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New Media at the Turn of the Century

Peter K. Yu

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NEW MEDIA AT THE TURN OF THE CENTURY

Peter K. Yu*

I.	When the Motion Picture Was New	3
II.	Why Was the Internet Different?	14
	A. Technological Determinism	14
	B. Legal Determinism	17
	C. Social Determinism	19
	D. Summary	21
III.	What a Theory of Law, Technology, and Society Should Be About?.....	21
	A. A General Theory.....	22
	B. Triangular Relationship Between Law, Technology, and Society.....	23
	C. Interactions Between the Past, the Present, and the Future.....	27
	Conclusion	28

INTRODUCTION

In recent cases, the United States Supreme Court has shown great care and vigilance in protecting free speech on the Internet. In *Reno v. ACLU*, the Court invalidated the Communications Decency Act, which, if enforced, would have limited the access of adults to online speech that was only fit for children.¹ A few years later, the Court, in *Ashcroft v. ACLU (I)*, upheld the preliminary injunction against the enforcement of the Child Online Protection Act (COPA), the successor to the Communications Decency Act.² In that case, the Court only focused on the narrow question concerning whether the use of “community standards” in the

* Copyright © 2007 Peter K. Yu. Associate Professor of Law & Director, Intellectual Property & Communications Law Program, Michigan State University College of Law; Core Faculty, Asian Studies Center & Adjunct Professor of Telecommunication, Information Studies and Media, Michigan State University; Research Fellow, Center for Studies of Intellectual Property Rights, Zhongnan University of Economics and Law. Part I of this Article was expanded from Peter K. Yu, *New Technology and the Supreme Court: How Movie Censorship in the Early Twentieth Century Sheds Light on Contemporary Issues of Free Speech on the Internet*, FINDLAW’S WRIT: LEGAL COMMENTARY, http://writ.news.findlaw.com/commentary/20020523_yu.html (May 23, 2002). The Author would like to thank the participants of the online symposium at the Law and Technology Theory Blog and the Fourth Annual Intellectual Property and Communications Law and Policy Scholars Roundtable at Michigan State University College of Law, in particular Adam Candeub, Kevin Collins, Deven Desai, Doris Long, Lyria Bennett Moses, Adam Mossoff, Ira Nathenson, Kristen Osenga, Michael Risch, Joseph Rousseau, Mark Schultz, Kieran Tranter, Spencer Weber Waller, and Katja Weckstrom, for their valuable comments and suggestions. The Author is also grateful to Lisa Hammond for excellent research and editorial assistance.

¹ 521 U.S. 844 (1997).

² 535 U.S. 564 (2002).

statute to identify “material that is harmful to minors” violates the First Amendment.³ Two years later, the Court, in *Ashcroft v. ACLU (II)*, again upheld the preliminary injunction on COPA, finding that the government failed to show that the less restrictive alternatives proposed by the respondent “may be more effective than the provisions of [the statute].”⁴

It was only in *United States v. American Library Association, Inc.* that the Court upheld the Children’s Internet Protection Act, which requires libraries receiving certain federal funds to install software to block access to obscenity and child pornography and to prevent minors from obtaining access to material that is harmful to them.⁵ Nevertheless, that case focused on the Spending Clause and is easily distinguishable, because the statute “does not directly regulate private conduct.”⁶

Based on these cases, one may take for granted the Court’s protective stance on protecting free speech on the Internet. After all, the Internet is the “new, new thing”; it deserves the Court’s utmost attention and protection. Interestingly, when these cases are juxtaposed with the Court’s earlier cases concerning free speech and free press protections in the motion picture—the “new, new thing” of the past century—the two lines of cases reveal that the Court has taken a dramatic different approach in its treatment of these two new technologies. Thus, by studying these earlier cases, one not only will gain a greater appreciation of the Court’s current protective stance toward the Internet, but wonder whether the Court’s different approaches can be attributed to the complex interplay of law, technology, and society.

In an earlier article, I discussed how the encounter of the Church, medieval scribes and Venetian printers with the Gutenberg press had provided important insights into our current response to the “digital dilemma” created by the Internet and new media technologies.⁷ This Article uses a similar analytic-historical approach. Part I traces the development of free speech and free press protections of motion pictures. Although this Part recounts the painful history of movie censorship in the first half of the twentieth century, it does not seek to rehash the many arguments made by First Amendment scholars elsewhere. Rather, this Part offers a “thick description” to show that legal, technological, and social factors have both shaped and been shaped by each other and how a confluence of these factors affected the free speech and free press protections of motion pictures.

Part II offers three deterministic accounts to explain the Court’s different treatment of the Internet: technological determinism, legal determinism, and social determinism. Showing that none of these accounts fully explains the Court’s differing approach in the recent Internet cases, this Part underscores the need for a holistic and integrated approach to the study of law, technology, and society. Part III offers some preliminary observations on what a general theory of law, technology, and society should and should not be about. The Article then concludes with brief explanations of the importance of the development of such a theory.

³ See *id.* at 566.

⁴ 542 U.S. 656 (2004).

⁵ 539 U.S. 194 (2003).

⁶ *Id.* at 203 n.2.

⁷ Peter K. Yu, *Of Monks, Medieval Scribes, and Middlemen*, 2006 MICH. ST. L. REV. 1 [hereinafter Yu, *Of Monks, Medieval Scribes*].

I. WHEN THE MOTION PICTURE WAS NEW

When the motion picture was invented in the late 1880s, it was the “new, new thing,” just like the Internet today.⁸ Except for a few technology enthusiasts, the public rarely saw motion pictures and had limited interest in this new technology. When Chief Justice Edward Douglass White of the United States Supreme Court and his colleagues were asked to view the oft-banned film *The Birth of a Nation*, the Chief Justice remarked: “Moving picture! It’s absurd, Sir. I never saw one in my life and I haven’t the slightest curiosity to see one.”⁹ His reaction was not surprising, considering the fact that motion pictures at that time were generally considered cheap public amusements that were usually “[l]ocated in penny arcades alongside slot machines, phonographs, muscle-testing apparatuses, and fortune-telling machines.”¹⁰

By the turn of the twentieth century, however, motion pictures had attracted greater interest and attention. Although some movie producers, like Thomas Edison and his managers, sought to develop movies for the middle class,¹¹ motion pictures “had come to be viewed as a working-class amusement” by 1910.¹² Being widely popular among low-income households, in particular immigrants and new urban migrants, they quickly became a major concern of social reformers. As Edward de Grazia and Roger Newman recounted:

Public officials and civic organizations came to share the view that movies might inspire criminal activity and antisocial behavior. Mothers “could do nothing with their children, especially the boys, after they had attended moving picture shows.” In Chicago, social reformer Jane Addams was not “against” movies but argued that police and citizen groups should “supervise” what could be seen in theaters. Movies, she said, could be instructive and wholesome; they “dramatized great moral lessons” and could raise the quality of life if placed under the proper guidance. The *Chicago Tribune* saw nothing good in the new entertainment form. It deplored the “nickelodeons” (which sometimes charged a dime) for lacking “a redeeming feature to warrant their existence.” Since they “minister . . . to the lowest passions of childhood,” it was “proper to suppress them at once.” The newspaper called for “a law absolutely forbidding entrance of a boy or girl under 18” to their “wholly vicious” influence. “There is no voice raised to defend the majority of five-cent theaters,” the editorial concluded, “because they cannot be defended. They are hopelessly bad.”¹³

⁸ As Ruth Inglis stated:

In 1889, Edison invented the kinoscope, the immediate forerunner of the modern motion picture. Similar machines were developed in France and England. The American invention was a type of peep-show machine with an aperture through which one person at a time could see pictures move. A few years later the projector and screen were perfected, and the first public commercial showing took place in New York City in 1894.

RUTH A. INGLIS, *FREEDOM OF THE MOVIES: A REPORT ON SELF REGULATION FROM THE COMMISSION ON FREEDOM OF THE PRESS* 25 (1947).

⁹ EDWARD DE GRAZIA & ROGER K. NEWMAN, *BANNED FILMS: MOVIES, CENSORS AND THE FIRST AMENDMENT* 4 (1982).

¹⁰ W. Bernard Carlson, *Artifacts and Frames of Meaning: Thomas A. Edison, His Managers, and the Cultural Construction of Motion Pictures*, in *SHAPING TECHNOLOGY / BUILDING SOCIETY: STUDIES IN SOCIOTECHNICAL CHANGE* 175, 184 (Wiebe E. Bijker & John Law eds., 1994) [hereinafter *SHAPING TECHNOLOGY / BUILDING SOCIETY*] (“Located in penny arcades alongside slot machines, phonographs, muscle-testing apparatuses, and fortune-telling machines, the kinoscope seemed to Edison to be a frivolity.”); *accord* Note, *Censorship of Motion Pictures*, 49 *YALE L.J.* 87, 89 (1939) [hereinafter *Censorship of Motion Pictures*] (noting “a belief induced by the nickolodeon [sic] stage of the motion picture, that [the motion picture] was comparable to a sideshow or circus”).

¹¹ See Carlson, *supra* note 10, at 178 (stating that Edison’s managers “viewed the movies as a product for the middle class and shaped their business strategy accordingly”); *id.* at 187-89 (discussing how the Edison managers “attempted to have movie theaters opened in upper-middle-class towns near the Edison laboratory” and explaining why they “chose to produce movies with middle-class values while other companies produced movies for the burgeoning urban working-class audience”).

¹² *Id.* at 187.

¹³ DE GRAZIA & NEWMAN, *supra* note 9, at 8.

The social reformers' reactions were understandable, because progressivism was at its height at the turn of the century, and "an enthusiasm for moral uplift, social justice, and civic regeneration was sweeping the country" at that time.¹⁴ As de Grazia and Newman explained, "[t]he main premise of [the progressive] movement . . . was that reformation of the environment could be achieved by people of goodwill. Once the city, the 'hope of democracy,' was cleansed of its evils the people who dwelt there would also progress."¹⁵ Among the two main concerns of the proponents of this movement were "the moral education of the country's youth and the Americanization of its immigrants."¹⁶ Because theaters were filled with both children and immigrants, social reformers considered motion pictures a "new kind of urban vice," and public officials and civic organizations called for tougher regulation.¹⁷

To protect public morality, many states and municipalities enacted censorship laws to regulate the operation and exhibition of motion pictures. In 1907, the Chicago City Council enacted the nation's first motion picture censorship law, which prohibited "immoral or obscene" pictures while requiring exhibitors of motion pictures to first obtain permits from the police department.¹⁸ The States of Pennsylvania, Ohio, Kansas, and Maryland soon followed suit by establishing statewide censorship boards,¹⁹ while the Cities of Birmingham, Detroit, Kansas City, Los Angeles, Louisville, New York, St. Louis, San Francisco, Trenton, and Washington introduced local ordinances or censorship boards.²⁰

Throughout the early twentieth century, courts uniformly declared the constitutionality of state regulations concerning the operation and exhibition of motion pictures.²¹ Although these

¹⁴ *Id.* at 7.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 8. As de Grazia and Newman described:

People who formerly had spent their spare time in poolrooms, dance halls, and, especially, saloons, now flocked to new and converted movie houses, which shortly became the *bête noir* of progressives. For immigrants and other newcomers to the cities, the moving picture house was "the substitute for the saloon." The "slums," wrote Vachel Lindsay, were "an astonishing assembly of cave-men crawling out of their shelters to exhibit for the first time in history a common interest on a tremendous scale in an art form. Below the cliff caves were bar rooms in endless lines. Yet this new thing breaks the lines as nothing ever did. Often when a moving picture house is set up, the saloon on the right hand or the left declares bankruptcy." Progressives found little comfort in this situation: movie houses and saloons appeared to them equally suspect. Some reformers maintained that "recreation is the antitoxin of delinquency, and the sooner it is administrated, . . . the milder will be the disease." "Recreation," at that time, meant activity directed at some socially useful, educational, or developmental end; leisure time was not intended to be spent socializing with peers in settings that might threaten the traditional authority of home, church, and school. Movies were not obviously healthy recreation; their potential for evil was at least as great as their disposition toward good—unless they could be controlled. To many, films loomed as a new kind of urban vice.

Id. at 7-8.

¹⁸ *See id.*; *see also* *Block v. City of Chicago*, 87 N.E. 1011 (Ill. 1909) (upholding the constitutionality of the censorship ordinance in the City of Chicago).

¹⁹ *See* DE GRAZIA & NEWMAN, *supra* note 9, at 13.

²⁰ *See id.* at 14; *see also* *Censorship of Motion Pictures*, *supra* note 10, at 98 (noting that "[t]he actions of local censor boards are apt to be even more capricious than those of the state censors, as the boards are infinitely more susceptible to any locally powerful religious, social or patriotic organization"). For example, policy departments in Detroit, St. Louis, Washington, San Francisco, Louisville, and Trenton were empowered by municipal ordinances or acted upon their own initiatives to inspect movies. Los Angeles and Birmingham formed censorship boards within the police department or other inspection bureaus, while Kansas City created a censorship board that was responsible to the mayor. In August 1913, New York City passed the first comprehensive municipal law in the country to oversee motion picture houses. Although the statute did not expressly authorize the regulation of motion picture content, "the New York City license commissioner construed it to empower him to review content." *Id.* at 15. Until the State of New York set up its official statewide censorship board in 1921, that commissioner behaved as a *de facto* movie censor in the City. *See id.* at 23.

²¹ *See* Julius Steinbrenner, *Notes and Comment*, 1 CORNELL L.Q. 173 (1916) (stating that "[w]henver the question of [movie] censorship has arisen, the courts have uniformly declared in favor of its constitutionality"); *Recent Important Decisions*, 13 MICH. L. REV. 515, 516 (1915) (noting that "[t]he authorities [we]re unanimous, wherever the question has arisen, that the regulation of licenses to moving picture theatres, and the censoring of films is within the scope of the police power").

regulations would undoubtedly be considered prior restraints today, very few litigants at the turn of the twentieth century challenged the statute as an abridgement of freedom of speech. Indeed, “courts ha[d] rarely been called upon to construe ‘freedom of the press,’ for the idea of a muzzled press [was] so foreign to the spirit of our government that seldom ha[d] any attempt been made to restrict expression of opinion.”²²

In 1914, film censorship laws were challenged for the first time²³ as an abridgement of freedom of the press in *Mutual Film Corp. v. Industrial Commission*.²⁴ At issue in the case was the Ohio censorship law, which banned motion pictures that were “in the judgment and discretion of the board of censors [lacking in] a moral, educational, or amusing and harmless character.”²⁵ A few months after the law entered into effect, Mutual Film Corp., a nationwide motion picture distributor,²⁶ challenged the statute before the United States District Court of the Northern District of Ohio. In its complaint, the distributor alleged that (1) the statute violated the freedom of the press guarantees under the First Amendment to the United States Constitution and under the Ohio Constitution; (2) the statute violated the Commerce Clause of the United States Constitution; (3) the statute was not sustainable as an inspection law under section 10, article 1, of the United States Constitution; and (4) the statute delegated legislative power to censorship boards in violation of the Ohio Constitution.²⁷

The distributor lost the case at the district court level, and appealed the case to the United States Supreme Court.²⁸ At the appellate level, Mutual Film retained three of its original arguments and claimed that (1) the statute imposed an unlawful burden on interstate commerce; (2) the statute violated the freedom of speech and press guarantees under the Ohio Constitution,²⁹ and (3) the statute attempted to delegate legislative power to censorship boards in violation of the

²² Steinbrenner, *supra* note 21, at 237; see John Wertheimer, *Mutual Film Reviewed: The Movies, Censorship, and Free Speech in Progressive America*, 37 AM. J. LEGAL HIST. 158, 158 (1993) (arguing that litigants before *Mutual Film* had not raised free-speech arguments).

²³ See *Freedom of Speech and Boards of Censors for Motion Pictures Shows*, 80 CENT. L.J. 307, 307 (1915) [hereinafter *Freedom of Speech*] (considering “startling” the freedom of the press claim in *Mutual Film*); Wertheimer, *supra* note 22, at 162 (noting that “prior to the Mutual Film Corporation’s lawyers themselves, scarcely anyone in America had thought to argue that the governmental control of public amusements raised constitutional free-speech issues”).

²⁴ 215 F. 138 (1914).

²⁵ Ohio Film Censorship Law § 4, reprinted in *Mutual Film*, 215 F. at 140 n.1. For a detailed discussion of Ohio Film Censorship Law in 1913-1952, see generally Ivan Brychta, *The Ohio Film Censorship Law*, 13 OHIO ST. L.J. 350 (1952). As Brychta described:

The Film Censorship Act created a body of censors, provided an abstract standard of censorship, and prohibited public exhibition of films unapproved by the board. It determined a fee to be paid for the examination of the films, stipulated sanctions against the violation of the law, and provided for administrative hearing before the board in behalf of persons dissatisfied with the board’s rulings, as well as for judicial review before the Supreme Court of Ohio.

Id. at 353.

²⁶ See Wertheimer, *supra* note 22, at 176 (noting that the broad scope of Mutual Film’s national distribution network “rendered the company extra-sensitive to state-by-state regulation of its product”); see also *id.* at 175 (considering “fee and delays” two of Mutual Film’s biggest worries); Brychta, *supra* note 25, at 374 (noting that “[t]he worst burden of a censorship statute does not lie in the amount of things eliminated, but in the necessity to submit everything intended for publication to the government”).

²⁷ See *Mutual Film*, 215 F. at 141-48.

²⁸ 236 U.S. 230 (1915). For discussions of *Mutual Film*, see generally Brychta, *supra* note 25; *Freedom of Speech*, *supra* note 23; *Recent Decisions*, 15 COLUM. L. REV. 546 (1915); Wertheimer, *supra* note 22; *Recent Important Decisions*, *supra* note 21; Steinbrenner, *supra* note 21.

²⁹ Section 11, article 1, of the Ohio Constitution provided:

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted.

OHIO CONST. § 11, art. 1 (1913), quoted in *Mutual Film*, 236 U.S. at 239.

Ohio Constitution. Notably, the distributor abandoned the federal constitutional claim at this stage and contended merely that the Ohio censorship law violated the freedom of speech and press guarantees under the Ohio Constitution.

Although the Court conceded that motion pictures might be used for a variety of worthy purposes—for example, “as graphic expressions of opinion and sentiments, as exponents of policies, as teachers of science and history, as useful, interesting, amusing, educational and moral,”³⁰—the Court noted that the Ohio statute targeted only those motion pictures that “m[ight] be used for evil” and would not censor pictures that were used for worthy purposes.³¹ As the Court explained:

Their power of amusement and, it may be, education, the audiences they assemble, not of women alone nor of men alone, but together, not of adults only, but of children, make them the more insidious in corruption by a pretense of worthy purpose or if they should degenerate from worthy purpose. Indeed, we may go beyond that possibility. They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a prurient interest may be excited and appealed to. Besides, there are some things which should not have pictorial representation in public places and to all audiences.³²

In light of the motion picture’s capacity to create expressions that were dangerous to society, the Court gave great deference to the state legislature, which “considered it to be in the interest of the public morals and welfare to supervise moving picture exhibitions.”³³

The Court did not stop there, however. Writing for a unanimous court, Justice Joseph McKenna explained that, although motion pictures might be “mediums of thought,” they did not necessarily warrant protection under the Ohio Constitution.³⁴ Citing the lack of precedents, the Court emphatically rejected the extension of free speech and free press protections to the motion picture. As the Court stated:

We immediately feel that the argument is wrong or strained which extends the guaranties of free opinion and speech to the multitudinous shows which are advertised on the bill-boards of our cities and towns and which regards them as emblems of public safety, to use the words of Lord Camden, quoted by counsel, and which seeks to bring motion pictures and other spectacles into practical and legal similitude to a free press and liberty of opinion.³⁵

Analogizing motion pictures to theatrical performances, which were subject to licensing and control at the time,³⁶ the Court noted that “the police power is familiarly exercised in granting or

³⁰ *Mutual Film*, 236 U.S. at 241.

³¹ *Id.* at 242; see also Steinbrenner, *supra* note 21, at 174 (attributing the Court’s holding to “the manifest capability for evil in the unrestricted exhibition of moving pictures”).

³² *Mutual Film*, 236 U.S. at 242.

³³ *Id.*

³⁴ See *id.* at 243.

³⁵ *Id.* at 243-44.

³⁶ See Wertheimer, *supra* note 22, at 162 (stating that “[t]he American past was replete with prior restraints on theatrical expression”); *Censorship of Motion Pictures*, *supra* note 10, at 90 (“With . . . a background [of theater censorship] in English law, and with a Puritan heritage in America which frowned on the stage, it is understandable that the theatre in the early years of this country was regarded as a low form of entertainment, to be licensed by each town or city in the interest of morality and decency.”); Note, *Motion Pictures and the First Amendment*, 60 YALE L.J. 696, 704 (1951) [hereinafter *Motion Pictures and the First Amendment*] (noting that “the Puritan tradition . . . long characterized the stage as evil”); see also Wertheimer, *supra* note 22, at 165 (noting that legislators, judges, and litigants at the time had not asked whether “the[] nineteenth-century laws licensing and prohibiting theatrical shows in advance violate American constitutional speech and press guarantees”).

withholding licenses for [those] performances as a means of their regulation.”³⁷ The Court also found that “[t]he exercise of the power upon moving picture exhibitions has been sustained,” citing cases in the States of California, Illinois, Maryland, and Minnesota.³⁸ Interestingly, by focusing on the familiar and by noting the lack of complaints regarding abridgement of the freedom of the press in theatrical performances and motion pictures, the Court skillfully “evaded the issue of whether the familiar practice was constitutional” at all.³⁹

The Court then explained why motion pictures should be treated differently from other mediums of expression:

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 by the Ohio constitution, we think, as part of the press of the country or as organs of public opinion.* They are mere representations of events, of ideas and sentiments published and known, vivid, useful and entertaining no doubt, but, as we have said, capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition.⁴⁰

In light of the distinctive nature of motion pictures, the Court found it constitutional for the state legislature to require censorship before exhibition in order to protect the public morals and welfare of its residents. The Court, nonetheless, left open the scenarios where motion pictures were “used to amuse and instruct in other places than theatres—in churches, for instance, and in Sunday schools and public schools.”⁴¹ Because the statute did not cover those situations and the issues were not before it, the Court refrained from making any determination.

The *Mutual Film* decision was initially well received by the legal community.⁴² Viewed in retrospect, the outcome of *Mutual Film* was no surprise, because the motion picture distributor’s First Amendment argument was slightly ahead of its time. When the case was decided, the Supreme Court had yet to apply the First Amendment to state actions. As the district court stated, the prevailing law at that time was that the first eight amendments to the United States Constitution referred only to powers exercised by the federal government, but not to those exercised by the States.⁴³ It was not until the 1925 case of *Gitlow v. New York* did the

³⁷ *Mutual Film*, 236 U.S. at 244.

³⁸ *Id.*

³⁹ Brychta, *supra* note 25, at 363.

⁴⁰ *Mutual Film*, 236 U.S. at 244 (emphasis added).

⁴¹ *Id.* at 245.

⁴² See, e.g., *id.* at 364 (noting that *Mutual Film* “commanded a general assent” shortly after the opinion was published); *Freedom of Speech*, *supra* note 23, at 307 (expressing approval for the Supreme Court decision in *Mutual Film*); *Recent Important Decisions*, *supra* note 21, at 516 (“It cannot be well argued that [the Ohio] statute is in opposition to the constitutional provisions regarding ‘freedom of the press.’ If moving pictures shows come within this provision, so do theatres and all public performances.”); Wertheimer, *supra* note 22, at 160 (noting that *Mutual Film* “met with general if not universal approval from the legal community” immediately after the case was decided). But see D.W. GRIFFITH, *THE RISE AND FALL OF FREE SPEECH IN AMERICA* (1916) (criticizing *Mutual Film* and advocating “the freedom of the screen”); Steinbrenner, *supra* note 21, at 174 (questioning the soundness of *Mutual Film*); *Recent Decisions*, *supra* note 28, at 546 (questioning the court’s distinctive treatment of motion pictures in *Mutual Film* despite the fact that “moving pictures are instrumentalities for the transmission of thought, and actual words and sentences are often thrown upon the screen”).

⁴³ See *Mutual Film Corp. v. Industrial Commission*, 215 F. 138, 141 (1914) (“That the first eight articles of the amendments to the Constitution have reference to powers exercised by the government of the United States and not to those of the states” (quoting *Eilenbecker v. District Court*, 134 U.S. 31, 34 (1890))).

Supreme Court include freedom of speech and press among the fundamental rights and liberties protected by the Due Process Clause of the Fourteenth Amendment.⁴⁴

In the two decades following *Gitlow*, commentators began to attack the desirability and constitutionality of the *Mutual Film* decision.⁴⁵ The ensuing legal debate was intensified when the Supreme Court of Tennessee upheld a ban by the Memphis censorship board on a movie showing a desegregation school class on the ground that “the south [did] not permit negroes in white school nor recognize social equality between the races even in children.”⁴⁶ In response to that censorship decision, Eric Johnston, then-president of the Motion Picture Association of America, vowed that the industry “intend[ed] to meet the issue of political censorship head-on in the highest court in the land. We’re after a clear-cut decision that will give the screen the full protection and freedom guaranteed by our American Bill of Rights.”⁴⁷ Although the United States Supreme Court did not grant certiorari in the case,⁴⁸ the motion picture industry was ready to challenge the constitutionality of film censorship laws.⁴⁹

Meanwhile, motion picture technologies had evolved. “Talkies” emerged in the late 1920s,⁵⁰ photography and projection improved, and technicolor was later developed. All of these new features helped make movies a more effective medium to communicate ideas.⁵¹ Moreover, other new media technologies had emerged. By the time the Court overturned the *Mutual Film* decision in the early 1950s, the motion picture was no longer the “new instrumentality in places of amusement.”⁵² Rather, it “ha[d] been succeeded as a mechanical plaything by the radio, television, and the sound truck, and, by and large, ha[d] matured into an effective and intelligent form for the presentation of ideas.”⁵³

Like technology, the nature of movie content had changed substantially since *Mutual Film*, partly due to the self-regulation efforts of the motion picture industry⁵⁴ and partly due to the changing market and movie audience.⁵⁵ Shortly after the decision, movie producers and

⁴⁴ 268 U.S. 652, 666 (1925).

⁴⁵ See, e.g., 1 ZECHARIAH CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 235-41 (1947); MORRIS L. ERNST, THE FIRST FREEDOM 182, 268 (1946); INGLIS, *supra* note 8, at vi; Theodore Kadlin, *Administrative Censorship: A Study of the Mails, Motion Pictures and Radio Broadcasting*, 19 B.U.L. REV. 533, 548-61 (1939); Theodore R. Kupferman & Philip J. O’Brien, Jr., *Motion Picture Censorship—The Memphis Blues*, 36 CORNELL L.Q. 273 (1951); *Censorship of Motion Pictures*, *supra* note; Note, *Film Censorship: An Administrative Analysis*, 39 COLUM. L. REV. 1383 (1939); see also Brychta, *supra* note 25, at 364 (criticizing *Mutual Film* for being “an expression of volition rather than cognition, and accordingly it appeals more to emotion than reason”).

⁴⁶ *United Artists Corp. v. Board of Censors*, 225 S.W.2d 550 (Tenn. 1949); see also Kupferman & O’Brien, *supra* note 45 (criticizing *United Artists Corp.*). “The Tennessee Supreme Court’s decision upheld the ban but turned on the issue of the distributor’s standing to sue rather than on the issue of censorship.” *Motion Pictures and the First Amendment*, *supra* note 36, at 700.

⁴⁷ DE GRAZIA & NEWMAN, *supra* note 9, at 71.

⁴⁸ *United Artists Corp. v. Board of Censors*, 339 U.S. 952 (1950), *denying cert. to* 225 S.W.2d 550 (Tenn. 1949).

⁴⁹ See Brychta, *supra* note 25, at 368 (stating that the motion picture industry had contemplated “to bring a test case by violating the law through the showing of an unapproved newsreel”).

⁵⁰ “Warner Brothers’ introduction of sound was a major change. The first feature picture with sound, *Don Juan*, was released in the summer of 1926.” INGLIS, *supra* note 8, at 33. For early history of motion pictures, see generally TERRY RAMSAYE, A MILLION AND ONE NIGHTS: A HISTORY OF THE MOTION PICTURE THROUGH 1925 (reprint ed. 1986).

⁵¹ As the Court noted later in *Joseph Burstyn, Inc. v. Wilson*, “[i]t is not without significance that talking pictures were first produced in 1926, eleven years after the *Mutual* decision.” 343 U.S. 495, 502 n.12 (1952); see also *Motion Pictures and the First Amendment*, *supra* note 36, at 707 (noting that “[t]he addition of speech to the screen since the date of the *Mutual* decision has contributed to the effectiveness of movies as a communicator of ideas”).

⁵² *Mutual Film*, 215 F. at 143.

⁵³ Kupferman & O’Brien, *supra* note 45, at 299.

⁵⁴ For the industry’s self-regulation efforts, see generally DE GRAZIA & NEWMAN, *supra* note 9; INGLIS, *supra* note 8.

⁵⁵ In her report on movie self-regulation, Ruth Inglis described the changing market and movie audience:

Longer pictures meant a slower turnover of customers. This in turn led to higher admission prices and larger theaters. It was a period of great expansion with the building of many large and pretentious movie “palaces,” which,

directors became active in instituting reforms to make the industry respectable. In July 1916, they established the National Association of the Motion Picture Industry (“NAMPI”) to avert censorship and further federal regulation of their business practices.⁵⁶ NAMPI “announced a self-censorship program aimed at stopping the growing censorship movement and endorsed two changes in federal legislation affecting movies . . . [which included a futile] constitutional movement that called for freedom of the screen and placed films on an equal ‘constitutional’ basis with the print media.”⁵⁷ Its efforts unfortunately backfired and led to further censorship by both federal and state governments.⁵⁸ As industry support disappeared, the group was quickly dissolved.⁵⁹

In March 1922, the Motion Picture Producers and Distributors Association of American (“MPPDA”) was established to replace the now-defunct NAMPI.⁶⁰ While the arrival of talkies in the mid-1920s had enabled the industry to “gr[o]w even more powerful financially and in its public impact,”⁶¹ they also resulted in diverging qualities and standards.⁶² To meet these new challenges, the MPPDA—which was known to the industry at that time as the Hays Office—adopted the Motion Picture Production Code in January 1931.⁶³ Pushed and drafted by the Catholic community, the Code incorporated the following general principles:

1. No picture shall be produced which will lower the moral standards of those who see it. Hence the sympathy of the audience shall never be thrown to the side of crime, wrong-doing, evil, or sin.
2. Correct standards of life, subject only to the requirements of drama and entertainment, shall be presented.

with rising admission prices and new comforts, began to compete with legitimate plays for a more sophisticated audience. In fact, as time went on, the movies gradually supplanted the provincial theater with its road shows and surpassed the remaining “live” theater in metropolitan areas in terms of attendance.

Formerly the motion picture audience, to a large extent, had been composed of working-class people, many of whom could not read English. Now middle-class audiences were attracted. . . . n order to hold the new audiences, the movie houses became more “refined.” This refinement extended to the pictures themselves. Slides with local store advertising were eliminated, and obvious preaching or crude dramas of simple morality were no longer tolerated. A new sophistication was noticeable, and the audiences seemed to accept the standards by which exhibitors measured the worth of pictures.

INGLIS, *supra* note 8, at 32.

⁵⁶ See DE GRAZIA & NEWMAN, *supra* note 9, at 22.

⁵⁷ *Id.* “[I]n 1919, the National Association of the Motion Picture Industry proposed a constitutional amendment (it died in Congressional committee) which would have provided for ‘freedom of the screen.’” Wertheimer, *supra* note 22, at 188.

⁵⁸ See DE GRAZIA & NEWMAN, *supra* note 9, at 23.

⁵⁹ See *id.* at 25.

⁶⁰ See *id.*

⁶¹ *Id.* at 29. Compare *id.* (stating that the motion picture “[a]lready ranked among the nation’s ten largest industries”), and Wertheimer, *supra* note 22, at 171 (noting that “[b]y 1913 the American movie industry was doing over three hundred million dollars worth of business a year, making it buy [sic] some accounts the fourth largest industry in the country”), with INGLIS, *supra* note 8, at 35 (noting a 1944 study that “placed the movies in forty-fifth place in terms of the total volume of business on the basis of the figures for gross income reported in the 1937 *Statistics of Income* issued by the Bureau of Internal Revenue”).

⁶² As de Grazia and Newman explained:

The nearly universal adoption of sound by 1929 prompted Hays [the president of the MPPDA] to consider new methods of strengthening the effectiveness of his office’s censorship activity. Not only did the sheer amount of language used in movies increase far beyond that employed in the subtitles for silent pictures, but the sort of language used was threatening to get out of control. New actors had been recruited, often too hurriedly for proper selection and training, from vaudeville and burlesque circuits. These, at first, improvised their lines while the movie was being filmed, creating a precarious situation that was promptly abandoned as scriptwriters adapted to the requirements of sound.

Id. at 32.

⁶³ See DE GRAZIA & NEWMAN, *supra* note 9, at 35.

3. Law, natural or human, shall not be ridiculed, nor shall sympathy be created for its violation.⁶⁴

In the very beginning, the MPPDA did not have an enforcement arm, and the Code was ineffective.⁶⁵ To address this shortcoming, the MPPDA transformed its Studio Relations Department to the Production Code Administration (“PCA”) in June 1934.⁶⁶ In addition, the industry levied against its member a \$25,000 fine for releasing a film without a PCA certificate and seal of approval.⁶⁷ The MPPDA also required all member-controlled theater circuits not to book any picture without such approval.⁶⁸ Because all major film producers are members of the association, these sanctions had effectively transformed the PCA to the MPPDA’s “police department,” and the standards of movies were finally established.⁶⁹

By the 1930s, motion pictures had emerged as a dominant communication medium that was redefining American culture.⁷⁰ Although movies had proven effective in shaping public opinion during the First World War,⁷¹ they became even more important in the interwar period. During the Great Depression and the Second World War, movies provided Americans not only with a shared visual experience, but also with a “common bond of language” that helped unify the country.⁷² In 1937 alone, sixty-one percent of the American population went to movies every week.⁷³ As interest in motion pictures increased, the subject matter of motion pictures also gradually moved away from the early focus of sex and scandal⁷⁴ to the later discussion of racial,

⁶⁴ *Id.* at 34; *see also id.* at 33 (describing the Catholic origins of the Motion Picture Production Code). For a detailed discussion of the Motion Picture Production Code, *see generally* INGLIS, *supra* note 8.

⁶⁵ *See* DE GRAZIA & NEWMAN, *supra* note 9, at 39.

⁶⁶ *See id.* at 43.

⁶⁷ *See id.*

⁶⁸ *See id.*

⁶⁹ *See id.*

⁷⁰ *See id.* at 50.

⁷¹ As de Grazia and Newman observed:

World War I proved the significance of the cinema in American life. Movies became a powerful propaganda vehicle, “moulding public opinion in favor of the British position.” Through patriotic pictures, most producers, mainly Americans of English and Scottish descent, demonstrated their “loyalty.” By the time that President Wilson, on April 2, 1917, somberly asked Congress—with nearly every member waving or wearing an American flag—to declare war against Germany, the movies already were solidly behind the war. The country’s film industry had mobilized before its army.

Id. at 18; *see also* INGLIS, *supra* note 8, at 29 (“The period of the first World War was extremely important in the history of the movies. It was one of transition, completely changing the economics, content, and influence of films.”).

⁷² *Id.* at 51. As de Grazia and Newman elaborated:

[Movies’] ability to “span geographic frontiers” and “give the old something to talk about with the young” was noticed. Movies would “crumble the barriers between people of different educations and different economic backgrounds.” At their best, they could ease sectional tensions and reduce religious and racial friction. At something less than their best, they, like radio, presented stereotypes that served to heighten group misperceptions and prejudice.

Moviegoiners from the Depression to World War II, especially the young among them, gained a “fantasy life in common, from which,” as one child of the 1930s later put it, “we are still dragging up the images that obsess us.” The movies became “nothing less than a kind of Jungian collective unconscious, a decade of coming attractions out of which some of the truths of our maturity have been formed.” Hollywood “possessed the nation,” Arthur Schlesinger, Jr., wrote. “It formed our images and shaped our dreams.” During the 1930s, “the movies were near the operative center of the nation’s consciousness. They played an indispensable role in sustaining and stimulating the national imagination.”

Id.; *see also* INGLIS, *supra* note 8, at 1:

The demands of the second World War tested the medium as never before and demonstrated its great potentialities. As a result, both inside and outside the motion picture industry there is increasing recognition that the movies have an essential role to play in social life and that the freedom of the screen is important because of what the film can do.

⁷³ *See* DE GRAZIA & NEWMAN, *supra* note 9, at 51.

⁷⁴ *See* Kupferman & O’Brien, *supra* note 45, at 273 (noting that motion pictures “started with sex and was nurtured on scandal” (footnote omitted)); *see also* DE GRAZIA & NEWMAN, *supra* note 9, at 8 (noting that early motion pictures “were not concerned with

social, and political matters.⁷⁵ As a result of this change in content, the medium was viewed with greater respectability and began to foster a closer connection to the press and to civil liberties to which constitutional protection applied.⁷⁶

Against this background, the Court began to change its perception of motion pictures as “business pure and simple, originated and conducted for profit.”⁷⁷ In *United States v. Paramount Pictures, Inc.*, a case involving an antitrust lawsuit against major motion picture studios, the Court noted, in dicta, that: “We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.”⁷⁸ Unlike the *Mutual Film* Court, the *Paramount Pictures* Court considered motion pictures a medium of communication, rather than one of entertainment and amusement.

A year later, in *Kovacs v. Cooper*,⁷⁹ a case involving a sound truck emitting loud and raucous noises in violation of a municipal ordinance, three Supreme Court justices aligned motion pictures with other media of communication. As Justice Hugo Black observed in his dissent, “[i]deas and beliefs are today chiefly disseminated to the masses of people through the press, radio, moving pictures, and public address systems.”⁸⁰ Likewise, in their concurrences, Justice Robert Jackson considered the moving picture screen as a “method[] of ‘communication of ideas,’”⁸¹ while Justice Felix Frankfurter described movies as a “form[] of modern so-called ‘mass communications.’”⁸² Notwithstanding the encouraging support in these dicta, Justice Jackson continued the *Mutual Film* approach in distinguishing between motion pictures and other media. As he noted: “The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself”⁸³

In 1952, thirty-seven years after *Mutual Film*, the Court finally overruled its previous unpopular decision to include motion pictures among the First Amendment guarantees in *Joseph Burstyn, Inc. v. Wilson*.⁸⁴ At issue in *Burstyn* was the revocation by the New York State Board of Regents of the license to exhibit Roberto Rossellini’s *The Miracle*, which was described as “a

elevated themes, or with ‘fairy tales, fantasies, [or] storybook romances,’ because these were ‘far removed’ from the ‘immediate interests’ of most people”); *id.* at 35 (“A 1930 sample of 500 films showed that while comedies composed 16 percent, almost all the rest dealt with crime (27 percent), sex (15 percent), and love (30 percent).”).

⁷⁵ See Kupferman & O’Brien, *supra* note 45, at 273-74 (noting that “the motion picture industry had plunged heavily and profitably into anti-racism films” in the 1940s (footnote omitted)); P.D. McAnany, *Motion Picture Censorship and Constitutional Freedom*, 50 KY. L.J. 427, 432 (1962) (observing that “Americans were coming to accept the screen for opinions on many things”); *Motion Pictures and the First Amendment*, *supra* note 36, at 706 n.25 (noting that “[a]n early survey of motion picture content showed that from 1920 to 1930 there was an increase in the number of films devoted to such topics as biography, documentary, social problems, history, and war”).

⁷⁶ See McAnany, *supra* note 75, at 432 (noting that “the growing awareness of the potentialities of film for more than mere entertainment resulted in movies of a controversial type, devoted to the exploration of social problems”); *cf.* Brychta, *supra* note 25, at 363 (noting that the *Mutual Film* Court placed “an overwhelming emphasis upon those elements in motion picture exhibitions which have no connection with civil liberties, as if the presence of these factors inevitably made impossible the presence of elements to which constitutional protection does apply”).

⁷⁷ *Mutual Film*, 236 U.S. 230, 244 (1915).

⁷⁸ 334 U.S. 131, 166 (1948).

⁷⁹ 336 U.S. 77 (1949).

⁸⁰ 336 U.S. at 102 (Black, J., dissenting) (emphasis added).

⁸¹ *Id.* at 97 (Jackson, J., concurring).

⁸² *Id.* at 96 (Frankfurter, J., concurring).

⁸³ *Id.* at 97 (Jackson, J., concurring).

⁸⁴ 343 U.S. 495 (1952). For discussions of *Burstyn*, see generally McAnany, *supra* note 75, at 428-35; *Decisions*, 27 N.Y.U. L. REV. 699, 699 (1952); John L. Sanders, *Notes and Comments*, 31 N.C.L. REV. 103, 103 (1952); *The Supreme Court, 1951 Term*, 66 HARV. L. REV. 89, 114 (1952).

bold attempt to deal with the problem of human love.”⁸⁵ Although the film had attracted only limited criticism by the Vatican and in Italy,⁸⁶ the Catholic community in New York City heavily criticized the film when it was shown in the Paris Theatre on 58th Street in Manhattan.⁸⁷ The controversy became greater when Francis Cardinal Spellman condemned the picture and “call[ed] on ‘all right thinking citizens’ to unite to tighten censorship laws.”⁸⁸ His action backfired and aroused dissent among other devout Christians, many of whom appreciated the film’s artistic quality and did not find the film sacrilegious.⁸⁹ In light of this controversy, the Board of Regents reviewed its decision to grant the two licenses involved in the film’s exhibition. The Board ultimately found the film “sacrilegious” and revoked the prior licenses.⁹⁰

The motion picture distributor brought suit in the New York state courts asking for a review of the Regents’ decision.⁹¹ In addition to claims challenging the Regents’ authority, the distributor alleged that (1) the term “sacrilegious” was so vague and indefinite as to offend due process; (2) the statute was invalid under the Fourteenth Amendment as a violation of the guarantee of separate church and state and as a prohibition of the free exercise of religion; and (3) the statute in question violated the Fourteenth Amendment as a prior restraint upon freedom of speech and of the press.⁹² The lower court rejected all three arguments, and the New York Court of Appeals affirmed the decision on appeal.

Upon challenge before the United States Supreme Court, however, the Court reversed and held that motion picture was a form of expression protected against impairment by the First and Fourteenth Amendments.⁹³ In addition, the Court found that the New York statute that permitted banning of motion pictures on the ground that they were “sacrilegious” was a prior restraint that unconstitutionally abridged the rights of freedom of speech and of press under the First and Fourteenth Amendments.⁹⁴ As Justice Tom Clark explained:

It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought

⁸⁵ McAnany, *supra* note 75, at 433-34. For a summary of the plot of *The Miracle*, see *Burstyn*, 343 U.S. at 507-08 (Frankfurter, J., concurring) (reprinting a plot summary excerpted from *The Atlantic Monthly*); see also DE GRAZIA & NEWMAN, *supra* note 9, at 231-33 (discussing the censorship of *The Miracle*).

⁸⁶ See *Burstyn*, 343 U.S. at 508-10 (Frankfurter, J., concurring). Ironically, “all the persons having significant positions in the production—producer, director, and cast—were Catholics.” *Id.* at 515.

⁸⁷ See *id.* at 510-11. The National Legion of Decency, a private Catholic organization for film censorship, attacked the film as “a sacrilegious and blasphemous mockery of Christian religious truth.” *Id.* at 511.

⁸⁸ *Id.* at 513.

⁸⁹ See *id.* at 513-14. For example, Allen Tate, the well-known Catholic poet and critic, wrote: “The picture seems to me to be superior in acting and photography but inferior dramatically. . . . In the long run what Cardinal Spellman will have succeeded in doing is insulting the intelligence and faith of American Catholics with the assumption that a second-rate motion picture could in any way undermine their morals or shake their faith.” *Id.* at 515.

⁹⁰ See *id.* at 498.

⁹¹ See *Joseph Burstyn, Inc. v. Wilson*, 101 N.E. 2d 665 (1951), *rev’d*, 343 U.S. 495 (1952).

⁹² See *id.* at 670-74.

⁹³ See *Burstyn*, 343 U.S. at 502.

⁹⁴ See *id.* at 503-05. The New York Court of Appeals gave a broad and all-inclusive definition to the term “sacrilegious”: “It is simply this: that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule.” *Burstyn*, 101 N. E. 2d at 672. In response, the United States Supreme Court noted that this definition will vest “unlimited restraining control over motion pictures in a censor”: “In seeking to apply the broad and all-inclusive definition of ‘sacrilegious’ given by the New York courts, the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies.” *Burstyn*, 343 U.S. at 504-05. The Court also pointed out that “the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views.” *Id.* at 505.

which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. As was said in *Winters v. New York*: “The line between the informing and the entertaining is too elusive for the protection of that basic right [a free press]. Everyone is familiar with instances of propaganda through fiction. What is one man’s amusement, teaches another’s doctrine.”⁹⁵

The Court also rejected the argument that motion pictures did not warrant First Amendment protection “because their production, distribution, and exhibition [was] a large-scale business conducted for private profit.”⁹⁶ Likewise, it maintained that the motion picture’s capacity for evil did not authorize “substantially unbridled censorship” such as the New York statute in question.⁹⁷ Rather, as Justice Clark noted, such capacity “m[ight] be relevant in determining the permissible scope of community control.”⁹⁸

Notwithstanding the Court’s reversal and extension of First Amendment protection to motion pictures, several threads of the *Mutual Film* decision remained.⁹⁹ As the Court made clear in *Burstyn*, the *Mutual Film* decision was overruled to the extent that it was inconsistent with the present decision.¹⁰⁰ Thus, the Court’s reasoning concerning the danger of motion pictures, the need for state protection against dangerous speeches, such as obscenity and child pornography,¹⁰¹ and the need for higher protection concerning motion pictures remained well and alive.¹⁰² Indeed, as the *Burstyn* Court noted: “Each method tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary.”¹⁰³ Thus, it is no surprise that commentators have found that the “capacity for evil” theme and the medium-specific approach embraced by the *Mutual Film* Court continues to haunt the development of expressions in motion pictures and other media.¹⁰⁴ As Edward de Grazia and Roger Newman summed up the history of movie censorship

⁹⁵ *Id.* at 501 (quoting *Winters v. New York*, 333 U.S. 507, 510 (1948) (footnote and citation omitted)).

⁹⁶ *Id.*

⁹⁷ *Id.* at 502.

⁹⁸ *Id.*

⁹⁹ See McAnany, *supra* note 75, at 434 (noting that “the Court was not convinced that prior restraint on films was altogether invalid”); *id.* at 444 (“Films had been recognized as a medium for the expression of ideas and included within the protection of the first and fourteenth amendments. But this freedom did not rule out the use of prior censorship to control expressions found to be dangerous to the community.”).

¹⁰⁰ The Court stated: “To the extent that language in the opinion in *Mutual Film Corp. v. Industrial Comm’n* is out of harmony with the views here set forth, we no longer adhere to it.” *Burstyn*, 343 U.S. at 502 (citation omitted).

¹⁰¹ The Court noted: “Since the term ‘sacrilegious’ is the sole standard under attack here, it is not necessary for us to decide, for example, whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films.” *Id.* at 505-06; see also McAnany, *supra* note 75, at 444 (arguing that *Burstyn* “did not rule out the use of prior censorship to control expressions found to be dangerous to the community”); *Decisions*, *supra* note 84, at 701-02 (noting that statutes that “are drafted carefully may still provide for censorship in cases of lewdness, obscenity, incitement to crime, threatening the forceful overthrow of the government, and the like”).

¹⁰² The Court stated: “To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments . . . is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places.” *Id.*; McAnany, *supra* note 75, at 434 (arguing that the *Burstyn* Court “refused to go much further than a bare declaration of emancipation”).

¹⁰³ *Burstyn*, 343 U.S. at 503.

¹⁰⁴ As Donald Lively explained:

The overruling of *Mutual Film*’s fear-based holding has, in the long run, been meaningless to the extent that the affirmation of media-specific first amendment analysis has ensured the vitality of fear-based regulatory rationales. Concerns virtually identical to those expressed in *Mutual Film* have been sounded with the emergence of radio, television, and cable television and have become the policy foundations for each new medium’s governance. For each medium, the Court has qualified constitutional protection by focusing on purported differences between the natures of the new, mostly electronic and old print media. A mechanism for maintaining

in *Banned Films*: “For as long as movies have been made, there has been a relentless struggle to control their appearance, their morals, their ideas.”¹⁰⁵

II. WHY WAS THE INTERNET DIFFERENT?

After thirty-seven years, a Great Depression, and two World Wars, the Court finally extended free speech and free press protections to motion pictures. This long struggle of motion picture industry provided an interesting contrast to the protection the Court has given to the Internet in recent cases. One therefore cannot help but wonder why it took the Court so long to extend protection to this new medium and why the Court treated the two media differently. Were the outcomes different because the Internet was a different technology from motion pictures? Or were they different because the cases were adjudicated at different times? Although we will never know the answers to these questions, or whether the Internet would have been extended full free speech and free press protections in 1915, this Part offers three explanations to account for the Court’s different treatment of the Internet: technological determinism, legal determinism, and social determinism. While none of these accounts can fully explain the Court’s differing approach in early Internet cases, they help us understand better the different factors that may influence the development of law, technology, and society. In particular, they alerted us to the limitations of oversimplistic deterministic accounts while highlighting how a confluence of factors affect the legal protection new technologies receive.

A. *Technological Determinism*

When new technologies emerge, there is a tendency to have high hopes, “technoromaticism,”¹⁰⁶ inflated dreams, or even “irrational exuberance.”¹⁰⁷ For example, when the transatlantic cable was built, people commented on the peacemaking potential of the telegraph. As Edward Thornton, the British ambassador to the United States, asked rhetorically, “What can be more likely to effect [peace] than a constant and complete intercourse between all nations and individuals in the world?”¹⁰⁸ Likewise, when wireless radio technology was introduced, people suggested that world peace would be “only a turn of the dial away.”¹⁰⁹ I wish it were that simple!

Thus, when the Internet became popular, it was no surprise that technology enthusiasts described the new technology as a tool to help the poor and the disadvantaged to realize their full social, economic, political, cultural, educational and career potential.¹¹⁰ Some commentators

some measure of control over new media thus has been maintained. Although the device may operate less heavily than *Mutual Film*’s complete denial of first amendment protection, it is equally effective.

Donald E. Lively, *Fear and the Media: A First Amendment Horror Show*, 69 MINN. L. REV. 1069, 1080 (1985) (footnote omitted).

¹⁰⁵ DE GRAZIA & NEWMAN, *supra* note 9, at xv.

¹⁰⁶ Richard Coyne, TECHNOROMANTICISM: DIGITAL NARRATIVE, HOLISM, AND THE ROMANCE OF THE REAL (1999).

¹⁰⁷ Justin Hughes, *Of World Music and Sovereign States, Professors and the Formation of Legal Norms*, 35 LOY. U. CHI. L.J. 155, 156 (2003) [hereinafter Hughes, *Of World Music and Sovereign States*] (noting that, in the case of both railroads at the end of the nineteenth century and the Internet at the end of the twentieth century, “irrational exuberance led to overbuilding, with enormous losses for investors, but with valuable infrastructure created for the rest of us, whether or not these are consumers or new businesses that will thrive on what has been created”); accord Monroe E. Price, *The Newness of New Technology*, 22 CARDOZO L. REV. 1885, 1885 (2001) (noting that “[e]very candidate for new information technology has invited a super-heated rhetoric of millennial social change”).

¹⁰⁸ TOM STANDAGE, *THE VICTORIAN INTERNET: THE REMARKABLE STORY OF THE TELEGRAPH AND THE NINETEENTH CENTURY’S ON-LINE PIONEERS* 90 (1998).

¹⁰⁹ Price, *supra* note 107, at 1885.

¹¹⁰ As I wrote at the turn of this century:

also have noted the Internet's ability to erode the gap between the rich and the poor and to strengthen democracy¹¹¹ and free speech in authoritarian countries.¹¹² Justice John Paul Stevens alluded to "the vast democratic fora of the Internet" in *Reno v. ACLU*,¹¹³ while Judge Stewart Dalzell, in the lower court's decision, described it as "the most participatory form of mass speech yet developed."¹¹⁴

Although judges may agree with these prognoses, they cannot just extend protection to the new technology based on its newness or potential benefits. As Justice Anthony Kennedy reminded his colleagues in his dissent in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, "comparisons and analogies to other areas of our First Amendment case law [are] a responsibility, rather than the luxury the plurality considers them to be."¹¹⁵ Thus, instead of examining each new technology based on its first impression, judges need to explain through analogical reasoning why the technology is different in a legal or constitutional sense from existing technologies (such as newspapers, broadcasting, cable, or satellite).¹¹⁶ Is the Internet different because computing technology is less invasive and more interactive?¹¹⁷ Is it different because the medium historically has not been subjected to extensive government regulation?¹¹⁸ Is it different because "Cyberspace is malleable," as Justice Sandra Day O'Connor put it?¹¹⁹ Is it different because market entry to the online world is "easy, inexpensive and nondiscriminatory"?¹²⁰ Is it different because the Internet is less susceptible to domestic regulation?¹²¹ Is it different because the Internet is a network¹²² and provides a new "cultural

Access to the Internet and new communications technologies is paramount to survival in the New Economy. Today, information technology increasingly determines the ease with which we conduct such daily activities as personal communication, business transactions, entertainment, education, job searches, research and information gathering, medical assistance, and political participation. They also enable us to "connect[] to family, friends, schools, employers, political representatives, markets and society." Without information technology, we will become the "New Invisible Man." Our function as citizens, students, workers, and consumers in society also will diminish significantly.

Peter K. Yu, *Bridging the Digital Divide: Equality in the Information Age*, 20 CARDOZO ARTS & ENT. L.J. 1, 8-9 (2002) (footnotes omitted).

¹¹¹ See sources cited in *id.* at 24 n.131, 40 n.215.

¹¹² See *id.* at 24-27.

¹¹³ 521 U.S. 844, 868 (1997).

¹¹⁴ 929 F. Supp. 824, 883 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

¹¹⁵ 518 U.S. 727, 787 (1996) (Kennedy, J., concurring in part and dissenting in part).

¹¹⁶ On recent discussions of analogical reasoning, see Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923 (1996); Dan Hunter, *Reason Is Too Large: Analogy and Precedent in Law*, 50 EMORY L.J. 1197, 1203 n.25 (2001); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993). For other sources, see Hunter, *supra*, at 1203 n.25. For discussions of metaphors used in conceptualizing technological change brought about by the Internet, see generally A. Michael Froomkin, *The Metaphor Is the Key: Cryptography, the Clipper Chip, and the Constitution*, 143 U. PA. L. REV. 709 (1995); Price, *supra* note 107; Harmeet Sawhney, *Information Superhighway: Metaphors as Midwives*, 18 MEDIA, CULTURE & SOC'Y 291 (1996).

¹¹⁷ See MIKE GODWIN, CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE 10 (1998) (noting that "the structure, the dynamic, and the sheer cheapness of access to the Net mean that this is the first mass medium ever with the potential to give each of us a voice with the reach of a newspaper or TV station, but with the intimacy and responsiveness of the telephone"); Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1668 (1998) (discussing the interactivity of digital communications technologies).

¹¹⁸ See *Reno v. ACLU*, 521 U.S. 844, 845 (1997) (stating that, in the past, "the Court relied on the history of extensive government regulation of the broadcast medium"); see also Price, *supra* note 107, at 1904-07 (questioning the historical regulation rationale).

¹¹⁹ *Reno v. ACLU*, 521 U.S. 844, 890 (1997) (O'Connor, J., concurring in part and dissenting in part) ("Cyberspace differs from the physical world in another basic way: Cyberspace is malleable.").

¹²⁰ Price, *supra* note 107, at 1909.

¹²¹ See Sullivan, *supra* note 117, at 1667-68 (discussing the unboundedness of digital communications technologies).

¹²² See GODWIN, *supra* note 117, at 9 ("While traditional print and broadcast media rely on a 'one-to-many' model, computer-based communications of the new sort can function as 'many-to-many.'"); Matt Jackson, *The Digital Millennium Copyright Act of 1998: A Proposed Amendment to Accommodate Free Speech*, 5 COMM. L. & POL'Y 61, 66 (2000) (noting that "the Internet is significant in large

space”?¹²³ Or is it different because digital technologies have permeated our lives to a much greater degree than their predecessors?

Even if judges are able to find some “peculiar characteristics” to justify varying treatment,¹²⁴ the logic “if new, then protection” does not automatically follow. Instead, they have to explain why those characteristics warrant protection, rather than regulation. After all, the opposite of the logic “If new, then protection” is “If new, then regulation.” As much hype and irrational exuberance a new technology attracts, that technology has also sparked “‘rational’ worries”¹²⁵ and “‘irrational fears”¹²⁶ (as shown in the history of movie censorship at the turn of the twentieth century and in anecdotes concerning the Luddites’ destruction of machines¹²⁷). In fact, as speech cases in the broadcasting context have shown, “peculiar characteristics” have often been used to justify regulation rather than protection,¹²⁸ while some courts “have a disturbing tendency to treat regulations of the electronic media as principally structural economic regulations without recognizing the effects on First Amendment values.”¹²⁹

Moreover, most technologies have a dual capacity for both good and evil. As beneficial as the Internet is, it also has created serious concerns over sex, violence, obscenity, hate speech, incitement, defamation, invasion of privacy, massive infringement of intellectual property

part because it is a network, not just because it is digital”). For sources discussing the network effects of the Internet, see Yu, *Bridging the Digital Divide*, *supra* note 110, at 22 n.121.

¹²³ M. Ethan Katsh, *Rights, Camera, Action: Cyberspatial Settings and the First Amendment*, 104 YALE L.J. 1681 (1995). Lawrence Lessig explained the newness of this cultural space:

What will be new are the communities that this space will allow, and the constructive (in the sense of constructivist) possibilities that these communities will bring. People meet, and talk, and live in cyberspace in ways not possible in real space. They build and define themselves in cyberspace in ways not possible in real space. And before they get cut apart by regulation, we should know something about their form, and more about their potential.

Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1745-46; *see also* YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006) (discussing social productions in the new networked information economy); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 2 (2004) (noting that “digital technologies change the social conditions in which people speak, and by changing the social conditions of speech, they bring to light features of freedom of speech that have always existed in the background but now become foregrounded”).

¹²⁴ *National Ass’n of Indep. Television Producers & Distribs. v. FCC*, 516 F.2d 526, 531 (2d Cir. 1975) (stating that “the *peculiar characteristics* of the broadcast media require the application of constitutional standards to their regulation which differ from those applicable to other types of communication” (citing *Red Lion Broad. Co., Inc. v. FCC*, 395 U.S. 367, 386 (1969) (emphasis added)); *see also* Henry Goldberg & Michael Couzens, “*Peculiar Characteristics*”: *An Analysis of the First Amendment Implications of Broadcasting*, 31 FED. COM. L.J. 1 (1978) (examining the explicit and implicit regulatory controls that are exercised to require or encourage the presentation of certain content or categories of programs).

¹²⁵ GODWIN, *supra* note 117, at 299.

¹²⁶ As Dean Rodney Smolla observed, “Censorship is a social instinct.” RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 4 (1992); *accord* Lively, *supra* note 104, at 1076 (noting that “[s]ince early in the twentieth century, an undifferentiated phobia of a potential for some evil, rather than a palpable fear of demonstrable social harm, has been the initial response to the emergence of each major new medium”); *see also* Clay Calvert, *The First Amendment and The Third Person: Perceptual Biases of Media Harms & Cries for Government Censorship*, 6 COMM.LAW CONSPECTUS 165 (1998) (discussing the third party effect hypothesis in which people systematically overestimate harmful media effects on others). Ironically, as Justice Louis Brandeis pointed out, “[i]t is the function of speech to free men from the bondage of irrational fears.” *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

¹²⁷ *See* DONALD MACKENZIE, *KNOWING MACHINES: ESSAYS ON TECHNICAL CHANGE* 6 (1998) (discussing the “irrational resistance to technical change, such as that of the much-disparaged Luddite machine breakers”).

¹²⁸ For a comprehensive discussion of speech regulation in the broadcasting context, *see generally* Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101 (1993).

¹²⁹ Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1083 (1994) [hereinafter *Message in the Medium*]; *see also* *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938) (stating that “[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth”); Matthew L. Spitzer, Turner, Denver and Reno, in *A COMMUNICATIONS CORNUCOPIA: MARKLE FOUNDATION ESSAYS ON INFORMATION POLICY* (Roger Noll & Monroe Price, eds., 1998) (discussing the Court’s disagreements in *Turner*, *Denver Area*, and *Reno* in light of the overall framework of higher protection of speech than for economic regulation).

rights,¹³⁰ online stalking, and Internet frauds. In most cases, the technological nature itself does not offer sufficient guidance on our normative choices. As opponents of gun control constantly remind us, “Guns don’t kill people; people kill people.” The same can be said of the Internet and other new communications technologies.¹³¹ Even if courts are able to distinguish between the technology at issue and its antiquated counterparts, they often have to look beyond the technical contents to determine whether the technology deserves protection or regulation.

B. *Legal Determinism*

First Amendment scholars would quickly point out that the First Amendment landscape in the mid-1990s was quite different from that in the early twentieth century. Although the history of the First Amendment doctrine is rather short, as Dan Farber pointed out,¹³² the First Amendment jurisprudence has evolved rapidly in the past decades. As the late Melville Nimmer noted in the context of movie censorship, the changes in the constitutional climate inevitably resulted in “the erosion of the grounds of the *Mudual Film* decision”.¹³³

[S]ome four years after the *Mutual Film* case, the Supreme Court enunciated the so-called “clear and present danger” test, a concept destined to be of tremendous importance in the area of free speech, including that of motion picture censorship. Subsequently, in *Gitlow v. New York*, another constitutional principle of importance in this area evolved, when it was held that the guarantees of the First Amendment were applicable to the states as a part of the due process limitations of the Fourteenth Amendment. Next, in *Near v. Minnesota*, the Court laid down the distinction between prior restraints and subsequent punishment, holding that the First Amendment prohibits prior restraints even in those cases in which it would permit subsequent punishment. Finally, in *United States v. Paramount Pictures*, the Court first recognized that motion pictures were a form of speech as contemplated by the First Amendment. It is in the light of these changes in constitutional doctrine that the decision in the *Burstyn* case must be considered.¹³⁴

Thus, as free speech and free press protections expand, one naturally expects the Internet to benefit from the long struggle of its technological predecessors. At the very least, one would expect it to receive the same protection those other technologies have received. After all, free speech and free press protections seem to be path-dependent: What type of protection a new technology will get is likely to be dependent on what type of protection other once-new technologies now get.

¹³⁰ For discussions of the peer-to-peer file-sharing wars, see generally Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907 (2004); Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653 (2005).

¹³¹ Cf. Mike Godwin, *Don't Blame the Tools*, WIRED, Oct. 1997, at 117, http://www.wired.com/wired/archive/5.10/idees_fortes.html (“Human beings, not their tools, bear responsibility for censorship.”); Lawrence Lessig, *What Things Regulate Speech: CDA 2.0 vs. Filtering*, 38 JURIMETRICS J. 629, 663-64 (1998) (discussing Mike Godwin’s argument that we should not attack the technology, but the uses of the technology, which Professor Lessig described as “a more sophisticated version of ‘guns don’t kill people, people kill people.’”); Alfred C. Yen, *What Federal Gun Control Can Teach Us About the DMCA’s Anti-Trafficking Provisions*, 2003 WIS. L. REV. 649, 697 (2003) (suggesting that “[a] circumvention technology control law modeled after federal gun control law will deter the irresponsible misuse of circumvention technology while preserving access to such technology for lawful purposes”).

¹³² As Daniel Farber pointed out:

Although the First Amendment was ratified in 1791 and the Fourteenth Amendment in 1868, freedom of speech did not come into its own as a legal issue until World War I. This is not to say that there were no cases involving the issue or no academic writing on the subject, but it did not receive serious Supreme Court attention until the early Twentieth Century. Thus, as part of legal doctrine, the First Amendment is only about eighty years old.

DANIEL A. FARBER, *THE FIRST AMENDMENT* 11 (2002). For a collection of sources discussing free speech law before the First World War, see Wertheimer, *supra* note 22, at 181 n.131.

¹³³ Melville B. Nimmer, *The Constitutionality of Official Censorship of Motion Pictures*, 25 U. CHI. L. REV. 625 (1958).

¹³⁴ *Id.* at 627-28 (footnotes omitted).

This perspective, however, focuses too much on the gradual expansion of First Amendment protection in non-technology-specific areas; it ignores the increasing regulation of electronic media. In fact, the path dependence argument does not always lead to stronger protection of new technologies. Rather, it may suggest more limited protection, in light of the fact that its predecessors, like broadcasting or cable, have failed to obtain these protections.¹³⁵ As the Court stated in *Red Lion Broadcasting Co. v. FCC.*, “differences in the characteristics of new media justify differences in the First Amendment standards applied to them.”¹³⁶ Unsurprisingly, the *Red Lion* Court cited *Burstyn* to support this medium-specific proposition.

This growing protection, indeed, has led the late Ithiel de Sola Pool to write his now-classic book, *Technologies of Freedom*, which “[t]he new communication technologies have not inherited all the legal immunities that were won for the old” and underscored the need to preserve free speech in electronic media.¹³⁷ As he elaborated:

In each of the three parts of the American communications system—print, common carriers, and broadcasting—the law has rested on a perception of technology that is sometimes accurate, often inaccurate, and which changes slowly as technology changes fast. Each new advance in the technology of communications disturbs a status quo. It meets resistance from those whose dominance it threatens, but if useful, it begins to be adopted. Initially, because it is new and a full scientific mastery of the options is not yet at hand, the invention comes into use in a rather clumsy form. Technical laymen, such as judges, perceive the new technology in that early, clumsy form, which then becomes their image of its nature, possibilities, and use. This perception is an incubus on later understanding.¹³⁸

In his view, “[e]lectronic modes of communication that enjoy lesser rights are moving to center stage. . . . [A]s speech increasingly flows over those electronic media, the five-century growth of an unbridged right of citizens to speak without controls may be endangered.”¹³⁹

Moreover, as research on evolutionary biology has shown, the path can continue to change radically even if it is historically contingent. Citing research on a new evolutionary theory that focuses on “punctuated equilibria,” Oona Hathaway explained how “change occurs in fits and starts rather than in slow and steady gradual steps.”¹⁴⁰ As he explained, “species change little during most of their existence,” but that stability “is punctuated by periods of rapid adaptation.”¹⁴¹ As a result, even if one employs path dependence theories, one still needs to

¹³⁵ Cf. Jim Chen, *Conduit-Based Regulation of Speech*, 54 DUKE L.J. 1359 (2005) (noting that “[t]he jurisprudence of conduit-based regulation reflects no such rationality; it rests exclusively on historic path-dependency”).

¹³⁶ 395 U.S. 367, 386 (1969).

¹³⁷ ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 1 (1984); accord Lively, *supra* note 104, at 1071-72 (noting that “[b]ecause of ‘peculiar characteristics’ attributed to them, however, the constitutional protection afforded them is more limited than the print media’s” (footnote omitted)); *id.* at 1072-73 (noting that “fear of a new medium’s potential for evil has been a consistent rationale for either denying new media first amendment recognition or circumscribing their first amendment freedom” (footnote omitted)); *Message in the Medium*, *supra* note 129, at 1062 (noting that “[a]lthough the print medium reigns supreme in the First Amendment universe, new electronic media have been relegated to subordinate positions and subjected to greater government regulation”); see also Monroe E. Price & John F. Duffy, *Technological Change and Doctrinal Persistence: Telecommunications Reform in Congress and the Court*, 97 COLUM. L. REV. 976, 976 (1997); (stating that “judges and legislators frequently invoke technological change as a justification for altering regulatory arrangements, revising statutes, or reconsidering constitutional doctrine”).

¹³⁸ *Id.* at 7.

¹³⁹ *Id.* at 1.

¹⁴⁰ Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 607 (2001).

¹⁴¹ *Id.* As Professor Hathaway elaborated:

In a model that biologists Niles Eldredge and Stephen Jay Gould termed “punctuated equilibrium,” species change relatively little during most of their existence. This stability is punctuated by periods during which new species

explore when the path will be punctuated by these changes, such as technological developments. Although the voluminous case law on the First Amendment has placed constraints on the judges' decisionmaking process,¹⁴² it simply will not tell exactly when the change will occur.

In sum, the path dependent argument can go either way. It also does not fully account for all of the potential development of the path. Nevertheless, it shows us the danger of having missteps that would be difficult to correct. Given the importance of this path, it is therefore no surprise that early cyberlaw commentators have called for the self-governance of the media while others have advocated caution, restraint, and flexibility in developing free speech protections in the new medium.¹⁴³ Their positions make a lot of sense. If the Court offers stronger protection to the Internet, such protections may be extended later to other similar technologies. Conversely, if the Court introduces more regulation, the justifications for those regulations may be used later to further restrict protection in other technologies. Although we may not be able to predict the future path, path dependence theories have shown us that the path will develop slowly absent a significant punctuating change.

C. *Social Determinism*

When one discusses legal developments in the digital environment, one sometimes forgets the times when the Internet first became popular. As Gaia Bernstein pointed out, the socio-legal acceptance of a new technology is a long process in which non-technological factors often come into play.¹⁴⁴ As a result, it may be helpful to look beyond the technology to understand how courts and commentators perceived the technology and why they did so differently from other similar technologies.

Justin Hughes wondered how different the “path of cyberlaw” would have been had international and comparative law scholars arrived at the debate first.¹⁴⁵ Indeed, when one traveled back to early cyberia, one would find among its “early settlers” a mixed and odd group of American constitutional, criminal, commercial, and copyright law scholars.¹⁴⁶ It is self-

rapidly branch off from a persisting parental stock in a process of “speciation.” Evolution results from the occurrence of these punctuations and the differential survival of the species they produce. The process of speciation is usually sparked when “a small local population becomes isolated at the margin of the geographic range of its parent species.” Under this theory, the local populations, termed “peripheral isolates,” quickly differentiate from the parent species because of the rapid adaptation of the small population to a distinct local environment under conditions of genetic isolation. Under some circumstances, these peripheral isolates develop into a new species, incapable of reintegration into the parent species. Thus, under new evolutionary theory, change occurs primarily in fits and starts rather than in slow and steady gradual steps.

Id. at 614-15 (footnotes omitted).

¹⁴² See Hunter, *supra* note 116, at 1214-29 (discussing the multiple-constraint model of analogy).

¹⁴³ See, e.g., GODWIN, *supra* note 117, at 299-300 (noting that “the best thing to do, when technology opens up a new frontier for freedom of expression, is to sit and wait awhile and see how existing laws and institutions cope with the problems”); Lessig, *The Path of Cyberlaw*, *supra* note 123, at 1745 (“[I]f we had to decide today, say, just what the First Amendment should mean in cyberspace, my sense is that we would get it fundamentally wrong.”); *id.* at 1752 (stating that “[a] prudent Court—Supreme Court, that is—would find ways to let these questions simmer for a while, to let the transition into this new space advance, before venturing too boldly into its regulation”).

¹⁴⁴ See Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035 (2002).

¹⁴⁵ See Hughes, *Of World Music and Sovereign States*, *supra* note 107, at 165 (wondering “what the first years of ‘Internet law’ scholarship would have looked like if the first people on the scene had been scholars established in international or comparative law, not experts in U.S. contract and constitutional law”).

¹⁴⁶ See *id.* (“Whether by accident or an invisible hand of intellectual selection, the initial wave of legal scholars drawn to the Internet was mainly experts in American constitutional, criminal, commercial, and copyright law.”); see also Justin Hughes, *The Internet and the Persistence of Law*, 44 B.C. L. REV. 359, 360-61 (2003) [hereinafter Hughes, *Internet and the Persistence of Law*] (stating that “when

explanatory why American scholars arrived there first—and, for that matter, copyright, commercial, and criminal law scholars. However, it is somewhat odd to find constitutional law scholars there. Pioneers as they might be, these scholars are not usually known for their fascination for cutting-edge technologies. So, what happened?

Perhaps, their arrival had to do with the time when the Internet became popular. Although the Internet can be traced back to the 1960s, the World Wide Web was not invented until 1989.¹⁴⁷ Graphic browsers were launched years later, and the rest is now history. In retrospect, the invention of the Web was a major world event that transformed our daily life. Nevertheless, 1989 is usually remembered for a different world event: the fall of the Berlin Wall (and the subsequent collapse of the Soviet Union). This latter event, no doubt, has colored the early legal commentary on Cyberspace.

Consider, for example, Lawrence Lessig’s well-cited book, *Code and Other Laws of Cyberspace*.¹⁴⁸ Although the book is often cited today for its technology-related propositions, it cannot be ignored that the book has a strong constitutional foundation—to be more precise, a strong American constitutional foundation. The first sentence of the opening chapter is particularly revealing. It read: “A Decade ago, in the spring of 1989, Communism in Europe died—collapsed, as a tent would fall if its main post were removed.”¹⁴⁹ A page later, Professor Lessig continued: “At just about the time when this post-communist euphoria was waning—in the mid-1990s—there emerged in the West another ‘new society,’ to many just as exciting as the new societies promised in post-Communist Europe.”¹⁵⁰

Professor Lessig, however, was not alone in drawing connection to the other important 1989 event in his book. His opening was indeed characteristic of books published on the topic in the mid-to-late 1990s. Andrew Shapiro, for example, opened *The Control Revolution* by alluding to the fax he received from a friend in Moscow on August 19, 1991—the date when Communist hardliners launched a coup against the reform government of then-USSR President Mikhail Gorbachev.¹⁵¹ Likewise, in her pioneering book on the digital divide, Pippa Norris wrote:

The year 1989 dawned like any other but, in retrospect, it witnessed two major developments of immense historical significance. One as highly visible and widely celebrated: the symbolic dismantling of the Berlin Wall sparking the brushfire of electoral democracy spreading throughout the post-Communist world and beyond. The other was less generally recognized at the time, beyond a few scientific and technical cognoscenti: the invention of the World Wide Web.¹⁵²

American academics began paying attention to the Internet, it felt—despite the “global” rhetoric—like a wholeheartedly American institution”).

¹⁴⁷ For interesting discussions of the origin of the Internet, see generally TIM BERNERS-LEE, *WEAVING THE WEB: THE ORIGINAL DESIGN AND ULTIMATE DESTINY OF THE WORLD WIDE WEB* (2000); KATIE HAFNER & MATTHEW LYON, *WHERE WIZARDS STAY UP LATE: THE ORIGINS OF THE INTERNET* (1998); JOHN NAUGHTON, *A BRIEF HISTORY OF THE FUTURE: FROM RADIO DAYS TO INTERNET YEARS IN A LIFETIME* (2000).

¹⁴⁸ LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999).

¹⁴⁹ *Id.* at 3.

¹⁵⁰ *Id.* at 4.

¹⁵¹ See ANDREW L. SHAPIRO, *THE CONTROL REVOLUTION: HOW INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD WE KNOW* 3 (1999).

¹⁵² PIPPA NORRIS, *DIGITAL DIVIDE: CIVIC ENGAGEMENT, INFORMATION POVERTY, AND THE INTERNET WORLDWIDE* 3 (2001).

The similarities between the openings of these books are far from coincidences. To many scholars and commentators, who have thought about changes in the Eastern and Central Europe or worked on projects related to its transition, the Cyberspace seems to be an appealing alternative forum—or, even better, a domestic one—for them to practice what they preached, or sought to preach, outside the country. Instead of dealing with the historical baggage of prior constitutional cases or the unappealing conditions in the post-Soviet environment, they now had the freedom and opportunity to create their “ideal libertarian society.”¹⁵³ As these new lines of scholarship slowly found its way to the Court, their approach certainly had influenced the courts’ perception of the new medium.¹⁵⁴

Obviously, the fall of the Berlin Wall and developments in Eastern and Central Europe were not the only major developments in the late 1980s that might have affected early cyberlaw scholarship. One could easily cite the increasing emphasis on intellectual property rights and the trade in information goods, as was evident in the creation of the Federal Circuit in 1982 and the negotiation of the TRIPs Agreement in the late 1980s and early 1990s.¹⁵⁵ There are also other examples. I highlight the influence of the fall of the Berlin Wall here not to suggest a direct causal link between the event and the Court’s protective stance on protecting free speech on the Internet. Rather, this section seeks to remind readers that the perception of a new technology is often contingent on historical conditions and contemporary worldviews. To a great extent, that perception is a prisoner of its time; how much protection the technology got reflects the *zeitgeist* of the contemporary era.

D. Summary

In sum, there are many possible explanations for the Court’s different treatment of the Internet. Some of them are technological, some of them are legal, and the others are social. In exploring the technological, legal, and social deterministic accounts, this Part shows that none of these accounts satisfactorily explains the Court’s recent treatment of the Internet. Thus, if we are to understand the complex process that affects the protection and development of new technologies, we need to have a more informed discussion of the complex interplay of law, technology, and society.

III. WHAT A THEORY OF LAW, TECHNOLOGY, AND SOCIETY SHOULD BE ABOUT?

Although the short length of this Article does not allow me to develop a general theory of law, technology, and society, this Part provides some preliminary sketches on what that theory should be about. A general theory of law, technology, and society should be about relationships that are timeless, iterative, and non-technologically specific. First, if the findings are to be generalized for application to other new technologies, it cannot treat each new technological

¹⁵³ LESSIG, CODE, *supra* note 148, at 4.

¹⁵⁴ See, e.g., *Reno v. ACLU*, 521 U.S. 844, 889 (1997) (O’Connor, J., concurring in part and dissenting in part) (“Before today, there was no reason to question this assumption, for the Court has previously only considered laws that operated in the physical world, a world that with two characteristics that make it possible to create ‘adult zones’: geography and identity.” (citing Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 886 (1996))); *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 777 (1996) (Souter J., concurring) (“In my own ignorance I have to accept the real possibility that ‘if we had to decide today . . . just what the First Amendment should mean in cyberspace, . . . we would get it fundamentally wrong.’” (quoting Lessig, *The Path of Cyberlaw*, *supra* note 123, at 1745)).

¹⁵⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1197 (1994).

development as *sui generis*. Second, the theory should help us better understand the triangular interrelationship among law, technology, and society. Finally, the theory should offer insights into the interactions between the past, the present, and the future.

A. *A General Theory*

Although a general theory of law, technology, and society is obviously about technology, it is not about any particular technology or its technical contents, design characteristics, or intrinsic properties. Simply put, a general theory of law, technology, and society cannot be technologically specific. While it may be interesting to explore whether a particular technology deserves protection or regulation, that exploration is not particularly helpful to our understanding of the interrelationship among law, technology, and society. In fact, treating technological developments as *sui generis* would ultimately defeat the purpose of having a general theory in the first place.

This technologically generic approach makes a lot of sense from the standpoint of technological development. While the dual use nature of most technologies has made predictions virtually impossible, humans are non-omniscient and do not know machines well enough.¹⁵⁶ When Thomas Edison invented phonographs, he did not intend them to be used for amusement purposes. Instead, he designed them as “business dictating machines” to record and distribute information.¹⁵⁷ “Even though several of his competitors . . . were selling phonographs for listening to prerecorded music, Edison regarded this as a wasteful application.”¹⁵⁸ As his secretary later recalled:

It is probable that this adaptation of the phonograph [to amusement purposes] was associated in his mind with the musical boxes so highly popular during the early Victorian era and broadly classified as “toys” His attitude indicates that he regarded the exploitation of this field as undignified and disharmonious with the more serious objectives of his ambition.¹⁵⁹

It was only after the failure of the business market that Edison reluctantly allowed phonographs to be used for amusement purposes.¹⁶⁰

Likewise, when Alexander Graham Bell invented the telephone, he did not intend to create a revolutionary communication technology. Rather, he designed it as a “speaking telegraph.”¹⁶¹ Indeed, when the newly formed Bell Telephone Company placed its first advertisement of its telephone service in May 1877, it emphasized this improvement over existing technology. As the advertisement stated: “No skilled operator is required: direct conversation may be had by speech without the intervention of a third person. The communication is much more rapid, the average number of words being transmitted by Morse Sounder being from fifteen to twenty per minute, by Telephone from one to two hundred.”¹⁶² In

¹⁵⁶ See Hughes, *Internet and the Persistence of Law*, *supra* note 146, at 367 (listing human omniscience as one of the two major shortcomings of some early descriptive accounts of the Internet).

¹⁵⁷ Carlson, *supra* note 10, at 181-82.

¹⁵⁸ *Id.* at 182.

¹⁵⁹ *Id.* (quoting ALFRED O. TATE, EDISON’S OPEN DOOR 302 (1938)).

¹⁶⁰ See *id.*

¹⁶¹ STANDAGE, *supra* note 108, at 197.

¹⁶² *Id.* at 198-99.

its early days, the telephone had also been “used . . . to pipe music into homes from distant concert halls.”¹⁶³ Interestingly, even though Bell had not been “harassed” by a long-distance carrier or a telemarketer, he had the foresight to note that people would find it intrusive for strangers to telephone you. As he stated, “No one in their right mind . . . would tolerate something as intrusive as unannounced phone calls.”¹⁶⁴

The most entertaining, yet insightful observation was perhaps the one made by Langdon Winner and others about today’s television—or what former FCC Chairman Mark Fowler called “a toaster with pictures.”¹⁶⁵ As Professor Winner wrote, “None of those who worked to perfect the technology of television in its early years and few of those who brought television sets into their homes ever intended the device to be employed as the universal babysitter.”¹⁶⁶ Yet, it has proven time and again that it was an effective, though perhaps socially undesirable, babysitter.

In light of the unpredictability of the phonograph, telephone, and television, one therefore has to wonder what the Internet is and what computers are. Are computers gadgets to record and distribute information (like a phonograph)? Are they devices for piping music into your home from faraway concert halls—or worse from CD factories (like a telephone)? Or are they simply digital babysitting machines (like a television)? The answer seems to be our college favorite: All of the above. In fact, as Carolyn Marvin wrote, “[i]n a historical sense, the computer is no more than an instantaneous telegraph with a prodigious memory, and all the communications inventions in between have simply been elaborations on the telegraph’s original work.”¹⁶⁷

Moreover, the future use of computers has been particularly difficult to predict. Unlike toasters or stereos, computers are general-purpose machines that are capable of a wide variety of uses in our daily life. While fireplaces may have served both intended and unintended purposes, nobody today will question whether computers have had many more possible uses. How the latter will be used ultimately will depend on who control them, what types of hardware or software have been installed on them, and—in the future, perhaps—how artificially intelligent they will be.

B. *Triangular Relationship Between Law, Technology, and Society*

A general theory of law, technology, and society should help us better understand the triangular interrelationship among legal, technological, and social factors. There are two different layers in this complex relationship. The first one is simple and straightforward: Each element, broadly defined, is interdependent on each other.¹⁶⁸ Law affects both technology and society; technology affects both law and society; and society affects both law and technology. To study these interactions, volumes of research on these interactions—both empirical and

¹⁶³ SHAPIRO, *supra* note 151, at 18.

¹⁶⁴ Michael Antonoff et al., *The Complete Survival Guide to the Information Super Highway*, POPULAR SCI., May 1994, at 97, 100, quoted in Lessig, *The Path of Cyberlaw*, *supra* note 123, at 1747 n.13.

¹⁶⁵ Caroline E. Mayer, *FCC Chief’s Fears*, WASH. POST, Feb. 6, 1983, at K6.

¹⁶⁶ LANGDON WINNER, *THE WHALE AND THE REACTOR: A SEARCH FOR LIMITS IN AN AGE OF HIGH TECHNOLOGY* 12 (1988).

¹⁶⁷ CAROLYN MARVIN, *WHEN OLD TECHNOLOGIES WERE NEW: THINKING ABOUT ELECTRIC COMMUNICATION IN THE LATE NINETEENTH CENTURY* 3 (1990).

¹⁶⁸ Broadly defined, the term *society* includes not only what is generally considered social factors, but also political, economic, psychological, and historical factors. See Wiebe E. Bijker & John Law, *General Introduction to SHAPING TECHNOLOGY / BUILDING SOCIETY*, *supra* note 10, at 1, 2 (“For the social is not just exclusively sociological. In the context of technology and its social shaping, it is also political, economic, psychological—and indeed historical.”).

theoretical—have already emerged. For example, law and society literature focuses on the interactions between law and society;¹⁶⁹ cyberlaw, health law, and other technology law-related scholarship discusses the interactions between law and technology; and literature in the Science and Technology Studies emphasizes the interactions between technology and society.¹⁷⁰

Consider, for example, the first set of interactions—those between law and technology. First-generation cyberlaw scholarship warned us about the significant challenges posed by the Internet and new communications technology. Although the call for self-governance by early cyberlaw commentators¹⁷¹ has been largely rejected today (partly due to the continued interactions among law, technology, and society), these pioneering works provided important insights into the many challenges posed by new technologies.

In response, Jack Goldsmith denounced the need to distinguish between cyberspace and real-space transactions and advocated the need to ground cyberspace transactions in real-space laws.¹⁷² Ethan Katsh, Lawrence Lessig, William Mitchell, and Joel Reidenberg, among others, also showed that code could be law and the cyberspace was regulable.¹⁷³ While Professor Lessig underscored the need to build into code our foundational constitutional values,¹⁷⁴ Professor Reidenberg reminded policymakers to “understand, consciously recognize, and encourage” the set of rules for information flows imposed by technology and communication networks.¹⁷⁵

Most recently, some scholars have also begun to look at how law and technology adapt to each other in an iterative process. Compared to early cyberlaw scholarship, such a continuous process better describes the interactions between the two. For example, Arthur Cockfield discussed how the liberal approach helped law adapt to technological change by becoming more

¹⁶⁹ As Lawrence Friedman stated: “[T]he output of the legal system—laws, decisions, orders, and administrative behavior—leads in turn to more social change, which affects the legal culture, influences demands on the system, and starts the cycle over again.” Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763, 770-71 (1986). As another commentator noted:

The field of sociolegal studies has several goals: to expand fundamental knowledge about legal process; to explain and understand patterns, departures, and changes within it; to study the interrelationship between the legal system and other social and cultural systems of society; and to understand what I have called the role of law—with a little “I”—in normative ordering.

Felice J. Levine, “*His*” and “*Her*” Story: *The Life and Future of the Law and Society Movement*, 18 FLA. ST. U.L. REV. 69, 71 (1990). For the origin and development of the law and society movement, see sources cited in Marc Galanter & Mark Alan Edwards, *Introduction: The Path of the Law ands*, 1997 WIS. L. REV. 375, 377 n.10 (1997).

¹⁷⁰ For discussions of the interactions between technology and society, see, for example, WIEBE E. BIJKER, OF BICYCLES, BAKELITES, AND BULBS: TOWARD A THEORY OF SOCIOTECHNICAL CHANGE (1997); MACKENZIE, *supra* note 127; SHAPING TECHNOLOGY / BUILDING SOCIETY, *supra* note 10; THE SOCIAL CONSTRUCTION OF TECHNOLOGICAL SYSTEMS: NEW DIRECTIONS IN THE SOCIOLOGY AND HISTORY OF TECHNOLOGY (Wiebe Bijker et al., 1989) [hereinafter SOCIAL CONSTRUCTION OF TECHNOLOGICAL SYSTEMS]; THE SOCIAL SHAPING OF TECHNOLOGY (Donald A. MacKenzie & Judy Wajcman eds., 1999).

¹⁷¹ For articles advocating the self-governance of cyberspace, see, for example, David R. Johnson & David G. Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); David G. Post, *Anarchy, State, and the Internet: An Essay on Law-Making in Cyberspace*, 1995 J. ONLINE L., <http://www.wm.edu/law/publications/jol/-articles/post.shtml>; I. Trotter Hardy, *The Proper Legal Regime for “Cyberspace,”* 55 U. PITT. L. REV. 993 (1994); Henry H. Perritt, Jr., *Cyberspace Self-government: Town Hall Democracy or Rediscovered Royalism?*, 12 BERKELEY TECH. L.J. 413 (1997); Edward J. Valauskas, *Lex Networkia: Understanding the Internet Community*, FIRST MONDAY, <http://www.firstmonday.dk/issues/issue4/valauskas/index.html> (Oct. 7, 1996).

¹⁷² See Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998). *But see* David G. Post, *Against “Against Cyberanarchy,”* 17 BERKELEY TECH. L.J. 1365 (2002).

¹⁷³ See, e.g., LESSIG, CODE, *supra* note 148; WILLIAM MITCHELL, CITY OF BITS 111 (1995); M. Ethan Katsh, *Software Worlds and the First Amendment: Virtual Doorkeepers in Cyberspace*, 1996 U. CHI. LEGAL F. 335; Lessig, *Reading the Constitution in Cyberspace*, *supra* note 154; Joel R. Reidenberg, *Governing Networks and Rule-Making in Cyberspace*, 45 EMORY L.J. 911 (1996); Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553 (1998) [hereinafter Reidenberg, *Lex Informatica*].

¹⁷⁴ See LESSIG, CODE, *supra* note 148; see also Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 549 (1999) (stating that “more than law alone enables legal values, and law alone cannot guarantee them”).

¹⁷⁵ Reidenberg, *Lex Informatica*, *supra* note 173, at 555.

flexible and forward-looking.¹⁷⁶ In the context of *in vitro* fertilization, Lyria Bennett Moses undertook a comparative analysis of how legal and political institutions in different countries adapted to technological change.¹⁷⁷ On a similar subject, Gaia Bernstein explored at length the socio-legal acceptance of such new technologies as artificial insemination.¹⁷⁸

While scholars have focused on the first layer, very little scholarship has not been devoted to the second, and more complex, layer—that is, how the synergistic combination of two elements can affect the third.¹⁷⁹ This layer is not just about the influences of law, technology, and society, but the influences of the sociolegal, the sociotechnical, and the technolegal. Drawing on insights from Science and Technology Studies literature, this Article contends that the influences of the synergistic combination of two factors are different from the influences of the aggregate of the two factors standing alone.¹⁸⁰ As factors “mesh together,” they form an emergent phenomenon.¹⁸¹

This approach makes a lot of sense in light of the continuous interactions among the different factors. In science and technology literature, commentators have described two views. The first one focuses on the repeated interactions between factors in a reciprocal fashion.¹⁸² This view assumes that the division between the different factors is stable and unitary. The second one employs the metaphor of a “seamless web” to blur the matter-of-fact boundaries among the different factors. Proponents of such a view discourages *a priori* distinctions among these factors, as they, the proponents argue, do not exist in stable form in the real world.¹⁸³ Regardless of one’s view, greater theorizing of the interrelationship among law, technology, and society will provide a more informed understanding of these relationships.

To elaborate, sociolegal factors can affect technology; they can determine which technology will succeed and which one will fail. Although we tend to focus on the success stories while ignoring failures, it is important to remember that technologies do not develop in a linear fashion. Our research therefore will benefit considerably if we explore both successful and unsuccessful technologies.¹⁸⁴ We should ask not only about what we could learn from the

¹⁷⁶ See Arthur J. Cockfield, *Towards a Law and Technology Theory*, 30 MAN. L.J. 383 (2004). As he explained: “legal analysis in light of technological change can be broken down into two broad categories: (1) a ‘liberal’ approach that is more sensitive to the ways that technological change affects interests, while often seeking legal solutions that are less deferential to legal precedents and traditional doctrine; and (2) a ‘conservative’ approach that relies more on traditional doctrinal analysis and precedents.” *Id.* at 383.

¹⁷⁷ See Lyria Bennett Moses, *Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilization*, 6 MINN. J.L. SCI. & TECH. 505 (2005).

¹⁷⁸ See Bernstein, *supra* note 144.

¹⁷⁹ See, e.g., *id.*

¹⁸⁰ See BIJKER, *supra* note 170, at 274 (“The theory of sociotechnical change . . . must mirror the heterogeneity of this socitechnical ‘stuff’ without resorting to just ‘adding up’ the social and the technical.”).

¹⁸¹ See Bijker & Law, *General Introduction*, *supra* note 168, at 10 (“[W]hen two more strategies mesh together, the end product is an emergent phenomenon: a game of chess cannot, after all, be reduced to the strategies of either one of the players.”).

¹⁸² See Wiebe E. Bijker & John Law, *What Next? Technology Theory, and Method*, in SHAPING TECHNOLOGY / BUILDING SOCIETY, *supra* note 10, at 201-02 (discussing the interactive view).

¹⁸³ See *id.* at 201-02 (discussing the seamless web view).

¹⁸⁴ See BIJKER, *supra* note 170, at 270 (noting that “we can understand technologies only if we analyze successful and unsuccessful machines symmetrically”); see also Bijker & Law, *General Introduction*, *supra* note 168, at 3 (“[A]ll technologies are shaped by and mirror the complex trade-offs that make up our societies; technologies that work well are no different in this respect than those that fail. The idea of a ‘pure’ technology is nonsense.”); Trevor J. Pinch & Wiebe E. Bijker, *The Social Construction of Facts and Artifacts: Or How the Sociology of Science and the Sociology of Technology Might Benefit Each Other*, in SOCIAL CONSTRUCTION OF TECHNOLOGICAL SYSTEMS, *supra* note 170, at 17, 22 (criticizing the assumption, usually of historians of technology, that “the success of an artifact is an explanation of its subsequent development”).

comparison of the development of these technologies, but also why those particular technologies were selected for comparison in the first place.

Similarly, sociotechnical factors affect what the law is. Although technology does not always determine the law and technology is far from unregulable, the combination of technology and society—or what Wiebe Bijker has called “sociotechnology” or “sociotechnical ensembles”¹⁸⁵—will play an important role in shaping law. As Joseph Nye and Robert Keohane reminded us, “information does not flow in a vacuum, but in political space that is already occupied.”¹⁸⁶ At some point, socio-political developments will affect technology, whose developments in turn will affect the law. For example, such developments will determine whether the law accepts or rejects a particular technology as well as whether the law treats them as promises or threats.

Finally, technolegal factors can affect society. We know that code is law and law can regulate code, but we often overlook how law and code are used in conjunction to shape our life. When law is inadequate, code lends its helping hand; when technology is incompetent, or too expensive, the law provides a supporting mandate. In the context of the Digital Millennium Copyright Act and anticircumvention protection, I have discussed how law and code can interact with each other to help preserve the important limitations and exceptions in existing copyright law.¹⁸⁷ In a recent book chapter, I also talked about how encryption and genetic use restriction technologies have been used to supplement protection rights holders obtain in the intellectual property system.¹⁸⁸ As the use of computing technology becomes more widespread, technolegal developments are likely to play a bigger role than either law or technology itself.

While it is important to understand how law, technology, and society have shaped and been shaped by each other—both as standalone actors and in their synergistic combinations—it is also important to understand the role of each set of factors in the relationship. Consider law for example. Is law a mediator in a relationship between technology and society? How does it negotiate that relationship?¹⁸⁹ Does law facilitate greater acceptance of technology by society (or provide “closure” to the technological debate¹⁹⁰)? Or does law result in its rejection? Does law enable society to adapt to the technology? Or does it create barriers for such adaptation? All of these are interesting and important questions that are worth further exploration.

In addition, it is also important to explore the mix of law, technology or society that would result in socially desirable policy changes. For example, Professor Cockfield contended that the liberal approach would help the legal system adapt to technological change by making it flexible and forward-looking, because that approach “is more sensitive to the ways that

¹⁸⁵ BIJKER, *supra* note 170, at 273-76.

¹⁸⁶ ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE* 217 (3d ed. 2001).

¹⁸⁷ See Peter K. Yu, *Anticircumvention and Anti-anticircumvention*, 84 DENVER U. L. REV. 13, 63-73 (2006).

¹⁸⁸ See Peter K. Yu, *Five Disharmonizing Trends in the International Intellectual Property Regime*, in 4 *INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE* 73, 91-94 (Peter K. Yu ed., 2007).

¹⁸⁹ See John Law & Michel Callon, *The Life and Death of an Aircraft: A Network Analysis of Technical Change*, in *SHAPING TECHNOLOGY / BUILDING SOCIETY*, *supra* note 10, at 21, 21-22 (discussing the “negotiation space” that allowed for “the development of an array of the heterogeneous set of bits and pieces that is necessary to the successful production of any working device”); cf. Wiebe Bijker et al., *Common Themes in Sociological and Historical Studies of Technology*, in *SOCIAL CONSTRUCTION OF TECHNOLOGICAL SYSTEMS*, *supra* note 170, at 9, 13 (describing technological development “as a nondetermined, multi-directional flux that involves constant negotiation and renegotiation among and between groups shaping the technology”).

¹⁹⁰ See BIJKER, *supra* note 170, at 270-72 (discussing the concept and process of “closure”); Pinch & Bijker, *supra* note 184, at 44-46 (discussing closure and stabilization).

technological change affects interests . . . [and] less deferential to legal precedents and traditional doctrine.”¹⁹¹ Similar issues can be explored with respect to the technological and the social. For instance, one would expect that complex, system-based technologies would be in a better position to resist legal control than simple technologies.¹⁹² Likewise, one would not be surprised to find variations in the relationship between law and technology based on changing socio-economic conditions and the changing influence of selected social groups. In sum, there are many possible inquiries that warrant our attention.

C. *Interactions Between the Past, the Present, and the Future*

A general theory of law, technology, and society needs to help us analyze the various patterns of change and continuity—not just technological change, but also legal change and social change. Because the study of law, technology, and society often requires us to make cross-temporal comparisons between laws and institutions, technologies, and social environments, the more we understand the interactions between the past, the present, and the future, the more knowledge we will have concerning the complex interplay of law, technology, and society. In fact, such a study will provide insights into the dialogue between the past and the present while helping envisioning the future. While we may not be able to predict the future evolution of a particular technology, our study is likely to provide useful clues to finding the future paths of new technologies. After all, knowing what the future paths can or should be is likely to be more important to legal scholars than finding out exactly what that path will be.

When we make historical comparisons, we tend to pick some notable earlier successful technologies—in my case, the Gutenberg press in an earlier article¹⁹³ and here motion pictures (which were selected because of its historical contrast with the print media in the free speech context). What makes historical analysis particularly challenging is that history is not always static or objective,¹⁹⁴ although this point concededly remains contested among historians. We collect or re-discover historical facts only after a certain period of time, and how we perceive a particular issue today often colors our treatment (or reconstruction) of the past.

Moreover, there may not always be an objective past. Nor is that past always ascertainable, even if it exists. As Susan Scafidi reminded us:

Historians no longer unanimously subscribe to the belief that they are engaged in a search for objective truth, and few would claim to discern universal laws of history. The proportion of historical research that yields concrete, unassailable facts is dwarfed by the amount of expressive material generated by historians. Even the names, dates, and places that

¹⁹¹ Cockfield, *supra* note 176, at 383.

¹⁹² *Cf. id.* at 385-86 (noting that some commentators have found embedded technologies “increasingly deterministic and present greater resistance to change”).

¹⁹³ Yu, *Of Monks, Medieval Scribes*, *supra* note 7.

¹⁹⁴ For example, Alun Munslow reminded us:

The past is not discovered or found. It is created and represented by the historian as a text, which in turn is consumed by the reader. Traditional history is dependent for its power to explain like the statue pre-existing in the marble . . . But this is not the only history we can have. By exploring how we represent the relationship between ourselves and the past we may see ourselves not as detached observers of the past but . . . participants in its creation. The past is complicated and difficult enough without the self-deception that the more we struggle with the evidence the closer we get to the past.

ALUN MUNSLOW, *DECONSTRUCTING HISTORY* 178 (1997).

apparently comprise the most straightforward part of the historical record are often written in pencil—especially if the handwriting is not one’s own but that of a colleague in the field.¹⁹⁵

In *The Invention of Tradition*, Eric Hobsbawn and Terence Ranger collected a provocative set of essays showing how many of what we consider ancient traditions were only invented comparatively recently.¹⁹⁶ As Professor Hobsbawn alerted us, “‘Traditions’ which appear or claim to be old are often quite recent in origin and sometimes invented.”¹⁹⁷ After reading this series of essays, one certainly will have a very different conception of what we consider as part of our tradition.

In the legal context, we face a similar challenge, as “doctrines gradually change as they are adapted to new conditions.”¹⁹⁸ When we interpret prior case law, we often have to ask ourselves what the holding of the case is and what the precedent stands for. As Monroe Price pointed out in his insightful analysis of *Reno v. ACLU*, Justice Stevens in *Reno* has revised the past by subtly changing the implied meaning of *Red Lion Broadcasting Co. v. FCC*.¹⁹⁹ In the past, *Red Lion*, which introduced the fairness doctrine, stood for the proposition that “broadcasting was more readily subject to regulation because scarcity of available frequencies made some form of rationing necessary and that necessity allowed the imposition of public interest standards.”²⁰⁰ Although scholars have questioned the technology-based premises,²⁰¹ courts seemed not to have been bothered by these queries. In *Reno*, however, Justice Stevens used *Red Lion* to justify the different treatment of the Internet from other media. As Professor Price pointed out, *Red Lion* in *Reno* “seems to stand for the proposition that the status of broadcasting as a more regulable medium is historically contingent, rather than solely technologically based.”²⁰² After *Reno*, one therefore has to wonder how to interpret the *Red Lion* precedent. Does it stand for the proposition that government regulation may be technologically based? Or does it stand for the proposition that media regulation is historically contingent?

CONCLUSION

In this Article, I recount the struggle of motion pictures in the free speech context to illustrate the complex interplay of law, technology, and society. Although the Article highlights the need for the development of a general theory of law, technology, and society, one question remains unanswered: Why is it important to develop such a theory?

To that question, I offer five responses. First, it helps us better understand the interdependent relationship among law, technology, and society. In scrutinizing this relationship,

¹⁹⁵ Susan Scafidi, *Digital Property/Analog History*, 38 LOY. L.A. L. REV. 245, 263 (2004). Similarly, Professor Munslow maintained: History always comes to us at many removes from the actuality it claims to represent. Every historical interpretation is just one more in a long chain of interpretations, each one usually claiming to be closer to the reality of the past, but each one merely another reinscription of the same events, with each successive description being the product of the historian’s imposition at the levels of the trope, emplotment, argument and ideology. No amount of training in the forensic skills of dissecting the sources can eliminate the unavoidable process whereby the historical work is as much invented as found.

MUNSLow, *supra* note 194, at 35.

¹⁹⁶ THE INVENTION OF TRADITION (Eric J. Hobsbawn & Terence Ranger eds., 1983).

¹⁹⁷ Eric Hobsbawn, *Introduction: Inventing Traditions*, in THE INVENTION OF TRADITION, *supra* note 196, at 1, 1.

¹⁹⁸ Price & Duffy, *supra* note 137, at 1003.

¹⁹⁹ 395 U.S. 367 (1969).

²⁰⁰ Price, *supra* note 107, at 1905.

²⁰¹ For a collection of criticisms of *Red Lion*’s scarcity rationale, see Chen, *supra* note 135, at 1403 n.310.

²⁰² Price, *supra* note 107, at 1906.

the theory enables us to ask deeper questions about the powers and limits of each set of factors. It also helps us reject the oversimplistic deterministic accounts that privilege some of these factors as if they stand behind to exert special influences on the development of the system.²⁰³ Because law, technology, and society are context-dependent and will continue to shape and be shaped by each other in a complex relationship, none of these factors will exist in its purest, naturally-occurring form (as theories often assume).²⁰⁴ Thus, instead of treating the influence of each factor as singular acts of intervention, it makes sense to examine how all of them participate in an iterative process of continuous interactions and exchanges.

Second, the theory provides important insights into our policy recommendations. By enabling us to understanding the complex interplay of law, technology, and society, we understand better what recommendations will and will not be practical and sustainable. We also will be in a better position to identify potential problems and challenges created by new technological developments. While the complexity of the interactions has made these analyses difficult, the analyses will benefit from existing scholarship that presents a simpler model.

Third, the theory challenges our existing assumptions and theoretical perspectives while providing insights into other areas of law that are not technologically related. As Professor Cockfield noted, a general law and technology “could draw from and inform traditional legal scholarship that studies discrete areas of technology law like intellectual property law.”²⁰⁵ By introducing new ideas, vocabularies, definitions, and directions, the theory therefore will enrich our understanding of the legal system and “illuminate” those other areas of law that have yet to be affected by technological change.²⁰⁶

Fourth, the study of law provides an important focus that can contribute significantly to the study of technology and society. Conflicts are important junctures that illuminate our understanding of technological and social developments. As Wiebe Bijker and John Law noted, “many—perhaps all—technologies are born in conflict or controversy.”²⁰⁷ Interestingly, conflicts have also been the main focus of the study of the law. In the legal field, we often ask how past conflicts arose, how they were resolved, what other ways can we resolve them, and how we can prevent them from occurring again in the future. Thus, by bringing the legal study with the study of technology and society, an integrated approach will help us unearth a wealth of information that may be useful in understanding technology and society and that is often ignored in the compartmentalized world of academic disciplines. Such an approach also would allow us

²⁰³ Cf. John Law, *Technology and Heterogeneous Engineering: The Case of Portuguese Expansion*, in SOCIAL CONSTRUCTION OF TECHNOLOGICAL SYSTEMS, *supra* note 170, at 111, 113 (“[I]n explanations of technological change the social should not be privileged. It should not . . . be pictured as standing by itself *behind* they system being built and exercising a special influence on its development.”).

²⁰⁴ See BIJKER, *supra* note 170, at 273 (“Purely social relations are to be found only in the imaginations of sociologists or among baboons, and purely technical relations are to be found only in the wilder reaches of science fiction. The technical is socially constructed, and the social is technically constructed.” (footnotes omitted)).

²⁰⁵ Cockfield, *supra* note 176, at 383.

²⁰⁶ Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207 (1996); *see also* Cockfield, *supra* note 176, at 384 (noting that entire law can be transformed when technology law were integrated with “other areas of law that have been relatively unaffected by technological change.”).

²⁰⁷ Bijker & Law, *Strategies, Resources, and the Shaping of Technology*, in SHAPING TECHNOLOGY / BUILDING SOCIETY, *supra* note 10, at 105; *see also* Bijker & Law, *Strategies, Resources, and the Shaping of Technology*, in SHAPING TECHNOLOGY / BUILDING SOCIETY, *supra* note 10, at 9 (noting that many commentators have assumed that “technologies are born out of *conflict, difference, or resistance*”); Pinch & Bijker, *supra* note 184, at 27 (noting that “[c]ontroversies offer a methodological advantage in the comparative ease with which they reveal the interpretative flexibility of scientific results”).

to take advantage of the advances made in other disciplines while enriching legal analyses in other disciplines.

Finally, as technology becomes important, there is urgency for us to have a better grasp of the interplay of law, technology, and society. In doing so, we will be able to develop laws and policies that will help us develop better technologies and societies.²⁰⁸ As Wiebe Bijker and John Law conclude in *Shaping Technology / Building Society*:

Our technologies surround us, as they have for millennia, but never before have they been so powerful. Never before have they brought so many benefits. Never before have they had such potential for destruction—in many cases a potential that has been realized. And never before has the task of understanding those technologies—how they are shaped, how they shape us—been so urgent. . . . When things go wrong, it may not not [sic] make much sense to blame technologies. Neither does it necessarily make sense to blame people, nor even the economic systems in which they are caught up. Who or what should be blamed for the Nimitz Highway collapse? Or the Challenger disaster? Or the deforestation of the Himalayas? Or the greenhouse effect? If we want to make sense of these horrors—and more important, do something about them—it does not really help to look for a scapegoat. Rather, what we urgently need is a tool kit—or rather a series of tool kits—for going beyond the immediate scapegoats and starting to grapple with and understand the characteristics of heterogeneous systems.²⁰⁹

This article recounts how the Court struggled to extend free speech and free press protections to motion pictures. The study of this painful history of movie censorship not only provides important insights into the complex interplay of law, technology, and society, but helps us better understand how the law protects and regulates technology, how sociolegal developments influence technology, and how technological developments transform society while necessitating changes to the law.

²⁰⁸ See Wiebe Bijker et al., *Technology and Beyond*, in *SOCIAL CONSTRUCTION OF TECHNOLOGICAL SYSTEMS*, *supra* note 170, at 307, 307 (“Apart from its possible implications for technology policy, the new understanding of technology that is evolving can potentially feed back into the development of technology itself.”)

²⁰⁹ John Law & Wiebe E. Bijker, *Postscript: Technology, Stability, and Social Theory*, in *SHAPING TECHNOLOGY / BUILDING SOCIETY*, *supra* note 10, at 290, 306.