HOW THE MOVIES BECAME SPEECH

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I. INTRODUCTION

In its 1915 decision in *Mutual Film Corp. v. Industrial Commission of Ohio*, the U.S. Supreme Court, upholding an Ohio film censorship law, held that motion pictures were not part of "the press of th[is] country" and were therefore unprotected by freedom of speech and press.[1] Films were, as a medium, mere entertainment

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1. Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 244-45 (1915).

and visual "spectacles" with a powerful capacity to incite audiences to immoral behavior.[2] *Mutual Film* legitimated an extensive regime of state and local film censorship that existed until the mid-twentieth century. In seven states and nearly one hundred municipalities, censor boards banned or ordered deletions to films deemed to be immoral, sacrilegious, or otherwise objectionable.[3] It was not until 1952, with its landmark decision in *Joseph Burstyn, Inc. v. Wilson,* that the Supreme Court overturned *Mutual Film* and declared motion pictures, like the traditional press, to be an important medium for the "communication of ideas" protected by the First Amendment.[4] By the end of the next decade, film censorship had been almost entirely abolished.[5]

Why did the Court shift from regarding the cinema as an unprotected medium to part of the constitutionally protected "press"? The history of film censorship in the United States has been extensively documented, but scholars have yet to offer a compelling explanation of why the Supreme Court changed its mind about motion pictures and the First Amendment. The standard account is that the change was inevitable.[6] By the 1940s, the Supreme Court had proscribed prior restraints on speech and begun the practice of heightened scrutiny of state actions restricting speech on the basis of viewpoint or content.[7] It was thus only a "matter of time" before

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2. *Id.* at 244.

3. *See* Ford H. MacGregor, *Official Censorship Legislation*, 128 ANNALS AM. ACAD. POL. & SOC. SCI., Nov. 1926, at 163, 170-71 (noting that a majority of U.S. cities have laws against "indecent shows, exhibitions, or pictures, or entertainments that tend to corrupt the public morals, or incite to crime, or that are detrimental to the public welfare"). On film censorship generally, see IRA H. CARMEN, MOVIES, CENSORSHIP, AND THE LAW (1966); EDWARD DE GRAZIA & ROGER K. NEWMAN, BANNED FILMS: MOVIES, CENSORS, AND THE FIRST AMENDMENT (1982); GARTH JOWETT, FILM: THE DEMOCRATIC ART 108-38 (1976) (discussing the history and issues surrounding film censorship); RICHARD S. RANDALL, CENSORSHIP OF THE MOVIES: THE SOCIAL AND POLITICAL CONTROL OF A MASS MEDIUM (1968); LAURA WITTERN-KELLER, FREEDOM OF THE SCREEN: LEGAL CHALLENGES TO STATE FILM CENSORSHIP, 1915-1981 (2008).

4. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952).

5. *See* WITTERN-KELLER, *supra* note 3, at 247-71 (discussing events that led to the near end of film censorship between 1965 and 1981).

6. RANDALL, *supra* note 3, at 25-28 (describing the "[i]rresistible [f]orces" that led the Court to overturn *Mutual*); MURRAY SCHUMACH, THE FACE ON THE CUTTING ROOM FLOOR: THE STORY OF MOVIE AND TELEVISION CENSORSHIP 188-89 (1974); Melville B. Nimmer, *The Constitutionality of Official Censorship of Motion Pictures*, 25 U. CHI. L. REV. 625, 627 (1958) ("[T]he inevitable result . . . was the erosion of the grounds of the *Mutual Film* decision."). *But see* LAURA WITTERN-KELLER & RAYMOND J. HABERSKI, JR., THE MIRACLE CASE: FILM CENSORSHIP AND THE SUPREME COURT 121 (2008) ("Looking at the case more than fifty years later, it is easy to slip into the fallacy of appraising it as an inevitable development.").

7. STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA 388-97 (2009).

motion picture censorship would be held unconstitutional.[8]

The constitutional explanation is not wrong, but it is not complete either. What had to happen before the *Mutual Film* decision could yield to *Burstyn v. Wilson* was not only a change in First Amendment doctrine but also a fundamental transformation in the communication environment. I describe that transformation as "media convergence." The term "media convergence" has been used often lately, typically to refer to the combining of communications media that used to be separate—television, radio, and print—into a single digital mode of delivery.[9] Here, I use the term "convergence" in a different way, to refer to what I call the "social convergence" of mass communications. Social convergence occurs when the uses, practices, and cultures associated with different modes of communication come to resemble each other. By the 1950s, movies occupied a role in public life and popular culture that increasingly resembled the traditional "press," or print journalism. At the same time, print journalism took on styles and functions that were more like those historically associated with the movies. The distinctions that had been so critical to the *Mutual Film* court—between information and entertainment, visual and print media, and rational and "sensational" forms of communication—no longer held. The demise of film censorship reflected not only more capacious understandings of freedom of expression but also the social reality of convergent communications.[10]

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8. *See* CARMEN, *supra* note 3, at 45 ("[I]t would be only a matter of time before a case which demanded a modern scholarly appraisal of rights held by movie companies under the First Amendment would reach the Supreme Court."); RANDALL, *supra* note 3, at 26 ("[S]o advanced had this [free speech] doctrine become by the end of World War II, that it seemed only a matter of time before a place would be found in it for motion pictures.").

9. The concept of media convergence was described famously in 1983 by media theorist Ithiel de Sola Pool: "A process called the 'convergence of modes' is blurring the lines between media . . . . A single physical means . . . may carry services that in the past were provided in separate ways." ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 23 (1983); *see also* Van Kornegay, *Media Convergence and the Neo-Dark Age*, *in* UNDERSTANDING MEDIA CONVERGENCE: THE STATE OF THE FIELD 84 (August E. Grant & Jeffrey S. Wilkinson eds., 2009) ("[T]he definition of media convergence is still evolving, but generally the term refers to the process of gathering, editing, storing, transmitting, and consuming text, images, and sound in digital form with networked computers playing some mediated role."); August E. Grant, *Introduction, in* UNDERSTANDING MEDIA CONVERGENCE, *supra*, at 3-17 (discussing the evolution of the term "convergence").

10. Media scholar Henry Jenkins has described several different kinds of media convergence: "Technological Convergence: . . . . When words, images and sounds" are digitized; "Economic Convergence: The horizontal integration of the entertainment industry"; and "Organic Convergence: Consumers' multitasking strategies for navigating the new environment[, such as] what occurs when a high schooler is watching baseball on a big–screen television, listening to techno on the stereo, word-processing a paper and writing email to his friends." Henry Jenkins, *Convergence? I*

The movies initiated what would become a familiar pattern of public and judicial responses to new media. New media often generate anxieties, which lead to mechanisms to repress or restrict them.[11] First Amendment protection is sought for the new medium by likening it to the traditional press.[12] Courts compare the new medium to print media, find the two media fundamentally dissimilar, and deny the new medium full free speech protection.[13] Yet over time, more extensive free speech rights may follow as new and old media converge.[14] Historically, to acquire legitimacy and meet public demands, new media have assumed some of the styles and functions of preexisting media; old media, to retain popular appeal, have mimicked the new.[15] As the characteristics and functions of the new medium overlap with older media, dissimilar treatment can no longer be justified, and deregulation occurs.[16]

This Article explores the relationship between media convergence and "constitutional convergence" through the largely untold story of how the movies came to be a constitutionally protected medium of speech. Bringing together media history, social history, and legal history, it tracks the relationship between the law and its cultural contexts and demonstrates how communications theory, communication practices, and developments in media technology interacted to create the circumstances for a major change

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Diverge, TECH. REV., June 2001, at 93. For a more detailed discussion, see generally HENRY JENKINS, CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE (2006).

11. *See* Donald E. Lively, *Fear and the Media: A First Amendment Horror Show*, 69 MINN. L. REV. 1071, 1072-73 (1985) ("[F]ear 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.") (emphasis omitted).

12. *See* Brief Amici Curiae of Site Specific, Inc. in Support of Appellees, Reno v. ACLU, 521 U.S. 844 (1997) (No. 96-511), 1997 WL 74392 at *2, *8, *11 ("This Court should recognize that print media are the proper analogy for the Internet."); Brief for Pacifica Foundation, FCC v. Pacifica Found., 438 U.S. 726 (1978) (No. 77-528), 1978 WL 206840 at *10-12; Brief for Appellant at 13, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (No. 522), 1952 WL 82541 at *13 ("Today movies perform the same functions as other media of the press.").

13. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 661-62 (1994); FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386-87 (1969); Trinity Methodist Church, S. v. Fed. Radio Comm'n, 62 F.2d 850, 851 (D.C. Cir. 1932).

14. *See Burstyn*, 343 U.S. at 501-02 (holding that motion pictures are protected by the constitutional "free speech and free press guaranty"); NBC v. United States, 319 U.S. 190, 226 (1943).

15. *See* DE SOLA POOL, *supra* note 9, at 40-42.

16. *See* Robert Corn-Revere, *New Technology and the First Amendment: Breaking the Cycle of Repression*, 17 HASTINGS COMM. & ENT. L.J. 247, 252 (1994) (arguing that new media are likely to be given full First Amendment status as they "gain[] cultural penetration and become[] more mainstream"). A more accurate way of describing this may be that new and old media converge.

in First Amendment law. In what follows, I focus on the efforts of a nationwide anticensorship movement to engineer the reversal of *Mutual Film* and end the practice of government censorship of film. Between World War I and the 1950s, this movement used an argument about media convergence as the basis for its claim for freedom of speech for the cinema. Because the movies had come to fulfill many of the same social functions as the traditional press, it argued, there was no basis for constitutional distinction.

In telling this story, I want to not only bring to light an important, lost chapter in free speech history but also suggest its current implications. The saga of how the movies became speech is the story of how the public and courts grappled with questions that have become even more pressing in our age of rapidly proliferating communications technologies: namely, does the medium matter? To paraphrase an issue raised by Justice Alito's concurrence in the 2011 case *Brown v. Entertainment Merchants Ass'n*, which struck down a California ban on selling violent video games to youth, should we assume that "playing violent video games [is] very different from reading a book, listening to the radio, or watching a movie or a television show"?[17] Should these distinctions have constitutional significance? This case study of the forty-year battle for freedom of the screen provides a vantage into the historical relationship between freedom of speech and new media and may offer insights into the future of media law at a time when new and old forms of communication are blurring, mixing, and merging at lightning speed.

When movies entered American culture at the turn of the twentieth century, they were regarded—as new technologies almost always are—with awe, yet also with skepticism and fear. Visual, sensational, and intensely "real," movies were said to bypass the rational mind and morally corrupt impressionable and gullible viewers. Challenging the constitutionality of state motion picture censorship laws, the Mutual Film Company in 1915 made a groundbreaking argument in federal court, as Part I explains. The company claimed that motion picture censorship violated the First Amendment because movies, particularly newsreels, were similar to newspapers and thus part of the nation's press.[18] In *Mutual Film*, the Court rejected the press-screen analogy and determined that motion pictures were merely sensational entertainment, in contrast to newspapers, with their important social purpose of disseminating the news.[19]

As Part II illustrates, in response to the decision, the motion picture industry made the press-screen analogy the basis of a

17. 131 S. Ct. 2729, 2742 (2011) (Alito, J., concurring).

18. Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 231-32 (1915).

19. *Id.* at 243-44.

nationwide "freedom of the screen" campaign that it used between 1915 and 1922 to try to turn public opinion against censorship, prevent the passage of state and local censorship laws, and challenge the *Mutual Film* decision in court.[20] Yet the industry could not surmount the widespread belief in the cinematic medium's inherent "[capacity for] evil."[21] When the freedom of the screen campaign failed, the film industry abandoned its efforts to challenge government film censorship and instead adopted a program of self-censorship. It used the argument it had once disavowed—that the movies were inherently more dangerous than print—to justify its internal content regulation under the infamous Hollywood Production Code ("Code").

Part III describes how the American Civil Liberties Union ("ACLU"), then just emerging as the leader of a national civil liberties movement, took up the anticensorship effort in the 1930s. Much has been written about the organization's efforts against literary censorship, but its significant role in the campaign against film censorship has been scarcely documented. As the film industry had done earlier, the ACLU attempted to turn public opinion against censorship, challenge permit denials in court, and ultimately engineer the defeat of *Mutual Film*. Against the backdrop of Supreme Court decisions in the 1930s proscribing prior restraints on publishing and instituting the practice of heightened scrutiny of content-based restrictions on speech on matters of public concern,[22] the ACLU argued that newsreels and documentaries depicting political affairs were part of the "press," and film censorship was thus unconstitutional. Yet despite the similarities between newsreel and newspaper content, the increasing popularity of motion pictures, and the more liberal free speech climate, the ACLU still could not surmount the biases against the movies. Abandoning a proposed test case challenging *Mutual Film* in 1939, the ACLU concluded that given the widespread belief in the unique threats posed by the cinematic medium, the decision in *Mutual Film* was unassailable.

Part IV explains how developments in free speech law and the theory and social experience of mass communications permitted new, and ultimately successful, arguments about the parity between the cinema and the traditional press beginning in the 1940s. By World War II, movies had become a significant source of news and public information, and newspapers, like movies, a medium of popular entertainment. Newspapers and magazines were becoming, like film, visual and "sensational." Communications research disproved the model of the passive, impressionable film audience; movies were seen

20. *See infra* notes 155-58 and accompanying text.

21. *See* DE GRAZIA & NEWMAN, *supra* note 3, at 22.

22. *See* FELDMAN, *supra* note 7, at 397.

as affecting the consciousness and behavior of audiences in ways that were similar to print.[23] These changes in the communication context pushed a reconsideration of the medium's constitutional status. In the immediate postwar era, the ACLU and the film industry, now working jointly, revived the press-screen argument in a series of constitutional challenges to film censorship. In *Burstyn*, the Court, acknowledging the reality of media convergence, accepted the film exhibitor's argument that movies functioned like the press as a "medium for the communication of ideas."[24] *Burstyn* represented the beginning of the end of film censorship. Subsequent Supreme Court decisions in the 1950s and 1960s reinforced and clarified the parallels between movies and print as protected media and led to the abolition of most of the state and local censor boards by the end of the 1960s.

Mutual Film initiated what is still the reigning medium-specific approach to First Amendment analysis. The level of scrutiny courts apply to any particular restriction on speech depends on the medium through which the speech is conveyed; the level of protection given to any medium generally depends on the extent to which the courts see it as resembling print media.[25] The Supreme Court has been willing to grant a new medium free speech protection when convinced that the medium plays a sufficiently similar role in public life and discourse as the traditional press.[26] The new medium must be rationalized and its threats depotentiated, a process that has historically been mediated by communications theory, social science research, and the experiences of media audiences. In 1997, the Court declared that the Internet was a fully protected medium of communication based in large part on its similarities to print media.[27] Broadcast media have received lesser First Amendment protection on the belief that radio and television pose a particular threat to the vulnerable child viewer.[28] If the course followed by the movies is any indication, when the impact of broadcasting on audiences is understood to be similar to other, fully protected media, the Supreme Court will broach the possibility of full First

23. *See infra* notes 386-88 and accompanying text.

24. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952).

25. *See* Lively, *supra* note 11, at 1079-80, 1088; *see also* Thomas G. Krattenmaker & L. A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719, 1719-24 (1995) (arguing that the First Amendment should not be "used as a sword to prevent communications convergence or as a shield to . . . force these technologies into . . . categories").

26. Corn-Revere, *supra* note 16, at 275-76, 286-87. *But see* DE SOLA POOL, *supra* note 9, at 250 ("As new technologies have acquired the functions of the press, they have not acquired the rights of the press.").

27. Reno v. ACLU, 521 U.S. 844, 870 (1997).

28. FCC v. Pacifica Found., 438 U.S. 726, 757-58 (1978) (Powell J., concurring).

Amendment protection for broadcasting. In fact, there are indications that such a reassessment may be happening now.[29]

And this may be the most profound legacy of our experience with the movies—our enduring ambivalence about whether the medium matters. As a matter of formal First Amendment doctrine, the medium continues to have constitutional significance. At the same time, as the functions and properties of new and old media overlap and blur, free speech law has been willing to question, and at times even disregard, the distinctions between them. In our present era of rapidly converging communications, it remains to be seen whether the medium-specific approach to freedom of speech makes sense at all, as a matter of logic, experience, or law.

But first, history.

II. A "CAPACITY FOR EVIL": THE ORIGINS OF MOVIE CENSORSHIP AND THE *MUTUAL FILM* DECISION, 1900-1915

A. Spectacles

At the turn of the twentieth century, motion pictures were to Americans what the Internet is to us today: one of many wondrous, new communication technologies—along with telephones, phonographs, and mass-circulation print media—revolutionizing social relationships, individual and group identities, and the experience of everyday life. At the turn of the century, as Peter Yu writes, they were the "new, new thing."[30] Although moving picture technology was developed in the 1870s, motion pictures were not publicly exhibited until the 1890s, when they were shown before and after performances in vaudeville houses.[31] Early films consisted of short documentary footage of simple scenes: waves crashing on a beach, dancing chorus girls, and boxing matches.[32] They were regarded as visual novelties, "the latest in a long line of visual novelty acts [and spectacles]—'living picture' tableaux, lantern slides, [and] shadowography."[33]

By 1902, the movies had become so popular that special theaters were built exclusively for film exhibition. By 1910, according to *Scientific American* magazine, 20,000 of these so-called

29. *See* Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 326-27 (2d Cir. 2010) (noting similarities between broadcast television, cable television, and the Internet).

30. Peter K. Yu, *New Media at the Turn of the Century*, 2-3 (Mich. State Univ. Coll. Of Law Legal Studies Research Paper No. 04-17, 2007), *available at* http://ssrn.com/abstract=965579.

31. *See* ROBERT SKLAR, MOVIE-MADE AMERICA: A CULTURAL HISTORY OF AMERICAN MOVIES 13-14 (1994).

32. JOWETT, *supra* note 3, at 42-43.

33. Daniel Czitrom, *The Politics of Performance: From Theater Licensing to Movie Censorship in Turn-of-the-Century New York*, 44 AM. Q. 525, 530 (1992).

"nickelodeons" existed in the country's northern cities.[34] Narrative films were then being produced, and simple slapstick comedies and adventures were among the most popular genres.[35] Cheap, readily accessible in urban areas, and easily comprehended by those unable to understand English, silent movies catered to the vast audience of immigrant laborers then arriving on America's shores.[36]

Motion pictures became the first form of mass entertainment for an emerging mass public, and they sparked a moral panic. Progressive reformers, concerned with the moral uplift of a mass populace allegedly degraded by the vices of modern urban life, and conservative Protestant groups, which viewed "cheap amusements" as a threat to traditional religious values, condemned dark and cramped nickelodeons as breeding grounds for crime and illicit sexual activity.[37] There were outcries over film content. Produced by immigrant entrepreneurs, often Jews from Eastern Europe, many films mocked repressive Victorian sexual norms, depicted "themes of rebellion," and lampooned the rich.[38] Above all, it was the "spectacular" quality of the cinema that terrified the reformers.[39]

Movies were regarded as powerful agents of social control because they invoked "sensation" rather than reason. Sensational matter was said to appeal to the working masses, who were allegedly impressionable and driven by emotion rather than intellect, and spurred them to act because they were highly "suggestible."[40] Sensational, titillating entertainment—material "that stimulates man's . . . senses merely for the sake of the pleasure and excitement attendant upon the stimulation"—would produce primitive, instinctual, and imitative behavior.[41]

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34. LARY MAY, SCREENING OUT THE PAST: THE BIRTH OF MASS CULTURE AND THE MOTION PICTURE INDUSTRY 35 (1980).

35. *See generally* 1 CHARLES MUSSER, THE EMERGENCE OF CINEMA: THE AMERICAN SCREEN TO 1907, 451-89 (Charles Harpole ed., 1994) (describing the popular films of the early 1900s).

36. *See* MAY, *supra* note 34, at 25-27 (discussing how the cinema failed to become a tool for science and instead became entertainment for the immigrant population).

37. LEE GRIEVESON, POLICING CINEMA: MOVIES AND CENSORSHIP IN EARLY-TWENTIETH-CENTURY AMERICA 91 (2004); MAY, *supra* note 34, at 56-57.

38. *See* MAY, *supra* note 34, at 36-37.

39. *Id.* at 39-40.

40. Suggestibility was a concept rooted in nineteenth-century theories of hypnosis. As cultural historian Richard Butsch writes, the "concept of suggestion was the coordinating stimulus to explain why many people responded the same when reason was rejected as the cause." RICHARD BUTSCH, THE CITIZEN AUDIENCE: CROWDS, PUBLICS, AND INDIVIDUALS 34 (2008).

41. Delos F. Wilcox, *The American Newspaper: A Study in Social Psychology*, 16 ANNALS AM. ACAD. POL. & SOC. SCI. 56, 76 (1900). In 1895, the eminent French sociologist Gustave LeBon published a book entitled *The Crowd: A Study of the Popular Mind*, which became an international best seller and had a profound influence on American social thought. *See* Robert K. Merton, *Introduction* to GUSTAVE LE BON,

At the turn of the century, reformers had decried the sensationalistic magazines, dime novels, yellow newspapers, and tabloids that had become popular in the late nineteenth century, linking them to crime and immoral behavior.[42] Motion pictures were considered even more dangerous because they were entirely visual.[43] Since the development of photography in the mid-nineteenth century, a discourse had developed around the powerful emotional impact of photographic images and their ability to convey strong feelings far more vividly than words.[44] "Pictures [were] more degrading" than printed material, because they "import moral lessons directly through the senses."[45] Unlike reading, looking at images—particularly moving images—required no active cognition; the message was thrust upon viewers. "When we read, there is time for thought, reasoning, and the formation of judgment; but motion pictures progress so swiftly as to permit almost no cerebral action," one commentator noted.[46] Books could only influence literate audiences, but pictures reached the illiterate masses and children. The written word "cannot lead the [viewer] further than his limited imagination will allow, but the motion picture forces upon his view things that are new, they give firsthand experience."[47]

Even more than still photographs, the movies could provoke irrational behavior because they were inherently "psychological." As the Harvard psychologist Hugo Munsterberg noted in a 1916 book titled *The Photoplay*, one of the earliest studies of the psychology of movie-going, sitting in a darkened theater watching images projected larger-than-life on the screen, film audiences were highly

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THE CROWD: A STUDY OF THE POPULAR MIND, at v-vi (Penguin Books 1977) (1895). Le Bon rejected the idea that had shaped liberal political thinking since the eighteenth century—that people were intrinsically rational beings. LE BON, *supra*, at 27-34. The primary characteristic of crowds, according to Le Bon, was that individuals were subsumed in a "crowd mind" and lost their ability to reason. *Id.* at 32. The men and women who typically comprised urban crowds were prone to unreason to begin with; poor immigrants and laborers were considered "inferior forms of evolution" that behaved impulsively and acted on emotions and instincts. *Id.* at 35-36; BUTSCH, *supra* note 41, at 34.

42. *See generally* Margaret A. Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society—From Anthony Comstock to 2 Live Crew*, 33 WM. & MARY L. REV. 741 (1992) (discussing late nineteenth-century morality campaigns).

43. *Id.* at 761.

44. *See generally* ALAN TRACHTENBERG, READING AMERICAN PHOTOGRAPHS: IMAGES AS HISTORY, MATTHEW BRADY TO WALKER EVANS (1989).

45. MAY, *supra* note 34, at 40 (internal quotation marks and footnote omitted).

46. Rowland C. Sheldon, *Moving Pictures, Books and Child Crime*, THE BOOKMAN 242 (May 1921), *reprinted in* STATE CENSORSHIP OF MOTION PICTURES 54, 57 (James R. Rutland ed., 1923).

47. *See* MAY, *supra* note 34, at 40 (internal quotation marks omitted).

impressionable.[48] "The normal resistance breaks down and the moral balance . . . may be lost under the pressure of the realistic suggestions," Munsterberg wrote.[49] With their power to compress time, and to cut back and forth between disconnected impressions, movies mimicked the workings of the mind.[50] As such, they hypnotized viewers, causing them to lose themselves in the images and to abandon self-control.[51]

The dangers of the movies were typically couched in terms of harms to child audiences. Motion pictures would have an especially powerful and destructive impact on juveniles, who lacked the reason and experience to differentiate between the "reel" and the "real."[52] But child protection was not the only motivation behind film censorship, and youth were not the only vulnerable audiences. Reformers feared the influence of films on the "vast number of illiterates and the ignorant"[53]—"the foreigner, who cannot speak our language"[54]—who "lack the means of deriving pleasure from a good play or good reading matter and who are unable to concentrate their minds for any length of time on matters requiring much thought."[55] The influence of the motion picture, it was speculated, was "greater and wider in extent . . . than even the churches or the schools."[56] "No fiction, no poetry[,] no painting, no sculpture, no pulpit and no drama has ever reached so uncountable an audience, in a mood so expectant, so credulous, so impressionable."[57] Whoever made the movies potentially controlled the consciousness of the masses.

The panic over the movies was thus a proxy for much deeper and more profound cultural anxieties. Elites feared the rise of a mass, urban, laboring population and the collapse of their social authority.[58] At the turn of the century, the nation was experiencing vast immigration and was in the throes of urbanization and industrialization. America was also becoming a mass-mediated

48. JOWETT, *supra* note 3, at 84-85.

49. *Id*. at 85.

50. *See* MAY, *supra* note 34, at 41-42.

51. *See id*. at 39.

52. *See id*. at 40-41.

53. Rupert Hughes, *Movie Men Favor a Federal Censor*, N.Y. TIMES, Feb. 5, 1922, at 1.

54. NEW YORK STATE MOTION PICTURE COMMISSION, ANNUAL REPORT OF THE MOTION PICTURE COMMISSION 8 (1922).

55. Joseph Levenson, *Censorship of the Movies*, THE FORUM, Apr. 1923, *reprinted in* STATE CENSORSHIP OF MOTION PICTURES, *supra* note 46, at 83.

56. NEW YORK STATE MOTION PICTURE COMMISSION, ANNUAL REPORT OF THE MOTION PICTURE COMMISSION 11 (1924).

57. P. W. Wilson, *The Crime Wave and the Movies*, 70 CURRENT OPINION 320, 321 (Mar. 1921).

58. *See generally* MAY, *supra* note 34, at 3-59 (chronicling the response of nineteenth-century elites to commercial entertainment).

society, and with the popularization of motion pictures, photographs, and illustrated newspapers and magazines, a visual culture. In this environment of profound technological and social change, it is not surprising that the elite classes were nervous about what seemed to be a most dangerous and provocative combination of mass-circulated images and crowds.

B. Repression

By 1915, states and municipalities throughout the country had enacted film censorship laws. Most required films to be screened by an official censor board prior to exhibition and prohibited films that were deemed to be indecent, incite crime, or otherwise corrupt public morals.[59] In 1911, Pennsylvania became the first state to establish statewide film censorship. The censorship statute established a film licensing system under the control of a politically appointed censor board that was empowered to review all films to be shown in the state and to deny exhibition licenses to those films that were "sacriligious [sic], obscene, indecent, or immoral, or . . . tend to [debase or] corrupt morals."[60] Films depicting "nudity, infidelity, women drinking or smoking, [and] prolonged passion," among other topics, were prohibited.[61] Similar censorship laws were passed in Ohio and Kansas in 1913.[62] The Ohio law provided that only films deemed "moral, educational, or amusing and harmless" would be approved by the board.[63] Kansas called for elimination of films that involved social drinking or barroom scenes.[64] Municipal censorship mechanisms ranged from "censorship boards to police control."[65] Chicago, the largest domestic market for film after New York, began

59. *See generally* Note, *Film Censorship: An Administrative Analysis*, 39 COLUM. L. REV. 1383 (1939) (describing motion picture censorship by censor boards and other government institutions); Legislation, *The Legal Aspect of Motion Picture Censorship*, 44 HARV. L. REV. 113 (1930) (detailing examples of censor boards).

60. Act of June 19, 1911 Pa. Laws 1067, 1068; *see also* MacGregor, *supra* note 3, at 166-67. (explaining the organization of the Pennsylvania State Board of Censors and process of film approval).

61. DE GRAZIA & NEWMAN, *supra* note 3, at 14.

62. OHIO REV. CODE ANN. §§ 871-48 to -871-53(d) (West 1921); KAN. STAT. ANN. §§ 51-101-51 to -112 (1935).

63. OHIO REV. CODE ANN. § 871-49.

64. Gregory D. Black, *Hollywood Censored: The Production Code Administration and the Hollywood Film Industry, 1930-1940*, 3 FILM HIST. 167, 169 (referencing the Kansas board's "banning scenes of . . . drinking"). The statute was held constitutional in 1915. Mut. Film Corp. of Mo. v. Hodges, 236 U.S. 248, 258 (1915).

65. Note, *supra* note 59, at 1385; *see also* MacGregor, *supra* note 3, at 170; Comment, *Censorship of Motion Pictures*, 49 YALE L.J. 87, 98 (1939) ("The 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.").

the practice of police licensing of the cinema in 1907.[66] In some cities, censorship was exercised through the power of municipalities to license public places of amusement.[67] By the end of the 1920s, eight states and nearly one hundred municipalities practiced prior censorship of films.[68] The censor boards usually directed that specific deletions be made; after the cuts, the film could be submitted for rescreening.[69] None of the laws had established standards for what was "indecent" or "harmless," making it virtually impossible to predict what the censors would accept or reject.[70]

The legal rationale for film censorship was well-established. Because movies were regarded as "shows" and "spectacles," like dramatic performances, film licensing was justified by analogy to theater licensing, which was practiced widely in the nineteenth century.[71] Courts upheld theater licensing—a practice often used to shut down or control "cheap theater" that played to working-class audiences—as a valid exercise of the state's police power in the interest of public safety and morals.[72] Because theatrical performances were considered neither "speech" nor "press" for constitutional purposes, free speech challenges to theater censorship laws were generally not contemplated.[73] Had they been, they most likely would have been unsuccessful. Courts routinely upheld legislative restrictions on speech that had a "bad tendency"—that were likely to "create unrest" or subvert public morals—as a legitimate exercise of the police power.[74]

Early challenges to film censorship drew on the same arguments

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66. RICHARD KOSZARSKI, AN EVENING'S ENTERTAINMENT: THE AGE OF THE SILENT FEATURE PICTURE, 1915-1928, 203 (1990) *in* 3 HISTORY OF THE AMERICAN CINEMA (Charles Harpole ed.); MacGregor, *supra* note 3, at 171.

67. New York City's movie theater licensing law, passed in 1913, was construed to give the licensing commissioner the power to base his decisions on film content. WITTERN-KELLER, *supra* note 3, at 26-27; *see The Legal Aspect of Motion Picture Censorship*, *supra* note 59, at 114; Note, *supra* note 59, at 1386.

68. The states were Kansas, Maryland, New York, Ohio, Pennsylvania, Virginia, Massachusetts, and Connecticut. MacGregor, *supra* note 3, at 168-69.

69. *See* Comment, *supra* note 65, at 91-92, 96.

70. *See* Note, *supra* note 59, at 1398.

71. John Wertheimer, *Mutual Film Reviewed: The Movies, Censorship, and Free Speech in Progressive America*, 37 AM. J. LEGAL HIST. 158, 163-66 (1993); Comment, *supra* note 65, at 89-90.

72. Wertheimer, *supra* note 71, at 163-66; Comment, *supra* note 66, at 89-90; *see also* Commonwealth v. McGann, 100 N.E. 355-56 (Mass. 1913) (upholding states' police power to license in order to protect public morals). The Minnesota Supreme Court approved a heavy license fee on the cinema, classing it with "pursuits . . . liable to degenerate and menace the good order and morals of the people," such as "circuses, theatrical performances, or shows of any kind." Higgins v. Lacroix, 137 N.W. 417, 417, 419 (Minn. 1912).

73. Wertheimer, *supra* note 71, at 165-66.

74. DAVID RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 132-46 (1997).

that had been used to challenge theater licensing. In 1909, a Chicago film exhibitor contested the refusal of permits for *The James Boys in Missouri* and *Night Riders*, two films that had been described as "represent[ing] . . . malicious mischief."[75] Chicago's film censorship statute "prohibit[ed] the exhibition of obscene and immoral pictures" and required that all movies receive approval from the chief of police before exhibition.[76] The exhibitor argued that the licensing ordinance was vague because it offered no way to test the police chief's determination that a film was immoral or obscene; unconstitutionally delegated discretionary and judicial power to the chief of police; "took . . . property without due process of law"; and was "unreasonable and oppressive."[77] No free speech challenge was made. All of his arguments failed. The Illinois Supreme Court upheld the city's police power to regulate film, like theater, in the interest of the general welfare.[78] It soon became apparent to the film producers and exhibitors that the only way to legally attack film censorship was to dissociate motion pictures from cheap theater.

C. The Analogy

Beginning around 1910, the film industry spared no expense to link the movies with other more respected and established forms of culture, art, and publishing, such as high drama, fine literature, and serious journalism. While producers continued to turn out slapsticks and adventures, they also began making educational films, movies based on respected plays and novels, and dramas depicting serious social and political issues.[79] New, lavish movie theaters, dubbed "theater palaces," were built.[80] By 1915, in part because of these efforts, motion pictures had begun to attract a broad, middle-class audience.[81] According to historian John Wertheimer, the film "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."[82]

Newsreels were a key part of this effort to "clean up" the movies. First produced in the United States by a branch of Pathé Frères Films in 1911, they were promoted as a "magazine on a film" showing

75. Block v. City of Chicago, 87 N.E. 1011, 1016 (Ill. 1909).

76. *Id.* at 1012-13; *see* Wertheimer, *supra* note 71, at 167. For a discussion of early Chicago censorship practices, see DE GRAZIA & NEWMAN, *supra* note 3, at 8-10.

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

78. *Id.* at 1016.

79. *See* MAY, *supra* note 34, at 64-65.

80. *Id.* at 147-166.

81. *See id.* at 163 ("[T]he motion picture had become a major urban institution for the middle class.").

82. Wertheimer, *supra* note 71, at 171.

"[t]he news of the world in pictures."[83] Newsreels depicted a range of current events: sporting events, parades, the comings and goings of political figures, and also more serious social issues such as women's suffrage, temperance, and child labor.[84] Promoters claimed that the cinema's verisimilitude made newsreels a more reliable and accurate source of the news than newspapers. As the Biograph Company claimed in an advertisement for its newsreels, "A written description is always the point of view of the correspondent. But the Biograph camera does not lie . . . ."[85] In reality, the "news" events depicted in newsreels were often staged or reenacted.[86] Film companies nonetheless promoted newsreels as the only journalistic medium "utterly without bias."[87] The film companies came to view newsreels and documentaries as their most effective defense against the charge that films were mere spectacles lacking a social purpose.

The newsreels also became a potential vehicle for constitutional challenges to film censorship. As noted by the film industry trade journal *Moving Picture World*, newsreels were often banned by movie censor boards for being immoral or scandalous, while newspapers covering the same events were allowed to publish freely.[88] For example, the film depicting the story of the infamous Thaw-White murder and sex scandal of 1906 was prohibited in several cities, and exhibitors in New York were arrested for showing it.[89] However, when newspapers in Louisville were indicted under an obscenity statute for printing part of Mrs. Thaw's lurid testimony about how she was drugged and seduced, the judge dismissed the charges, stating that the news was a matter "of legitimate public interest and [that] the press had a right and duty to report it."[90] "[P]ages upon pages of newspaper" space were devoted to the Eastland ship disaster of 1915, including photographs of "the removal of bodies from . . . the vessel and in the morgues."[91] But films depicting it were prohibited by censor boards.[92] "The root of this evil of discriminating against the moving pictures must be attacked by enfranchising the

83. RAYMOND FIELDING, THE AMERICAN NEWSREEL 1911-1967, at 66, 72 (1972).

84. *See* Brief of Appellants at 24-25, 27, Mut. Film Corp. v. Indust. Comm'n of Ohio, 236 U.S. 230 (1915) (No. 456).

85. FIELDING, *supra* note 83, at 146.

86. *Id.* at 147-52.

87. *Id.* at 146.

88. *See* GRIEVESON, *supra* note 37, at 49, 70-71.

89. *Id.* at 37-39.

90. Commonwealth v. Herald Publ'g Co., 108 S.W. 892, 893-95 (Ky. 1908); GRIEVESON, *supra* note 37, at 48-50 ("[E]stablishment of a distinction between the press and moving pictures . . . would be critical to the definition of the social function of cinema.").

91. Kenneth C. Crain, *Zig-Zag Censorship*, MOVING PICTURE WORLD, Aug. 14, 1915, at 1192.

92. *Id.*

motion picture and placing it on an equal footing with the newspapers before the law," *Moving Picture World* had argued.[93] So that the analogy with the press could be effectively mobilized in any legal challenges to movie censorship, "the line should very sharply be drawn" between fictional movies and newsreels.[94]

In effect, *Moving Picture World* was suggesting that newsreel censorship be attacked as a violation of freedom of the press. At the time, freedom of the press was by no means an absolute shield against government restrictions on publishing. The "bad tendency test" was applied to newspapers; for example, as the Connecticut Supreme Court of Errors opined in 1900, freedom of the press was not intended to "supply a place of refuge in behalf of the violators of laws enacted for the protection of society from the contagion of moral diseases."[95] Yet free press doctrine had always distinguished sharply between subsequent punishment and prior restraints such as licensing and censorship.[96] Freedom of the press, in the Blackstonian formulation, "consist[ed] in laying no previous restraints upon publications."[97] Most state constitutions contained free speech and free press provisions prohibiting prior restraints, and a string of state cases upheld the Blackstonian position.[98] By 1914, it had become clear to the film interests that likening newsreels to newspapers—perhaps not the sensational modern press, but the fabled, crusading press of First Amendment tradition—might lead to the invalidation of film censorship as a prohibited prior restraint.[99]

D. Mutual Film v. Ohio

In 1914, the Mutual Film Corporation, a film distributor and producer of newsreels, took this press-screen analogy to federal court in what became the first free speech challenge to a film censorship law.[100] The company, which had refused to submit any of its

93. W. Stephen Bush, *Indirect Federal Censorship*, MOVING PICTURE WORLD, June 29, 1912, at 1206.

94. *Facts and Comments*, MOVING PICTURE WORLD, Apr. 18, 1914, at 331.

95. State v. McKee, 46 A. 409, 414 (Conn. 1900) (upholding a conviction against a newspaper under a state statute criminalizing the publication of "bloodshed, lust or crime").

96. *See* RABBAN, *supra* note 74, at 132 (explaining that the judicial approach between the Civil War and World War I with respect to free speech was to prohibit prior restraints, yet allow "the punishment of publications for their tendency to harm the public welfare").

97. Near v. Minnesota, 283 U.S. 697, 713 (1931) (emphasis omitted) (internal quotation marks omitted) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *151, *152) (internal quotation marks omitted).

98. *Id.* at 719 & n.11 (listing court decisions supporting the principle that freedom of the press entails freedom from prior restraints).

99. *See Facts and Comments*, *supra* note 94, at 331.

100. Mut. Film Co. v. Indus. Comm'n of Ohio, 215 F. 138, 139-41 (N.D. Ohio 1914)

newsreels to censorship in Pennsylvania, Ohio, Kansas, and Chicago, challenged the constitutionality of the censorship laws.[101] This was not a noble cry to expand the marketplace of ideas, but rather an effort to expand the marketplace for Mutual's films.[102] Mutual objected to the fees that had to be paid to the censor boards for screening and the costs involved in editing films to meet the censors' demands.[103] Mutual was especially troubled by the delays caused by mandatory submission to the censor boards; newsreels depended on their timeliness, and the licensing process could take weeks, even months.[104] Just as corporations, beginning in the Gilded Age, had begun to draw on constitutional provisions such as due process for commercial purposes, Mutual mobilized freedom of the press for similar ends.[105]

In its challenge to the Ohio law, Mutual alleged that "the statute violate[d] the commerce clause" and "delegate[d] legislative power to the board of censors in violation of . . . the Ohio Constitution."[106] Making what was then a novel argument, Mutual also argued that the censorship law violated freedom of the press as guaranteed under a provision in the Ohio State Constitution that paralleled the First Amendment;[107] the federal amendment would not be applied to the states through the Fourteenth Amendment until 1925.[108] It claimed that the newsreel it put out, the *Mutual Weekly*, was "as much a press enterprise as are any of the standard magazines, periodicals, and newspapers," and that it "furnish[ed] and publish[ed the] news through the medium of motion pictures."[109] Its newsreels depicted "events . . . described in words and by photographs in newspapers, weekly periodicals, magazines, and other publications."[110] The district court rejected the analogy. Films were primarily a "means of furnishing entertainment and amusement," and movie theaters had "all the material attributes of an ordinary theater."[111] "Why," the

(per curiam), *aff'd*, 236 U.S. 230 (1915).

101. Mut. Film Corp. v. Hodges, 236 U.S. 248, 249-50 (1915); Mut. Film Corp. v. City of Chicago, 224 F. 101, 102 (7th Cir. 1915); *Indus. Comm'n of Ohio*, 215 F. at 139-40; Buffalo Branch, Mut. Film Corp. v. State Bd. of Censors, 23 Pa. D. 837, 838 (Pa. Ct. Com. Pl. 1914), *aff'd*, 250 Pa. 225 (1915).

102. Wertheimer, *supra* note 71, at 173.

103. *Id.* at 174-77.

104. *See id.* at 175 (discussing Mutual's argument that "[t]hree poorly paid state employees . . . cannot pass upon over five hundred films per month").

105. *Id.* at 179-81.

106. *Indus. Comm'n of Ohio*, 215 F. at 145-48.

107. *Id.* at 141-42; Wertheimer, *supra* note 71, at 169 (discussing the novelty of Mutual's First Amendment argument).

108. Gitlow v. New York, 268 U.S. 652 (1925).

109. *Indus. Comm'n of Ohio*, 215 F. at 142 (internal quotation marks omitted).

110. *Id.*

111. *Id.* at 142-43.

court asked, "is this not the practical equivalent of a plan to regulate these public exhibitions, the picture film theaters, through the old system of granting and . . . withholding [theater] licenses?"[112]

Mutual appealed the Ohio case to the Supreme Court. This time it led with the free press claim, arguing that the Ohio law violated freedom of the press as guaranteed in the Ohio Constitution.[113] "The Mutual Weekly . . . is as much a press enterprise as are Harper's Weekly, Leslie's Weekly, the Illustrated London News, and countless other periodicals," the company asserted.[114] Like newspapers, the subjects that appeared in Mutual's newsreels "cover the entire range of human activity [and] deal with nearly every possible subject."[115] Mutual also tried to analogize the act of reading papers to watching films and pointed out that the titles or captions that appeared between the images in the silent newsreel consisted of printed words.[116] It then argued that newsreels should be protected by freedom of the press because they "impress[ed ideas] upon the minds of . . . thousands of people" just as newspapers and magazines did.[117] Mutual even went as far as to suggest that newsreels were particularly deserving of constitutional protection because the "directness of their appeal" made them *more* effective than newspapers in "the spreading of knowledge and molding of public opinion upon every kind of political, educational, religious, economic, and social question."[118]

The Court rejected the argument that movies were part of the nation's press.[119] Motion pictures were "vivid, useful, and entertaining, no doubt, but . . . capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition."[120] The Court implied that because movies did not require thought or literacy to understand, they bypassed reason and could provoke irrational reactions. As a New York appeals court summarized the idea in 1922, "Those who witness the [movies] are taken out of bondage to the letter, and the spoken word."[121]

The *Mutual Film* Court concluded that movies were mere entertainment and spectacles—"a business, pure and simple, originated and conducted for profit, like other spectacles"—and

112. *Id.* at 143.

113. Brief of Appellants at 14, Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230 (1915) (No. 456).

114. *Id*. at 32.

115. *Id.* at 24.

116. *Id.* at 25-26.

117. *Id*. at 28.

118. *Id*. at 27.

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

120. *Id*.

121. Pathé Exch., Inc. v. Cobb, 195 N.Y.S. 661, 665 (N.Y. App. Div. 1922).

further noted

> 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 billboards of our cities and towns, and . . . which seeks to bring motion pictures . . . into practical and legal similitude to a free press and liberty of opinion.[122]

Movies were not, according to the Court, "part of the press of the country, or . . . organs of public opinion."[123] Upholding the Ohio censorship regime as a valid exercise of the state's police powers, the unanimous Court, led by Justice McKenna, held that motion pictures were as a medium, categorically outside the protections of constitutional freedom of speech and press.[124]

III. FREEDOM OF THE SCREEN: THE FILM INDUSTRY AND MOVIE CENSORSHIP, 1917-1930

The *Mutual Film* decision established the medium-specific approach to free speech analysis. The Court compared movies to the press and concluded that movies were fundamentally dissimilar and thus outside the scope of free speech protection.[125] Freedom of the press, it opined, protected the printed page and the rational process by which printed words were interpreted and understood.[126] Movies, by contrast, were visual "spectacles," and watching them, a passive, noncognitive act.[127] *Mutual Film* established binaries that would henceforth define the film censorship debate: informational versus entertainment media; visual versus print media; and material evoking "sensation" versus that appealing to reason.[128]

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122. *Indus. Comm'n of Ohio*, 236 U.S. at 243-44.

123. *Id.* at 244.

124. *Id.* at 244-45.

125. *Id.* at 241-45.

126. *See id.* at 243.

127. *See id.* at 241-44.

128. The decision was widely praised. For the response of the Women's Christian Temperance Union, see ALISON M. PARKER, PURIFYING AMERICA: WOMEN, CULTURAL REFORM, AND PRO-CENSORSHIP ACTIVISM, 1873-1933, at 142 (1997). However, the decision was also attacked by critics who questioned the soundness of the Court's analogical reasoning. As noted in the Michigan Law Review, "It could perhaps reasonably be asked whether the exhibition of a motion picture film is not such a publication of the sentiments of the author, actors and producer that it could be regarded as a communication and as within the protection of the clause guaranteeing the freedom of speech." Werner W. Schroeder, Note and Comment, *The Power to Regulate Moving Pictures*, 14 MICH. L. REV. 138, 138 (1915); *see also* Robert H. Freeman, Recent Decisions, 15 COLUM. L. REV. 546, 546 (1915) ("[S]ince moving pictures are instrumentalities for the transmission of thought . . . such a form of publication would seem to merit as much protection as the printing of the same words or sentences on paper."). For a good summary of popular reaction to the decision, see Garth S. Jowett, "*A Capacity for Evil": The 1915 Supreme Court* Mutual *Decision*, *in* CONTROLLING HOLLYWOOD: CENSORSHIP AND REGULATION IN THE STUDIO ERA 16, 30

The decision spurred the immediate drafting of censorship legislation throughout the country. Between 1923 and 1925, more than thirty-four states introduced censorship legislation, while the federal government seriously considered acting as well.[129] The Smith-Hughes bill of 1915 would have created a federal motion picture commission to be charged with "examining, censoring and licensing all films before they could be admitted to interstate commerce."[130] The commission would deny licenses to films that were "obscene, indecent, immoral, inhuman . . . depict[ed] a bull fight, or prize fight, or [were] of such character that its exhibition would tend to impair the health or corrupt the morals of children or adults, or incite to crime."[131] It was ultimately unsuccessful, but similar proposals would be introduced over the next forty years.[132] In 1925, Congressman W.D. Upshaw of Georgia proposed a federal censorship bill that would create a federal motion picture commission and would give the commission the power not only "to preview and license motion picture[s]" but also to examine and censor scripts and to supervise the production of films in studios.[133]

These developments led to a new effort by the organized film industry to defeat movie censorship in the legislatures and the courts. Joining together under the banner of NAMPI, the National Association of the Motion Picture Industry, film producers, distributors, and exhibitors launched what they called the "freedom of the screen" campaign, based on Mutual's press-screen analogy.[134] NAMPI challenged film permit denials, lobbied against proposed censor laws, and, in an attempt to mobilize public opinion against censorship, tried to convince the public that film licensing violated freedom of the press no less than the licensing of newspapers.[135] Although the campaign generated much anticensorship publicity, NAMPI ultimately failed.[136] It could not surmount deeply ingrained assumptions about the danger of the cinematic medium—its powerful, hypnotic effect on suggestible and vulnerable viewers.[137]

A. The "Freedom of the Screen" Campaign

Film exhibitors and producers exercised their right, in most jurisdictions, to appeal censor board decisions, typically to no avail.

(Matthew Bernstein ed., 1999).

129. *See* RANDALL, *supra* note 3, at 17.

130. *See* MacGregor, *supra* note 3, at 164.

131. H.R. Res. 456, 64th Cong. (1915); *see* MacGregor, *supra* note 3, at 164.

132. *See* MacGregor, *supra* note 3, at 164-66.

133. *See id.* at 165.

134. *See* DE GRAZIA & NEWMAN, *supra* note 3, at 22-23.

135. *Id.*

136. *Id.* at 23.

137. *Id.* at 22-23.

Most censorship statutes permitted appeals to a higher administrative tribunal, then judicial review.[138] Administrative decisions were reviewed under a deferential abuse of discretion standard.[139] Because of the vague standards set out to guide the censors, "there [was] almost always . . . some evidence to sustain their determination[.]"[140] The appeals process was lengthy and, in many cases, not worth the effort; films, especially newsreels, "los[t] value rapidly in the time required for a judicial hearing."[141] Judges in this era went out of their way to remind the film industry plaintiffs that movies were "spectacles" and that free speech rights did not apply.[142] Rejecting the filmmaker's challenge to the decision of the license commissioner of New York City denying a permit for an educational film on birth control, the court reminded the plaintiff that if he had in mind the constitutional provision of freedom of speech, "it should be remembered that the defendant has not attempted to interfere with any such constitutional right of the citizen. We are dealing with a place of amusement conducted . . . for commercial benefits."[143]

Constitutional challenges were effectively foreclosed by *Mutual Film*. In 1922, in what was the last attempt to challenge a film censorship statute on free-speech grounds until the late 1940s, Pathé, a newsreel manufacturer, challenged the denial of a license by the New York censor board as a violation of a provision in the state constitution guaranteeing freedom of the press.[144] As was argued in *Mutual Film*, Pathé contended in *Pathé Exchange, Inc. v. Cobb* that newsreels were part of the "press" because they presented similar

138. Note, *Motion Pictures and the First Amendment*, 60 YALE L.J. 696, 698 n.6 (1951).

139. *See* Reuel Schiller, *Free Speech and Expertise: Administrative Censorship and the First Amendment*, 86 VA. L. REV. 1, 35 (2000) ("Again and again, courts stated that they could not substitute their judgment for that of the official empowered to enforce the censorship ordinance."). *But see* L.J. Selznick Prods., Inc. v. Pa. Bd. of Censors, 26 Pa. D. 423, 426, 430 (Ct. Com. Pl. 1917) (finding that the board had abused its discretion in eliminating titles and certain subtitles of the film *The Easiest Way*, on the subject of "illicit love"); Lubin Mfg. Co.'s Appeal, 25 Pa. D. 578, 581 (Ct. Com. Pl. 1916) (finding that the board abused its discretion by condemning portions of picture on theory that all references to matters such as motherhood, sex, or birth lead to evil and lewd thoughts).

140. *See* Note, *supra* note 59, at 1398.

141. *See* Comment, *supra* note 65, at 96.

142. *See id.* at 88.

143. Universal Film Mfg. Co. v. Bell, 167 N.Y.S. 124, 127 (Sup. Ct. 1917*)*; *see also* Message Photo-Play Co. v. Bell, 166 N.Y.S. 338, 341 (App. Div. 1917) ("[P]laintiff has no constitutional or other right, on the theory of freedom of speech or of the press or otherwise, to give public exhibition of the film in question at an *unlicensed* theatre. . . .").

144. *See* Pathé Exch., Inc. v. Cobb, 195 N.Y.S. 661, 663 (App. Div. 1922).

subjects as newspapers.[145] Pathé's lawyer also argued that viewing movies was in practice no different than reading; "[n]o logical or reasonable distinction can be made between the two media of expression," only that one used paper and ink and the other celluloid.[146] The appellate court, citing *Mutual Film*, rejected the argument that newsreels were virtually the same in character as newspapers.[147] Unlike reading newspapers, audiences "absorbed" movies "without conscious mental effort."[148] "Nothing is left to the imagination, as on the printed page."[149] It repeated that movies were mere "spectacle[s]" and not "part of the press of the country."[150] New York's highest court affirmed.[151]

The difficulty of challenging censor board decisions in court led NAMPI to focus its efforts on the legislative defeat of censorship. In states where censorship operated or censorship legislation was pending, NAMPI attempted to turn public opinion against film licensing using "free press" arguments. The film interests perceived, perhaps rightly, that the public, rather than the relatively conservative judiciary, would be more sympathetic to the argument that film censorship violated constitutional freedoms. Historically, popular understandings of free speech have often been more expansive and speech-protective than formal doctrine.[152] Despite widespread support for government restrictions on film content, by 1920 there was also growing public hostility towards censorship, a reaction against severe crackdowns on dissidents during World War I.[153] The arrests of wartime protesters for seditious speech and the prohibitions on publication of allegedly unpatriotic newspapers had brought unprecedented attention to free speech issues and generated a civil libertarian defense of free expression as a core principle of a democratic society.[154]

Playing on this popular free speech consciousness and the

145. *See Pathé Suit Fights News Reel Censor*, N.Y. TIMES, Feb. 10, 1922.

146. *Pathé Exch.*, 195 N.Y.S. at 663. Pathé's lawyer, Frederick Coudert, argued that "[n]ews films are a part of the press and a part of the publications of the world today and as such should be immune from censorship. . . . This news service depicts the events transpiring in the world today. It is probably the most important record of its kind that will ever be devised." *News Reel Censorship Before the Court; Expect Early Decision on Pathé Plea*, MOVING PICTURE WORLD, May 20, 1922, at 305.

147. *Pathé Exch.*, 195 N.Y.S. at 666.

148. *Id.* at 665.

149. *Id.*

150. *Id.* at 666.

151. *See* Pathé Exch., Inc. v. Cobb, 142 N.E. 274 (N.Y. 1923).

152. *See* MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE" 12-13 (2000).

153. *See* PAUL S. BOYER, PURITY IN PRINT: BOOK CENSORSHIP IN AMERICA FROM THE GILDED AGE TO THE COMPUTER AGE 69-70 (2d ed. 2002).

154. *See* RABBAN, *supra* note 74, at 299-302.

increasing popularity of the movies, NAMPI turned its "freedom of the screen" campaign into a public crusade. In pamphlets, treatises, and even public rallies, the organization argued that "[t]here is no basic difference between the publishing of printed words and printed pictures and the publishing of pictures in motion."[155] The Moving Picture World sent slides bearing anticensorship messages to theater owners to flash on the screen before and after the main feature. "What do you think about motion pictures? Is there any reason for showing them to the police or censor before they go on the screen? Newspapers are free, pictures ought to be equally free," read one slide.[156] Read another slide: "Censorship Strikes at Freedom of Expression and is Therefore Un-American."[157] NAMPI presented censorship as a tool for class interests; movies were the people's entertainment, and the censors interfered with the public's "constitutional" right to consume the entertainment and culture they wished.[158]

In states where censorship legislation was being considered, theater owners, after showing the slides, circulated anticensorship petitions for patrons to sign.[159] Entertainment industry lawyers made public lectures, likening film censorship to prior restraints on the press.[160] In major cities, exhibitors held rallies and "mass meetings" to stir up public opinion against film censorship.[161] In 1916, movie industry leaders visited President Woodrow Wilson to remind him that the movies entertained twenty million people daily and to ask his support in securing for motion pictures "the same liberty enjoyed in this country by the press . . . and other mediums of

155. B.B. Hampton, *No Other Business Would Stand Censorship*, MOVING PICTURE WORLD, Mar. 10, 1917, at 1543, *available at* http://www.archive.org/stream/movingpicturewor23newy#page/n5/mode/2up.

156. *A True Catechism of Censorship*, MOVING PICTURE WORLD, Mar. 6, 1915, at 1418.

157. W. Stephen Bush, *Danger Ahead*, MOVING PICTURE WORLD, Feb. 20, 1915, at 1114, *available at* http://www.archive.org/stream/movingpicturewor23newy#page/n5/mode/2up.

158. *Freedom for the Screen Committee Formed to Fight Censorship*, MOVING PICTURE WORLD, Sept. 3, 1921, at 39 ("Slides, cartoons, news pictures, publicity posters and speakers will be some of the weapons [in the campaign], with the big underlying idea that the screen as the amusement of the people will set about to restore liberty to the people, acting not only in its own interest but in the interest of all America.").

159. Bush, *supra* note 157.

160. *See* GUSTAVUS A. ROGERS, THE LAW OF THE MOTION PICTURE INDUSTRY Lecture Before the College of the City of New York (Nov. 28, 1916), *available at* http://ia600406.us.archive.org/1/items/lawofmotionpictu00rogeiala/lawofmotionpictu00rogeiala.pdf.

161. Campaign Committee, Pittsburgh Screen Club, *Censorship Protest in Pennsylvania*, MOVING PICTURE WORLD, Apr. 8, 1916, at 234.

thought transmission."[162] NAMPI generated major publicity when it attempted, unsuccessfully, to amend the New York State Constitution to add that motion pictures, "whether of dramatic or educational subjects, shall enjoy the same privileges and immunities which under this section are accorded to the press, and no law shall be passed imposing any previous legal restraint upon [them]."[163] The group later called for the protection of motion pictures from censorship to be written into the First Amendment.[164]

"Freedom of the screen" and the press-screen analogy were endorsed and publicized by a wide range of interest groups. Newspapers promoted NAMPI's campaign;[165] as the *New York Times* wrote in 1923, the *Pathé* decision portended the "censorship of [the] news."[166] NAMPI also won the support of Progressive reformers who were opposed to censorship on free speech grounds.[167] Believing that the movies could be an important medium for the education and uplift of the masses, many Progressives had advocated self-regulation by the film industry rather than government censorship.[168] Movie censorship was the same as censorship of the press because movies had become "a news and educational medium quite as universal as the magazine or newspaper."[169] Organized labor also mobilized in support of "freedom of the screen," as newsreels

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162. W. Stephen Bush, *President Against Censorship*, MOVING PICTURE WORLD, Oct. 21, 1916, at 371 (quoting Walter W. Irwin, Speech at Meeting between NAMPI delegates and President Woodrow Wilson (Oct. 3, 1916)).

163. *Chance to Kill Censorship*, MOVING PICTURE WORLD, Apr. 24, 1915, at 532; W. Stephen Bush, *The Great Victory*, MOVING PICTURE WORLD, Nov. 13, 1915, at 1275.

164. Alan Franklin, *Public Opinion Backs Industry in Fight for Freedom and Would Uphold It in Battle to Amend Constitution so as to Give the Screen a Square Deal*, MOVING PICTURE WORLD, Oct. 8, 1921, at 628.

165. *Crowds Applaud Arguments for Repeal of Censorship*, MOVING PICTURE WORLD, Mar. 17, 1923, at 305.

166. *See Censorship of News*, N.Y. TIMES, Jul. 10, 1922, at 9.

167. *See* Nancy J. Rosenbloom, *From Regulation to Censorship: Film and Political Culture in New York in the Early Twentieth Century*, 3 J. GILDED AGE & PROGRESSIVE ERA 369, 383 (2004). In 1907, progressive reformers in New York had advocated for self-regulation of the movies, rather than government regulation, in the form of a private institute, the National Board of Review, to which film exhibitors would voluntarily submit their products for review. *Id.* at 375. The Board would grant a seal of approval to those films that met its standards. *See id.* Those standards "curtail[ed] prolonged love scenes," restricted the "display of [people] in ways to arouse the imagination and suggest immorality and indecency," and forbade "the portrayal of crime where it degenerates into pandering to a morbid appetite." Buffalo Branch, Mut. Film Corp. v. Breitinger, 95 A. 433, 439 (Pa. 1915); *see also* DE GRAZIA & NEWMAN, *supra* note 3, at 12 (listing the Board's standards). The National Board of Review eventually won the support of the film industry, and for a period of time, producers voluntarily submitted their entire output. *See* Rosenbloom, *supra*, at 375.

168. DE GRAZIA & NEWMAN, *supra* note 3, at 26-41.

169. National Board of Review of Motion Pictures, *in* STATE CENSORSHIP OF MOTION PICTURES, *supra* note 46, at 95, 97.

depicting strikes were among those widely censored.[170] At the 1916 convention of the American Federation of Labor, the organization officially opposed film censorship, claiming that "freedom of the press, and motion pictures are the palladium of free institution[s]."[171]

By the early 1920s, NAMPI's efforts had yielded some measure of success. The organization's efforts to liken film censorship to press censorship were credited with the defeat of a film censorship referendum in Massachusetts in 1922.[172] In its efforts to bring movies into parity with the press, the film industry secured a revision in 1920 of the federal penal code that the movies, along with other matter including printed materials, were not to be transported by common carrier in interstate commerce if "obscene, lewd, lascivious, filthy, or of indecent character."[173] As Edward de Grazia and Roger Newman noted, "by linking movies with the print media in the context of moral censorship, it actually worked to strengthen the public sense that movies, like the print media, were meant to be free of censorship."[174] In opposition to the Smith-Hughes federal censorship bill, Congressman Frederick Dallinger, drawing on NAMPI's rhetoric, wrote of "the importance of bringing the moving-picture film within the constitutional guaranty of a free speech and a free press, because the analogy" with the press was logical and "complete."[175]

But NAMPI's effort to generate support for "freedom of the screen" could not compete with an even more vigorous effort by social and religious conservatives, including the Women's Christian Temperance Union, to generate fear of the movies and their alleged capacity for evil.[176] The years after World War I saw a conservative backlash against the social upheaval caused by the war, and movies

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170. Rosenbloom, *supra* note 167, at 390, 398-99.

171. *A Mighty Stride for the Right—The 1916 A.F. of L. Convention,* 24 AFL-CIO AMERICAN FEDERATIONALIST 28, 29 (1917); *see Censoring of Films Un-American, Woll Tells Labor Press*, WASH. POST, Oct. 3, 1923 at 4.

172. The offices of the MPPDA generated speeches, newspaper releases, and magazine articles calculated to convince the public that censorship would lead to the curtailment of a free press. The referendum was defeated, although Massachusetts later put into effect a "blue law" that permitted the exhibition on Sunday of only those films considered by the commissioner of public safety or local mayors to be "in keeping with the character of the day." *See* WITTERN-KELLER, *supra* note 3, at 29. "Since no . . . distributor was likely to cut a film just to be shown on Sunday," it functioned as a broad-brushed censorship law. *Id.* The 1922 Massachusetts defeat became a turning point in the battle against censorship, as very few major censorship laws were enacted after that date. *Censorship Repudiated in Massachusetts*, MOVING PICTURE WORLD, Nov. 18, 1922, at 229.

173. DE GRAZIA & NEWMAN, *supra* note 3, at 22.

174. *Id.*

175. FREDERICK DALLINGER, MINORITY VIEWS, H.R. REP. NO. 64-697, pt. 2, at 4 (1916).

176. *See* WITTERN-KELLER & HABERSKI, *supra* note 6, at 19-20.

were blamed for a host of social ills, including increasing crime and juvenile delinquency, declining religious observance, a rising divorce rate, and growing popularity of a more fast-paced, materialistic life.[177] Those who to sought go "[b]ack to normalcy"—the same forces behind Prohibition—were "naturally prejudicial to a medium that now claimed 40,000,000 admissions a week and seemed to have an ever-increasing influence on American habits," in the words of one historian.[178]

Each year, censor boards ordered thousands of cuts from films to eliminate sexual innuendo, "portraits of changing moral standards, . . . scenes of crime[,] . . . labor-management discord, [and] government corruption and injustice."[179] In 1921, the New York Motion Picture Commission demanded deletions of scenes that would corrupt morals, incite crime, or were considered "immoral" or "indecent" in 235 movies.[180] Three years later, there were more than 3,500 deletions,[181] and in 1928, Chicago censors deleted over 6,000 scenes.[182] Pennsylvania banned the showing of baby clothes, and in Kansas, drinking could be shown only if the drinker was punished for imbibing.[183] Often so many deletions were ordered that they destroyed the continuity of the film. A famous screenwriter who saw one of his own movies in a Kansas theater after it had been censored failed to recognize it.[184] Although only a small minority of states practiced official film censorship, its effects were national, as producers, reluctant and unable to make several versions of the same movie, watered down film content to meet the demands of the most conservative censoring jurisdictions.[185]

In a decade that witnessed the maturation of the social sciences and the development of techniques for mass survey research, sociologists and psychologists set out to empirically document the movies' "capacity for evil."[186] Most of these studies lacked explicit proof of causation; instead, researchers surveyed audiences about their movie-going habits and attempted to correlate the frequency of

177. *See* RANDALL, *supra* note 3, at 14.

178. *Id.*

179. Gregory D. Black, *Hollywood Censored: The Production Code Administration and the Hollywood Film Industry, 1930-1940*, 3 FILM HISTORY 167, 169 (1989).

180. *See* DE GRAZIA & NEWMAN, *supra* note 3, at 28.

181. *Id.*

182. *See* Black, *supra* note 179, at 170.

183. *See* Douglas W. Churchill, *Hollywood Heeds the Thunder*, N.Y. TIMES, July 22, 1934, at SM1.

184. *See* RANDALL, *supra* note 3, at 158.

185. WITTERN-KELLER & HABERSKI, *supra* note 6, at 19; *see also* Note, *supra* note 59, at 1390 (describing the national impact of efforts to censor films).

186. JOWETT, *supra* note 3, at 210-32; *see also* JANET STAIGER, MEDIA RECEPTION STUDIES 21-27 (2005) (describing various research studies analyzing the effects of movies on audiences).

film attendance with deviant behavior.[187] Ultimately, the case against the movies continued to rest on the medium's alleged psychological impact. Unlike print media, wrote psychologist A. T. Poffenberger of Columbia University in 1921, motion pictures operated through suggestion.[188] Research demonstrated suggestion "to be one of the most potent causes of the commission of crime."[189] An article in *Outlook* magazine observed that "[o]ne minute before the screen excites [viewers] more than a week of reading crime stories. . . . It also thrills infinitely more than any formal lesson conveyed through talk or reading."[190] In 1923, a psychologist concluded that

> [t]here is a vast psychological difference between hearing or reading an account of a murder, or an assault . . . and seeing these things actually portrayed on the screen. In the former cases the verbal impressions received must be translated into concrete visual imagery before the facts narrated can be really intelligible and significant.[191]

The nascent field of communication studies presented a "direct effects" or "magic bullet" model of audience reception that posed film viewers as passive and vulnerable.[192] As the theory was later described, persuasive "[m]essages only had to be loaded, directed at the target and fired; if they hit the target audience, then the expected response would be forthcoming."[193]

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187. JOWETT, *supra* note 3, at 215-29; STAIGER, *supra* note 186, at 21-27.

188. A.T. Poffenberger, *Motion Pictures and Crime*, 12 SCI. MONTHLY 336, 339 (1921).

189. Theodore Spector, *The Influence of Journalism on Crime*, 15 J. AM. INST. CRIM. & CRIMINOLOGY 155, 156 (1924).

190. Walter B. Pitken, *Screen Crime vs. Press Crime*, OUTLOOK & INDEP., July 29, 1931, at 399. Based on a formula he devised to measure the "psychic intensity" of the various forms of mass media, he concluded that the movies "ha[ve] higher intensity than any other known medium of communication." *Id.*

191. Joseph Roy Geiger, *The Effects of the Motion Picture on the Mind and Morals of the Young*, 34 INT'L J. ETHICS 69, 69-70 (1923).

192. The direct effects theory rested on the assumption that individuals had a similar human nature; because, under the alienated conditions of urban mass society, people were not held back by strong social controls from others, such as shared customs and traditions, the effects of mass communications could be powerful, uniform, and direct. SHEARON A. LOWERY & MELVIN L. DEFLEUR, MILESTONES IN MASS COMMUNICATION RESEARCH: MEDIA EFFECTS 12-14 (3d ed. 1995). For a discussion of the impact of the direct effects theory on First Amendment law, see Mehmet Konar-Steenberg, *The Needle and the Damage Done: The Pervasive Presence of Obsolete Mass Media Audience Models in First Amendment Doctrine*, 8 VAND. J. ENT. & TECH. L. 45, 59-62 (2005); Michele Munn, Note, *The Effects of Free Speech: Mass Communication Theory and the Criminal Punishment of Speech*, 21 AM. J. CRIM. L. 433, 436-59 (1994).

193. Clay Calvert, *The First Amendment and the Third Person: Perceptual Biases of Media Harms & Cries for Government Censorship*, 6 COMMLAW CONSPECTUS 165, 170 (1998) (alteration in original).

The arrest of popular slapstick actor Fatty Arbuckle on charges of rape and murder in 1921, and similar Hollywood drug and sex scandals that year, testified to the perceived link between movies and immoral behavior.[194] Following the scandals, there were reports throughout the country of increases in crime, juvenile delinquency, and other licentious activity.[195] In the wake of the Arbuckle affair, nearly one hundred censorship bills were introduced in thirty-seven states.[196] New York, where the cinema had its largest audience, passed a film censorship law.[197] It was then that NAMPI made an historic decision. Recognizing the strength of the "capacity for evil" argument against film and the futility of pressing the analogy between the press and screen, the leaders of the movie industry decided to jettison the freedom of the screen campaign and instead to capitulate to the censors.[198]

C. Self-censorship

It was thus that self-censorship of the movies under the infamous Hollywood Production Code began. Self-regulation was made possible by the reorganization of the movie industry, previously a loose network of separate production, distribution, and exhibition companies, into a studio system in which a single entity controlled all three functions.[199] In 1925, the major film studios—now joined under the trade alliance Motion Picture Producers and Directors Association ("MPPDA")—hired Will Hays, former Postmaster General of the Harding administration, to operate a centralized public relations office for the studios.[200]

In 1924, the MPPDA passed a resolution that called on each member studio to forward to the Hays Office a copy of the synopsis of each screenplay, book, or story that it was considering making into a film.[201] The Hays Office was, in turn, to advise the studios on any item that might offend public morals or be banned by a censor board.[202] In 1926, the MPPDA began codifying the deletions of the

194. *See* SKLAR, *supra* note 31, at 78-79.

195. *See id*. at 81-82.

196. *See* DE GRAZIA & NEWMAN, *supra* note 3, at 23-24.

197. Richard Andress, *Film Censorship in New York State*, N.Y. STATE ARCHIVES, http://www.archives.nysed.gov/a/research/res_topics_film_censor.shtml (last visited Apr. 1, 2012).

198. *See* KOSZARSKI, note 67, at 205-07.

199. On the origins of the studio system, see generally TINO BALIO, GRAND DESIGN: HOLLYWOOD AS A MODERN BUSINESS ENTERPRISE, 1930-1939 (1996); DOUGLAS GOMERY, THE HOLLYWOOD STUDIO SYSTEM: A HISTORY (2008).

200. Stephen Vaughn, *Morality and Entertainment: The Origins of the Motion Picture Production Code*, 77 J. AM. HIST. 39, 42-43 (1990).

201. *See id.*

202. *See* PAUL STARR, THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS 318 (2004) (noting how Hays was instrumental in promoting self-

state censorship boards into a code that Hays called the "Don'ts and Be Carefuls."[203] This was an update of the "Thirteen Points" put out by NAMPI in 1921, which called on producers to eliminate sex appeal, commercialized vice, "prolonged passionate love," bloodshed and violence, and "salacious titles" in films.[204] The 1927 code added prohibitions of "profanity, nudity . . . drugs, sexual perversion, [and]miscegenation."[205]

Industry leaders concluded that self-regulation would be less expensive and more efficient than deletions by censor boards, post-production changes, and possible rejections of films.[206] They also hoped that self-regulation would yield public relations benefits; the Hays Office established a Studio Relations Committee that reached out to conservative reform groups and actively encouraged their participation in the studios' project of devising a moral code for films.[207] By demonstrating that they could regulate themselves, the Hays Office hoped, the studios might bring about the eventual demise of state and municipal film censorship and stave off the possibility of federal censorship.[208] Self-censorship did appear to play a role in the defeat of several proposed censorship bills in the 1920s and may have reduced deletions in areas where the censor boards operated,[209] but it did so at the expense of creativity and innovation in film. The Code effectively restrained film content within the moral and political boundaries imposed by the censors.

The introduction of sound to motion pictures in 1927 added new realism to the screen and sparked a social panic. With sound added to pictures, screen criminals, who before could only pantomime their

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regulation of the film industry).

203. *See* Vaughn, *supra* note 200, at 44.

204. DE GRAZIA & NEWMAN, *supra* note 3, at 22-23.

205. *See* Vaughn, *supra* note 200, at 44 & n.13 (internal quotations omitted). The guidelines were aimed at further curtailing the provocative content "that most often troubled political censors." *Id.*

206. *See id.* at 45, 56-57 (explaining that the Production Code, which promoted self-regulation, would decrease costs and censorship).

207. *See* Black, *supra* note 179, at 169 (noting that "Protestant ministers and women's organizations" favored cooperating with the Studio Relations Committee in the earlier part of the 1920s); *see also* Francis G. Couvares, *Hollywood, Main Street, and the Church: Trying to Censor the Movies Before the Production Code*, *in* MOVIE CENSORSHIP AND AMERICAN CULTURE 133-35 (Francis G. Couvares ed., 2006) (noting that one of the Committee's first actions was to "establish[] formal relations with as many religious and reform organizations as possible").

208. DE GRAZIA & NEWMAN, *supra* note 3, at 22-23; *see also* Note, *supra* note 60, at 1389 ("[T]he Hays Office . . . endeavor[ed] to help the industry to produce films that . . . satisf[ied] the censor boards, the pressure groups, and public opinion.").

209. *See* Legislation, *supra* note 59, 116 & n.33 (noting that in the 1921 legislative season, "twenty-nine out of thirty-one states rejected proposed legislation establishing state censorship, while in 1923 similar legislation was considered and unanimously rejected by thirteen states").

thoughts, "could [now] brag about flaunting law.[210] The number of ordered deletions by censor boards surged.[211] Complying with censor board deletions of talking films was far more cumbersome than censorship of silent films, as it involved not only cutting out scenes but also redoing entire soundtracks.[212] As the trade journal *Variety* noted, not only were the alterations costly, but many viewers were less likely to attend films that had been watered down to meet the prudish tastes of the censors.[213] But the studios did not challenge the censors[214] and instead suffered the significant financial burden of revising films for censoring jurisdictions.[215]

The talkie panic encouraged new studies of the psychological effects of movies on children, and in the early 1930s, the famous Payne Fund studies were published.[216] Esteemed sociologists and psychologists interviewed and analyzed the responses of hundreds of young moviegoers; the Payne Fund studies are widely regarded as the first scientific study of motion pictures as mass communication.[217] Herbert Blumer's study, *Movies and Conduct*, concluded that movies induced "emotional possession."[218] "[M]otion

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210. *See* Black, *supra* note 179, at 170.

211. *See* DE GRAZIA & NEWMAN, *supra* note 3, at 29-30 (explaining the increase in regulations against the movies as a result of the introduction of sound in films).

212. LEONARD J. LEFF & JEROLD L. SIMMONS, THE DAME IN THE KIMONO: HOLLYWOOD, CENSORSHIP, AND THE PRODUCTION CODE 6-7 (2d ed. 2001).

213. *See Heedless of Cost to Industry, Politicians in Nine More States Ask Film Censoring This Year*, VARIETY, Mar. 8, 1939, at 6; *see also* LEFF & SIMMONS, *supra* note 212, at 6.

214. There were rumors of a possible challenge to *Mutual Film;* according to one commentator,

> the industry is only waiting for a favorable opening to launch a general offensive against the institution of censorship . . . and to carry its case before the American people [because] the mechanical nature of a talking picture and the difficulty of manipulating it after manufacture have given the censorship problem an immediate economic aspect so alarming that the industry cannot afford to ignore it.

Edwin W. Hullinger, *Free Speech for Talkies?*, 227 N. AM. REV. 737, 738 (1929). However, the proposed suit never materialized.

In 1929, Fox Film and Vitagraph Film, two independent companies, challenged the Pennsylvania censor board's ban on spoken dialogue in the talkies but were defeated in court, which found that the state censorship statute was elastic enough to encompass dialogue. *See In re* Fox Film Corp., 145 A. 514, 515, 517-18 (Pa. 1929) (holding that a talkie is simply a film variation and thus governed by the statute); *In re* Vitagraph, Inc., 145 A. 518, 519 (Pa. 1929) (holding the state censorship statute includes review of sounds recorded in a separate medium).

215. Churchill, *supra* note 183, at SM1.

216. *See* Arthur R. Jarvis Jr., *The Payne Fund Reports: A Discussion of their Content, Public Reaction, and Effect on the Motion a Picture Industry, 1930-1940*, 25 J. POPULAR CULTURE, Fall 1991, at 129-32.

217. *See* JOWETT, *supra* note 3, at 220-22 (discussing the Payne Fund studies).

218. HERBERT BLUMER, MOVIES AND CONDUCT 91 (1933).

pictures may play very vividly upon a given emotion of the individual; his impulses may be so aroused and his imagery so fixed that for a period of time he is transported out of his normal conduct and is completely subjugated by his impulses," he wrote.[219] Movies could be a greater influence on children's morals and habits than their teachers or parents, the study concluded, and they appeared to be driving young people to early sexual activity and criminal behavior.[220] Again, there was a class-based subtext; as Blumer summarized, "the degree of influence of motion pictures is less in the cultured classes than it is in the case of others."[221] The Payne Fund studies were written up in a popular volume, *Our Movie Made Children*, which publicized and sensationalized the dramatic effects of the movies and caused an outcry against Hollywood.[222] Following the publication of *Our Movie Made Children*, religious, educational, and citizen groups led by the Catholic Church and its Legion of Decency called for the condemnation of "vile and unwholesome moving pictures."[223] Catholics were asked to boycott films and to sign a pledge to condemn "those salacious motion pictures which [were] corrupting public morals and promoting a sex mania in our land."[224] A bill was introduced into Congress that would prohibit the distribution in interstate commerce of "any film 'which is harmful to the public or any part thereof in any respect'" as judged by a federal motion picture commission.[225]

Hollywood's response was to strengthen its self-censorship. In 1930, the MPPDA adopted a new code of self-regulation that had been drafted in part by Father Daniel Lord, a Jesuit priest.[226] The Production Code reiterated the proscriptions typically enforced by the state and local film censors, mostly having to do with crime and sex.[227] The basic premises of the Production Code (the "Code") included that "the sympathy of the audience should never be thrown to the side of crime, wrongdoing, evil, or sin" and that "[l]aw, natural

219. *Id.* at 94.

220. *Id.* at 197; *see* GARTH S. JOWETT ET AL., CHILDREN AND THE MOVIES: MEDIA INFLUENCE AND THE PAYNE FUND CONTROVERSY 79-80 (1996).

221. BLUMER, *supra* note 218, at 218.

222. GREGORY D. BLACK, HOLLYWOOD CENSORED: MORALITY CODES, CATHOLICS, AND THE MOVIES 152-53 (1994).

223. *See* RUTH INGLIS, FREEDOM OF THE MOVIES: A REPORT ON SELF-REGULATION FROM THE COMMISSION ON THE FREEDOM OF THE PRESS 120-25 (1947) (discussing Legion of Decency's plan to boycott movies).

224. *Id.*

225. Note, *supra* note 59, at 1390-91.

226. Vaughn, *supra* note 200, at 39-40.

227. On the origins of the Code, see generally THOMAS DOHERTY, PRE-CODE HOLLYWOOD: SEX, IMMORALITY, AND INSURRECTION IN AMERICAN CINEMA 1930-1934, (John Belton ed., 1999); FRANK WALSH, SIN AND CENSORSHIP: THE CATHOLIC CHURCH AND THE MOTION PICTURE INDUSTRY 46-65 (1996).

or human, shall not be ridiculed, nor shall sympathy be created for its violation."[228] It established an administrative apparatus, the Production Code Administration ("PCA"), to monitor studio compliance.[229] Studios were ordered to submit all scripts to the PCA. The fine for releasing a film that violated the code was $25,000.[230]

The MPPDA justified its internal content regulation by arguing that motion pictures posed *far more* danger to the public than print media. "A book describes; a film vividly presents," read the Preamble to the Code.[231] The Code further stated, "Newspapers are after the fact and present things as having taken place; the film gives the events in the process of enactment and with apparent reality of life."[232] Film spectators were psychologically more receptive than print consumers and "the mobility, popularity, accessibility, emotional appeal, vividness, straightforward presentation of fact in the film make for more intimate contact with a larger audience and for greater emotional appeal."[233] Film was mass art reaching "every class of society," and "combining . . . two fundamental appeals of looking at a picture and listening to a story."[234] The film industry had entirely reversed its position. Rather than present the movies as a vehicle for the dissemination of serious ideas analogous to the traditional press, the Code described films as mere "entertainment" and as seductive spectacles with vast powers to mislead, incite, and corrupt.[235] The censors, it seemed, had triumphed.

IV. THE ACLU'S CAMPAIGN AGAINST CENSORSHIP OF THE SCREEN, 1930-1940

When Hollywood retreated from the anticensorship effort, the ACLU took up the cause. That the ACLU might oppose government censorship of film is hardly surprising to the present-day reader, but in the early 1930s, its involvement in the anticensorship campaign was far from foreordained. The original focus of the ACLU, which initiated the modern civil liberties movement, had been on protecting political dissenters against government crackdowns on radical speech during World War I.[236] In the beginning, the organization focused on

228. *See* LEFF & SIMMONS, *supra* note 212, at 286-87; *see also* Black, *supra* note 179, at 172. (discussing the general principles of the Production Code).

229. *See* RANDALL, *supra* note 3, at 200-01. (detailing the MPPDA's creation of the PCA).

230. Note, *supra* note 59, at 1388.

231. INGLIS, *supra* note 223, at 214.

232. *Id.*

233. *Id.* at 214-15.

234. *Id.* at 213 (emphasis omitted).

235. *See id.* at 212-14.

236. *See generally* SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 11-29 (2d ed. 1999) (describing the origins of the ACLU during

political speech, rather than artistic or cultural expression, and it avoided "controversies where questions of morals [were] present."[237] By the late 1920s, however, it had become fully involved in efforts to protect cultural and literary expression from state repression. ACLU lawyers defended sex education literature from obscenity charges and led campaigns against book censorship in Boston.[238] When that city banned several modern novels—among them, the works of Theodore Dreiser and D.H. Lawrence—on grounds of indecency, the ACLU was at the forefront of campaigns to challenge the actions in court and mobilize public opinion against them.[239] During efforts in Massachusetts to enact a scheme of government licensing of plays in the early 1930s, the ACLU put out a pamphlet, *Censorship in Boston*, which described such licensing as an unconstitutional prior restraint.[240]

In 1929, the ACLU turned its attention to motion picture censorship. Before then, the organization had ignored the issue because it described "silent films as mere pictures, not protected by the First Amendment."[241] The introduction of sound to motion pictures led the organization to change its position. Talking movies were undeniably "speech," and in 1929, the ACLU announced that it was "wholly opposed to any censorship whatever of films accompanied by speech."[242] ACLU lawyers portended that censorship of talking newsreels would open the door to "an attempt . . . under the guise of an exercise of the police powers" to censor other forms of expression "until full censorship is held to be permissible in the United States."[243] In a 1929 article in *The Nation*, James Rosenberg, a noted civil liberties lawyer, asked if sound films could be censored, "[w]hy not a speech of Al Smith or Herbert Hoover?"[244]

In 1931, the ACLU formed an anticensorship committee, the National Council for Freedom from Censorship, to attack censorship on all fronts, including film censorship.[245] While the *Mutual Film* litigation and NAMPI's "freedom of the screen" campaign had been

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1917 and 1918).

237. BOYER, *supra* note 153, at 203 (internal quotation marks omitted).

238. *Id*. at 192-95, 202, 203-04.

239. *See generally id.* at 167-206 (detailing censorship campaigns in Boston in the 1920s and the ACLU's efforts against them).

240. *See id*. at 162, 204; *see also* WALKER, *supra* note 236, at 83-84.

241. WALKER, *supra* note 236, at 84.

242. *Id*.

243. *Views Censorship as a Growing Peril*, N.Y. TIMES, Mar. 16, 1928. By 1929, literary censorship was on the wane across America, due in large part to the perception that movies posed a more urgent threat. BOYER, *supra* note 153, at 165.

244. *See* James N. Rosenberg, *Padlocking the "Talkies"*, THE NATION, Dec. 5, 1928, at 602.

245. *See* WALKER, *supra* note 236, at 85.

driven by economic motives, the ACLU's involvement was driven by its philosophy of minimal government intervention in private expression.[246] This orientation gave the fight against movie censorship an entirely different purpose and tone. The organization was initially hostile to the Hollywood studios; it opposed the Hays Office's capitulation to the censors, and it publicly attacked the Production Code as a form of private censorship.[247] But the ACLU was not averse to making alliances with independent producers, distributors, and exhibitors outside of the studio system. The independents were more affected by the censors than the Hollywood studios, as censors were less likely to cut films that bore the Production Code seal of approval. For distributors owned by the major studios, paying the censor examination fee was a small part of doing business, but for independents, fees were a substantial burden.[248]

One of the ACLU's first actions against film censorship was an attempt to expose to the public the "Star Chamber"-like secrecy under which the censors operated.[249] In 1931, the organization began writing to local censor boards asking them for the official reports they compiled when they screened films, which listed the reasons for approving or banning them; no state required these reports to be made public.[250] When the ACLU obtained some reports from New York censors, it published them in a pamphlet, "What Shocked the Censors," which ridiculed the cuts as outlandish and prudish.[251] In New York, the ACLU attempted to move forward the passage of a bill that would require censor board records to be open to the public, so that "the censorship board should be subject . . . to public criticism."[252]

ACLU lawyer Morris Ernst, who had led the organization's efforts against literary censorship, was particularly concerned with government suppression of film for alleged "indecency," which he characterized as a single, state-enforced moral standard and anathema to democratic principles.[253] Ernst urged the organization

246. *Id.* at 82-86.

247. *See Censorship Debaters Want Hays Ousted*, N.Y. TIMES, Mar. 1, 1930.

248. *See* WITTERN-KELLER, *supra* note 3, at 33.

249. Letter from Gordon W. Moss, Sec'y, Nat'l Council on Freedom from Censorship, to Elizabeth Gillman, Sec'y, Md. Civil Liberties Comm., Inc. (Feb. 9, 1922) ("They habitually work behind closed doors, after the fashion of a star chamber, and seldom permit anyone access to the records of what they delete from pictures.").

250. *See id*.

251. *ACLU History: Defending 'What Shocked the Censors'*, AMERICAN CIVIL LIBERTIES UNION (Sept. 1, 2010), http://www.aclu.org/free-speech/aclu-history-defending-what-shocked-censors.

252. Press Release, Nat'l Council on Freedom from Censorship (Mar. 8, 1932).

253. *See* BOYER, *supra* note 153, at 146-50; MORRIS L. ERNST & WILLIAM SEAGLE, TO THE PURE: A STUDY OF OBSCENITY AND THE CENSOR 132 (1928).

to assist in legal actions against unfavorable censor decisions on the grounds of sexual immorality.[254] In 1935, prominent ACLU lawyer Arthur Garfield Hays was commissioned by the distributors of a foreign art film, *Remous*, which depicted adultery, to challenge before a New York appeals court the state censor board's decision to ban the film.[255] Hays argued that the term "immoral" had no legally defensible meaning and that the censor board's denial of an exhibition permit on that basis was an abuse of discretion.[256] He also argued that there was no proven connection between onscreen immoral conduct and incitement to immoral behavior: "It cannot be said that the portrayal of such themes necessarily 'tends to corrupt morals'"[257] and the audience was not "made up of morons."[258] The court upheld the censors.[259]

Because issues of sexual morality were politically charged and likely to provoke disagreement, even within the ACLU, and in the absence of a Supreme Court ruling declaring entertainment or art protected by freedom of speech, the organization devoted the majority of its anticensorship efforts to attacking the censorship of newsreels and political documentaries.[260] This type of censorship seemed to offer a clear-cut case of unconstitutional suppression of political speech. The ACLU's efforts were set against the backdrop of a series of Supreme Court decisions in the 1930s that effectively abolished the "bad tendency" test and, noting the centrality of free expression to pluralist democracy, instituted the practice of heightened scrutiny of state actions restricting speech on matters of public concern on the basis of content or viewpoint.[261]

In a string of cases following *Gitlow v. New York*, which held the First Amendment to be applicable to the states through the Fourteenth Amendment,[262] the Court construed the First Amendment as a strict limitation on content-based prohibitions on political speech. In *Near v. Minnesota*, in 1931, the Court struck down a Minnesota state "nuisance law" that prohibited the publication of a "malicious, scandalous and defamatory newspaper, magazine, or other periodical."[263] The statute was "aimed at the distribution of scandalous matter as detrimental to public morals and

254. *See* BOYER, *supra* note 153, at 146-50.

255. WITTERN-KELLER, *supra* note 3, at 76-77.

256. *See id.* at 77-81.

257. *Id.* at 78.

258. *Id.*

259. Mayer v. Byrne, 10 N.Y.S.2d 794, 795 (N.Y. App. Div. 1939); DE GRAZIA & NEWMAN, *supra* note 3, at 223; WITTERN-KELLER, *supra* note 3, at 80.

260. WITTERN-KELLER, *supra* note 3, at 12, 91.

261. FELDMAN, *supra* note 7, at 388-97.

262. Gitlow v. New York, 268 U.S. 652, 666 (1925).

263. Near v. Minnesota, 283 U.S. 697, 701-02, 722-23 (1931).

to the general welfare, tending to disturb the peace of the community and to provoke assaults and the commission of crime."[264] Before *Near*, the statute would have been considered a legitimate exercise of the police power. The Court struck down the law—"the essence of censorship"—as an unconstitutional prior restraint on publishing.[265] *Near* held that with narrow exceptions,[266] prior restraints violated the First Amendment, and the burden was on the state to show that the challenged speech fell into one of the exceptions.[267]

In subsequent cases in the 1930s, the Court invalidated the convictions of religious minorities, socialists, communists, and union activists by striking down state laws restricting various forms of public speech that did not pose a clear and present danger to public safety.[268] The advocacy of unpopular political, moral, or religious views did not by itself constitute a clear and present danger. Because free expression was "the matrix, the indispensable condition, of nearly every . . . form of freedom,"[269] freedom of speech occupied a "preferred position" in the scheme of constitutional liberties that warranted heightened judicial solicitude.[270] In *Thornhill v. Alabama*, the Court described a First Amendment right to publish and discuss "matters of public concern," described as "information and education with respect to the significant issues of the times."[271] In this new and more favorable constitutional climate, the ACLU resurrected the press-screen analogy and Mutual Film's argument, claiming that the differences between newsreels and newspapers were insignificant

264. *Id.* at 709 (internal quotations omitted).

265. *Id.* at 713.

266. *Id.* at 716 ("No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government.").

267. *See id.* at 721-23 ("If [prior restraint is allowed], the legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly.").

268. *See, e.g.*, De Jonge v. Oregon, 299 U.S. 353, 365 (1937) ("The holding of meetings for peaceable political action cannot be proscribed."); Herndon v. Lowry, 301 U.S. 242, 258-64 (1937) (invalidating statute that sought to "enmesh any one who agitates for a change of government"); Stromberg v. California, 283 U.S. 359, 369-70 (1931) (striking down statute that criminalized display of a red flag as a sign of government opposition).

269. Palko v. Connecticut, 302 U.S. 319, 327 (1937*), overruled on other grounds by* Benton v. Maryland, 395 U.S. 784, 794 (1969).

270. *See* G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 330-32 (1996) (explaining the Court's interpretation of the "preferred position theory" during this era).

271. Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940).

when it came to speech on "matters of public concern."[272]

A. In Defense of Newsreels

Citing free speech concerns, several states had exempted newsreels from their censorship statutes. In 1926, New York amended its censorship law to prohibit censor board review of newsreels.[273] "There is no more reason to censor motion picture films which portray exclusively current events of the day than there is to censor newspapers," said a joint statement issued by the bill's sponsors.[274] Newsreel censorship was repealed in Pennsylvania in 1930, followed by Kansas in 1935.[275] Despite this, newsreels were still widely censored in the 1930s.

In the early years of the cinema, newsreels were generally shown before features and intended as a relatively unimportant program component that supported the main feature.[276] But by the 1920s, they had become popular and were an established part of the standard movie exhibition program.[277] The newsreels were issued twice weekly and were about eight minutes in length.[278] They were, as one film historian has described them, a "jumble of unrelated stories"; the experience of watching a newsreel was not unlike scanning the pages of a newspaper.[279]

In the charged political climate of the New Deal era, newsreels increasingly took on controversial topics and assumed a partisan tone. State and municipal censor boards banned them because they were politically controversial but justified their decisions under their statutory authority to refuse to license "immoral" films.[280] Some state censor boards indicated that they were less likely to order cuts to

272. *See* FELDMAN, *supra* note 7, at 395-97 (discussing presumptions favoring free speech after the Court's series of decisions from 1938 to 1940 upholding First Amendment rights).

273. *Would Free News Reels: Senate Bill Provides for Lifting of Censorship from Them*, N.Y. TIMES, Jan. 20, 1926.

274. *Smith Signs Five Bills: Legislature Gets Measure Exempting News Reels from Censorship*, N.Y. TIMES, Feb. 5, 1926, at 7.

275. Comment, *supra* note 65, at 93-94.

276. THOMAS SCHATZ, BOOM AND BUST: AMERICAN CINEMA IN THE 1940S, at 397-98 (1997), *in* 6 HISTORY OF THE AMERICAN CINEMA (Charles Harpole ed.).

277. *See id.* at 397-98. "Over two-thirds of the nation's approximately 16,500 theaters included one of five commercial newsreels"—Paramount News, 20th Century-Fox's Movietone News, RKO-Pathé News, MGM's News of the Day, and Universal Newsreel—as a component of the staple program. *Id.* at 398. The newsreels were the centerpiece of the film industry's efforts to appeal to what it described as a "class" audience—those who sought from the movies not only entertainment but also art and information. MARGARET FARRAND THORP, AMERICA AT THE MOVIES 20-21 (1939).

278. SCHATZ, *supra* note 276, at 398.

279. *Id.* at 400.

280. Note, *supra* note 59, 1398-99.

newsreels than other kinds of motion pictures, but there were other jurisdictions in which newsreels were cut heavily.[281] Often, newsreels were banned for no reason other than that they were seen as hostile to the incumbent administration.[282]

Chicago was notorious for its censorship of political newsreels.[283] A film could not be shown in that city unless a permit was obtained from the Board of Motion Picture Censors, which was under the control of the police department. Permits were not to be granted to movies that "portray depravity, criminality or lack for virtue."[284] The Chicago Civil Liberties Union found that between 1936 and 1939, the Board ordered deletions to more than one thousand films, including many newsreels, and banned forty-three.[285] Newsreels depicting labor conflicts, in particular, were among those banned.[286] In 1934, Universal Newsreel, which had produced a labor film that was banned in Chicago, threatened to take the ban all the way "to the United States Supreme Court if necessary."[287] As the company's lawyer told the *New York Times*, "We have always felt that, in common with the press, we should be permitted to show the public any newsworthy happening which we are able to photograph . . . ."[288] For unknown reasons, the proposed challenge was abandoned.

Throughout the country during the 1930s, episodes of the *March of Time*, a dramatic, cinematic version of the week's news, were banned.[289] The series regularly played to an audience of eighteen million people.[290] Film historian Raymond Fielding described the newsreel series as "polemic cinema" and "a dazzling display of controversial material which provoked the most intense and unrelenting program of censorship ever inflicted upon a motion picture film series."[291] In Kansas, despite the provision in the censorship statute expressly exempting newsreels, the state censorship board in 1937 ordered a speech by Senator Burton

281. Memorandum from the ACLU on Meeting Called by the National Council on Freedom from Censorship (Dec. 1, 1938).

282. *Id.*

283. *See* MacGregor, *supra* note 3, at 171.

284. *Id.*

285. LOUIS M. NOYES ET AL., REPORT OF SUB-COMMITTEE OF THE CHICAGO CIVIL LIBERTIES COMMITTEE ON THE MOTION PICTURE CENSORSHIP SITUATION IN CHICAGO 206 (1939).

286. *Id.* at 207.

287. *Reveal Kelly's Movie Ban on Rioting Scenes*, CHI. TRIB., Mar. 3, 1934, at 14.

288. *Id.*

289. Raymond Fielding, *Mirror of Discontent: The March of Time and its Politically Controversial Film Issues*, 12 W. POL. Q. 145, 1446, 150 (1959) ("[T]he Warner Brothers circuit refused to carry the film on grounds it was pro-Nazi propaganda.") (emphasis removed).

290. DE GRAZIA & NEWMAN, *supra* note 3, at 54.

291. Fielding, *supra* note 289, at 145.

Wheeler opposing President Roosevelt's bill to enlarge the Supreme Court to be cut from a *March of Time* newsreel.[292] Between 1937 and 1938, Massachusetts called for thirteen deletions from newsreels, including the *March of Time* series.[293] In 1935, Senator Huey Long pushed a censorship act through the state legislature.[294] The act was Long's revenge for an issue of The *March of Time* that had ridiculed Long and his rise to power.[295]

The ACLU offered legal assistance to film producers, distributors, and exhibitors who sought to challenge the newsreel bans in court.[296] Yet, because legal actions against the censor boards were so often unsuccessful, the organization devoted the majority of its efforts to turning public opinion against newsreel censorship using "free press" rhetoric and exerting pressure on the censor boards to reverse their decisions.[297] In several municipalities, censors banned the *March of Time* episode titled *Inside Nazi Germany* on the grounds that it contained material that was likely to create ill feeling against a nation that was then friendly to the United States.[298] The ACLU led protests and sent telegrams to the censor boards that had banned the film describing the restriction as a "violation of constitutional rights of freedom of the press."[299] After the protests, in many cases, the restrictions were lifted.[300] After *Professor Mamlock*, an anti-Nazi film, was banned in four different states,[301] pressure from the ACLU and newspapers caused the bans to be reversed.[302] In

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292. *See* DE GRAZIA & NEWMAN, *supra* note 3, at 54; Comment, *supra* note 65, at 95.

293. DE GRAZIA & NEWMAN, *supra* note 3, at 202.

294. FIELDING, *supra* note 83, at 285.

295. *Id*.

296. *See* WALKER, *supra* note 236, at 100.

297. *Id.*; *see also* DE GRAZIA & NEWMAN, *supra* note 3, at 54. (discussing the public outcry that resulted when Chicago banned a Nazi newsreel and the city's decision to subsequently revoke the ban).

298. DE GRAZIA & NEWMAN, *supra* note 3, at 54; *see also* Fielding, *supra* note 293, at 146-47 ("The film and its release could not have been more ingeniously designed to arouse audiences and provoke controversy. It featured the figure, voice, and hysterical histrionics of German dictator Adolf Hilter [and] was labeled both pro-Nazi and anti-Nazi . . . .").

299. Telegram from Hatcher Hughs, Chairman, and Hazel L. Rice, Sec'y, Nat'l Council on Freedom from Censorship, to James P. Allman, Comm'r of Police, Chi., Ill. (Jan. 19, 1938).

300. DE GRAZIA & NEWMAN, *supra* note 3, at 54.

301. *See, e.g.*, Thayer Amusement Corp. v. Moulton, 7 A.2d 682, 684 (R.I. 1939). The "amusement inspector" of Providence, Rhode Island, disapproved of the film's public exhibition in the city. *Id.* When the distributor petitioned the state Supreme Court, the court rejected the claim, stating that there was a well-understood belief in the state "that a license to show motion pictures publicly for a price is necessarily a mere privilege and not in any sense a right of property." *Id.* at 688.

302. Note, *supra* note 59, at 1383 n.1; Letter from Hazel Rice, Sec'y, to Robert Mathews, Professor, Ohio State Univ. (Dec. 30, 1938).

1934, the Chicago police's ban of newsreel scenes depicting mob violence during a labor protest was rescinded after the local Civil Liberties Union launched a public protest in which it argued that the censorship ordinance did not give the city authority for newsreel censorship and that censorship of news films violated freedom of speech.[303]

The Spanish Civil War, which was politically divisive in the United States, led to several pro-Loyalist documentaries and subsequent efforts to ban them.[304] Many non-Catholics supported the Loyalists; supporters of the Franco-led insurgents tended to be Catholic.[305] In response to pressure from Catholic organizations, the film *Blockade*, a documentary that portrayed the bombardment of Spanish towns by Franco forces, was banned in several cities with large Catholic populations.[306] The ACLU successfully pressured censor boards to rescind them.[307] In 1937, the Ohio and Pennsylvania censor boards refused to pass the anti-fascist film *Spain in Flames*, compiled from Spanish and Soviet newsreels of the Spanish Civil War, on "the grounds that it was harmful in stirring up race hatred and that it was antireligious."[308] Protests coordinated by the ACLU and exhibitors brought public attention to the ban and put pressure on the censor board to repeal it.[309] Exhibitors also challenged the ban in court and were assisted by the local branches of the ACLU.[310] The Pennsylvania ban was ultimately overruled by the state's highest court on the grounds that the censor board was without authority in that state to censor newsreels.[311]

B. The Pettijohn Memo

The attacks on the newsreels were highly unpopular and brought

303. NOYES ET AL., *supra* note 285, at 205-08.

304. DE GRAZIA & NEWMAN, *supra* note 3, at 59.

305. *Id.* at 58-59.

306. *National Action on "Blockade"*, FILM SURVEY, Aug. 1938, at 2-3; *see generally* Greg M. Smith, *Blocking* Blockade*: Partisan Protest, Popular Debate, and Encapsulated Texts*, 36 CINEMA J. 18 (1996) (describing in further detail the facts and issues surrounding the *Blockade* ban).

307. *National Action on* "Blockade," *supra* note 207, at 2. *Blockade* led to the formation of a Hollywood-based committee for "freedom of the screen" comprised of screenwriters, directors, producers, and "[r]epresentatives of sixty religious, fraternal, social, labor, and veteran organizations," led by the film's producer, Walter Wanger, to protest censorship of newsreels and political documentaries. *Urge 'Freedom of the Screen*,' N.Y. TIMES, July 21, 1938, at 14.

308. N. Am. Comm. to Aid Spanish Democracy v. Bowsher, 9 N.E.2d 617, 618 (Ohio 1937).

309. Press Release, ACLU, "Spain in Flames" *Ban in Two States Fought* (March 5, 1937).

310. *Id.*

311. *In re* "Spain in Flames," 36 Pa. D. & C. 285, 294 (Ct. Com. P. 1937).

about a "terrific zoom of protest" throughout the country, noted the film trade journal *Variety* in 1938.[312] Many felt that "prohibiting of the reel amounted to an infringement of the freedom of the press clause in the Constitution."[313] The previous year, when the educational film *The Birth of A Baby* was banned throughout the country by state and local censorship authorities that prohibited the showing of obscene and indecent films,[314] a national firestorm ignited, with protesters asking why the film should be considered indecent when magazines containing still pictures from the film were not.[315] Editorials in several New York papers called for the movie's release, noting that "[n]ovels, plays, books on the social sciences discuss sex with . . . frankness."[316]

Several state courts that reviewed censor board decisions also expressed the view that censorship of newsreels violated freedom of speech and press. In 1936, the Michigan Supreme Court invalidated the decision of the Detroit police commissioner to revoke a permit for a Soviet film, *The Youth of Maxim*, under an ordinance that forbade movies that were "indecent or immoral."[317] The court held that the officer had exceeded his discretion since the word "immoral" did not accurately describe "a tendency to support communism or sovietism."[318] According to the court, accepting the police commissioner's contention "would [have] invest[ed] him with dangerous and plainly unconstitutional power."[319] In 1938, the Pennsylvania Court of Common Pleas invalidated a censor board decision that banned the exhibition of the Soviet film *Baltic Deputy* on the grounds of immorality.[320] The judge concluded that "[a]ccording to the censors, a revolution by Communists is objectionable, whereas a revolution against Communists would not be . . . it is difficult to decide a law case on stuff and nonsense like this."[321] A New York judge dissenting from a decision that upheld the

312. *Pros and Cons of on* 'March of Time's' *Nazi Subject Boosts B.O. All Over*, VARIETY, Jan. 25, 1938.

313. *Id.*

314. WITTERN-KELLER, *supra* note 3, at 82-83.

315. *Id.*; *see* "The Birth of a Baby*" Aims to Reduce Maternal and Infant Mortality Rates*, *LIFE*, Apr. 11, 1938, at 33-36 (featuring still pictures from the film). After Cincinnati officials demanded that a portion of the film be deleted, the committee filed for an injunction stating that the city's ordinance violated freedom of speech and press. Am. Comm. on Maternal Welfare v. City of Cincinnati, 11 Ohio Supp. 425, 427-28 (Ct. Com. Pl. 1938). The court upheld the ban. *Id.* (citing Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230 (1915)).

316. WITTERN-KELLER, *supra* note 3, at 84.

317. Schuman v. Pickert, 269 N.W. 152, 153, 155 (Mich. 1936) (citation omitted).

318. *Id.* at 154-55.

319. *Id.* at 154; DE GRAZIA & NEWMAN, *supra* note 3, at 212-13.

320. DE GRAZIA & NEWMAN, *supra* note 3, at 58.

321. *Id.*

ban on a film called *Tomorrow's Children*, a semi-documentary film on sterilization, stated that regardless of the medium in which it was presented, the prohibition of discussion of a "disputatious subject of public concern" violated freedom of the press by allowing "a Commission or Commissioner . . . to determine the limit and character of the information to be given to the public."[322]

By the end of the 1930s, the Supreme Court's First Amendment decisions and public opinion against newsreel censorship pushed the ACLU to contemplate a test case challenging *Mutual Film* that involved a ban on a newsreel on a political topic.[323] In 1938, the organization formally convened a national conference to repeal motion picture censorship laws; members of "[t]he Authors League of America, Actors' Equity Association, Screen Actors' Guild [and] the National Lawyers Guild," among other organizations, were present.[324]

Shortly after the conference, general counsel for the Hays Office, C.C. Pettijohn, considered the "legal wizard" of Hollywood, authored a *Memorandum on the Constitutionality of the Censorship of News Reels* that he sent to the ACLU.[325] In his memorandum, Pettijohn urged speedy action on a test case, arguing that "the time has arrived when the constitutionality of these laws can be successfully challenged in the Courts."[326] The reason, he argued, was the changed status of newsreels.[327] As Pettijohn pointed out, "The Supreme Court of the United States has always zealously defended and protected the right to freedom of speech and of the press guaranteed by the Constitution and it is a matter of common knowledge that the public generally has . . . come to recognize the News Reels as a part of the press of the country."[328] According to Pettijohn, newsreels had established a prominent position in the lives of the people and were no longer considered merely "shows and spectacles."[329] He agreed that the proper strategy was to challenge film censorship in Ohio, asserting that "[t]he best approach is through the News Reels whose similarity to newspapers makes their case unassailable and a proceeding praying for an injunction against the enforcement of the

322. Foy Prods., Ltd. v. Graves, 253 A.D. 475, 481-83 (N.Y. App. Div. 1938).

323. Memorandum on the Constitutionality of the Censorship of News Reels from C. C. Pettijohn & Gaylord R. Hawkins 1 (Jan. 3, 1939) [hereinafter Pettijohn Memorandum].

324. Memorandum of Meeting to Discuss Status of Motion Picture Censorship from the Nat'l Council on Freedom from Censorship (Dec. 1, 1938).

325. *See* Pettijohn Memorandum, *supra* note 323.

326. *Id.*

327. *Id.*

328. *Id.* at 2.

329. *Id.* at 2-3.

censor statute."[330] In the event of a favorable decision, "a like suit should be brought on behalf of all other types of pictures."[331]

The ACLU's reactions to the film industry's efforts to reenter the anticensorship effort were mixed. In 1939, at a national anticensorship conference, Morris Ernst, the National Council on Freedom from Censorship's attorney, attacked the Hays organization for cooperating with the censors.[332] Hays lobbyists promoted the fact "that in four years the [Production Code Administration] had demanded well over a hundred thousand changes from producers."[333] When a member of the Hays office said this at the censorship conference, the member was heckled by the audience.[334] ACLU board members had long sought to have Hays ousted as a private "censor" of the film industry.[335] Nonetheless, recognizing the advantages of cooperation by the MPPDA, with its prestige and extensive legal and publicity resources, the ACLU board circulated the Pettijohn memorandum among its members.[336]

Pettijohn's analysis pushed the newsreel test case to a priority position in the organization.[337] Journalist Quincy Howe, one of the leaders of the ACLU's anticensorship committee, began corresponding with other civil liberties groups, asking them whether, on the basis of Pettijohn's analysis, they would be willing to support a challenge to *Mutual*.[338] The reception was lukewarm, and there were mixed reactions even within the ACLU board. One board member, Whitney North Seymour, a prominent New York trial lawyer, disagreed with the memo, stating that it was unclear whether there would be a favorable decision in a newsreel case.[339] Pointing to decisions like *Pathé*, he noted that even the changed status of newsreels could not overturn persistent assumptions about

330. *Id.* at 31.

331. *Id.*

332. *Conference Chides Hays*, VARIETY, Oct. 18, 1939, at 3.

333. LEFF & SIMMONS, *supra* note 212, at 83.

334. *Id.*

335. *Censorship Debaters Want Hays Ousted*, N.Y. TIMES, Mar. 1, 1930.

336. *See id.*

337. ACLU lawyer Alexander Lindey agreed that "[a]s a matter of general strategy the way to attack the constitutionality of motion picture censorship is to point out . . . that" in 1915 movies were "in their crude early state . . . that the character of films ha[d] undergone a vast change, so that it can be reasonably argued today that movies are a medium for the dissemination of ideas, somewhat akin to the press." Letter from Alexander Lindey, Attorney, Greenbaum, Wolff & Ernst, to Jerome M. Britohey, Attorney, ACLU (Oct. 30, 1939).

338. Letter from Hazel Rice, Sec'y, AMCLU, to Quincy Howe, Simon & Schuster (Mar. 22, 1939).

339. Letter from Whitney North Seymour, Attorney, Simpson, Thacher & Bartlett, to Quincy Howe, Attorney, Nat'l Council on Freedom from Censorship (Apr. 6, 1939) [hereinafter Seymour Letter].

the cinema's "capacity for evil" and the relationship between the viewer and the screen.[340]

Indeed, a significant segment of the public in the 1930s was still deeply committed to the idea that the mass media, particularly radio and movies, could have a near-hypnotic effect on susceptible viewers.[341] It was still widely believed that news conveyed through the film medium was more likely to provoke irrational audience responses than news in print.[342] At the end of the decade, the Payne Fund studies were still accepted as the authoritative statement on youth audiences' relationship to the movies,[343] and watching films was still described as a passive and irrational experience, compared to reading, seen as active and cognitive.[344] Even those who opposed film censorship observed that there "is a greater likelihood of people being aroused to action by a graphic presentation in a crowded theatre than by words read in the tranquil surroundings of a home or library."[345]

Sociological investigations of radio listening supported the view that audiences were defenseless against the media.[346] Orson Welles's 1938 radio broadcast of *War of the Worlds*, which led audiences to mistakenly believe that a fictional account of a Martian invasion was real and to react with hysteria and panic, demonstrated the media's potential to mislead the "mass mind" and provoke crowd behavior.[347] The use of radio broadcasts by fascist leaders in Europe and charismatic American opposition figures like Father Charles Coughlin and Senator Long—not to mention President Roosevelt, with his famous "fireside chats"—reinforced the association between

340. *Id.*

341. *See* Paul G. Cressey, *The Motion Picture Experience as Modified by Social Background and Personality*, 3 AM. SOC. REV. 516, 516-17 (1938) (discussing recent research on the effects of motion pictures on attitudes and behavior).

342. *See id.*

343. *See id.* at 516 nn.1-4 (citing seven Payne Fund studies describing the effects motion pictures have on "the information, the attitudes, and behavior of children and youth").

344. As noted by one communications researcher in 1940, reading, unlike watching movies or listening to the radio, permits the consumer to control his own activity. DOUGLAS WAPLES ET AL., WHAT READING DOES TO PEOPLE 29 (1940). The reader "pauses whenever and as long as he likes to compare what he reads with his own experience. Unlike the other media, reading even permits him to turn back, to re-read, to read again at other times and in other moods." *Id.*

345. Note, *supra* note 59, at 1394.

346. "[R]adio had become the primary mode of mass communication and entertainment in the late 1930s . . . . It was estimated that of the 32 million families in the United States in 1938, 27 million had radios." LOWERY & DEFLEUR, *supra* note 192, at 45.

347. *See id.* at 45-67 (discussing the broadcast and summarizing a Princeton University study of the public reaction that resulted).

the media and mass political indoctrination.[348]

Seymour further concluded that it was "extremely doubtful" whether success in a newsreel case "would dispose of the problem of motion picture censorship generally."[349] While the Supreme Court had implied a broad First Amendment right to publish on a wide range of topics of concern to the public,[350] whether there was a constitutional right to disseminate "pure entertainment," such as dramatic films, was still an open question. A narrow ruling in favor of newsreels might have the effect of legitimating the constitutionality of prior restraint of dramatic films. "The very argument for assimilating the nature of newsreels to the nature of the press shows how different are ordinary motion pictures," Seymour explained.[351] Seymour admitted that he had reached his conclusions "very reluctantly because [he] should like to see the constitutional guarantees construed with increasing liberality."[352] However, the likelihood of success was so slight in a test case involving newsreels that he would "not advise a private client to make the effort."[353] "Indeed . . . the consequences of failure might be very serious,"[354] he noted, because a decision to uphold the right of censorship could lead to more states adopting formal censor measures.[355] The ACLU board subsequently voted against pursuing the test case, leaving *Mutual Film* and the practice of film censorship, after twenty-five years, largely intact.[356]

V. CONVERGENCE

As we have seen, during the 1930s, the ACLU had hoped to bring motion pictures under the guarantees of freedom of speech by likening newsreels to newspapers as protected political speech. Yet the organization concluded by the end of the decade that despite the similarity between newspaper and newsreel content, it was still widely believed that news on film was simply not the equivalent of printed news. The medium mattered.

But mass media and the public's experiences with it are never static, and during the 1930s and 1940s, both cinema and print journalism were changing fast. What is significant to our discussion is that these two media "converged" in several key respects. By the end of World War II, due in part to government use of newsreels and

348. *See infra* note 395.
349. Seymour Letter, *supra* note 339, at 3.
350. Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940).
351. Seymour Letter, *supra* note 339, at 3.
352. *Id.*
353. *Id.*
354. *Id.*
355. *Id.*
356. *See id.* (arguing why the ACLU should not pursue a test case at that time).

documentaries during the war, movies were widely considered to be vehicles of news and public information on par with newspapers.[357] At the same time, newspapers and magazines had become major sources of popular entertainment.[358] Newspapers and magazines were also becoming, like film, highly visual and "sensational."[359] Developments in media theory and communications research cast doubt on the idea of an irrational, vulnerable audience for motion pictures and a rational audience for print.[360] These changes not only transformed the social experience of mass communications but also shaped free speech law.[361] As the distinctions between movies and print blurred, the assumptions undergirding the *Mutual* decision began to crumble.[362]

A. The Merging of Film and Print

The basis of Pettijohn's 1939 memo had been an argument about media convergence. No longer seen as titillating curiosities, he noted, newsreels had so evolved in their sophistication and credibility that "the public generally has in late years come to recognize the News Reels as a part of the press of the country."[363] While the ACLU had not been confident enough of this appraisal to challenge *Mutual*, many legal commentators at the time similarly observed that newsreels were widely viewed as an arm of the "press." As noted in the *Ohio State University Law Journal* in 1939,

> the motion picture has graduated from the era of slapstick comedy and gushy romanticism to a period of wide use of the movie medium for instruction, expression of opinion, and propagandism. There is no dearth of factual evidence to the effect that today, far more than in 1915 or 1922, motion pictures constitute an organ for the expression of public opinion . . . .[364]

In his classic 1941 work *Free Speech in the United States*, Harvard Law professor Zechariah Chafee Jr., one of the most eminent free speech theorists of the day, also observed the similarity between newsreels and newspapers and concluded that "[a]ll the objections to a press censorship apply as well to film censorship, especially in an age when more persons probably go to the movies

357. *See infra* Part IV.A.

358. *Id.*

359. *See infra* Part IV.B.

360. *See infra* Part IV.D.1.

361. *See infra* Part IV.D.2.

362. *See infra* Part IV.E.

363. Pettijohn Memorandum, *supra* note 323, at 2.

364. Anna Faye Blackburn, *Constitutional Law: Recent Decisions on the Extensive and Intensive Aspects of the Guaranty of Free Speech and Free Press*, 5 OHIO ST. U. L.J. 89, 90 (1939).

than read books."[365] "Suppressing newsreels," he wrote, "is much the same as suppressing newspapers."[366] In 1939, the *Columbia Law Review* noted "that today motion pictures are definite media of ideas" and observed the existence of few if "any factors which justify suppressing this segment of the 'press' as distinguished from newspapers."[367] Thus, the article concluded, "Certainly the newsreels must be considered an integral part of the nation's 'press.'"[368]

The nation's experience with both the print media and the movies in World War II reinforced and generated parallels between these modes of mass communication. The potential of the motion picture as a medium of education and propaganda was officially recognized by the U.S. government, which enlisted Hollywood in its wartime mobilization efforts. In 1942, President Roosevelt created the Office of War Information ("OWI"), which he directed to act as a liaison between the federal government and the radio and movie industries.[369] The Bureau of Motion Pictures ("Bureau") was established as part of the OWI.[370] The Bureau supervised the studios to encourage the production of films with patriotic themes and to discourage films that might be damaging to U.S. relations overseas.[371] At one point, the OWI asked the studios to submit their scripts for preproduction review.[372]

The OWI cooperated with the Hollywood studios, which produced newsreels and documentary films for use in military training.[373]

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365. ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 543, 543-44 (1941) (noting that "[t]he value of motion pictures to the thought of the nation is obvious today").

366. *Id*. at 543.

367. Note, *supra* note 59, at 1393.

368. *Id*. The article also asserted that "[a] recognition that the motion pictures have attained a maturity and have become an important medium for the traffic of ideas demands that the government's control over the idea and . . . content of movies be limited within the confines of the 'clear and present danger' rule." *Id.* at 1394-95. In 1939, the *Yale Law Journal* encouraged "an attack on the constitutionality of the [censorship] statutes in an effort to secure reconsideration" of the *Mutual* decision and "to bring the motion picture within the constitutional guaranties of freedom of speech and press." Comment, *supra* note 65, at 110-11. The journal advised "to make this attempt first on the basis of a newsreel or documentary film, and then, if that were successful, to seek to expand the scope of the ruling to all motion pictures." *Id.* at 111. The Supreme Court would probably overturn *Mutual* "[i]n view of the advance of the cinema as an educational force, and in view of its position as the one popular source of knowledge." *Id.* at 113.

369. SCHATZ, *supra* note 276, at 269.

370. DE GRAZIA & NEWMAN, *supra* note 3, at 61.

371. *Id.* at 62-63.

372. *Id.* at 62.

373. *See* SCHATZ, *supra* note 276, at 402 (describing a surge in the production of films and newsreels related to the war through the collaboration of the U.S. government and Hollywood).

Newsreels and documentary films became more developed in both depth of coverage and technical sophistication and, by the mid-1940s, were "a theatrical attraction in [their] own right, attended to as avidly as the putative top of the bill."[374] Hollywood's emphasis on nonfictional films during the war changed the tone of its entire output—one scholar has observed that in the postwar era, "fictional and documentary treatments of the war had reached a remarkable symbiosis."[375] Studios began to photograph dramatic movies using "newsdrama cinematography," and "social problem films" dealing with serious social issues were produced in significant number.[376] To postwar Americans, "movies were no longer a dream screen and Hollywood no longer purely a factory for entertainment."[377] The Hays Office, which had earlier championed films as "pure entertainment," changed its position and lauded the "increasing number of pictures which treat honestly and dramatically many current themes."[378] In 1947 the prestigious Hutchins Commission on Freedom of the Press, an academic commission convened to study the communications industries, concluded that, given the importance of films in disseminating public information, "the constitutional guarantees of the freedom of the press be recognized as including motion pictures."[379]

Just as movies were taking on more of the functions of the traditional press, print journalism in many ways became more like movies. Increasingly, newspapers were regarded as a source of entertainment. While human interest journalism and breezy, entertaining styles of news reporting had been associated primarily with lowbrow newspapers and magazines in the early twentieth century, by the 1940s, they were staples of even the most respected publications. As cultural critic Helen MacGill Hughes summarized in 1940, "The natural history of the newspaper . . . is the story of the expansion of the traditional function—originally the publishing of practical, important news—to include the sale of interesting personal gossip."[380] Communications research showed that while the "amount of attention given to material of political importance" was increasing in motion pictures, it was decreasing in print media, which was focusing more on "sports, comic strips and society reports."[381] Studies in the 1940s demonstrated that the reading public turned to

374. *Id.*

375. *Id.* at 132.

376. *Id.* at 417.

377. *Id.*

378. THORP, *supra* note 277, at 273, 275.

379. INGLIS, *supra* note 223, at 179.

380. HELEN MACGILL HUGHES, NEWS AND THE HUMAN INTEREST STORY 2 (Greenwood Press 1968) (1940).

381. Note, *supra* note 138, at 706 n.25.

newspapers for relaxation and diversion even more than for the news.[382]

During the 1930s and 1940s, print media were becoming more visually sensational, just like the movies. As one historian has noted, in the 1940s print journalism "lunge[d] towards the visual."[383] The camera was coming to be considered a "crucial reporting tool,"[384] and by 1938, commentators were noting that photojournalism (or "pictorial journalism") was "at least challenging reportorial journalism" as a mode of conveying public information.[385] Big glossy photo magazines, epitomized by *Life* and *Look*, devoted more space to pictures than words.[386] As Judge Levinthal of the Pennsylvania Court of Common Pleas noted in dicta in 1937, overturning the censor board's ban on the documentary *Spain in Flames*,

> The recent development of pictorial news periodicals, of picture pages and sections in newspapers, and of theatres devoted primarily to the display of newsreels, all attest the important and vital role of pictures as a medium of information, opinion, and education. "Picture-journalism" properly has come to be recognized as a responsible and powerful new arm of all journalism. For millions of persons, news pictures are competing actively with the printed word . . . .[387]

By the end of the 1940s, audiences' relationships to print and film were also converging. At the end of the war, when the national population was around 139 million,[388] about 70 million attended the movies weekly, newspapers reached 46 million Americans, and 34 million homes had radios.[389] Media consumers became adept at switching between modes of communication and sources of information—in a single day, a person might be exposed to the same news story in a newspaper or magazine, on the radio, and in a newsreel. Audiences watched movie stars on the screen, heard them over the airwaves, and read about them in newspapers and

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382. Bernard Berelson, *What "Missing the Newspaper" Means*, *in* MASS COMMUNICATION AND AMERICAN SOCIAL THOUGHT: KEY TEXTS, 1919-1968, at 254-62 (John Durham Peters & Peter Simonson, eds. 2004).

383. JACQUELINE FOERTSCH, AMERICAN CULTURE IN THE 1940S, at 50 (2008).

384. Barbie Zelizer, *Words Against Images: Positioning Newswork in the Age of Photography*, *in* NEWSWORKERS: TOWARD A HISTORY OF THE RANK AND FILE 135, 140 (Hanno Hardt & Bonnie Brennen eds., 1995).

385. *Id.* at 144.

386. *See id*. at 148.

387. *In re* Spain in Flames, 36 Pa. D. & C. 285, 292 (1937).

388. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 1999, at 868 (1999), *available at* http://www.census.gov/prod/99pubs/99statab/sec31.pdf.

389. Paul F. Lazarsfeld & Robert K. Merton, *Mass Communication, Popular Taste, and Organized Social Action*, *in* MASS COMMUNICATION AND AMERICAN SOCIAL THOUGHT: KEY TEXTS, 1919-1968, *supra* note 382, at 230, 232.

magazines.[390] As media conglomerates and chains developed in the 1930s, the connections between radio, print, and film became more explicit. The Hearst Company advertised its films in its newspapers and promoted its newspaper reporters and movie actors on its radio stations.[391] Film scripts were read over the radio and printed in newspapers; movie actors wrote newspaper columns; newspaper reporters did radio shows; and radio stars appeared in films.[392] The manipulation of the mass media by politicians and public figures contributed to the blurring of the line between entertainment and real life. President Roosevelt appeared before the public in all three forms of major mass media and was often seen in the presence of Hollywood celebrities.[393]

This is not to say that audiences did not consider the distinctions between different mass media forms to be significant. Audiences still went to the movies because they loved the thrill of the big screen and the social experience of the movie theater. They listened to the radio because of its convenience as an in-home medium of entertainment and news, and because it offered imaginative possibilities and opportunities for social interaction much different from movies and print.[394] The newspaper was still the subject of its own daily ritual for many Americans.[395] Nonetheless, by the end of the 1940s, the idea that movies presented stories, themes, and images that were entirely unlike those that appeared in magazines and newspapers—which might have been more accurate in the cinema's early years—no longer held true.[396] The class connotations that had earlier attached to different media—that movies were for working people and reading for the upper classes—also withered in an age when Americans of all backgrounds and stations in life became part of the national audience

390. *See* SAMANTHA BARBAS, MOVIE CRAZY: FANS, STARS, AND THE CULT OF CELEBRITY 1 (2001) [hereinafter MOVIE CRAZY] (detailing a "movie-crazed" era where Americans "often devoted more attention to stars than to traditionally newsworthy items").

391. *See generally* SAMANTHA BARBAS, THE FIRST LADY OF HOLLYWOOD: A BIOGRAPHY OF LOUELLA PARSONS 83, 129-30, 189-90 (2005) (detailing Hearst's advertising holdings and practices).

392. *Id.*

393. *See generally* BETTY HOUCHIN WINFIELD, FDR AND THE NEWS MEDIA (1990) (discussing President Roosevelt's relationship with and influence over the press).

394. LAWRENCE W. LEVINE, THE UNPREDICTABLE PAST: EXPLORATIONS IN AMERICAN CULTURAL HISTORY 300-07 (1993); *see* Herta Herzog, *On Borrowed Experience: An Analysis of Listening to Daytime Sketches*, 9 STUD. IN PHIL. & SOC. SCI. 65, 69 (1941) (explaining why women listened to radio programs to provide "an emotional release," escape from "drudgery" of everyday life, or to provide a "recipe[] for adjustment").

395. *See generally* Berelson, *supra* note 382 (discussing other motivations for reading the newspaper).

396. *See* Note, *supra* note 138, at 704-05 & n.22.

for mass communications.[397]

In short, the distinctions that had been determinative for the *Mutual Film* Court—between print and visual media, between serious media and "sensational" media, between upper-class and lower-class forms of leisure—were blurring.[398] So were the lines between information and entertainment. The *Mutual Film* court's assumption that entertainment could not convey serious ideas, or that ideas had less worth because they were amusing, had become inapt and outdated in a society where magazines, novels, and films were widely regarded as a source of public information, education, and social values.[399] As a *Yale Law Journal* article summarized, "modern communication research casts doubt on the validity of this dichotomy between entertainment and ideas. Evidence indicates that specific ideas of importance can be conveyed within a fictional context and that fictional expression is frequently responsible for creating a general framework for the development of public attitudes and behaviors."[400] It was against this backdrop that the Supreme Court heard two cases, *Hannegan v. Esquire* and *Winters v. New York,* in which it concluded that the First Amendment protected not only political speech but popular entertainment.[401]

B. Freedom of Entertainment

Hannegan and *Winters* did not involve film, but both cases had a significant impact on the film censorship question and involved "sensational" media—violent and sexually titillating magazines that were, like film, believed to corrupt and incite vulnerable audiences.[402]

Hannegan involved the efforts of Postmaster General Frank Walker to crack down on the distribution of *Esquire* magazine, an amalgam of fiction, feature stories, and mildly erotic photographs and illustrations directed at men.[403] Walker reconceptualized the

397. *See* Robert S. Lynd & Helen Merrill Lynd, *Middletown: A Study in Contemporary American Culture*, *in* MASS COMMUNICATION AND AMERICAN SOCIAL THOUGHT: KEY TEXT 1919-1968, *supra* note 382, at 58, 65-66 (describing the diverse group of people that attended movies in one American small town).

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

399. *Id.*

400. Note, *supra* note 138, at 704-05. "The fictional media, particularly the movies, can have an important influence on preparing people to think about public issues. They are effective in bringing issues to people's attention in a situation where interest has been aroused." *Id.* at 705 n.22; s*ee* Franklin Fearing, *Influence of the Movies on Attitudes and Behavior*, 254 ANNALS AM. ACAD. POL. & SOC. SCI. 70 (1947) (finding films have a measurable effect on viewers' attitudes toward the subject matter but may not affect patterns of behavior).

401. Winters v. New York, 333 U.S. 507, 520 (1948); Hannegan v. Esquire, Inc., 327 U.S. 146, 158-59 (1946).

402. *Hannegan*, 327 U.S. at 151; *Winters*, 333 U.S. at 508 n.1.

403. *Hannegan*, 327 U.S. at 150-51.

second-class postal subsidy as a "certificate of good moral character" for magazines.[404] The statute granting second class postage stated that in order to qualify the material "must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers."[405] In early 1943, Walker revoked *Esquire*'s second-class permit.[406] The matter that the Postmaster General objected to was a small percentage of the total magazine that consisted of "jokes, cartoons, pictures, articles, and poems . . . said to reflect the smoking-room type of humor, featuring, in the main, sex."[407] *Esquire* sought to enjoin enforcement of the Postmaster General's order, and the trial court denied the injunction.[408] The D.C. Circuit reversed.[409]

In 1946, the Supreme Court upheld the D.C. Circuit and ended the Post Office's decency campaign.[410] Justice Douglas, writing for a unanimous court, held that the Postmaster General had exceeded his authority and had no discretion to deny second-class permits to publications that were not actually obscene.[411] The statute would have to be much more explicit for the Court to believe that Congress "made such a radical departure from our traditions and undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country."[412] The decision was based on congressional intent, but the statement of the Court was constitutional in scope:

> Under our system of government there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information . . . varies . . . from one generation to another. . . . [A] requirement that literature or art conform to some norm prescribed by an official

404. JAMES C.N. PAUL & MURRAY L. SCHWARTZ, FEDERAL CENSORSHIP: OBSCENITY IN THE MAIL 73 (1961).

405. *Hannegan*, 327 U.S. at 148.

406. *Id.* at 149-50.

407. *Id.* at 151; *see also* WILLIAM BRUCE JOHNSON, MIRACLES & SACRILEGE: ROBERTO ROSSELLINI, THE CHURCH, AND FILM CENSORSHIP IN HOLLYWOOD 303 (2008) (stating the Postmaster General objected to "racy cartoons and men's-club humour").

408. *Hannegan*, 327 U.S. at 150. Although the Postmaster General admitted that the articles were "not obscene in a technical sense," he found that "indecent, vulgar, and risque" material was a "dominant and systematic feature" of the magazine. *Id.* at 149. Such material was in a "treacherous borderland zone where the average person hesitates to find them technically obscene, but still may see ample proof that they are morally improper and not for the public welfare and the public good." *Id.*

409. Esquire, Inc. v. Walker, 151 F.2d 49, 55 (D.C. Cir. 1945), *aff'd sub nom.* Hannegan v. Esquire, Inc., 327 U.S. 146 (1946).

410. *Hannegan*, 327 U.S. at 158-59.

411. *Id.* at 157-58.

412. *Id.* at 156 (footnote omitted).

> smacks of an ideology foreign to our system.[413]

Winters v. New York involved an even more scandalous publication—*Headquarters Detective, True Cases from the Police Blotter, June 1940*, a magazine containing "a collection of crime stories which portray in vivid fashion tales of vice, murder and intrigue."[414] Winters, a bookseller, was convicted under a state statute criminalizing the distribution of publications made up of criminal news and stories of deeds of "bloodshed, lust or crime."[415] The New York Court of Appeals upheld the conviction.[416]

Winters appealed to the Supreme Court, arguing that the statute was unconstitutionally vague and that it violated freedom of the press because it criminalized nonobscene publications solely because of disagreements of taste.[417] "Bad taste does not render the magazines outlaw," Winters argued, "Lofty ideals should not be permitted to whittle away our Bill of Rights."[418] Winters analogized the repression of pulp and scandal magazines to film censorship, suggesting that the Court not only invalidate his conviction, but overturn *Mutual Film*.[419]

The Supreme Court reversed the conviction, holding the statute to be unconstitutionally vague.[420] The Court rejected the State's argument that freedom of the press applied only to informational publications, noting that "[t]he line between the informing and the entertaining is too elusive for the protection of that basic right."[421] While recognizing a state's interest in minimizing "all incentives to crime, particularly in the field of sanguinary or salacious publications with their stimulation of juvenile delinquency," the Court reasoned that the First Amendment would limit a state's ability to exercise value judgments about the worth of a publication

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413. *Id.* at 157-58 (footnote omitted).

> From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values. But to withdraw the second-class rate from this publication today because its contents seemed to one official not good for the public would sanction withdrawal of the second-class rate tomorrow from another periodical whose social or economic views seemed harmful to another official.

Id. at 158.

414. People v. Winters, 48 N.Y.S.2d 230, 230-31 (App. Div. 1944); *see* KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT 25 (2003).

415. *Winters*, 48 N.Y.S.2d at 230.

416. People v. Winters, 63 N.E.2d 98, 101 (N.Y. 1945).

417. Brief for Appellants at 17, Winters v. New York, 333 U.S. 507 (1948) (No. 3), 1947 WL 43989 at *17.

418. *Id.* at *17.

419. *See id.* at *46.

420. *See Winters*, 333 U.S. at 520 ("Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained.").

421. *Id.* at 510.

under the guise of the police power.[422] The Court concluded, "What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature."[423]

Hannegan and *Winters* represented the extension of a series of decisions earlier in the decade, many involving Jehovah's Witnesses, that enshrined viewpoint neutrality, diversity of opinion, and freedom of conscience as the foundational principles of freedom of speech.[424] In those cases, the Court had held that freedom of speech was incompatible with any unitary view of aesthetics or faith or taste.[425] The purpose of free speech was to allow the people, not the state, to establish their own moral standards—to make their own choices about what ideas to believe, what values to hold, and what culture to consume. *Hannegan*, and especially *Winters*, took those antipaternalism principles into the highly contested terrain of cheap amusement.[426] The Court recognized the impossibility, in the age of media convergence, of making distinctions between entertainment media and informational media and suggested that even crass and lowbrow entertainment contributed to valuable public discourse.[427] The contrast to the *Mutual Film* Court, with its disdain for "mere entertainment," could not be greater.[428] In *Lovell v. City of Griffin*, which struck down a ban on distributing pamphlets as a violation of free speech, the Court defined the First Amendment "press" as

422. *See id*.

423. *Id*.

424. *See* W. Va. Bd. Of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."); Martin v. City of Struthers, 319 U.S. 141, 150 (1943) ("It is our proud achievement to have demonstrated that unity and strength are best accomplished, not by enforced orthodoxy of views, but by diversity of opinion through the fullest possible measure of freedom of conscience and thought."); Cantwell v. Connecticut, 310 U.S. 296, 310 (1940) ("The essential characteristic of these liberties is, that under their shield many types of life, character, opinion, and belief, can develop unmolested and unobstructed.").

425. *See supra* note 409 and accompanying text.

426. For a detailed discussion of the antipaternalism principle, see Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579 (2004).

427. *See* Hannegan v. Esquire, Inc., 327 U.S. 146, 157 (1946) ("What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another."); *Winters*, 333 U.S. at 510 ("The line between the informing and the entertaining is too elusive for the protection of that basic right . . . . What is one man's amusement, teaches another doctrine.").

428. Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 244 (1915) ("[Moving pictures] are mere representations of events, of ideas and sentiments published and known; vivid, useful, and entertaining, no doubt, but as we said, capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition.").

including "every sort of publication which affords a vehicle of information and opinion."[429] After *Winters*, the press included vehicles for "pure entertainment" and free speech protected not only political expression but also fiction, art, and popular culture.

C. Postwar Challenges

The *Hannegan* and *Winters* decisions spurred a renewed search by the ACLU for a test case. During World War II, faced with what it saw as more pressing civil liberties matters, the ACLU had paused its anticensorship campaign despite the entreaties of board member Morris Ernst, who in 1941 told the *New York Times* that "five State censorship boards in the United States [could be] abolished if . . . the matter [were taken] before the Supreme Court."[430] At the end of the war, the organization announced a series of new goals for the "film situation," including "getting a test case up to the Supreme Court[] to determine whether or not the motion picture is a medium of communication, and within the free speech and free press guarantees of the Bill of Rights."[431]

In 1946, the ACLU was far more optimistic about the success of a challenge to *Mutual* than it had been in 1939. The moral and social climate of the country had become somewhat more liberal during the war, and the censors' squeamishness about sex and violence appeared more outdated, restrictive, and prudish than ever. Despite the resurgence of censorial impulses during the postwar anti-communism "Red Scare," public opinion in the 1940s was generally opposed to state control over political and cultural expression.[432] A nation that had witnessed book burnings and censorship of the press in fascist Europe came to embrace the idea that the American tradition was the rule of law and that the Constitution protected the public "from arbitrary state power."[433] The film industry had acquired an aura of prestige and seriousness from its wartime involvement, and Hollywood was widely credited as having played a substantial role in winning the war.[434]

The ACLU had identified one of its postwar anticensorship goals as the cooperation of the Motion Picture Association of America ("MPAA")[435] in a test case involving a big-budget, high-profile film

429. 303 U.S. 444, 452 (1938).

430. *Ernst Says Movies Could End Censors,* N.Y. TIMES, Nov. 16, 1941, at 44.

431. Memorandum from the ACLU on Points for Discussion at a Meeting on Motion Picture Censorship ¶ 5 (Oct. 10, 1945).

432. *See* Schiller, *supra* note 139, at 77-78.

433. *Id.* at 77.

434. SCHATZ, *supra* note 276, at 132.

435. The MPPDA was renamed the MPAA in 1945. STEPHEN VAUGHN, RATING THE MOVIES IN AN AGE OF NEW MEDIA 5 (2006).

that would gain national attention.[436] Indeed, after the war, Hollywood's participation seemed more likely. In 1941, the heads of the major studios had been called upon to appear before a hearing of the Senate Interstate Commerce Committee to answer charges of attempting to promote U.S. involvement in the war through interventionist themes in films.[437] During the hearings, film industry witnesses, asserting that the "motion picture screen is an instrument of entertainment, education, and information," insisted that the movies were entitled to the guarantees of freedom of the press, breaking nearly two decades of silence on the issue.[438] Immediately after the war, Will Hays resigned as president of the MPAA and was succeeded by Eric Johnston, a former president of the U.S. Chamber of Commerce known for his moderate social and political views and committed to a more aggressive stance on censorship.[439] Although 1946 was a banner year, with film attendance at an all-time high, the subsequent years saw a rapid decline in film attendance, attributed both to the advent of television and to the somewhat tepid quality of censored films, which lacked the "vital juices of reality."[440]

In March 1946, ACLU board members Elmer Rice and Roger Baldwin wrote to the MPAA that they had revisited the Pettijohn memo and concluded that in light of recent Supreme Court decisions, film censorship would likely be held unconstitutional by the Supreme Court.[441] *Hannegan* and *Winters* eliminated the need to make an argument based solely on newsreels as "political speech," and the ACLU and MPAA now sought to challenge a ban on a dramatic film.

Thus, it was in 1948 that the MPAA joined the ACLU and the Hal Roach studio to attack a Memphis ban on a comedy called *Curley*.[442] *Curley* was based on the *Our Gang* comedies popularized by Hal Roach in the 1930s, but an integrated version of it featuring black and white characters.[443] It was banned in Memphis because, according to the censor board, the "South does not . . . recognize

436. Memorandum from the ACLU, *supra* note 431, ¶ 5.

437. John E. Moser, "*Gigantic Engines of Propoganda": The 1941 Senate Investigation of Hollywood*, 63 HISTORIAN 731, 731 (2001), *available at* http://onlinelibrary.wiley.com/doi/10.1111/j.1540-6563.2001.tb01943.x/abstract.

438. Leo C. Rosten, *Movies and Propaganda*, 254 ANNALS AM. ACAD. POL. & SOC. SCI., 116, 120 (Nov. 1947); INGLIS, *supra* note 223, at 19 ("For the first time in many years the industry . . . officially recognized and defended the right of the screen to have something to say.").

439. DE GRAZIA & NEWMAN, *supra* note 3, at 63-64.

440. *Johnston Endorses Fight on Censorship*, N.Y. TIMES, Aug. 27, 1949, at 14.

441. Letter from Elmer Rice & Roger Baldwin, ACLU, to Francis Harmen, Motion Picture Ass'n (Mar. 5, 1946).

442. Letter from Elmer Rice, ACLU, to Hal Roach, Hal Roach Productions (Oct 4, 1947).

443. Whitney Strub, *Black and White and Banned All Over: Race, Censorship, and Obscenity in Postwar Memphis*, 40 J. SOC. HISTORY 685, 691 (2007).

social equality between the races."[444] The film's producer and distributor challenged the ban, arguing "that censorship was an abridgement . . . of the First . . . Amendment[], and that the" board's decision "was arbitrary [and] capricious."[445] The trial judge dismissed the petition on the grounds that the censor statutes were applicable only to local exhibitors and that the plaintiffs did not show movies in the city and, therefore, had no standing to sue. The Supreme Court of Tennessee affirmed.[446] The MPAA appealed the decision to the U.S. Supreme Court, which denied certiorari.[447]

While the MPAA and ACLU awaited the outcome of *Curley*, the Supreme Court, in 1948, issued its decision in *United States v. Paramount Pictures, Inc.*, which effectively ended the studio system.[448] In *Paramount*, the Court found the studios' monopoly over exhibition in violation of the Sherman Act and ordered the studios to sell off their theaters.[449] The government had argued that there was a First Amendment problem with the monopoly.[450] Justice William Douglas, writing for the majority, said that the First Amendment would be implicated only if there were a question regarding monopoly in the production of motion pictures.[451] He added in dicta that "[w]e have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment."[452] The ACLU and MPAA lawyers seized on the sentence. For the first time, the Court suggested its willingness to question *Mutual Film* and the medium-based rationale for the exclusion of motion pictures from the guarantees of free speech.

D. The Medium and the Message

Douglas' statement was part of a broader interest of the Court, and of postwar American culture more generally, with the relationship between democracy and mass communications.[453] The war had focused public attention on the critical function of the mass media in the formation of national identity and the importance of

444. *Id.*; *see also Union Protests Film Ban*, N.Y. TIMES, Oct. 6, 1947, at 26.

445. Theodore R. Kupferman & Philip J. O'Brien Jr., *Motion Picture Censorship—The Memphis Blues*, 36 CORNELL L.Q. 273, 277 (1950).

446. United Artists Corp. v. Bd. of Censors, 225 S.W.2d 550, 556 (Tenn. 1949), *cert. denied,* 339 U.S. 952 (1950); *see* Strub, *supra* note 443 (discussing the racial motivations behind much of American film censorship).

447. 339 U.S. 952 (1950).

448. 334 U.S. 131, 165-66 (1948).

449. *Id.* at 152-53, 166-75.

450. *Id.* at 166.

451. *Id.*

452. *Id.*

453. *See generally* THE COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS (1947) (reviewing the state of the mass media industries and existing protections for freedom of the press).

access to information through the media as the foundation for democratic citizenship. A nation that had witnessed fascist propaganda overseas and a surfeit of war propaganda at home had become concerned with the psychological effects of mass communications, leading to a surge of media research during and after the war.[454]

One of the key findings of the research, for our purposes, was that the "magic bullet" theory of media reception was deeply flawed.[455] The notion that media consumers mindlessly absorbed everything they saw and heard did not capture the complexity of people's real experiences with mass communications.[456] Studies demonstrated that audiences often responded to media content critically rather than passively, with judgment and discernment.[457] Audiences' relationships with even the most "sensational" media—radio and film—were now seen as similar to their presumed rational relationship with print.[458] This research was widely publicized, and its influence can be seen in a series of First Amendment cases heard by the Supreme Court in which several of the Justices effectively rejected the vulnerable audience construct.[459] By the 1950s, one of the key rationales for motion picture censorship was beginning to be undermined.

1. Limited Effects

In the 1940s and 1950s, the direct effects paradigm was largely replaced by a "limited effects" model of media reception.[460] War-era research demonstrated that the media's effects on viewers' attitudes were far less direct and powerful than had earlier been assumed.[461] In one important wartime study, social psychologists were commissioned by the United States Army to study *Why We Fight*, a series of documentary films intended to educate recruits about the war and generate patriotic sentiment.[462] The conclusion of the study was that while films could effectively teach factual material to a large number of people in a short time, they did not fundamentally

454. *See* DAN SCHILLER, THEORIZING COMMUNICATION: A HISTORY 52-55 (1996) (discussing the political and social ends of wartime propaganda and finding that "public opinion and propaganda did not always coincide").

455. *See* LOWERY & DEFLEUR, *supra* note 192, at 91 (discussing the conflict between modern theories of media reception and the direct effects or "magic bullet" theory).

456. *See id*.

457. *See id*.

458. *See id*. at 94.

459. *See, e.g.*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952).

460. *See* LOWERY & DEFLEUR, *supra* note 192, at 90-91.

461. *Id.* at 141-54 (discussing United States Army experiments conducted on troops to assess how exposure to films changed their behaviors and attitudes).

462. *Id.* at 148-51.

change viewers' attitudes and motivations, which were deeply rooted in their personality traits, community belief systems, and social ties.[463] In an important 1939 article, sociologist Paul Cressey criticized the Payne Fund model of direct and immediate effects. He stressed that any research on audience reactions to the cinema must be viewed in terms of the total experience of the individual moviegoer, which always involved "a specific film, a specific personality, a specific social situation and a specific time and mood."[464] Reactions to movies were governed by a variety of factors, such as "the interrelationships between film content and the spectator's personality and social background, his special interests and values, and the events which are subsequent to the motion picture experience."[465] As psychologist Franklin Fearing wrote in 1947, "[t]he motion picture is not a fixed pattern of meanings or ideas which are received by a passive mind. Rather, what the individual 'gets' is determined by his background and his needs."[466]

This limited effects theory also suggested that audiences were more rational and media-savvy than had been imagined. In his study of the *War of the Worlds* broadcast, Hadley Cantril showed that reactions to the program were diverse and determined by the situational and attitudinal positions of the listeners.[467] While some audiences believed the phony report, others heard it and rejected it.[468] Those people who were frightened by the broadcast were "highly suggestible"; they believed what they heard without making sufficient checks to see if the information was accurate.[469] Those who were not scared were said to possess "critical ability"—a capacity to assess the credibility of events against their knowledge of the world.[470] The Cantril research suggested that rather than fall under the hypnotic sway of seductive messages, audiences could resist their effects.[471] Another study of the impact of radio soap operas showed that the stories were not accepted as "substitutes for reality."[472] As psychologist Fearing asserted, audiences' relationships to the cinema

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463. *Id.* at 90-91. In another important study, communications scholar Paul Lazarsfeld concluded that people's perspectives on the 1940 presidential election were influenced more by their social relationships than by the media. *Id.* at 73-89. Media messages affected "opinion leaders," who in turn influenced the masses. *Id.* at 89.

464. Cressey, *supra* note 341, at 518.

465. *Id.* at 521.

466. Fearing, *supra* note 400, at 70 (emphasis omitted).

467. LOWERY & DEFLEUR, *supra* note 192, at 66-67.

468. *Id.* at 59.

469. *Id.* at 62.

470. *Id.* at 59-62.

471. *See id.* at 65-67.

472. Herzog, *supra* note 394, at 82.

were characterized not by inactivity but "participation."[473]

This is not to say that the suggestible audience model was no longer persuasive. A competing line of studies continued—and still continues—to argue that movies and other forms of mass media have direct and powerful effects on audiences, particularly children.[474] Nonetheless, by 1950, the direct effects model had been dealt a serious blow. It had been undermined not only by communications research but also by social experience. Movies had not created moral anarchy, social chaos, or mindless zombies as had been predicted, and movie consumers had demonstrated, in a variety of different contexts, that they were adept at distinguishing between the screen and reality and did not accept what they saw in films at face value.[475] Even children were generally not considered to be as vulnerable as they once were. Researchers on children's exposure to the media, while concluding that children were more susceptible than adults to media suggestion, found that they too were affected by multiple influences—parents, peers, and teachers.[476] Audiences were not gullible dupes, but shrewd, skeptical, and far more able to resist media influence than had earlier been imagined.

2. The Supreme Court on Communication Effects

This was the same conclusion reached by the Supreme Court in the 1940s when it took up First Amendment cases involving the effects of communication and the relationship between the message, the medium, and the audience.[477] Since the adoption of the clear and present danger incitement standard by the Court in the 1930s,[478] free speech doctrine had generally embraced an Enlightenment-based view of human beings as rational and autonomous—one that believed that "except in extreme circumstances, human beings can resist harmful messages through reflection and rational thought."[479] This

473. Fearing, *supra* note 400, at 71.

474. *See generally* MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: "INDECENCY," CENSORSHIP, AND THE INNOCENCE OF YOUTH (2001) (reviewing history of indecency laws and other constraints focused on protecting children).

475. *See generally* MOVIE CRAZY, *supra* note 390 (discussing the development of cinematic fan culture).

476. *See* JOSEPH T. KLAPPER, THE EFFECTS OF MASS COMMUNICATION 164-65 (Paul F. Lazarsfeld & Bernard Berelson eds., 1960). Crime and violence in the media were not likely to cause deviant behavior in children, studies concluded, but rather reinforced tendencies that already existed. *See id.*

477. *See* FELDMAN, *supra* note 7, at 385-86.

478. *See id.* at 386-92.

479. Matthew D. Bunker & David K. Perry, *Standing at the Crossroads: Social Science, Human Agency and Free Speech Law*, 9 COMM. L. & POL'Y 1, 2-4 (2004); *see also* Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 811-16 (2010) (discussing the rational audience model).

view of the audience, however, clashed with empirical social scientific notions of human thought and action, exemplified by the "direct effects" research, which posited that individuals acted directly, and often irrationally, on environmental stimuli.[480] In a series of First Amendment cases in the 1940s, the Court negotiated between these two perspectives.[481] It came down generally in favor of the rational audience. The Court concluded that in most cases, adults should be presumed capable of resisting, ignoring, or avoiding messages that were unwanted or potentially harmful, even if presented in persuasive, intrusive, or arresting forms of communication. Audiences could and must protect themselves rather than call on the state to ban or limit the expression.[482]

Many of the cases in which the Court addressed the media effects question involved Jehovah's Witnesses and attempts by municipalities to quash them by banning or restricting the modes of communication they used for publicity and proselytizing, including distributing pamphlets and public speaking with loudspeakers.[483] In each case, in an attempt to justify licensing, taxation, or prohibitions on the speech, the government argued that not only the message but the method of communication, because of its intrusive or sensational quality, caused harms to audiences that could be remedied only by the intervention of the state.[484] In most of the cases, the Court discredited the state's theory of the vulnerable audience and invalidated the restrictions.[485]

In cases in the late 1930s and early 1940s, the Court struck down laws prohibiting the distribution of pamphlets in the streets or door-to-door.[486] The State had conjured up the specter of aggressive leafleteers forcing their tracts on unwilling recipients.[487] The Court concluded that audience self-help—refusing to take the pamphlets or throwing them away—was the proper remedy for unwanted speech,

480. *See supra* notes 192-93 and accompanying text.

481. *See, e.g.*, Hannegan v. Esquire, Inc., 327 U.S. 146 (1946); Winters v. New York, 333 U.S. 507 (1948); W. Va. Bd. of Educ. V. Barnette, 319 U.S. 624 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); United States v. Paramount Pictures, 334 U.S. 131 (1948).

482. *See, e.g.*, *Hannegan*, 327 U.S. at 146; *Winters*, 333 U.S. at 507.

483. Martin v. City of Struthers, 319 U.S. 141, 146-48 (1943) (holding city ordinance prohibiting door-to-door distribution of pamphlets to be unconstitutional); Murdock v. Pennsylvania, 319 U.S. 105, 114-17 (1943) (same); Saia v. New York, 334 U.S. 558, 562 (1948) (striking down an ordinance requiring a license for use of loudspeakers).

484. *See, e.g.*, *Martin*, 319 U.S. at 143-45; *Murdock*, 319 U.S. at 110-11.

485. *Martin*, 319 U.S. at 146-48; *Murdock*, 319 U.S. at 114-17.

486. *E.g.*, Lovell v. City of Griffin, 303 U.S. 444 (1938); *Martin*, 319 U.S. at 146-48.

487. *See, e.g.*, *Martin*, 319 U.S. at 144-45 (casting pamphleteers as analogous to nuisances subject to state regulation); Schneider v. New Jersey, 308 U.S. 147, 148-52 (1939) (considering ordinance seeking to "protect[] occupants and others from disturbance and annoyance").

rather than government restriction of expression.[488] In cases involving what we would now describe as hate speech, the Court similarly implied that audiences could and should respond rationally to inciting messages delivered in a provocative fashion.[489] In the 1949 case *Terminiello v. Chicago*, the Court invalidated the conviction of a racist street-corner speaker under a statute that prohibited public speech that created unrest.[490] The majority opinion noted that words spoken in person were more likely to "create[] dissatisfaction" or even "stir[] people to anger" than messages in print.[491] But it was precisely such inflammatory speech that was at the core of the First Amendment, Justice Douglas wrote for the majority, since a primary purpose of free speech was to invite impassioned debate.[492]

In *Saia v. New York*, the Court in 1947 struck down a local ordinance that required a license from the Chief of Police for the use of sound amplifiers for public speaking.[493] The State argued that the ban on loudspeakers was necessary to protect the peace of unwilling listeners; if they lived within earshot of the speaker, they could not avoid the message.[494] The Court invalidated the law because the

488. In the case *Lovell v. City of Griffin*, the Court invalidated city ordinances that prohibited the distribution of handbills or literature without permission from the city manager. 303 U.S. 444, 451 (1938). The licensing laws, as prior restraints, struck at the "very foundation of the freedom of the press by subjecting it to license and censorship." *Id.* In *Schneider,* the Court struck down prohibitions on the distribution of handbills and flyers, while in *Martin,* it struck down a local law prohibiting door-to-door distribution of pamphlets. *Martin*, 319 U.S. at 151-52; *Schneider*, 308 U.S. at 164-65.

489. 337 U.S. 1 (1949).

490. *Id.* at 5-6.

491. *Id.* at 4-5.

492. *Id.* at 4. However, in the 1942 case *Chaplinsky v. New Hampshire*, the Court initiated the "fighting words" doctrine and upheld a conviction for breach of peace in the case of a Jehovah's Witness protester who stood on the street and shouted religious epithets. 315 U.S. 568, 572-73 (1942). The Court found the words to be "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572. The same words, if written, might not produce the same effect; it was not the words themselves, but the "speaking" of them that was the trigger for the breach of peace. *Id.* at 573. *Chaplinsky* was the last case in which the Supreme Court used this "fighting words" doctrine. *See* Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH U. L.Q. 531, 531 (1980) (*"Chaplinsky* is the only case in which the Supreme Court has affirmed a conviction based on the defendant's expression of fighting words."). In *Kunz v. New York*, in which the majority invalidated on First Amendment grounds an ordinance that required a permit to speak on religious issues in public, Justice Robert Jackson, in dissent, similarly characterized using religious epithets as equivalent to "shouting fire in a theatre," noting that the same words in print would be "less apt to incite or provoke to mass action than spoken words, speech being the primitive and direct communication with the emotions." 340 U.S. 290, 298, 307 (1951) (Jackson, J., dissenting).

493. 334 U.S. 558, 563 (1948).

494. Brief for Respondent at 5, Saia v. New York, 334 U.S. 558 (1948) (No. 504), 1948 WL 47555 at *5.

licensing scheme allowed the police chief to exercise unfettered discretion over the content of the speech.[495] Implicit in the majority opinion was the assumption that unwilling listeners were not captive; they could avoid, resist, or mentally shut out the noise. Dissenting, Justice Felix Frankfurter asserted that while the unwilling audience could easily avoid written messages, it was impossible to escape the "aural aggression" of the loudspeaker, which was beyond one's "personal control."[496]

Yet in *Kovacs v. Cooper*, a subsequent case involving loudspeakers that upheld a ban on their usage, the Court reconsidered the communication effects question when it came to loudspeakers.[497] Justices Jackson and Frankfurter accepted the State's assertions about the unique harms to audiences posed by loudspeakers.[498] "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," Jackson wrote.[499] Analogizing films, which powerfully intrude on the consciousness of viewers, to loudspeakers, Frankfurter noted that "[m]ovies have created problems not presented by the circulation of books, pamphlets, or newspapers, and so the movies have been constitutionally regulated."[500] In a strong dissent, Justice Hugo Black disputed the majority's view of communication harms and argued that freedom of speech protects ideas regardless of the form of expression.[501] "This Court should no more permit this invidious prohibition against the dissemination of ideas by speaking than it would permit a complete blackout of the press, the radio, or moving pictures,"[502] he wrote in a statement that, in the words of one historian, "knocked the strongest pillar out from the *Mutual* decision."[503]

The impact of these cases on the anticensorship effort was twofold. The Court made clear that its assessment of whether or not a clear and present danger existed in any speech situation depended on its perception of harm to the audience, and in its assessment of potential harms, the Court would take into account the medium of communication.[504] As Justice Frankfurter noted in 1951, key factors in free speech analysis were the "mode of speech . . . regulated" and

495. *Saia,* 334 U.S. at 560-61.
496. *Id.* at 563 (Frankfurter, J., dissenting).
497. 336 U.S. 77, 86-87 (1949).
498. *Id.* at 96-97 (Frankfurter, J., concurring).
499. *Id.* at 97 (Jackson, J., concurring).
500. *Id.* at 96 (Frankfurter, J., concurring).
501. *Id.* at 102-04 (Black, J., dissenting).
502. *Id.* at 103.
503. CARMEN, *supra* note 3, at 41.
504. Niemotko v. Maryland, 340 U.S. 268, 282 (1951).

the effect of that mode on the listener.[505] Some forms of communication could create harms that were not remediable through self-help and in such cases, a deviation from normal free speech principles was warranted.[506] The effects of any mode of communication must be appraised individually; each medium, to repeat Justice Jackson's oft-cited phrase, would require a "law unto itself."[507]

At the same time, a majority of the Court adopted a presumption against communicative harms and rejected merely abstract or hypothetical speech injuries. Save in exceptional cases, audiences had the power and duty to resist harmful messages, or to defuse them through reason.[508] The Court indicated that in any future challenge to film censorship it would seriously appraise the potential effects of the cinema on the audience and would likely conclude that the harms posed by the movies were no greater than other media, or that any harmful effects did not justify the extraordinary measure of prior restraint.[509] In subsequent litigation over film censorship, the Court's presumption of a rational audience gave the ACLU and the MPAA an important tool to wield against the state's argument of powerful and pervasive media effects.

E. The Miracle

In 1949, the ACLU and the MPAA convened to discuss how to proceed with a test case in light of Justice Douglas' dictum in *Paramount*.[510] The organizations' lawyers debated whether it would be better to take three steps—first testing newsreels, then documentaries, then dramatic films—or to "first test news-reels and thus almost certainly get a favorable opinion from the U.S. Supreme Court."[511] Fears were again raised that an unfavorable distinction between newsreels and features might be made in a Supreme Court decision.[512] It was finally agreed that it would be best to include within the test all of the several classes of films censored.[513] The

505. *Id.* "A sound truck may be found to affect the public peace as normal speech does not. A man who is calling names or using the kind of language which would reasonably stir another to violence does not have the same claim to protection as one whose speech is an appeal to reason." *Id.*

506. *Id.* at 282-83.

507. *Kovacs*, 336 U.S. at 97 (Jackson, J., concurring).

508. *Id.* at 82-89 (majority opinion).

509. *See id.*

510. Memorandum of Conference between Sidney Schreiber, Phillip O'Brien and the Motion Picture Ass'n and Herbert M. Levy and Clifford Forster for the ACLU (Mar. 29, 1949).

511. *Id.*

512. *Id.*

513. "We think that the test should be set up so that the Court may squarely pass upon the censorship principle itself as applied to all classes of films, rather than to

ACLU and the MPAA now proposed, for the first time, to bring a test case that attacked the foundation of *Mutual* that argued that motion pictures, as a medium, were fundamentally similar to print media in their content and impact on audiences and were thus a part of the "press."[514]

During the following year, the ACLU and the MPAA pursued two test cases. One involved a film called *Pinky*, a serious drama about an African American woman who attempts to pass as Caucasian.[515] The censors of Marshall, Texas, denied an exhibition license on the grounds that the film was "of such character as to be prejudicial to the best interests of the people of [the] [c]ity."[516] An exhibitor showed the film anyway and was convicted. The MPAA dispatched a lawyer in an attempt to get the ordinance declared unconstitutional. The Texas Court of Criminal Appeals upheld the conviction, citing *Mutual*, and noting that movies had not "become propagators of ideas entitling [them] to freedom of speech."[517]

A subsequent case was brought over the film *Lost Boundaries*.[518] Produced by Louis de Rochemont, famous for his *March of Time* newsreels, *Lost Boundaries* was another "social problem" film that told the story of a black physician and his family, who passed as whites.[519] It was barred in Memphis by the chair of the city's censorship board because the film dealt with "social equality between whites and Negroes in a way that we do not have in the South."[520] An Atlanta censorship board also banned the film on the grounds that it would adversely "affect the peace, morals, and good order" of the city.[521]

De Rochemont's production company, with help from the MPAA and the ACLU, fought the Atlanta censor in federal court. The primary argument was that because of Justice Douglas's comment in *Paramount*, *Mutual* was no longer good law.[522] The district court

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pass merely on . . . the censorability of one or more particular classes of motion pictures," concluded a 1949 letter. Letter from R. Baldwin to Sydney Schreiber, Motion Picture Ass'n of Am. (Apr. 29, 1949).

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

515. PINKY (Twentieth Century Fox Film Corp. 1949).

516. Brief of Appellant at 2, Gelling v. Texas, 247 S.W.2d 95 (Tex. Crim. App. 1952) (No. 707), 1952 WL 82167 at *2.

517. Gelling v. State, 247 S.W.2d 95, 97 (Tex. Crim. App. 1952).

518. LOST BOUNDARIES (Louis De Rochemont Assocs., RD-DR Productions 1949).

519. *Id.*

520. Kupferman & O'Brien, *supra* note 445, at 276-77 n.28.

521. *Id.* at 285.

522. *See* Brief on behalf of the ACLU as Amicus Curiae, RD-DR Corp and Film Classics, Inc. v. Smith, 183 F.2d 562 (5th Cir. 1950) (No. 13205); *see also* United States v. Paramount Pictures, 334 U.S. 131, 166 (1948) [hereinafter ACLU Amicus Curiae Brief] ("[M]oving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment."); Mut. Film Corp. v. Indus. Comm'n

upheld the censor board's action based on *Mutual*.[523] De Rochemont appealed to the Fifth Circuit.[524] In its amicus brief, the ACLU argued that freedom of speech protected all existing means of communication:

> From the censor, the First Amendment defends the itinerant peddler of handbills, the street corner salesmen of lurid detective magazines, and the demagogue whose unaided voice attracts ten listeners in a park. In a time of many remarkable innovations in means of communication, regard for the principles of the First Amendment must reject an interpretation of "press" in terms of form rather than substance.[525]

The court rejected the argument, noting that *Mutual* had been followed "for more than a generation."[526] RD-DR filed a petition for certiorari, urging the Supreme Court to "take the final and explicit step, clearly foreshadowed by its more recent decisions, which would bring motion pictures into their rightful place alongside other media of communication to which the protection of the First Amendment is extended."[527] The Court declined.[528]

In the end, the film that eventually brought *Mutual*'s demise was a far cry from what either the ACLU or MPAA had intended or predicted. *The Miracle* was an Italian film directed by Roberto Rossellini and written by Federico Fellini.[529] It was one of a wave of avant garde foreign films that flooded the market after the *Paramount* decision and the demise of the studio system.[530] It told the story of a peasant woman who became pregnant after being seduced by a bearded stranger she believed to be St. Joseph; believing she had conceived immaculately, and scorned by her fellow villagers, she waited alone for the birth of her child, which she

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of Ohio, 236 U.S. 230, 389-92 (1915) (upholding the Ohio censorship law because it is "in the interest of the public morals and welfare to supervise" films).

523. RD-DR Corp. v. Smith, 89 F. Supp. 596, 597 (N.D. Ga.), *aff'd,* 183 F.2d 562 (5th Cir. 1950); *see also Atlanta Censor Sued*, N.Y. TIMES, Nov. 19, 1949 (reporting that RD-DR Corporation's counsel claimed that the Supreme Court had already granted constitutional protection to the motion picture).

524. The case, according to the briefs, marked the first time that a federal court was squarely called upon to extend to motion pictures the basic guarantees of the First and Fourteenth Amendments, which have long since been extended to other media of expression and communication. *See, e.g.*, ACLU Amicus Curiae Brief, *supra* note 522.

525. *Id*. at 12.

526. RD-DR Corp. v. Smith, 183 F.2d 562, 565 (5th Cir.), *cert. denied,* 340 U.S. 853 (1950).

527. Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit at 5, RD-DR Corp. v. Smith (Aug. 1950).

528. RD-DR Corp. v. Smith, 340 U.S. 853 (1950).

529. THE MIRACLE (Finecine, Tvere Film 1950).

530. *See* WITTERN-KELLER, *supra* note 3, at 110-11.

delivered in an empty church.[531]

The Miracle was licensed in New York and after the film's opening, it was attacked by the Legion of Decency as "'sacrilegious and blasphemous.'"[532] New York City's Commissioner of Licenses ordered the film withdrawn.[533] Joseph Burstyn, the film's distributor, challenged the action in state court.[534] The court ruled that the city license commissioner did not have the power to censor films, and within a week, the film was playing again.[535] The Legion again protested the movie and after a hearing, the state Board of Regents determined that the film was "sacrilegious," one of the proscribed categories under the state censorship law, and rescinded the license.[536] The film closed, and Burstyn appealed, assisted by the New York Civil Liberties Union.[537]

The intermediate appellate court held that movie censorship was within the state's police power and that the board's decision was not arbitrary or capricious.[538] New York's highest court upheld the ban, citing *Mutual Film* and noting the "unique problem" presented by the movies, with their "potentiality for evil, especially among the young."[539] That decision reaffirmed *Mutual Film*'s message and the lower court's declaration that "[m]otion pictures have been judicially declared to be entertainment spectacles, and not a part of the press or organs of public opinion."[540] Only Judge Stanley Fuld, in dissent, accepted Burstyn's argument:

> A belief does not lose its character as a belief, an idea does not become less of an idea, because, instead of being expressed by the air-borne voice, the printed word or the "still" picture, it is put forward by a "moving" picture. The First Amendment does not ask whether the medium is visual, acoustic, [or] electronic . . . .[541]

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531. WITTERN-KELLER & HABERSKI JR., *supra* note 6, at 3.

532. WITTERN-KELLER, *supra* note 3, at 112.

533. *Id.* at 112-13; *see* William E. Nelson, *Criminality and Sexual Morality in New York*, 1920-1980, 5 YALE J.L. & HUMAN. 265, 293-94 (1993). The licensing authority described the film as sacrilegious and filled with "'drunkenness, seduction and lewdness.'" *Id.* at 293.

534. Joseph Burstyn, Inc. v. McCaffrey, 101 N.Y.S.2d 892, 894 (Sup. Ct. 1951); *see also* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 506 (1952) (finding a New York statute allowing suspension of license to show films deemed "sacrilegious" an unconstitutional abridgement of free speech and press).

535. *McCaffrey*, 101 N.Y.S.2d at 893-94 (noting that state law vested the right to determine whether a motion pictures was sacrilegious solely in the State Education Department and the Board of Regents).

536. Joseph Burstyn, Inc. v. Wilson, 104 N.Y.S.2d 740, 742 (App. Div. 1951).

537. WITTERN-KELLER & HABERSKI JR., *supra* note 6, at 84.

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

539. *Id.* at 668.

540. *Wilson*, 104 N.Y.S.2d at 743.

541. *Wilson*, 101 N.E. at 681 (Fuld, J., dissenting).

A young civil liberties lawyer, Ephraim London, argued Burstyn's case before the Supreme Court, and the ACLU filed an amicus brief.[542] Burstyn contended that movies were, both functionally and as a matter of constitutional law, part of the nation's "press," and that in an age of media convergence, the conduit or form in which a message delivered was irrelevant to the basic right of free expression.[543] Furthermore, he argued,

> We are unable to follow the rationale of a decision that will recognize the comic strip as a vehicle of thought but will deny that recognition to motion pictures; that will concede the right of free press to a novel but will deny the right to a movie version of the same story . . . .[544]

The State insisted on the theory of the vulnerable audience and the cinema's "potential evil," noting that "[i]n the application of the First Amendment, the vehicle of communication is a governing factor."[545] The State further argued that "[t]he motion picture is not the equivalent of communication by 'tongue or pen' and that "[e]very member of the Court knows from personal experience that the vibrant, vivid, graphic portrayal in a motion picture has an impact that the lecturing voice of a speech, the cold type of the written page, the still picture in a magazine does not."[546] Burstyn attacked the State's media effects argument as "based on the undemocratic assumption that the people of the State are so morally weak that they will be corrupted by exposure to indecent or sacrilegious pictures."[547] He asserted that "[t]he conclusion that uncensored motion pictures present a danger to the public welfare and morality" had been proven by modern communications research to be "contrary to fact."[548]

A unanimous Supreme Court invalidated the New York censor law, finding that the censorship standard "sacrilegious" was unconstitutionally vague and that the law functioned as a prior

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542. Brief of ACLU and American Jewish Congress as Amici Curiae Supporting Appellant, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (No. 522), 1952 WL 82545. The claims advanced in the brief were that the statute violated freedom of speech under the First and Fourteenth Amendments, that it impinged on the right of free exercise of religion, and that the term "sacrilege" in the censor statute violated due process because of vagueness. *Id.* at 4-20, 26-54, 62-63.

543. Brief for Appellant at 11-15, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (No. 522), 1952 WL 82541 at *11-15 ("Today movies perform the same functions as other media of the press." In fact, "motion pictures, like other forms of the press, express ideas and opinions, disseminate information, proselytize and entertain.").

544. *Id*. at 12.

545. Brief for Appellees at 34, 41, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (No. 522), 1951 WL 82542 at *34, *41.

546. *Id.* at 34, 41.

547. Brief for Appellant, *supra* note 543, at 19-20.

548. *Id*. at 20.

restraint proscribed under *Near v. Minnesota.*[549] The Court overturned *Mutual Film* and rejected the argument that motion pictures lacked social value and "possess[ed] a greater capacity for evil . . . than other modes of expression."[550] The Court reasoned:

> [M]otion 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 . . . . 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.[551]

The opinion, in a footnote, cited studies by communications researcher Joseph Klapper supporting the "limited effects" model—that mass media do not by themselves sway the public's thoughts and behaviors, but rather reinforce preexisting beliefs and dispositions.[552]

The Court did not, however, categorically invalidate film licensing; instead, it reiterated its earlier conclusion that "[e]ach method [of communication] tends to present its own peculiar problems"[553] and suggested that a narrowly-drawn censorship statute designed to prevent the showing of obscene films might withstand constitutional scrutiny.[554] Although the Constitution did not require "absolute freedom to exhibit every motion picture of every kind at all times and all places,"[555] the "substantially unbridled censorship" exercised by the New York statute contravened the basic principles of freedom of speech.[556] The Court concluded that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. To the extent that language in the opinion in Mutual Film . . . is out of harmony with the views here set forth, we no longer adhere to it."[557]

F. Constitutional Convergence

The decision in *Burstyn* rested, in part, on media convergence. The Court invalidated *Mutual Film* not merely because World War I era police power jurisprudence could not be squared with modern free expression principles, but because *Mutual*'s assumptions about audiences' relationship to the screen, and the differences between the movies and print media, were no longer true. Movies presented

549. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503-04, 506 (1952).
550. *Id.* at 502.
551. *Id.* at 501.
552. *Id.* at 501 n.10; *see generally* KLAPPER, *supra* note 476.
553. *Joseph Burstyn, Inc.*, 343 U.S. at 503.
554. *Id.* at 505-06.
555. *Id.* at 502.
556. *Id.*
557. *Id.*

serious ideas and were an "organ of public opinion."[558] Like print journalism, motion pictures were an important medium of both amusement and information—purposes that were not at odds, according to the Court, but fully compatible.[559] The Court indicated its willingness to fashion free speech doctrine around the real-life, social conditions under which communications took place and to adopt a functional definition of the press.[560]

Despite the inclusion of the movies in the constitutionally protected press, the *Burstyn* Court was not willing to put movies completely on par with print media. A majority of the Court wanted to invalidate all pre-exhibition review of film as unconstitutional, but it compromised to achieve the vote of the more conservative members, who feared that such a sweeping ruling might impair the state's ability to control obscenity in film.[561] This tension persisted into the following decade. No one disputed that there were obvious, significant physical and technological differences between movies and print. The question was how much those differences should matter, if at all, for free expression purposes. Ultimately, something of a truce was reached. Pre-exhibition review of film was never explicitly declared unconstitutional, but decisions narrowed the scope of censorable material to unprotected expression—obscenity—and required any film licensing system to adhere to the same procedural safeguards that applied to injunctions to prevent the sale of obscene books.[562]

Between 1951 and 1957, the Court issued a series of per curiam opinions that reversed five state supreme court decisions upholding the banning of films by state censor boards.[563] In those cases, the challengers asked for a ruling declaring all film censorship unconstitutional, but the Court limited its decisions to the overbreadth of the statutory criteria— "immoral," tending to "corrupt

558. *Id*. at 501.

559. *Id*. ("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.").

560. *See id.* ("It cannot be doubted that motion pictures are a significant medium for the communication of ideas.").

561. *See* WITTERN-KELLER, *supra* note 3, at 142-43 (giving two theories for the unanimity of the decision); *see also* RANDALL, *supra* note 3, at 34 ("The Court's failure to address itself to the fundamental constitutional issue and to the question of procedural requirements was the price of a strenuous and salutary effort to provide judicial supervision at a time when judicial consensus was seemingly unobtainable.").

562. *See* Freedman v. Maryland, 380 U.S. 51, 60 (1965) (invalidating a Maryland censorship scheme).

563. Times Film Corp. v. City of Chicago, 355 U.S. 35 (1957); Holmby Prods. Inc. v. Vaughn, 350 U.S. 870 (1955); Superior Films v. Dep't of Educ., 346 U.S. 587 (1954); Commercial Pictures Corp. v. Regents of the Univ. of N.Y., 346 U.S. 587 (1954); Gelling v. Texas, 343 U.S. 960 (1952).

morals," and "harmful or conducive to immorality or crime."[564] The reason for the per curiam decisions was the inability of the Court to agree on the fundamental constitutional issue.[565] Lower courts interpreted the rulings in a variety of ways—to mean that all prior review of motion pictures was unconstitutional, that it was generally permissible, or that it was permissible to censor only when the material was obscene. In the mid-1950s, the highest courts of Ohio, Massachusetts, and Illinois invalidated their censorship laws, holding that they violated the First Amendment.[566] The New York Legislature amended its censorship statute to limit the coverage of the term "immoral" to films expressive of "sexual immorality."[567] Other states continued censoring without altering their statutes. In all states where censors operated, the number of ordered deletions dropped substantially, and few if any films were entirely banned.[568]

In its quest for a broad ruling holding all prior review of film unconstitutional, the ACLU and the MPAA pressed on the media effects argument, insisting that little if any evidence demonstrated that the movies posed particular dangers to audiences, even young viewers.[569] To this end, they drew heavily on communications research. The postwar era saw a boom in such research, a byproduct of the wartime expansion of the field of communications studies and also a contentious culture war in the 1950s.[570] At a time when many Americans felt under siege by an internal communist threat and perceived the existence of a more relaxed moral climate that allegedly produced such evils as promiscuity and juvenile delinquency, there were renewed efforts to ban or censor immoral or indecent expression, ranging from comic books to films to erotic literature.[571] Censorship advocates mobilized variants of the direct effects theory in an effort to link these social evils to media content.[572]

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564. ERIC SCHAEFER, "BOLD! DARING! SHOCKING! TRUE!" A HISTORY OF EXPLOITATION FILMS, 1919-1959, at 329 (1999) (alterations in original omitted); *see generally Times Film Corp.*, 355 U.S. at 35; *Vaughn*, 350 U.S. at 870; *Superior Films*, 346 U.S. at 589; *Commercial Pictures Corp.*, 346 U.S. at 589; *Gelling*, 343 U.S. at 960.

565. RANDALL, *supra* note 3, at 34.

566. Brattle Films, Inc. v. Comm'r of Pub. Safety, 127 N.E.2d 891, 892 (Mass. 1955); R.K.O. Radio Pictures v. Dep't of Educ. 122 N.E.2d 769, 771 (Ohio 1954); ACLU v. City of Chicago, 121 N.E.2d 585, 594 (Ill. 1954), *appeal dismissed*, 348 U.S. 979 (1955).

567. *See* WITTERN-KELLER, *supra* note 3, at 169.

568. Thomas B. Leary & J. Roger Noall, Note, *Entertainment: Public Pressures and the Law*, 71 HARV. L. REV. 326, 332 (1957).

569. *See, e.g.*, Brief of ACLU as Amicus Curiae Supporting Petitioner-Appellant at 11, Superior Films v. Dep't of Educ., 346 U.S. 587 (1954) (No. 217), 1953 WL 78566 at *11 [hereinafter Brief of ACLU as Amicus Curiae in Superior Films].

570. BUTSCH, *supra* note 40, at 124-125; *see* STAIGER, *supra* note 186, at 33-34.

571. HEINS, *supra* note 474, at 50-51.

572. *See* SCHAEFER, *supra* note 564, at 329.

In 1954, psychologist Frederick Wertham published a treatise, *The Seduction of the Innocent*, in which he argued that violent comic books were strongly correlated to juvenile delinquency.[573] Wertham and his advocates pushed for federal comic book censorship legislation.[574] The public interest stirred by the Wertham publication and similar studies led to a special congressional investigation into the relationship between juvenile delinquency and the media.[575] The overwhelming conclusion of the investigation was that violent media, including films, were unlikely to have a negative effect on the normal law-abiding child.[576] During the 1950s, similar battles were taking place in litigation over obscenity prosecutions. In *Roth v. United States*, in which the Court articulated the constitutional definition of obscenity and declared obscenity unprotected by the First Amendment,[577] amicus briefs filed by the ACLU and its affiliates drew on studies finding no causal relationship between obscenity and antisocial behavior.[578]

The film censorship cases in the 1950s thus became a stage for warring media effects research. In 1954, the distributor of a movie called *M*—the story of a psychopathic killer of young girls—challenged the Ohio state censor board's denial of exhibition on the grounds of immorality and argued that the censor statute was unconstitutional.[579] The Ohio Supreme Court affirmed the ban, and the case, *Superior Films v. Ohio*, was appealed to the U.S. Supreme Court.[580] The ACLU's brief drew on audience research and a detailed comparison of print-media content and film content to make the argument that movies presented no more of a threat to the public than magazines and newspapers.[581] Ohio justified the licensing decision on the alleged effect the movie might have on "unstable persons."[582] "No doubt the daily reports of crime and disaster in the newspapers and on the air, the pictures of pretty girls on magazine covers, the cheap editions which are now read by people who formerly never read a book . . . all could have such an effect on unstable persons," the ACLU argued, urging the court "not [to] attempt to pin prick out vague lines between different media based

573. HEINS, *supra* note 474, at 52-53.

574. *Id.* at 53-54.

575. *Id.* at 54.

576. *Id.* at 59.

577. Roth v. United States, 354 U.S. 476, 487, 492 (1957).

578. *See* Brief of Morris L. Ernst as Amicus Curiae Supporting Respondents at 30-31, Roth v. United States, 354 U.S. 476 (1957) (No. 582), 1957 WL 87528 at *30-31.

579. Superior Films, Inc. v. Dep't of Educ., 112 N.E.2d 311, 315, 318 (Ohio 1953), *rev'd*, 346 U.S. 587 (1954) (per curiam).

580. 346 U.S. 587 (1954).

581. Brief of the ACLU as Amicus Curiae in Superior Films, *supra* note 569, at 12.

582. *Id.* at 11-12.

on degrees of harm when the vital protections of the First Amendment are involved."[583] The MPAA's amicus brief drew on evidence that motion pictures do not "affect their viewers differently from other media which maximize the use of pictorial techniques."[584]

The State again rolled out and fired its well-used cannon. Citing the Payne Fund studies, it argued that the "vividness of the medium and its extraordinary capacity for conveyance of thought and emotional stimulus make it the most effective of all expression, with the concomitant dangers involved in its abuse."[585] The Supreme Court reversed the judgment in a per curiam opinion, citing *Burstyn v. Wilson*.[586] Justice Douglas wrote a concurrence in which he reiterated his desire for a ruling holding all prior censorship of films unconstitutional:

> Motion pictures are of course a different medium of expression than the public speech, the radio, the stage, the novel, or the magazine. But the First Amendment draws no distinction between the various methods of communicating ideas. . . .
>
> In this Nation every writer, actor, or producer, no matter what medium of expression he may use, should be freed from the censor.[587]

The next major ruling on film censorship, *Kingsley International Pictures Corp. v. Regents of University of New York*, fell into the same pattern of discussing the social-science debates and avoiding the constitutional question. *Kingsley Pictures* involved a film adaptation of the D.H. Lawrence novel *Lady Chatterley's Lover*, which was banned in New York as being "sexually immoral."[588] The film's distributor argued that the film licensing law was an unconstitutional prior restraint and that "[n]o evidence has yet been advanced to show that moving pictures present [a] clear and imminent danger of substantive evil . . . as to justify the drastic controls imposed by the licensing statutes."[589] The brief cited a 1954 study by the social psychologist Marie Jahoda that concluded "[t]here is a large overlap in content matter between all media of mass communication . . . . [and i]t is virtually impossible to isolate the impact of one of these media on a population that is exposed to all of

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583. *Id.* at 12, 20 (original emphasis omitted).

584. Brief of MPAA as Amicus Curiae Supporting Petitioner-Appellants at 26, Superior Films, Inc. v. Dep't of Educ., 346 U.S. 587 (1954) (No. 217), 1953 WL 78568 at *26.

585. Brief of Appellee at 13-14, Superior Films, Inc. v. Dep't of Educ., 346 U.S. 587 (1954) (No. 217), 1953 WL 78567 at *13-14.

586. Superior Films, Inc. v. Dep't of Educ., 346 U.S. 587, 588 (1954).

587. *Id.* at 589 (Douglas, J., concurring).

588. 360 U.S. 684 (1959).

589. Brief for Appellant at 15, Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959) (No. 394), 1959 WL 101358 at *15.

them."[590] The audience did not "take in everything [in the media] but mostly what he is predisposed to take."[591] The Court invalidated New York's censorship statute, holding that the licensing standard of sexual immorality was in effect a bar to the discussion of ideas,[592] but reserved judgment on the question of whether "the controls which a State may impose upon [film] . . . are precisely coextensive with those allowable for newspapers."[593] Douglas, concurring and joined by Black, again argued that the First Amendment allowed "no room for any censor whether he is scanning an editorial, reading a news broadcast, editing a novel or a play, or previewing a movie."[594]

By 1960, the Court had not fully accepted the press-screen analogy, but it did appear to be inching closer to a position limiting prior restraints on film to the exceptions that existed for the press. In the 1957 case *Times Film Corp. v. City of Chicago*, the Court reversed the Chicago censors' decision to ban the film *Game of Love* as immoral and obscene but used as authority a nonfilm case, *Roth v. United States*,[595] which held that while obscenity was not protected by the First Amendment, the treatment of sex was not synonymous with obscenity.[596] After 1957, it was widely accepted that prior restraints on film could exist only in cases of obscenity.[597]

The constitutional question was at last broached in the *Times Film Corp. v. City of Chicago* case of 1961.[598] In *Times Film*, the producer of a non-obscene film, *Don Juan,* refused to submit his film for review in Chicago and challenged the city's licensing system and the constitutionality of all pre-exhibition review of films.[599] The debate proceeded along familiar lines. In its amicus brief, the MPAA, citing research approving the limited effects model, argued that the impact of the movies on individual audience members could not be measured with any sophistication and "therefore [could not] form any

590. *Id.* at 16 (quoting MARIE JAHODA, THE IMPACT OF LITERATURE: A PSYCHOLOGICAL DISCUSSION OF SOME OF THE ASSUMPTIONS IN THE CENSORSHIP DEBATE 44 (1954)).

591. Brief for Appellant, *supra* note 589, at 16.

592. *Kingsley,* 360 U.S. at 688 ("What New York has done, therefore, is to prevent the exhibition of a motion picture because that picture advocates an idea—that adultery under certain circumstances may be proper behavior. Yet the First Amendment's basic guarantee is of freedom to advocate ideas.").

593. *Id.* at 689-90.

594. *Id.* at 697-98 (Douglas, J., concurring).

595. Times Film Corp. v. City of Chicago, 355 U.S. 43, 49-51, 77 (1957) (per curiam); *see also* Times Film Corp. v. City of Chicago, 244 F.2d 432, 433, 436 (7th Cir. 1957).

596. Roth v. United States, 354 U.S. 476, 485-87 (1957).

597. *See* NEVILLE MARCH HUNNINGS, FILM CENSORS AND THE LAW 219-20 (1967).

598. 365 U.S. 43, 44-45 (1961) (considering whether a municipal law was unconstitutional because it facially constituted a prior restraint, prohibited by the First and Fourteenth Amendments).

599. *Id.* at 44; RANDALL, *supra* note 3, at 35.

logical basis for establishing a difference in treatment."[600] The ACLU, which also filed an amicus brief, contended that "[u]ltimately, all arguments which seek to justify motion picture censorship rest upon the premise that motion pictures have a greater 'capacity for evil' than do the older media of communication. . . . The plain fact, however, is that every medium of communication is dangerous."[601]

Five members of the Court voted to uphold the city's power to license films, noting that to accept Times Film Corp.'s argument that constitutional protection "includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture" would be to strip the state of its right to prevent obscenity in film.[602] Four members of the Court dissented, led by Chief Justice Earl Warren, who wrote that the decision "comes perilously close to holding that not only may motion pictures be censored but that a licensing scheme may also be applied to . . . every other medium of expression."[603] The decision was so disturbing to the radio, television, and book industries that they joined with the MPAA in a "mutual defense pact" and unsuccessfully requested a rehearing.[604] But the decision did not have the effect that was feared. Despite the *Times Film* decision, the highest courts of three states found that motion picture censorship violated the free speech provisions of their respective state constitutions, with inspiration drawn from Chief Justice Warren's dissent.[605] "In eleven appellate decisions" during the next two years, "the censors were not once upheld on the merits."[606] As a result, the number of functioning state censorship boards declined, with almost twenty ending up inactive or totally disbanded.[607] By January 1963, only four state censorship boards remained.[608]

In 1965, *Freedman v. Maryland* issued the final blow to film censorship when the Court held Maryland's censorship law unconstitutional for failure to incorporate procedural safeguards.[609]

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600. Brief for Motion Picture Ass'n of Am. as Amicus Curiae Supporting Petitioner at 21, Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961) (No. 34), 1960 WL 98602 at *21.

601. Brief of ACLU as Amicus Curiae at 9, Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961) (No. 34), 1960 WL 98600 at *9.

602. *Times Film Corp.,* 365 U.S. at 46, 50.

603. *Id*. at 75 (Warren, C.J., dissenting). In his dissent, Chief Justice Warren wrote, "I am aware of no constitutional principle which permits us to hold that the communication of ideas through one medium may be censored while other media are immune." *Id*. at 51.

604. *See* WITTERN-KELLER, *supra* note 3, at 222.

605. *Id*. at 223.

606. *See* RANDALL, *supra* note 3, at 39.

607. DE GRAZIA & NEWMAN, *supra* note 3, at 104.

608. RANDALL, *supra* note 3, at 40.

609. 380 U.S. 51, 59-61 (1965). As Justice Douglas pointed out in his dissent, "the Chicago censorship system, upheld . . . in *Times Film Corp*. . . . could not survive

The Court held that the state censorship apparatus failed to provide for prompt judicial review of the censor's ruling, that it failed to provide that the censors must either license a film or take the matter to court where they would carry the burden of proving the film unprotected expression, and that it failed to provide for prompt judicial determination on the merits.[610] Though the majority did not state that movies were entitled to the same degree of protection under the First Amendment as other forms of speech, *Freedman* eroded much of the rationale for treating motion pictures differently from print.[611] The *Freedman* Court limited the holding in *Times Film* to the narrow and abstract proposition that a prior restraint is not "necessarily unconstitutional under all circumstances," effectively the standard for print.[612] The opinion cited only to decisions involving print media, and the majority gave as an example of a permissible film licensing procedure the "New York injunctive procedure designed to prevent the sale of obscene books," which "postpone[d] any restraint against sale until a judicial determination of obscenity following notice and an adversary hearing."[613]

In the wake of *Freedman*, the end of government film censorship came swiftly. Following the decision, several states and municipalities had their censorship statutes overturned.[614] The MPAA abolished the Production Code in 1966 and replaced it with a softer form of censorship.[615] In 1968, in response to *Ginsberg v. New York*, in which the Court had approved limited censorship of books and films to protect child audiences,[616] the MPAA instituted an age-based rating system administered through its new Code and Rating Administration.[617] The censorial impulses did not die, but rather set to work on other, seemingly more imminent threats, such as violence on television and rock and roll. All of the censor boards were dismantled by the mid-1960s, except Maryland's, which operated

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under today's standards." *Id.* at 61 n.* (Douglas, J., dissenting).

610. *Id.* at 58-59.

611. *See* Corn-Revere, *supra* note 16, at 276. In 1982, the Court would describe films as one of the "traditional forms of expression such as books." New York v. Ferber, 458 U.S. 747, 771 (1982).

612. *Freedman*, 380 U.S. at 53 (emphasis omitted) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 n.10 (1963)).

613. *Id.* at 60 (citing Kingsley Books, Inc. v. Brown, 354 U.S. 436, 440-43 (1957)).

614. WITTERN-KELLER, *supra* note 3, at 245. Statutes were overturned on procedural grounds in the states of "Maryland, New York, Virginia, and Kansas, as well as [cities of] Chicago, Ft. Worth, Providence, and Detroit." *Id.* Local censorship ordinances in "Ohio, Massachusetts, and Pennsylvania, Oregon, and Georgia [were] declared . . . in violation of their state constitutions." *Id.*

615. *See id*. at 277.

616. 390 U.S. 629, 637 (1968).

617. WITTERN-KELLER, *supra* note 3, at 277.

until 1981.[618]

VI. CONCLUSION

In the end, the medium mattered and at the same time, it didn't. The public believed—and still appears to believe—that there are real and meaningful differences between images and words, between pictures on the movie screen and in a book and on television. At the same time, we have been willing to ignore these distinctions when the functions, styles, and uses of different media overlap and blur. As we have seen, critics in the interwar years noted the illogic of holding newspapers and newsreels to different constitutional standards. In the 1950s, they pointed out the absurdity of a legal structure that allowed banned films to be shown on television.[619] Many today attack the different First Amendment standards applied to broadcasting and print.[620] Media convergence has historically been accompanied by calls for legal change—that the law should adjust to reflect the new communication context.

Media convergence was not the only factor behind *Burstyn* and the fall of movie censorship. There were many other forces at work, as I have highlighted—changing moral standards, demographic shifts, a growing anticensorship ethos, and the birth and development of a civil libertarian doctrine and theory of free speech. And yet the real-world changes in the communication environment played an important and often overlooked role in leading the Court to extend the guarantees of freedom of speech to the motion picture medium. In *Burstyn*, the Court demonstrated its willingness to consider a new medium protected by the First Amendment when convinced that the medium had similar effects on its audiences and

618. *Id*. at 270.

619. *See* WITTERN-KELLER & HABERSKI JR., *supra* note 6, at 128.

620. *See generally* Fred H. Cate, *Telephone Companies, The First Amendment, and Technological Convergence*, 45 DEPAUL L. REV. 1035, 1057-61 (1996) (discussing how the Court has assumed that the differences in the new forms of media justify applying different First Amendment standards); Corn-Revere, *supra* note 16, at 345 (discussing how mass media is converging into the "Multimedia Age" and how it will break down "the system of regulatory and constitutional classification that has defined the First Amendment status of electronic media"); Thomas Krattenmaker & L.A. Powe Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719, 1723 (1995) ("As communications technologies converge, it will be impossible for the Supreme Court to continue to rely on its bipolar . . . print-broadcasting models."); Matthew Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990, 990-92 (1989) (criticizing the Court's use of "scarcity" as a characteristic justifying the government's ability to regulate radio broadcasting); Adam Thierer, FCC v. Fox *and the Future of the First Amendment in the Information Ag*e, ENGAGE, Feb. 2009, at 143 (discussing the "old and new rationales" justifying the application of varying First Amendment standards to the broadcasting industry, and concluding that it has "never been justified" and should not "survive in our new era of media abundance and technological convergence").

similar social functions as the traditional press. This dynamic has been repeated with other new media technologies.

In *Reno v. ACLU*, the Court held that full free speech protection applied to the Internet because of its similarities to the traditional press.[621] In particular, the Court noted that users' high level of control over their access to the Internet parallels the autonomy that readers of print media enjoy when they choose when, how long, and how quickly they will look at a printed page.[622] The content of the Internet is coextensive with the range of diverse information one might find in magazines, newspapers, and books,[623] and the Internet itself is a form of print media, encompassing "not only traditional print and news services, but also audio, video, and still images."[624] Because none of the Internet's properties suggested any constitutionally relevant differences from traditional print, the Court concluded that there was "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."[625]

In the 1930s, radio was held to be outside the scope of the First Amendment because it was considered mere entertainment.[626] Seven years later—after radio had become an important news medium—the Court declared it to be protected by the First Amendment, albeit to a lesser extent than print media.[627] The reason for the diminished protection was spectrum scarcity—there were fewer opportunities for would-be speakers to access broadcasting, compared to print media, which warranted greater state control over broadcast content.[628] In 1978, in *FCC v. Pacifica Foundation*, which upheld the FCC's power to impose fines on broadcasters who aired indecent content, the Court announced another reason for a reduced First Amendment standard for broadcasting.[629] Because children were presumably unable to resist or avoid the harmful effects of a message delivered through the powerful, sensational media of radio or television, and because those media are highly accessible to children, the government could impose restrictions on indecent broadcasting, which would be impermissible if applied to print.[630] Broadcasting was

621. Reno v. ACLU, 521 U.S. 844, 869-70 (1997).

622. *Id.*

623. *Id.* at 870.

624. *Id.*

625. *Id.*

626. *See* Trinity Methodist Church, S. v. Fed. Radio Comm'n, 62 F.2d 850, 851, (D.C. Cir. 1932).

627. *See* NBC v. United States, 319 U.S. 190, 226-27 (1943).

628. *Id.* at 226; *see also* Red Lion Broad. Corp. v. FCC, 395 U.S. 367, 388-89 (1969) (holding that "Congress unquestionably has the power to grant and deny licenses and to eliminate existing stations" because of limited frequencies).

629. 438 U.S. 726, 749-50 (1978).

630. *See id.*

dissimilar to print because of its presumed effects on the vulnerable child audience.[631]

Yet, in a 2010 decision involving the FCC policy on "fleeting expletives," the Second Circuit questioned whether this distinction between broadcasting and fully protected media applied in light of media convergence.[632] Although it did not rule on the constitutionality of the *Pacifica* standard, the court queried whether *Pacifica*'s rationale made sense at a time when new technological means[633] allowed parents to control their children's broadcast consumption, and when children themselves had perhaps become less vulnerable to broadcast indecency because of frequent exposure to it in other media, such as cable television, "Youtube, Facebook, and Twitter."[634] In other words, the idea that children were likely to be harmed by material when it appeared in one medium, but not another, made little sense in a world where children are highly media savvy, are exposed to a variety of different media daily, switch between them in the blink of an eye, and use different technologies and means of communication for similar and overlapping purposes. Implying that the Supreme Court might overturn *Pacifica* for these reasons, the Second Circuit, like the *Burstyn* Court, suggested that the idea that the fundamental guarantees of the First Amendment applied with different force to different media made little sense in a world where our media experiences have converged.[635]

Similar debates about media effects and media convergence have arisen in litigation over the constitutionality of restrictions on the sale of video games. In *Brown v. Entertainment Merchants*

631. *Id.* at 749.

632. Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 319 (2d Cir. 2010).

633. The V-Chip, for example, can be used to block programs from a television. *V-Chip—Putting Restrictions on What Your Children Watch*, FCC, http://www.fcc.gov/guides/v-chip-putting-restrictions-what-your-children-watch (last visited May 5, 2012).

634. *Fox Television*, 613 F.3d at 326; *see also* FCC v. Fox Television Stations, 129 S. Ct. 1800, 1821 (2009) (Thomas, J., concurring) (noting that changes in technology and culture have "eviscerated the factual assumptions underlying" *Pacifica*).

635. *See Fox Television*, 613 F.3d at 327. It could be said that the broadcasting example contradicts the pattern of convergence I have described—broadcasting arguably converged with print media and the movies many decades ago. That courts are now only beginning to seriously consider the logic behind the differential First Amendment treatment of broadcasting would seem to indicate that convergence has little effect on doctrinal development—or at least that there may be a substantial lag between social convergence and constitutional convergence. I believe there is in fact a lag in the case of broadcasting that can be attributed to two factors: the scarcity rationale for differential treatment and the influence of mobilized interest groups on the public debate over violent and "indecent" television. Perhaps with even greater persistence than the film censorship advocates, these groups have successfully mobilized "direct effects" research correlating television violence with violent behavior in children. *See generally* HEINS, *supra* note 474, at 246-47.

Association, a 2011 case involving a California ban on selling violent video games to youth, the Supreme Court characterized video games as fully protected speech, citing *Joseph Burstyn, Inc. v. Wilson* for the proposition that "the basic principles of freedom of speech . . . do not vary" with a new and different communication medium.[636] The majority noted that media effects research had failed to demonstrate greater harms caused by video games than other media and suggested that violent video games are no more likely to incite violent behavior in children than other, fully-protected media forms such as films, cartoons, and even such classic literary works such as *The Odyssey* and *Grimm's Fairy Tales*.[637] The majority observed that California's attempt to restrict video games was one of many historical efforts, including movie censorship, to quash protected expression based on an unfounded belief in the medium's capacity for evil.[638] As the MPAA noted in its amicus brief, "the advent of new forms of media is closely followed by efforts to control and censor."[639]

There is some truth to these assertions. Since movies entered the cultural scene at the turn of the last century, if not earlier, we have been sensitive to the conduits, vehicles, and media of human communications. We have recognized that the medium is the message—that the meaning of an idea cannot be entirely disaggregated from the form in which it is conveyed and that some media may amplify harmful messages in ways that should appropriately raise our concerns.

At the same time, our historical experience with the movies taught us to see how mass media, and our experiences with them, are never static. Media technologies evolve, and cultures evolve. Media panics are defused as we become familiar with new media and integrate them into our lives. New media become less threatening and foreign when we see their similarities with old media, and when new media and old media converge. The continuous evolution of media technologies and media cultures poses a formidable challenge for the law. Technology is driven by rapid change, yet the legal order depends on stability and predictability. As Robert Corn-Revere has aptly put it, "we are left with an evident paradox. On one hand, the law is criticized for failing to keep up with innovations. On the other,

636. *See* Brown v. Entm't Merch. Ass'n, 131 S.Ct. 2729, 2733-34 (2011) (explaining that new categories of speech cannot be said to be unprotected by the First Amendment solely because the legislature finds them "shocking") (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952)).

637. *Id*. at 2736-39.

638. *Id*. at 2737.

639. Brief for the Motion Picture Ass'n of Am. as Amici Curiae Supporting Respondents at 25, Schwarzenegger v. Entm't Merch. Ass'n, 131 S. Ct. 2729 (2011) (No. 08-1448), 2010 WL 3697195 at *25.

it seems that the . . . law is undermined if it changes too quickly."[640] This story of the movies has offered one example of how the doctrine of free speech—perhaps clumsily, and against great opposition—caught up with the technological and social realities of a media convergent environment. How the law will adapt to the present convergence of communications is a story that is just unfolding.

640. Corn-Revere, *supra* note 16, at 285.