

Panel I: Free Speech and Deference to Legislative Judgements

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Deference, Suspicion, and the First Amendment

For many, *Gitlow* offers an exemplar of how *not* to do deference by failing to explain when and why we should defer to the government's regulation of speech. *Gitlow* thus invites us to revisit the role that deference plays, and has played, in First Amendment law—as well as what role it might play.

And because much of what followed in First Amendment law over the last century has been about suspicion at least as much (if not more than) deference, *Gitlow* also invites us to consider the role that suspicion plays, has played, and might play in First Amendment law. Indeed, the 20th-century Court's growing suspicion of the government's speech regulations (a turn that has only intensified in the 21st century) might be understood in part as a reaction to decisions like *Gitlow* that were so unsatisfying in their failure to offer a convincing theory of deference.

Just as we should expect courts to explain their choices to defer, so too—in my view—should we expect courts to explain their enormously consequential choice to be suspicious. The choice to be suspicious can drive the development of new doctrine (e.g., *NAACP v. Alabama*; *New York Times v. Sullivan*); can drive the choice between existing doctrinal rules (e.g., *Reed*); and can drive the application of existing rules to new facts (e.g., *Holder*).

What might a theory of suspicion look like? I'll discuss one possibility, drawing from ethicist and political scientist Russell Hardin, who observed that our choices to distrust are largely informed by inductive reasoning—that is, by our own past experience of “the motivation of the potentially trusted person to attend to the truster's interests and his or her competence to do so.” With this in mind, to say that we are suspicious of the government's regulation in a certain area requires us to explain how our experience, or other evidence, leads us to believe that the government—in that setting—does not have trustworthy intentions or that it is not competent.