring into the state.

In addition to lost time and money, censorship meant a disruption of Mutual Film's entire national distribution network. Inconsistent and unpredictable censorship rules conflicted with "the

41. John Wertheimer, *Mutual Film Reviewed: The Movies, Censorship, and Free Speech in Progressive America*, 37 AM. J. LEGAL HIST. 158, 171 (1993).

42. The early film industry was organized into three distinct parts: production, distribution, and exhibition. Filmmakers and companies that produced films sold those films to distributors. Distributors, such as Mutual Film, bought, repackaged, and either resold or leased those films to exhibitors. Finally, exhibitors, as theater owners, played the films for the general public. *See* Wertheimer, *supra* note 41, at 172. *See also Mutual*, 236 U.S. at 235.

43. *See* Wertheimer, *supra* note 41, at 173 (citing *Film Makers Realigned,* N.Y. TIMES, Aug. 7, 1915, at 7:2).

44. *See* WITTERN-KELLER, *supra* note 8, at 40–41. *See also* Wertheimer, *supra* note 41, at 173.

45. Wertheimer, *supra* note 41, at 173.

46. *Id.*

custom of the motion picture business that a subject [film] shall be released or published in all theaters in the United States on the same day."[47] As Mutual Film's President Harry Aitken noted, "what pleases one censor displeases another, and the manufacturer cannot possibly meet the varying requirements of them all."[48] In 1915, filmmaker D. W. Griffith produced the highly controversial feature film, "The Birth of a Nation." Depicting the Ku Klux Klan's "heroism" during the Civil War and Reconstruction, the film was quickly banned in a number of cities for its overtly racist depiction of African-American men. However, despite being denied licensing in numerous locations, the film broke box office records across the nation.[49] Certain cities banned the film for fear of riots, but others allowed the film to be displayed.

In 1914, worried that censorship would soon spread to every state, Mutual Film launched a systematic legal attack against film censorship. Going further than Chicago's Jake Block, Mutual Film used its unique position as a national corporation to challenge film censorship in both state and federal court.[50] In every case, the company argued similar points: (1) only the federal government could regulate the distribution of film reels under interstate commerce powers; (2) any license fees were effectively additional taxes; (3) censorship violated due process by preventing distributors from conducting regular business; (4) the vague and indefinite censorship statues improperly delegated legislative powers to administrative bodies; and (5) censorship in general "restrains the right of plaintiffs to freely write and publish their sentiments, guaranteed by the Constitution."[51] Although Block may have made similar economic arguments in 1908, Mutual Film's appeal to the Constitution was novel and bold.[52]

47. *Id.* at 176 (quoting Transcript of Record at 6–7, Mut. Film Corp. v. Indust. Comm. of Ohio, 236 U.S. 230 (1915) (No. 456)).

48. Wertheimer, *supra* note 41, at 177 (quoting Transcript of Record at 14–15, *Mutual*, 236 U.S. 230 (No. 456) (Affidavit of Harry E. Aitken)).

49. Wertheimer, *supra* note 41, at 172 (citing REEL LIFE, Feb. 20, 1915, at 6; 2 RAMSAYE, A MILLION AND ONE NIGHTS 635–37, 649 (1926)). *See also* Bainbridge v. City of Minneapolis, 154 N.W. 964 (Minn. 1915) (upholding the mayor's revocation of a theater's license in order to prevent the exhibition of "The Birth of a Nation").

50. *See* Mut. Film Corp. v. Indust. Comm'n of Ohio, 236 U.S. 230 (1915); Mut. Film Corp. of Mo. v. Hodges, 236 U.S. 248 (1915); Mut. Film Corp. v. City of Chi., 224 F. 101 (7th Cir. 1915); Mut. Film Corp. v. Breitinger, 95 A. 433 (Pa. 1915).

51. *Mut. Film Corp. v. Breitinger*, 95 A. at 434.

52. *See* WITTERN-KELLER, *supra* note 8, at 41.

Even before motion pictures were invented, municipalities had been censoring theatrical performances. During the nineteenth century, city officials used licensing laws to prevent the exhibition of theatrical shows deemed immoral or inappropriate for the public.[53] Theater owners and proponents tried to challenge such censorship laws by questioning the authority of legislators to make such laws, equating licensing fees to improper taxes, or attacking the underlying political agendas of local censorship boards.[54] However, there is no evidence showing that any litigant had ever made an argument that censorship laws violated the constitutional right of free speech.[55] Mutual Film's decision to argue that the First Amendment should be applied to motion pictures was groundbreaking.[56] Unfortunately for Mutual Film, no court—state or federal—was persuaded.

In 1915, the United States Supreme Court issued a ruling in *Mutual Film v. Industrial Commission of Ohio* that stood as an official blessing on the censorship of movies.[57] Explaining that "there are some things which should not have pictorial representation in public places and to all audiences," and that it is "in the interest of the public morals and welfare to supervise moving picture exhibitions," the Court permitted and promoted prior-restraint censorship of films.[58] And, as in *Block*, the Court acknowledged and permitted the exercise of a state's police power in regulating film exhibitions.[59] However, although the Court affirmed the opinions and rulings of the many courts below it, in *Mutual*, the Supreme Court took time to highlight a new issue in film censorship: how the First Amendment might be applied in the case of movies. In sum, the Court stated that the application of the First Amendment to films "is wrong or strained"[60] because moving pictures:

> [M]ay be mediums of thought, but so are many things. So is the theater, the circus, and all other shows and spectacles . . . .

53. *See* Wertheimer, *supra* note 41, at 164.
54. *Id.* at 166.
55. *Id.*
56. *See* WITTERN-KELLER, *supra* note 8, at 40–42.
57. *Id.* at 44.
58. *See* Mut. Film Corp. v. Indust. Comm'n of Ohio, 236 U.S. 230, 242 (1915).
59. *Id.* at 244.
60. *Id.* at 243.

> . . . and such and other spectacles are said by counsel to be publications of ideas . . . .
> . . . .
> . . . It cannot be put out of view that the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded nor intended to be regarded . . . as part of the press of the country, or as organs of public opinion.[61]

In *Mutual*, the Court described moving pictures as "spectacle," grouped film with the "circus," and dismissed it as a form of speech because it was also a business. This view of movies as "spectacle," rather than speech, carried heavy implications. Though censorship and government monitoring of speech and expression were hardly new phenomena in the United States, the common law had historically distinguished between post-publication punishments and prior restraints on publication.[62] Many books, paintings, photographic stills, and even theatrical performances were subject to censorship, but usually only after an initial publication.[63] However, in the case of film, reformers and the courts sought to review and censor content before any kind of public exhibition.[64] Though books, plays, and even live performances were subject to censorship only after public display, in the case of moving pictures—deemed not a form of speech—"prior-restraints" censorship was not a cause for concern.

Prior to the Court's ruling in *Mutual*, general concern about moving pictures had led the film industry in 1909 to create the National Board of Censorship, but the motion picture industry's half-hearted attempts to enforce national standards of censorship and review repeatedly failed to gain a sense of legitimacy in the eyes of the public. In part, this was because the standards of morality varied across America. As Governor Arthur Capper of Emporia Kansas explained, "a picture that is so common-place in New York as to cause no comment, nor to be questioned by the national board of censors, may cause indignation in Kansas, where we live in a different

61. *Id.* at 242–44.
62. Barbas, *supra* note 9, at 680.
63. WITTERN-KELLER, *supra* note 8, at 3.
64. *Id.*

environment."[65] Equating moving pictures to live stage performances or vaudeville shows (over which local communities had censorship powers), *Mutual* acted as an official blessing on the local censorship of moving pictures.[66] States were now free to accept or reject films based on their own local customs and preferences.

II. Growth of the Film Industry Amid International and Domestic Changes

Though it was the first case on film censorship to reach the Supreme Court, *Mutual* was just one of a series of cases through which the Court examined the First Amendment during the early twentieth century. When film censorship emerged as a legal issue, the United States was already in the midst of a struggle to define constitutionally protected "speech." Individuals and organizations, as well as the judiciary, questioned what the First Amendment should mean. At the same time, international and domestic political shifts such as World War I and the Red Scare influenced policy makers, the general public, and legal authorities alike.

A. Changes in the Film Industry

World War I in particular pushed the movie industry in new directions. In 1917, President Woodrow Wilson created the Committee on Public Information ("CPI") to further American war aims both domestically and internationally.[67] Within the CPI, the Division of Films used motion pictures to disseminate propaganda about the war effort across the nation.[68] At the same time, the CPI held official wartime censorship powers and could censor or ban any film deemed anti-American.[69] The CPI acted as both a distributor and censor by prescreening films, and unlike the National Board of Review, local censorship boards trusted the CPI and did not re-review politically relevant films that had been reviewed by the CPI.[70] Under the discretion of a single legitimate reviewing organization, government-censored films were uniformly displayed throughout the

65. GERALD R. BUTTERS, JR., BANNED IN KANSAS: MOTION PICTURE CENSORSHIP, 1915–1966, at 46 (2007) (citing Capper to Juliet King, Aug. 4, 1916, Box 8, File 176, Capper Papers, KSHS).

66. *Id.*

67. *Id.* at 124.

68. *Id.*

69. *Id.*

70. *Id.*

nation.[71] Filmmakers and Hollywood producers, many of whom were immigrants seeking both respectability and profit, eagerly worked with the government to create appropriate films.[72]

By the end of World War I, motion pictures had evolved. No longer seen as cheap entertainment for the uneducated, immigrant and working classes, the cinema had become "one of the most popular and influential forms of recreation in the United States."[73] More than any other form of popular recreation, motion pictures helped reflect and mediate the societal and cultural shifts that Americans struggled with following the end of World War I.[74] Depicting topics such as veterans' struggles,[75] race relations,[76] and changes in gender roles,[77] movies were a part of the ongoing discussion on gender, race, labor, and class.

The increasing popularity and undisputable significance of films, however, did not stop outspoken reformers from attempting to curb the film industry's growth. To the contrary, the medium's increasing importance spurred reformers to push further for regulation. The early twenties saw both a dramatic rise in popularity of films and a series of scandals within the film industry. One of the most remarkable scandals that would eventually push Hollywood to form a self-regulatory body was the "Fatty" Arbuckle scandal in 1921. Arbuckle, a popular comedian, had been accused of raping and murdering a young woman after forcing her to imbibe illegal alcohol at a party during Prohibition.[78] The prosecution alleged that Arbuckle's massive weight crushed the young woman as she tried to resist him. Though Arbuckle was eventually found not guilty, his career was forever ruined and Hollywood was cast as a cesspool of

71. As the head of the CPI, journalist George Creel created the Division of Films. Because Creel believed the government could use the movies to effectively disseminate war propaganda, he reached out to Hollywood filmmakers to produce films specifically promoting the war. The CPI, however, focused exclusively on politically sensitive material, so local censorship boards were left to filter through films for other kinds of potentially improper content. *See id.* at 131.

72. *Id.* at 134.

73. *Id.* at 146.

74. *Id.* at 142, 146.

75. *E.g.*, THE LOST BATTALION (MacManus Corp. 1919)

76. *E.g.*, THE HOMESTEADER (Micheaux Book and Film Co. 1919); BROKEN BLOSSOMS (D. W. Griffith Productions 1919).

77. *E.g.*, MALE AND FEMALE (Paramount Pictures 1919).

78. *See* ROBERT GRANT AND JOSEPH KATZ, THE GREAT TRIALS OF THE TWENTIES: THE WATERSHED DECADE IN AMERICAN COURTROOMS 76–97 (1998).

decadence and immorality.[79] Following the Arbuckle scandal, the film industry mobilized to resuscitate its fallen image.

The industry responded in 1922 by forming the Motion Picture Producers and Distributors of America ("MPPDA"—later renamed the Motion Picture Association of America ("MPAA")) in order to cleanup its image.[80] Formed and dominated by the largest studios and distributors of the early film industry,[81] the studios organized under the MPPDA collectively consented to and arranged for the rise of industry-wide self-censorship in an effort to free themselves from "the constant threat of censorship" from the government.[82]

Under the guidance of the former Postmaster General Will H. Hays, the MPPDA's censorship department came to be known as the Hays Office. Reasoning that it would be easier to preemptively block inappropriate material from being made into motion pictures than to edit and revise a finished product, the Hays Office organized industry-wide efforts of self-regulation.[83] The first attempt at self-regulation was the "Formula," released in 1924. Written to discourage studios from adapting books or plays with "salacious or otherwise harmful" material that would have "a deleterious effect on the industry in general," the Formula flopped.[84] With adherence totally voluntary and no institutionalized penalty, filmmakers mostly ignored the Formula.[85]

In 1926, the Hays Office again tried its hand at industry-wide content regulation by compiling and issuing a list of common materials banned by existing state and foreign censorship boards.[86] Released in 1927 as the "Don'ts and Be Carefuls," the list forbade eleven subjects and warned against twenty-five topics.[87] However, like the Formula that preceded it, the "Don'ts and Be Carefuls" was voluntary and, predictably, both sets of guidelines failed to really affect the kinds of movies being produced and released.[88]

79. *Id.* at 168. *See* CAROL ROBERTSON, THE LITTLE BOOK OF MOVIE LAW 65–68 (2012).

80. Blanchard, *supra* note 20, at 779–80.

81. RANDALL, *supra* note 8, at 199.

82. Blanchard, *supra* note 20, at 781.

83. *Id.* at 780.

84. Richard Maltby, *"To Prevent the Prevalent Type of Book:" Censorship and Adaptation in Hollywood, 1924–1934*, *in* MOVIE CENSORSHIP AND AMERICAN CULTURE 105 (Francis G. Couvares ed., 1996).

85. Blanchard, *supra* note 20, at 780.

86. Barbas, *supra* note 9, at 13; Maltby, *supra* note 84, at 105.

87. Blanchard, *supra* note 20, at 780. *See also* Appendix A.

88. RANDALL, *supra* note 8, at 199.

Then, in 1930, the Hays Office adopted "The Production Code" ("the Code") and in 1934, the Production Code Administration ("PCA") began to enforce the Code.[89] Under the new Code and enforcement powers of the PCA, any member of the MPPDA who released a film without the approval of the PCA would be fined $25,000.[90] Unlike the Formula and "the Don'ts and Be Carefuls," the Code worked. The difference was not necessarily in the rules employed; rather, the difference was in the industry. The advent of sound and the rise of the studio system changed the structure of the film industry such that the Code could be effective. By 1948, the studio system became so powerful and organized that the United States Department of Justice sought to dismantle it for violation of the Sherman Antitrust Act,[91] but for nearly two decades, the studio system organized the film industry enough to enforce a self-regulatory censorship system.

B. Changes in the Technology of Film

When *Mutual* reached the Supreme Court in 1915, the movie industry was made up of three separate parts: manufacturers, distributors, and exhibitors.[92] A manufacturer (the "studios") would create film content. A distributor would then purchase the finished film from the manufacturer and then either resell or, more usually, lease the film to exhibitors, who would play the film for a paying public. As a result, if a film was censored, the distributor, such as Mutual Film, bore the brunt of the lost costs. Shortly after the advent of sound films in 1927 and the huge economic successes of the early sound films, a few studios were able to acquire their own distributors and theater chains.[93] Owning the entire means of production and distribution gave the studios greater control over the content being made and released: They could, if they wished, enforce industry-wide regulations (like the Code) from start to finish. And that is precisely what they did. The technical changes of film as a medium affected not only the viewers' experiences, but also the industry itself.

The introduction of sound to motion pictures made it substantially more difficult and expensive to edit a film after a final cut. Due to the failure of the National Board of Review to gain

89. *Id.* at 200.

90. *Id.*

91. *See* United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

92. Mut. Film Corp. v. Indust. Comm'n of Ohio, 236 U.S. 230, 235 (1915).

93. BUTTERS, *supra* note 65, at 178–79.

national recognition, different states and municipalities had their own censorship boards and standards. In order to release a film to a specific state, that film would need to be reviewed and edited to meet that state board's requirements. With the advent and integration of sound, it became much more difficult to edit a film during distribution in order to meet the varying demands of different local censorship boards.[94] The MPPDA was dominated by the largest studios (MGM, RKO, Fox, Warner Brothers, and Paramount), which primarily sought profits and expansion. Self-censorship (through the PCA and the Code) helped these companies produce marketable films. The film industry may have originally spawned the MPPDA and industry-wide censorship in order to save face before the public, but it now had reason to endorse pre-production censorship in order to maximize profits.

Sound also brought with it other legal ramifications related to censorship. The Court in *Mutual* rejected moving pictures as protectable speech in part because film was nothing more than a series of moving pictures—it was mere spectacle. However, with the advent of sound, it was undeniable that film was literally speech. The potential legal consequence of "the talkies" did not go unnoticed by the American Civil Liberties Union ("ACLU").

During the early 1920s, the ACLU fought to defend and test the limits of American constitutional rights,[95] but like so many others, the ACLU initially rejected moving pictures as a form of protectable speech.[96] Parroting the Supreme Court in *Mutual*, the ACLU categorized moving pictures as "mere pictures, not protected by the First Amendment."[97] However, in 1927, as motion pictures began to incorporate sound, the ACLU changed its stance.[98] Following the addition of sound and the introduction of dialogue, film could no longer be dismissed as "mere pictures." By 1929, the ACLU was "wholly opposed to any censorship whatever of films accompanied by

94. Ruth Vasey, *Foreign Parts: Hollywood's Global Distribution and the Representation of Ethnicity*, *in* MOVIE CENSORSHIP AND AMERICAN CULTURE 216 (Francis G. Couvares ed., 1996).

95. *See ACLU History*, AMERICAN CIVIL LIBERTIES UNION, http://www.aclu.org /aclu-history#1 (last visited Nov. 10, 2013).

96. SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 84 (2d ed. 1999).

97. Barbas, *supra* note 9, at 697.

98. *Id.*

speech"[99] and worked to reformulate film censorship as an issue of free speech.

Film, both as a medium and as an industry, was changing. The addition of sound to moving pictures brought a two-fold change: internal, as the industry restructured itself to work with censors in order to maximize profits; and external, as the public's perspective of film as expression shifted. These changes took place against a larger backdrop of developing First Amendment jurisprudence. As film matured technologically and structurally, and as the public's understanding of and interaction with film grew in tandem, the Supreme Court's idea of "speech" and the reach of the First Amendment was likewise changing and expanding.

III. The Supreme Court and the First Amendment

During the early twentieth century, the United States Supreme Court ruled on a series of cases limiting the reach of the First Amendment. Responding to the unique social circumstances surrounding World War I, the Court sought to balance the right of free speech against the need for national security and domestic peace. But, even prior to the Court's rulings and the start of World War I, the American public struggled to come to terms with and understand the First Amendment's protections. Beyond the judiciary, individuals, organizations, and local governments tested the limits of "protected" speech. For instance, between 1906 and 1916, the Industrial Workers of the World (IWW or "the Wobblies"), a coalition of laborers seeking to establish a new social and economic order, incited over thirty free speech confrontations.[100] These confrontations tested the limits of local interpretations of the First Amendment.[101] When Wobblies began to protest in public spaces, local governments responded by passing ordinances repressing speech and the right to assemble.[102] Some cities struggled though legislation; others chose violent vigilantism.[103]

The free speech struggle would soon develop in courtrooms and through judicial decisions; but prior to and alongside the judicial journey, Americans from different socioeconomic classes struggled to

99. WALKER, *supra* note 96, at 84.

100. KEVIN STARR, ENDANGERED DREAMS: THE GREAT DEPRESSION IN CALIFORNIA 30 (1996).

101. *Id.* at 32–35.

102. *Id.* at 32.

103. *Id.* at 29–35.

understand and live with the First Amendment.[104] The application and limits of the First Amendment were far from clearly defined.

When the United States entered World War I, Congress passed the Espionage Act of 1917 and the Sedition Act of 1918. The series of cases following the enactment of such oppressive legislation pushed the Court to define the limits of "free speech."[105] But as the Supreme Court attempted to define and balance the First Amendment against the "clear and present dangers" of a nation at war, the Justices of the Court refrained from articulating a bright-line rule for when, how, and what the First Amendment protects. As the social environment shifted, so too did the public's, legislature's, and judiciary's understanding of the First Amendment.

Following the enactment of the Espionage and Sedition Acts, the Supreme Court issued several rulings on the constitutional protection of anti-war "speech." In *Schenck v. United States*, the Court reviewed a case concerning an alleged violation of the Espionage Act of 1917. The defendant, Charles Schenck, had created, distributed, and mailed documents to protest the draft.[106] As a defense, Schenck relied on "the First Amendment to the Constitution forbidding Congress to make any law abridging the freedom of speech, or of the press."[107] However, responding to the unique social circumstances and political necessities presented by World War I, the Court rejected Schenck's First Amendment arguments. Writing for a unanimous Court, Justice Oliver Wendell Holmes explained that "in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done."[108] The test, now known as the Clear and Present Danger Test, was "whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[109] Weighing social and political concerns of the time, the Court chose to frame its analysis of the First Amendment around the

104. *Id.*

105. *See* Gitlow v. New York, 268 U.S. 652, 673 (1925); Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1919).

106. *Schenck*, 249 U.S. at 49.

107. *Id.*

108. *Id.* at 52.

109. *Id.*

specific "circumstances" of "a nation at war" in its formulation.[110] In *Frohwerk v. United States* and again in *Debs v. United States*, the Court similarly limited the reach of the First Amendment.[111]

Later that same year, in *Abrams v. United States*, the Court again emphasized the nation's particular needs and concerns during wartime and found that the defendant's publications "obviously intended to provoke and to encourage resistance to the United States in the war" and so were punishable.[112] However, dissenting from the rest of the Court, Justice Holmes and Justice Louis Brandeis presented a different view of "the First Amendment to the Constitution that Congress shall make no law abridging the freedom of speech."[113] In an ideological switch that has since puzzled historians, Justice Holmes wrote that the writings should not be banned if the "pronunciamentos in no way attack the form of government of the United States."[114]

Although initially referring to legislation passed during the height of World War I, by the time *Abrams* reached the Supreme Court, the War had ended and the United States had entered into a period now known as the Red Scare. Fueled by fears of the alleged growth of communism and anarchism in organized labor and immigrant communities, the Red Scare was a time of harsh persecution of any political radicalism. As government agents and organizations arrested, interrogated, and deported suspected radicals (often without any due process), disillusioned scholars began to formulate new arguments about the First Amendment.

The dissent in *Abrams* was a reformulation of the test Holmes set forth in *Schenck*—"the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent."[115] In

110. *Id.*

111. Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919).

112. Abrams v. United States, 250 U.S. 616, 624 (1919).

113. *Id.* at 627.

114. *Id.* at 626 (Holmes, J., dissenting). *See, e.g.*, 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 (1971); Yosal Rogat and James M. O'Fallon, *Mr. Justice Holmes: A Dissenting Opinion—The Speech Cases*, 36 STAN. L. REV. 1349 (1984); Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CALIF. L. REV. 391 (1992).

115. *Abrams*, 250 U.S. at 627 (Holmes, J., dissenting).

Schneck, Holmes and his fellow Justices limited the reach of the First Amendment. However, in *Abrams*, Justice Holmes essentially reversed himself and, along with Justice Brandeis, emphasized "it is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned."[116] Describing the "theory of our Constitution" as "an experiment, as all life is an experiment," Justice Holmes pointed out that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[117]

A half-decade later, Justice Holmes, again joined by Justice Brandeis, reiterated the need to limit the "Clear and Present Danger" test in their dissent to *Gitlow v. New York*.[118] Justices Holmes and Brandeis emphasized "that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views." Going further, the dissent pointed out that "every idea is an incitement." And that "if in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[119]

Benjamin Gitlow ultimately lost his appeal before the Supreme Court and was charged with the crime of criminal anarchy for the writings he had published under the title, "The Left Wing Manifesto." But *Gitlow v. New York* was a turning point for the developing First Amendment. Though the Court rejected the argument that the First Amendment should protect Mr. Gitlow's writings, the Court held that for the purposes of that case, "freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[120] That is, the protections guaranteed by the First Amendment were 'incorporated' by the due process clause of the Fourteenth Amendment and applied uniformly to states across the nation. So although it was not yet clear exactly what protections the First Amendment guaranteed, whatever

116. *Id.* at 628.

117. *Id.* at 630.

118. Gitlow v. New York, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting).

119. *Id.* at 673.

120. *Id.* at 666.

protections it *did* grant were equally applicable across the nation. In the case of films, different states could not grant different levels of protection to the "expression" of moving pictures; state censorship boards would have to treat motion picture speech the same way as their neighboring states. But the question remained: Was film protected under the First Amendment?

A. Expanding the First Amendment through Constitutional Analysis

Film would remain outside the reach of the First Amendment until 1952 when a case—aptly nicknamed "the Miracle case"—would give the Court a chance to overrule *Mutual*. Since 1915, when the Court rejected the argument in *Mutual* that film censorship violated the First Amendment's guarantee of freedom of speech, no other case contesting film censorship had succeeded on a freedom of speech claim. However, the limits of the First Amendment continued to expand and soon set the stage for "the Miracle" and the eventual application of the First Amendment to films. Part of this developing First Amendment framework was the problem of prior-restraint censorship. Namely, the Court had yet to rule on the issue of whether a publication could be censored prior to any public display.

It was not until 1931 that the Supreme Court issued a ruling objecting to prior-restraint censorship.[121] In *Near v. Minnesota*, the Court considered "whether a statute authorizing [censorship] in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed."[122] The Court's answer was that "it has been generally, if not universally, considered that it is the chief purpose of the [constitutional protection] guaranty to prevent previous restraints upon publication."[123] To explain their previous holdings in the wartime cases such as *Schenck* and *Gitlow*, the Court noted that "[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight,"[124] but the "the main purpose of [the security of the freedom of the press] is 'to prevent all such previous restraints upon publications as had been practiced by other governments.'"[125]

121. Near v. Minnesota, 283 U.S. 697 (1931).

122. *Id.* at 713.

123. *Id.*

124. *Id.* at 716 (citations omitted).

125. *Id.* at 714 (citations omitted).

During the height of the Red Scare, the Court ruled in *Schenck* on an issue that seemed pertinent to national security. But, by 1931, much of the United States had grown disillusioned with the causes that seemed so justifiable a decade before. Rather than suppress the voices of dissent, the Court reasoned that certain kinds of publications may "unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication."[126]

In *Near*, the Court drafted a new history of the United States. Setting up a historical framework to support the majority's opinion that "liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship," the Court pointed out that "the conception of the liberty of the press in this country had broadened with the exigencies of the colonial period."[127] The Court boldly linked the constitutional guaranty of the freedom of the press to the United States' identity as "a free and independent nation."[128]

B. Expanding the First Amendment through Statutory Interpretation

In *Near*, the Supreme Court expanded the scope of the First Amendment. Condemning prior-restraints censorship during unexceptional situations, the Court clarified the way in which speech was protected; that is, the First Amendment normally grants "immunity from previous restraints or censorship."[129] A few years later, in 1934, the judiciary further broadened the reach of the First Amendment—this time interpreting an existing statute to expand the kinds of speech that should be protected.[130] In *United States v. One Book Entitled Ulysses by James Joyce*, the Court of Appeals for the Second Circuit asked if "a book of artistic merit and scientific insight

126. *Id.* at 722.

127. *Id.* at 716–17.

128. *Id.* at 718. In his dissent, however, Justice Pierce Butler rejected the majority's revisionist history. Rather than an organic outgrowth of America's longstanding tradition of protecting the freedom of the press against prior restraint, the majority's ruling "g[ave] to freedom of the press a meaning and a scope not heretofore recognized." *Id.* at 723 (Butler, J., dissenting). And though the majority artfully appealed to the heroic vision of America's founding fathers seeking to preserve liberty, Justice Butler pointed out that "the Federal Constitution prior to 1868, when the Fourteenth Amendment was adopted, did not protect the right of free speech of press against state action." *Id.* at 723 (Butler, J., dissenting).

129. *Id.* at 716.

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

should be regarded as 'obscene.'"[131] The court determined that it should not.[132]

In *Ulysses*, the United States Customs Service seized copies of James Joyce's novel under the Tariff Act of 1930.[133] The Act provided that "all persons are prohibited from importing into the United States . . . any obscene book, pamphlet, paper . . . or other material."[134] Although Joyce's novel was "rated as a book of considerable power by persons whose opinions are entitled to weight," parts of the book were "coarse, blasphemous, and obscene."[135] After the collector seized the novel, American publisher Random House Inc., challenged the action in the district court. The trial court found that "the book was 'not of the character the entry of which is prohibited'" under the Tariff Act.[136] On appeal, the Second Circuit Court of Appeals further clarified why the book was exempt from the Act.[137]

In its decision, the court of appeals noted that "the book as a whole is not pornographic, and, while in not a few spots it is coarse, blasphemous, and obscene, it does not, in our opinion, tend to promote lust."[138] The "obscene" passages in *Ulysses* were no worse than those in "Venus and Adonis, Hamlet, Romeo and Juliet," and under the collector's application of the Tariff Act, "many other classic[s] would have to be suppressed"—an absurd proposition that would "destroy much that is precious in order to benefit a few."[139] *Ulysses* made clear that censorship laws cannot be strictly applied. Certain materials should not be censored, even if they are "obscene." Just as the "works of physiology, medicine, science, and sex instruction are not within the statute," the court held that "the same immunity should apply to literature as to science."[140]

In *Ulysses*, the court of appeals created a new test for judging the obscenity of a book as a work of art: "[W]hether a given book is

131. *Id.* at 706.
132. *Id.* 708–09.
133. *Id.* at 706.
134. *Id.* (quoting 19 U.S.C. § 1305(a)).
135. *Id.* at 707.
136. *Id.* at 706.
137. *Id.* at 707–09.
138. *Id.* at 707.
139. *Id.*
140. *Id.*

obscene is its *dominant effect*."[141] The court created the "dominant effect" test specifically because "art certainly cannot advance under compulsion to traditional forms, and nothing in such a field is more stifling to progress than limitation of the right to experiment with a new technique."[142] Applying their new test, the court emphasized Joyce's "skillful artistry," "originality," and "excellent craftsmanship" and ultimately held that "*Ulysses* is a book of originality and sincerity of treatment . . . . Accordingly it does not fall within the statute, even though it justly may offend many."[143] Despite the clear language of the Tariff Act and the fact that *Ulysses* included some "obscene" material, the court protected the book from censorship because of its nature as a work of art. Though the court of appeals did not base its reasoning on the First Amendment, the court expanded the reach of the First Amendment through statutory interpretation when it acknowledged art as a form of expression demanding special treatment.

In *Mutual*, the Supreme Court described movies as "mere representations of events, of ideas and sentiments published and known" and refused to grant them any kind of protection under the First Amendment.[144] However, nearly two decades later in *Ulysses*, the court of appeals acknowledged the importance of art and held that censorship laws should not be strictly applied to literature. Although the court of appeals may not have considered motion pictures in its reasoning, it is clear that the judiciary's understanding of speech and "spectacle" was shifting.

The United States Supreme Court did not review the court of appeals' decision in *Ulysses*. However, in 1946, the Court similarly expanded the protections of the First Amendment in *Hannegan v. Esquire* when it condemned the "power of censorship" as something "so abhorrent to our traditions that a purpose to grant it should not be easily inferred."[145] In *Hannegan*, the Court went further than the court of appeals in *Ulysses* by holding that entertaining media, including media in "poor taste," should not be subject to outright censorship, as long as it conveys "ideas by words, pictures, or drawings."[146]

141. *Id.* at 708 (emphasis added).

142. *Id.*

143. *Id.* at 706, 708–09.

144. Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 244 (1915).

145. Hannegan v. Esquire, 327 U.S. 146, 151 (1946).

146. *Id.* at 151, 153.

The case began as a dispute over the classification of *Esquire Magazine* as a periodical after Congress had classified periodicals as publications "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."[147] Although the magazine had previously been granted a permit for lower postage rates as a periodical, in 1943 the Postmaster General revoked *Esquire*'s permit reasoning that periodicals were "under a positive duty to contribute to the public good and public welfare" and *Esquire* failed to meet that duty.[148] In its opinion, the Supreme Court rephrased the issue and potential impact of the case:

> 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.[149]

First, the Court chose to reframe the issue to focus it on the problem of censorship. Then, in line with its revisionist history set forth in *Near*, the Court in *Hannegan* again embraced a stance that censorship of the press was an un-American and abhorrent practice. Through its interpretation of the statute in question in *Hannegan*, the Court expanded the reach of the First Amendment by rejecting the idea that publications should be evaluated according to their "quality, worth, or value."[150] The Court boldly declared that "[u]nder our system of government there is an accommodation for the widest tastes and ideas" that will "var[y] with individuals as it does from one generation to another. . . . But a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system."[151] The language of the First

147. *Id.* at 148.
148. *Id.* at 150.
149. *Id.* at 151.
150. *Id.* at 153.
151. *Id.* at 157–58.

Amendment had not changed, nor had many of the statutes written decades ago; but, the Court's view of speech itself was changing.

Just two years after *Hannegan*, the Court in *Winters v. New York* again further extended the concept of protectable speech when it noted that even magazines of no "possible value to society . . . are as much entitled to the protection of free speech as the best of literature."[152] In *Winters*, the Court ultimately rejected a New York statute that prohibited the distribution or publication of materials "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime."[153] Ultimately, the majority agreed with the appellant who argued that the statute was so "vague and indefinite" that it permitted "the punishment of incidents fairly within the protection of the guarantee of free speech."[154] The Court reasoned that "[t]he 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."[155] The Court further opined that "[w]here a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained."[156]

By 1948, not only had the Supreme Court condemned prior-restraints censorship, but it had also deemed entertainment protected under the First Amendment. Through cases like *Ulysses*, *Hannegan*, and *Winters*, the judiciary had expanded the reach of the First Amendment through statutory analysis. Although these cases did not present constitutional questions, they changed constitutional interpretation: That which was once mere spectacle was now a form of protected expression. After *Hannegan* and *Winters*, the Supreme Court understood protected speech to include a broad variety of mediums not subject to a precise definition or category.[157]

IV. The Supreme Court and Film

As the Court's understanding of speech grew, film itself continued to rise as a powerful medium of communication both internationally and domestically. In particular, as nations marched

152. Winters v. New York, 333 U.S. 507, 510 (1948).

153. *Id.* at 508.

154. *Id.* at 509.

155. *Id.* at 510.

156. *Id*. at 520 (Frankfurter, J., dissenting).

157. *Id.* at 510.

into World War II, filmmakers began to use movies as a means of expressing political ideology and the emotional turmoil of entire nations. In 1925, Soviet filmmaker Sergei Eisenstein released the powerful propaganda piece *Battleship Potemkin*. Then, in 1927, Eisenstein released *October: Ten Days that Shook the World*, a dramatization of the 1917 Revolution. Leni Riefenstahl's *Triumph of the Will*, a documentation of the Nuremberg Nazi Party Congress, served a similar purpose in Nazi Germany. Released in 1935, *Triumph of the Will* depicted Adolf Hitler as a national leader who had united all of Germany to overcome the injustice and tragedy of World War I. Hitler had approached Riefenstahl and asked her to make a film "which would move, appeal to, impress an audience which was not necessarily interested in politics."[158] Aware of the power of film, Hitler sought to use it to further achieve his political aspirations. Although film struggled to shed its reputation as a "mere spectacle" in the United States, filmmakers and political leaders in Europe embraced film as a powerful form of communication.

Well aware of the popularity (and foreign governments' use) of film, the United States government again worked with the film industry after the United States entered World War II. In 1942, President Franklin D. Roosevelt created the Bureau of Motion Pictures within the Office of War Information in order to encourage Hollywood to release films that would assist wartime mobilization efforts.[159] Filmmakers ranging from Walt Disney and Charlie Chaplin to Frank Capra and Michael Curtiz worked to produce motion pictures that would promote sympathy for America's cause.

Moreover, although moving pictures had originally been developed for entertainment purposes, by the 1930s political newsreels had become a standardized part of movie exhibitions.[160] Released twice a week, eight-minute-long newsreels presented an assortment of news stories.[161] In 1941, Harvard School of Law Professor and First Amendment scholar Zechariah Chafee commented on the institutional and functional nature of newsreels and wrote that suppressing newsreels would be "much the same as suppressing newspapers."[162]

158. FREDERICK OTT, THE GREAT GERMAN FILMS 150 (1986).

159. Barbas, *supra* note 9, at 711.

160. *Id.* at 701.

161. *Id.*

162. ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 543 (1969).

By the mid-1940s, more than half of all Americans attended movies weekly for both entertainment and information.[163] Movies had transformed from being silent moving pictures shown in vaudeville houses to masses of immigrant laborers, to being powerful modes of communication carefully crafted to inform and persuade the American public. In 1915, the United States Supreme Court had held that moving pictures were "not to be regarded nor intended to be regarded . . . as part of the press of the country, or as organs of public opinion."[164] However, by the late 1940s, such a claim was absurd. Moving pictures had changed, as had the notion of "public opinion" and "ideas." The reach of censorship had been curtailed and the Supreme Court adhered to a new understanding of the freedom of speech.

A. The Decline of the Studio System: Creating Room for Experimentation

In 1948, for the first time, the Supreme Court applied its new view of the First Amendment to film in *United States v. Paramount Pictures* when Justice William O. Douglas noted in dicta that the Court had "no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment."[165] The case was groundbreaking for First Amendment advocates because it included the first official suggestion that the Supreme Court was ready to overrule *Mutual*, but even more pivotal at the time was the *Paramount* decision's tangible and immediate effect of breaking up the studio system.

The film industry had been largely monopolistic since 1908 due to the Motion Picture Patents Company's careful control of motion picture technology patents.[166] However, by 1918, when the Supreme Court ended such monopolistic control of the patents, the "independents"—who had been struggling against the MPPC—had gained control of the industry.[167] By the late 1940s, when *Paramount* was argued before the Supreme Court, the "Big Five" studios (MGM, Paramount, RKO, Twentieth Century Fox, and Warner Brothers) controlled not just the production of most films, but also about eighty

163. Barbas, *supra* note 9, at 713.

164. Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 244 (1915).

165. United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948).

166. JOHN LEWIS, HOLLYWOOD V. HARDCORE: HOW THE STRUGGLE OVER CENSORSHIP SAVED THE MODERN FILM INDUSTRY 54 (2000).

167. *Id.* at 56. *See* Motion Picture Patents Co. v. United States, 247 U.S. 524 (1918).

percent of the urban first-run theaters.[168] As a result, the Big Five were able to price-fix entrance fees and manipulate theaters across the nation into accepting whatever films the studios released. As Harry Cohn, the head of production of Columbia, put it, "I want one good picture a year . . . and I won't let an exhibitor have it unless he takes the bread and butter product, the *Boston Blackies*, the *Blondies*, the low-budget westerns, and the rest of the junk that we make."[169]

The Big Five also worked together to implement industry-wide self-censorship. Following the creation of the PCA and the Code, the MPPDA (supported by the Big Five) helped enforce the Code by preventing unapproved films from being played in studio-controlled theatres. For example, when the PCA refused to approve Howard Hughes' film, *The Outlaw*, the MPPDA's member studios prevented the distribution and exhibition of the film. Hughes openly complained about the Big Five's monopolistic control of the film industry and his struggle with the PCA and MPPDA brought public attention to the studios' role in the self-regulation and censorship of movie content.[170]

The Outlaw was eventually released in 1941, withdrawn, re-released with tremendous publicity in 1946, and then withdrawn again. Hughes continued to struggle with the MPPDA, which was by then renamed the MPAA, eventually filing a $5 million lawsuit against the association. In his complaint, Hughes included an appeal to the film's First Amendment right to free speech. Though Hughes' lawsuit—the first since *Mutual* to make an appeal to a film's right to free speech—failed to reach the Supreme Court, his legal battle against the MPAA helped reveal the organization's hold over the industry as a whole. According to Hughes, the MPAA either owned or controlled ninety percent of American theaters.[171]

Hughes' public struggle against the MPAA shed light on the monopolistic practices the organization desperately wanted to hide, but the United States Department of Justice had been troubled by the studio system's violations of the Sherman Antitrust Act since the late 1930s.[172] Though the Supreme Court did not decide *Paramount* until 1948, the case had first been filed in 1938 in the Federal District Court

168. LEWIS, *supra* note 166, at 57.

169. *Id.* at 54.

170. *Id.* at 24. *See* WITTERN-KELLER, *supra* note 8, at 95.

171. WITTERN-KELLER, *supra* note 8, at 95.

172. *Id.* at 95–96.

of New York.[173] And from the beginning, the studios seemed to agree that its "high, wide and handsome days [were] coming to a close."[174] Rather than try to remedy its suspected business practices, the studios instead sought to buy time with thirteen trial postponements and an interim consent degree.[175] However, as independent theater owners continued to complain and Hughes' high-profile lawsuit revealed the corruption within the film industry, the Justice Department continued with the case until it reached the Supreme Court in 1948.

In *Paramount*, the Supreme Court ultimately held that the Big Five studios had violated the Sherman Antitrust Act and had "monopolized the production of motion pictures;" the Court then sent the case back to the district court for divorcement proceedings.[176] The breakup of the studio system consequently set the stage for the end of censorship in the movie industry. Under the studio system, a few "major" motion picture studios controlled, or at least heavily influenced, much of the production, distribution, and exhibition of the most popular films.[177] These studios were able to fix the prices of movie theaters and also retaliate against theaters for showing films by independent companies.[178] When the Supreme Court held in *Paramount* that the studio system violated antitrust laws, the Court effectively created room for competition and experimentation. With the end of the studio system, the entire movie industry was freed to test the limits of acceptability and the protections of free speech.[179] Independent producers, distributors, and theaters soon found ways into the movie industry.[180] A few years later, one independent distributor would push the Court to overturn *Mutual* and recognize film as a form of protected speech under the First Amendment.

B. *The Miracle*: Overturning *Mutual*

In 1952, the Supreme Court granted certiorari to the case *Joseph Burstyn, Inc. v. Wilson*. The case asked whether a New York statute

173. LEWIS, *supra* note 166, at 56.

174. *Id.* at 57.

175. *Id.*

176. United States v. Paramount Pictures, Inc., 334 U.S. 131, 140 (1948).

177. Lea Jacobs, *Industry and Self-Regulation and the Problem of Textual Determination*, *in* CONTROLLING HOLLYWOOD: CENSORSHIP AND REGULATION IN THE STUDIO ERA 90 (Matthew Bernstein ed., 1999).

178. *Id.*

179. Blanchard, *supra* note 20, at 787.

180. *Id.*

permitting "the banning of motion picture films on the ground that they are 'sacrilegious'" was an "unconstitutional abridgment of free speech and a free press."[181] The movie in question was Roberto Rossellini's *Il Miracolo* (*The Miracle*), and the Supreme Court would use this case to overturn their decades-old holding in *Mutual*.[182]

The Miracle was a forty-minute film about a young girl who comes to believe she had been impregnated by St. Joseph when, in truth, a wandering, bearded stranger had raped her.[183] After her townspeople torment her for her belief that her child had been divinely conceived, she runs away to live in a cave.[184] When she is about to give birth, she considers returning to her town, but instead finds her way to an empty church where she gives birth alone.[185] When the film was released in Italy in 1948, the Vatican first dismissed the film for being "on such a pretentiously cerebral plane" and then declared the film as "an abominable profanation from religious and moral viewpoints."[186] However, the Vatican's censorship agency did not censor the film and it was exhibited freely throughout Italy.[187]

Joseph Burstyn was an independent film distributor who specialized in the importation of foreign films.[188] He was passionate about movies and he fervently believed in American democratic ideals. Although it was his ambition and entrepreneurial spirit that led him into the film industry, Burstyn genuinely loved film and saw it as a unique art form.[189] When he saw *The Miracle* in 1948, he immediately fell in love with the film and arranged to import it into the United States.[190] After submitting the film to the state censors and obtaining approval, Burstyn released *The Miracle* with two other short films in 1950 under the title *Ways of Love*.[191] The trio of films initially received critical praise, but soon came under attack as

181. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 497, 502 (1952).

182. *Burstyn*, 343 U.S. at 502.

183. *Id.* at 507.

184. *Id.* at 508.

185. *Id.*

186. *Id.* at 509.

187. *Id.*

188. LAURA WITTERN-KELLER & RAYMOND J. HABERSKI, JR., THE MIRACLE CASE: FILM CENSORSHIP AND THE SUPREME COURT 60 (2008).

189. *Id.* at 59–60.

190. *Id.*

191. *Id.* at 62.

"officially and personally blasphemous."[192] Burstyn may have been prepared for artistic backlash from conservative critics, but he likely did not foresee how important his struggle for *The Miracle* would eventually become.

1. Fighting for The Miracle

Burstyn's struggle for *The Miracle* began shortly after its release in New York City at the Paris Theater.[193] Alerted to the potentially sacrilegious nature of the film, the Legion of Decency, a Catholic organization dedicated to reviewing, rating, and boycotting inappropriate films, petitioned Commissioner of Licenses Edward T. McCaffrey (a professed Catholic) to revoke the theater's license.[194] Despite the Supreme Court's movement towards a more expansive First Amendment and its increasingly critical opinion of prior-restraint censorship, New York's license commissioners had censored theaters for decades by revoking licenses.[195] Thus, as they reviewed *The Miracle* in 1950, the license commissioners did not question their power to revoke Burstyn's license as the local courts had always supported the commissioners' actions.[196]

At the same time as Commissioner McCaffre and the Legion of Decency criticized *The Miracle* as blasphemy, other critics chose to condemn the film's director, Roberto Rossellini.[197] Just one year before Burstyn released *The Miracle* as part of *Ways of Love*, Rossellini had started a highly publicized affair with Ingrid Bergman during the filming of *Stromboli*.[198] When Bergman later gave birth to Rossellini's child and left her own husband and daughter, the affair turned into an international scandal.[199] The public outrage against Rossellini and Bergman eventually evolved into a petition to ban *Stromboli*.[200] Despite the fact that Rossellini's personal affairs had little to do with the censorable content of *The Miracle*, the public

192. *Id.* at 63 (citations omitted).
193. WITTERN-KELLER & HABERSKI, JR., *supra* note 188, at 62.
194. *Id.* at 63.
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*

pressure further placed Burstyn's film in jeopardy.[201] On Christmas Day, Commissioner McCaffrey suspended the theater's license.[202]

Film censorship through license regulation may have been commonplace even in 1950, but film itself had changed, as had many of its audience's expectations. Both Burstyn and Lillian Gerard, the director of the Paris Theater, not only appreciated film as a form of entertainment, but also loved it as an art. The Paris Theater, in particular, attracted a unique crowd who "demanded art when they went to the movies."[203] So when the theater pulled *The Miracle* from *Ways of Love*, the press wanted to know why.[204] Gerard was quick to explain that "the license commissioner, a man who issued licenses to bowling alleys, laundries, . . . and newlyweds had taken it upon himself to become a film critic. . . . [H]e had decided that *The Miracle* was unfit for the eyes of all other New Yorkers and thus declared it verboten."[205] Commissioner McCaffrey responded by extending the ban on *The Miracle* to not just the Paris Theater, but also any other theater that might consider showing it.[206] Following the commissioner's retaliation, the New York Civil Liberties Union and the New York Film Critics Association joined to help Burstyn and the Paris Theater challenge the commissioner's ban.[207] Likewise, film critics and popular newspaper editors wrote about *The Miracle*'s struggle to stay on the screen.

However, the MPAA did not join the effort to protect *The Miracle*. Not only had Burstyn offended the PCA in the past with his flagrant disregard for their recommendations regarding another import, *The Bicycle Thief*, but the MPAA's attorneys also did not think *The Miracle* would fare well before the courts.[208] *The Miracle* had been banned for "sacrilege"; it was a narrow kind of censorship and even if the courts found in favor of Burstyn, MPAA attorneys thought the opinion would prohibit only "sacrilegious" censorship.[209]

201. *Id.*

202. *Id.* at 64. On January 5, 1951, the New York Supreme Court granted Burstyn an injunction against McCaffrey's order. *Id.* at 67. But the Board of Regents again revoked *The Miracle*'s exhibition license the following month. *Id.* at 74. For greater details on Burstyn's struggle to keep *The Miracle* in theaters, *see id.* at 59–81.

203. WITTERN-KELLER & HABERSKI, JR., *supra* note 188, at 64.

204. *Id.*

205. *Id.* at 64–65 (citations omitted).

206. *Id.* at 65.

207. *Id.*

208. *See id.* at 54–58, 80.

209. *Id.* at 80.

Since Burstyn was an independent distributor, the MPAA simply did not want to risk further damaging their tenuous peace with the Catholic Church by openly supporting *The Miracle*.[210]

Burstyn v. Wilson was not the first case the film industry had tried to push up to the Supreme Court in an attempt to overturn *Mutual*, following Justice Douglas's tantalizing dicta about film and the First Amendment in *Paramount*. The MPAA and ACLU had been involved in cases regarding the censorship of the movies *Curley* and *Lost Boundaries*, but the Supreme Court refused to review either case.[211] Thus, it was a surprise for both organizations when the Court granted certiorari to Burstyn's independent import, *The Miracle*.

2. The Miracle *Before the Supreme Court*

On February 4, 1952, the Supreme Court of the United States granted review to the case *Joseph Burstyn, Inc. v. Wilson*. Burstyn, his attorneys, and the NYCLU had lost their case before New York's appellate division in 1951. Relying on *Mutual*, the appellate court explained that "motion pictures have been judicially declared to be entertainment spectacles, and not a part of the press or organs of public opinion; and hence subject to state censorship."[212] The court acknowledged that "strong criticism has been voiced against the distinctions made between movie films and freedom of expression otherwise guaranteed," but refrained from overturning *Mutual*.[213] It would be up to the Supreme Court to determine whether *Mutual* should remain the law. On April 24, 1952, the Supreme Court heard oral argument to consider, for the second time, whether movies are protected under the First Amendment. Specifically, in *Burstyn*, the Court examined "the constitutionality, under the First and Fourteenth Amendments, of a New York statute which permits the banning of motion picture films on the ground that they are 'sacrilegious.'"[214]

Burstyn's attorney was the young Ephraim London, who would later go on to argue and win nine cases before the Supreme Court.

210. *Id.* at 78.

211. *See* Barbas, *supra* note 9, at 728–30.

212. Joseph Burstyn, Inc. v. Wilson, 104 N.Y.S.2d 740, 743 (1951).

213. *Id.* (reasoning that it was not appropriate, "as an intermediate court, to re-examine the issue").

214. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 496 (1952).

But, *Burstyn v. Wilson* was his first.[215] In his brief, London reduced the case to four main points.[216] First, "[t]he New York film censorship law imposes an unconstitutional restraint on freedom of expression."[217] Second, "[t]he statute under which *The Miracle* was suppressed is so vague that it is void on its face. The attempted enforcement of the statute deprived appellant of its rights and property without due process of law."[218] Third, "[t]he statute violates the constitutional guaranty of separate church and state."[219] And fourth, "[t]he statute violates the constitutional guaranty of freedom of religion."[220]

In 1915, Mutual Film had argued before the Supreme Court that the constitutional right to freedom of speech should apply to films.[221] The Court rejected this novel argument in 1915, but nearly four decades later, the Court was willing to consider "that moving pictures, like newspaper and radio, are included in the press whose freedom is guaranteed by the First Amendment."[222] Both film and the First Amendment had undergone many changes since 1915 and London highlighted such changes as he urged the Court to overturn *Mutual*.[223] Specifically, London pointed out that *Mutual* had been decided before the Court incorporated the First Amendment through the Fourteenth Amendment in *Gitlow*, and according to *Winters*, "the line between the informing and the entertaining is too elusive."[224] Thus, London argued, *Mutual* was no longer good law.

After urging the Court to overturn *Mutual*, London focused on the specific language of the statute: "Sacrilege" was not clearly defined and to allow a governmental agency to determine its meaning was a violation of the First Amendment. At the heart of London's

215. Glen Fowler, *Ephraim London, 78, a Lawyer Who Fought Censorship, Is Dead*, N.Y. TIMES (June 14, 1990), http://www.nytimes.com/1990/06/14/nyregion/ephraim-london-78-a-lawyer-who-fought-censorship-is-dead.html.

216. Brief for Appellant at 10–42, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (No. 522).

217. *Id.* at 10.

218. *Id.* at 29.

219. *Id.* at 39.

220. *Id.* at 42.

221. Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 241 (1915).

222. United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948).

223. WITTERN-KELLER & HABERSKI, JR., *supra* note 188, at 104–05.

224. Winters v. New York, 333 U.S. 501, 507 (1948); Gitlow v. New York, 268 U.S. 652 (1925).

case was the argument against prior-restraint censorship.[225] The Court had already condemned prior-restraint censorship in *Near*, but the New York statute permitted the censoring of films even before any public exhibition.[226] Furthermore, the statute was so vague and broad that it failed to provide any due process and it led to arbitrary and inconsistent interpretations and enforcement.[227] Also, the statute violated the separation of church and state by "requiring a government official to pass on substantive matters of religion." It would seem abundantly clear that the New York statute was unconstitutional if film was indeed protected under the Constitution.[228]

In its opposition, the State of New York argued that the statute was well within the limits of the First Amendment and reminded the Court that *Mutual* had not yet been overturned.[229] The State argued that "the *Mutual* case forecloses any contention that the New York statute is unconstitutional."[230] However, as the State argued that *Mutual* was still good law, Chief Justice Fred M. Vinson interrupted counsel to say, "we have no doubt that moving pictures, like newspaper and radio, are included in the press whose freedom is guaranteed by the First Amendment."[231] Justice Douglas wrote the statement as dicta in 1948 for the *Paramount* case. In its brief, the State of New York had addressed and dismissed the statement as dicta.[232] But, with that single sentence, the Chief Justice challenged the foundation of the State's entire argument. The State responded by pointing to the special nature of films.[233] For example, though "a book describes; a film vividly presents" and while "a book reaches the mind through words merely; a film reaches the eyes and ears through the reproduction of actual events."[234] According to the State, the statute in question was "clearly directed to the promotion of public welfare, morals, public peace and order . . . the traditionally

225. *See generally* Brief for Appellant, *supra* note 216, at 10–23.

226. Brief for Appellant, *supra* note 216, at 10.

227. *Id.* at 32–33.

228. *Id.* at 40–42.

229. *See generally* Brief for Appellees at 12–18 , Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (No. 522).

230. Brief for Appellees, *supra* note 229, at 10.

231. WITTERN-KELLER & HABERSKI, JR., *supra* note 188, at 107.

232. Brief for Appellees, *supra* note 229, at 20.

233. *Id.* at 34.

234. *Id.* at 26.

recognized objects of the exercise of police power."[235] The argument was the same as that in *Mutual*: The special nature of films separated it from the forms of expression protected under the First Amendment.

3. The Decision

Nearly forty years had passed since *Mutual*. The film industry had changed and censorship had evolved. Likewise, the judiciary's understanding of the First Amendment had transformed both in terms of the scope of protection—as in *Near*—and the subjects protected—as in *Winters* and *Hannegan*.[236] With *Burstyn*, the Court could either perpetuate the existing system or overturn a law that had dominated an industry for decades.

On May 26, 1952, the Supreme Court released its opinion on *Burstyn v. Wilson*. In the unanimous opinion, Justice Tom C. Clark briefly traced the development of the First Amendment since *Mutual*—reminding all of the "series of decisions beginning with *Gitlow*" in which "this Court held that the liberty of speech and of the press which the First Amendment guarantees . . . is within the liberty safeguarded by the Due Process Clause of the Fourteenth Amendment."[237] He then dismissed the idea espoused in *Mutual* that motion pictures should be excluded from First Amendment protections "because their production, distribution, and exhibition is a large-scale business."[238] And, finally, he stated that a "capacity for evil . . . does not authorize substantially unbridled censorship."[239] The Court then explicitly overturned *Mutual* and declared that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. To the extent that language in the opinion in *Mutual* . . . is out of harmony with the views here set forth, we no longer adhere to it."[240]

In *Burstyn*, the Court acknowledged the changes in film as a medium that made *Mutual* no longer pertinent. *Burstyn* was the first time since *Mutual* that the Court was presented with the opportunity

235. *Id.* at 54.

236. Winters v. New York, 333 U.S. 507 (1948); Hannegan v. Esquire, 327 U.S. 146 (1946); Near v. Minnesota, 283 U.S. 697 (1931).

237. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 500 (1952).

238. *Id.* at 501–02.

239. *Id.* at 502.

240. *Id.*

to consider the application of the First Amendment to film, but between those cases, the film industry had undergone changes that pushed individuals like Joseph Burstyn to persist in his struggle. In addition, the American understanding of film had changed such that moving pictures could no longer be dismissed as mere business, entertainment, or spectacle. It was the unique combination of all of these elements that brought about the end of judicially sanctioned film censorship.

Burstyn was not the end of film censorship. Immediately after overturning *Mutual*, Justice Clark pointed out that "[i]t does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places."[241] Unbridled prior-restraint censorship was now limited, but the film industry would continue their own versions of self-regulation and censorship. *Burstyn*, however, had officially ushered in a new era of freedom for the screen. No longer mere "spectacle," film had become protected "speech."

Conclusion

It may be tempting to dismiss the overturning of *Mutual* as inevitable, but to do so would be to downplay the unique forces that were at play in bringing about such a massive change in the law. When Mutual Film filed suit in 1915, film was primarily entertainment designed for low-income wage earners or children looking to pass time. These "nickelodeons" were short black and white projections with no sound. However, when Joseph Burstyn fought to keep *The Miracle* in theaters in 1950, film had evolved into feature-length narratives with characters and ideas that could be expressed with sound. Newsreels accompanying these films informed the public of current events and spread government propaganda.

At the same time, the film industry was changing. As the major studios gained power, the industry established a system of self-censorship, regulating any content released to the public. The public perception of film changed—no longer cheap entertainment for children, film became a form of art and a powerful medium of expression and persuasion. Amidst these changes to film, the judiciary's understanding of the First Amendment was likewise shifting. International events like the two world wars and domestic struggles due to social and political uncertainty redefined

241. *Id.*

constitutional protections. Neither static nor predictable, the law is dynamic—always responding to the lives it governs. In the case of film censorship, as the medium and industry of film developed and transformed, so too did the law. *The Miracle* did not end film censorship, but it marked the beginning of a new era of film history.

Appendix A

The Don'ts and Be Carefuls, 1927[242]

Resolved, That those things which are included in the following list shall not appear in pictures produced by the members of this Association, irrespective of the manner in which they are treated:

1. Pointed profanity—by either title or lip—this includes the words "God," "Lord," "Jesus," "Christ" (unless they be used reverently in connection with proper religious ceremonies), "hell," "damn," "Gawd," and every other profane and vulgar expression however it may be spelled;
2. Any licentious or suggestive nudity—in fact or in silhouette; and any lecherous or licentious notice thereof by other characters in the picture;
3. The illegal traffic in drugs;
4. Any interference of sex perversion;
5. White slavery;
6. Miscegenation (sex relationships between the white and black races);
7. Sex hygiene and venereal diseases;
8. Scenes of actual childbirth—in fact or in silhouette;
9. Children's sex organs;
10. Ridicule of the clergy;
11. Willful offense to any nation, race or creed;

And be it further resolved, That special care be exercised in the manner in which the following subjects are treated, to the end that vulgarity and suggestiveness be eliminated and that good taste may be emphasized:

1. The use of the flag;
2. International relations (avoiding picturing in an unfavorable light another country's religion,

242. Motion Picture Producers and Distributors of America, *The Don'ts and Be Carefuls* (1927), *available at* http://www.wabashcenter.wabash.edu/syllabi/w/weisenfeld/rel160/donts.html.

history, institutions, prominent people, and citizenry);
3. Arson;
4. The use of firearms;
5. Theft, robbery, safe-cracking, and dynamiting of trains, mines, building, etc. (having in mind the effect which a too-detailed description of these may have upon the moron);
6. Brutality and possible gruesomeness;
7. Techniques of committing murder by whatever method;
8. Methods of smuggling;
9. Third-degree methods;
10. Actual hangings or electrocutions as legal punishment for crime;
11. Sympathy for criminals;
12. Attitude toward public characters and institutions;
13. Sedition;
14. Apparent cruelty to children and animals;
15. Branding of people or animals;
16. The sale of women, or of a woman selling her virtue;
17. Rape or attempted rape;
18. First-night scenes;
19. Man and woman in bed together;
20. Deliberate seduction of girls;
21. The institution of marriage;
22. Surgical operations;
23. The use of drugs;
24. Titles or scenes having to do with law enforcement or law-enforcing officers;
25. Excessive or lustful kissing, particularly when one character or the other is a "heavy."