HOW MACHINES CAME TO SPEAK

Jennifer Petersen

MEDIA TECHNOLOGIES AND FREEDOM OF SPEECH

Sign, Storage, Transmission
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and Lisa Gitelman

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CONTENTS

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Introduction

The "Speech" in Freedom of Speech

> *Congress shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech, or of the press*; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> —**First Amendment, US Bill of Rights**

The First Amendment that most Americans hold dear is an invention of the twentieth century. But what was behind this invention? The conventional explanation is that the set of expressive freedoms we know as free speech—the right to speak one's mind in a public space, to engage in offensive and dissenting speech or gesture, to craft aesthetic expressions of our inner states or selves—was forged through social movements and changes in political culture and legal thought. These histories are concerned primarily with the boundaries and purpose of democratic communication (e.g., the various normative bases or "theories" of free speech in legal theory) or shifts in social and moral parameters of the law (e.g., what is obscene)—in other words, they focus on the "free" in free speech. But the very conception of what constitutes expression—or the "speech" in free speech—has also changed during this period. At the dawn of the twentieth century, the "speech" of free speech referred to oratory and printed material. It was a narrow category populated by public speakers, pamphleteers, authors, and publishers. A plethora of activities that we would consider expressive, eligible for First Amendment protection today, would not have made sense as speech to early twentieth-century legal practitioners. Activities such as

burning flags, naked dancing, wearing symbols (such as black armbands), producing and displaying abstract art, or sitting in silent protest would not have been considered relevant to the First Amendment.

In the twenty-first century, questions about how to understand algorithmically generated speech, the role of algorithms in curating and amplifying the speech of users online, and more are provoking deep questions about the applicability and direction of First Amendment law. Whether a body of law developed under conditions of information scarcity can prove adequate to conditions of information abundance and whether utterances produced significantly by computational processes (and not only the decisions and judgments of their human designers) count as speech are pressing questions. Such questions are not only about freedoms but also about the nature and meaning of speech and expression. In order to answer these questions, we need to look at how "speech" has been constituted as an object of legal knowledge and action.

This book does just that, constructing a genealogy of the "speech" in free speech. In doing so, it rematerializes speech, showing how communication technologies and their surrounding concerns animate First Amendment law. By shifting the locus of inquiry and analysis from rights and freedoms to the legal conception of speech undergirding legal decisions in free speech cases, I show that changing media technologies and discourse on communication were important drivers in the twentieth-century transformation of how we understand and adjudicate free speech in the United States. Current legal doctrine and political rights have technocultural roots, as do some of the entrenched contemporary contradictions and impasses of free speech law and discourse.

It is, I argue, no accident that the First Amendment went through its reinvention, from granting a narrow right to speak and print (linguistic) messages to a broad right of political and aesthetic expression, at the same time as the means of communication were undergoing a radical transformation. New media technologies changed the way ideas circulated in the public sphere and even more basically the activities involved in public communication. The phonograph and photograph captured sound and images, preserving for the record what was formerly a fleeting event. Silent film conveyed stories and ideas not through words but through images and physical gestures, reanimating events and performances that had transpired in the past. And the radio uncannily extended the aura of the human voice beyond the bounds of physical copresence, in an odd mixture of intimacy and publicity.[1]

The adoption of new communication technologies not only extended communication but also in many ways transformed it. These new technologies quite literally placed people in different relation to one another as communicants. The printing press had allowed the lone writer to address an anonymous public of readers; it also provided the idea that anyone could be a pamphleteer or propagandist.[2] Film and radio, on the other hand, made most people into audiences more than proto-publishers. Today, in using the internet and mobile media, users produce information that is read by machines; we all are in a sense broadcasters, unwittingly signaling our location and interests to databases and data brokers. In these ways, communication technologies structure and restructure our very ability to speak, as well as the actions that constitute speech and its social meanings.

In the face of these changes in the material means and social possibilities of communication, philosophers, sociologists, religious leaders, politicians, and journalists all weighed in on the nature and function of communication as well as the ways in which it might go awry and imperil society. This proliferation of the means of and discourse on communication, which began in the late nineteenth century and became institutionalized in universities by the midcentury, presented new tools and questions about the nature and limits of "speech" in the law. Sites such as early twentieth-century sociological studies of influence, midcentury mass-communications research (in social psychology, sociology, political science, and finally its own discipline), and cybernetics provide many of the metaphors and models of communication that animate legal definitions and categorizations of expression. In this way, when we look into the legal constitution of freedom of speech, we find a discourse full of machines.

Take, for example, the history of the public forum. It is well known as an example in a progressive history of the First Amendment, in which more and more freedoms are granted to expression. In this case, it was the freedom to organize and discuss economic issues like work conditions. In the late 1930s, the mayor of Jersey City, New Jersey, Frank ("Boss") Hague, was notoriously anti-union, working hard to quash union organizing in the city. In 1937, Hague prevented the Committee for Industrial Organization (CIO) from distributing pamphlets and holding a mass meeting, going so far as deploying police to beat those assembled. The CIO took to the courts, bringing the case all the way to the Supreme Court. The Court handed down a landmark decision in the case, *Hague v. Committee for Industrial*

Organization (1939), stating that the public had a First Amendment right to gather and speak in public streets and parks. Such places were "public forums" dedicated to people's use and discourse, and no local official could determine who would and would not be allowed to speak in such places. Cities could no longer refuse to let labor organizers—and, in the years that followed, picketers and other peaceful protestors—use public venues to address a broad audience.[3]

This much is well known. Less well known are the terms and reasoning in the case, or the activities that were rendered as expressive. The decision and the rationales for it were deeply entwined with radio broadcasting. As Samantha Barbas has shown, the judges and justices who crafted the public forum were redressing the problems of radio: that a few broadcasters controlled access to the main platform for public discussion. The public forum was to be a platform for the working man.[4] But even more, the ways in which speech was defined, or the activities considered expressive in the case, reflected this media environment. In many prior cases, the Court had defined "speech" as the expression of personally held ideas, opinions, or beliefs. In *Hague v. CIO*, in contrast, the communication at issue was not expressing an idea but rather passing along or repeating ideas that originated elsewhere. The CIO emphasized that what they sought to do was to distribute copies of the National Labor Relations Act.[5] The literature they were distributing, then, was not technically expressing or publicizing the group's beliefs or convictions. It was not publicizing or making known something new, or expressing any original individual thought or view, as in many earlier First Amendment cases. In earlier cases, as is elaborated in chapter 1, the Court had defined speech and publication as an act of bringing something new to light. Speaking and publishing were uses of words, which represented ideas. And ideas resided in the minds of men. To speak or publish was thus to externalize such personal mental states or activity. In distinction, in *Hague v. CIO* and a set of related cases, the Court clarified that freedom of speech not only covered the freedom to speak or publish one's own sentiments (to express one's thoughts or ideas) but also contained a right to distribute information that might originate elsewhere. In this broadening of the scope of free speech, the expressive rights of individuals were re-articulated in a form that resembled the current media environment. Rather than authors publishing their ideas or interlocutors in an argument, the speakers protected by First Amendment law might act more like the transmitters or relays that enabled radio broadcasts to reach broad, unseen audiences. This decision, which momentously granted rights to the

members of the public to access and use public places for advocacy and dissent, did so through conceptualizing the speech of the petitioners, and the broader public, in the shape of radio transmissions.

Moments like this, in which the justices rearticulate the meaning or scope of speech or the press, are an incredibly important, but overlooked, part of the history of free speech. Like many instances in this history, *Hague v. CIO* is usually understood as a case in which the Court recognized and expanded civil liberties through freedom of speech. In this understanding, the focus is on the articulation of rights to a formerly disenfranchised group of speakers. It is usually a plot point in a progress narrative, of the ongoing expansion of political rights to more different types of citizens and their expression. Such histories are common in both legal and media history, and they focus on the history of the rights and liberties accorded to expression. Freedom is the variable; the character and form of speech or expression, in contrast, is a constant. *How Machines Came to Speak* adds to and complicates such understandings by demonstrating the speech in free speech to be historically contingent, and its historical trajectory to be multidirectional and textured rather than linear and progress-oriented. It constructs a genealogy of "speech" as a legal category, showing how the substance and nature of expression have been articulated differently within legal documents and arguments in different historical moments, and the often surprising sources of knowledge and experience that have given form to the category.[6] In doing so, it draws on insights and methods of media studies and science and technology studies to analyze the constitution of legal knowledge about expression and the instantiation of this knowledge in the legal code.

Speech and the Politics of Classification

Today, the prevailing legal knowledge is that the "speech" of free speech law is not coextensive with commonsense understandings of speech—or communication more broadly. It does not cover every utterance we would colloquially call "speech." And it includes much we would not (such as instrumental music or burning a flag). It is often used as a shorthand to encompass both the speech and press referenced in the First Amendment and is interchangeable with the more general term "expression" (as in "freedom of expression"). It is, in other words, a term of art.[7] I argue, however, that the need for a term of art—the abstraction of the legal terminology from

common parlance—is an artifact of the growing complexity of communication wrought by the development of media technologies in the twentieth century. Even as the speech in free speech has become a term of art, there has been no coherent and broad agreement about what exactly this technical term encompasses.[8] In the absence of clear conceptual definitions, justices evaluate questions of whether a particular artifact, medium, or action is an example of "speech" or "the press" by referring to earlier technologies, common sense (and experience), and contemporaneous discourse. In other words, technology and culture have shaped the legal term of art.[9]

These evaluations are important. Normative debates about how and why speech should be protected and the outcomes of precedent-setting legal decisions get most of the attention in discussions of free speech law, but modest classifications do much of the work. In First Amendment decisions, the simple determination of whether an action or artifact counts as speech or a form of expression is an important site where the scope of the law is determined. Before determining the outcome of a First Amendment case, the judges or justices must agree that the law even applies. Such decisions about coverage (does the law apply?) are places where the boundaries and limits of freedom of speech are determined, though often without a great deal of scrutiny or justification. Discussions of coverage are sites of classification, or category construction.

Science and technology studies scholarship has shown how classification and category construction enact political and moral judgments under the aegis of semantics or purely technical decisions.[10] This is true as well in the law, in which the classification of an issue or event—and the analogies employed—determines how a particular dispute is framed and discussed, which legal principles are involved, and what existing law (precedents) bind or direct legal decisions.[11] As the legal scholar James Boyle observes on this phenomenon: "The moment of typing, classifying and defining becomes the moment of moral decision. It is a fundamental way of *avoiding* moral decision for the same reason. The thing-like or reified nature of categories can operate to obscure a moral issue, to resolve by pre-theoretical definition an issue that would be troubling and painful if faced directly."[12] I take this to heart in considering speech law. In particular, this book suggests that many pivotal moments of free speech law have revolved around questions of what can be classified as speech (versus, for example, commerce or action) rather than around the more obvious questions of censorship, the extent of rights, or when the state can regulate speech in the name of public safety or national security. The moral and political stakes

of the latter discussions are explicit and on display. The moral and political stakes embedded in the former classification schemes are harder to read.

This focus on classifications takes me away from the typical trajectory or historiography of free speech, which focuses on precedent-setting cases that carved out new speech rights or qualified the ability of the state to regulate speech (i.e., established standards like "clear and present danger" or "incitement"). Such precedent-setting cases do show up in this book, but they show up more often as endpoints, places where a new conception of speech, crafted in earlier, less remarked-on legal decisions, is put into play. At center stage are, instead, cases that test the boundary of speech—often cases involving communication via a new medium that did not conform to prior definitions of speech. For example, silent films presented the Court with the question of whether the projection of images of pantomime, or telling a story through physical gesture, was a form of speech or publication—or something else entirely. Radio presented the Court with an act of communication that required multiple operators in order to be completed, raising the question of which of these operators was the speaker. And computer code presented the lower courts with questions of whether a set of instructions to a machine could be considered speech.[13] The novel claims in such cases test the boundaries of the category of speech; they ask that implicit, assumed boundaries are explicitly stated, contested, and, at times, adjusted. Such cases highlight questions distinct from the more commonly analyzed cases outlining the parameters under which the state can limit expression (e.g., obscenity and incitement). Yet, as I show here, these less-famous cases and the less-obvious questions they posed have often been among the factors that determine the outcomes of more famous, precedent-setting cases.

One of the upshots of the legal trajectory assembled here is that rulings about what counts as speech not only have different, more diverse, and mundane underpinnings than what is captured in histories that focus on law and social movements, but also involve moral and normative assessments—moral and political stakes that are obscured by the seemingly neutral language of classification—beyond those discussed by most scholars interested in the First Amendment. In legal scholarship, determinations of what counts as speech are usually construed as functions of underlying normative goals, such as the protection of individual autonomy (and/or self-fulfillment), the ability to self-govern, a safety valve for dissent, and the search for truth.[14] Instead, as I will show, legal decisions concerning the parameters of speech itself are bound up in the development, use, and

implications of media technologies—and the concerns about influence, access, and agency that go along with them.

The politics of how the legal category of speech is constituted goes far beyond normative concerns with truth, self-governance, stability, or autonomy. The moral stakes that are obscured in acts of the categorization of communication have to do with definitions of personhood, agency, and citizenship. Speech has long been entangled with such definitions in Western thought. In this tradition, speech suggests more than just communication. We are happy to say that trees, animals, machines, or institutions communicate. To say they speak is a more tendentious claim. Speech has been a mark of what distinguishes humans from these others. This was perhaps most famously articulated by René Descartes, for whom speech was uniquely human, a symptom of the soul; the ability to speak is what set "man" apart from both animals and machines.[15] Both machines and animals (e.g., parrots) might utter words, Descartes argued, but these words were not speech, because they were mere imitation (not their creation) and did not imply understanding.

At the beginning of the twentieth century, the term "speech" retained many of these Cartesian connotations. It signaled individual agency and creation, the externalization of mind and will. It was used to refer to transfers of meaning in which ideas were exchanged, objects represented, turns taken, and minds persuaded. Speech was self-evidently different from physical acts, from brute force to mere mechanical parroting. This distinction is sedimented in the separation of speech and conduct in First Amendment law. At the turn of the twentieth century, the distinction between the two seemed relatively straightforward. Speech was the ephemeral expression of interior mental states and ideas; the freedom to express or publicize these ideas was at the core of the First Amendment and liberal notions of freedom. It was based in a set of ideas about expression and publicity that drew both on the role of printing in the nineteenth century and on conceptions of the individual in liberal political thought. In contrast, action was physical conduct, with material consequences to person or property; as such, it was subject to legal regulation and constraint. At the center of this distinction was a seemingly clear line between regulating bodies and regulating minds. The former was necessary, while the latter was illegitimate and illegal. Not coincidentally, this meant that when workers, feminists, anarchists, and others assembled (say, in strikes, marches, or other forms we call protest today), these gatherings could be understood as displays of brute force or coercion, rather than expressions of dissent or advo-

cacy. The mind-body distinction rendered mute idioms associated with the body—and with the poor, workers, women, African Americans, and immigrants. For example, forms of agitation from efforts to unionize workers or protest labor conditions and the hunger strikes of imprisoned suffragettes were treated as forms of disruptive conduct.[16] The way in which speech was defined and opposed to bodily action was bound up in broader discriminations. Bodies and physicality were key to the boundary drawing in each.

While this distinction is still an important one in culture and in law, changes in communication have made it harder to draw the line between speech and conduct, bodies and minds. In the late 1930s and early 1940s, justices began to consider some physical actions, like saluting the flag and picketing, as expressive and thus protected by the First Amendment. These cases gave rise to a new legal category of speech—alternately labeled symbolic speech, expressive conduct, or speech plus—in which actions doubled as utterances.[17] For most of the twentieth century, the problem of expressive conduct centered on when human bodies and their actions were immune from regulation and when they were subject to restraint (e.g., can they be restrained from burning draft cards, sitting in silent protest, dancing without clothes?).

Just as embodied forms of communication were being included in the legal conception of speech, a strain of legal discourse and argumentation turned away from bodies and individuals entirely. Rather than discussing speakers and their rights, jurists began to discuss speech without speakers, and the flow of ideas and information. Information flows on its own much better than ideas, which tend to get stuck in the minds and bodies of individuals. In legal decisions from the latter half of the twentieth century, speech was increasingly equated with information, which might be either the product of individual acts of expression or the output of institutions or machines. In this shift, it was not so much that speech was disembodied (it was already disembodied in a different way in the early twentieth century) but that the terms of this disembodiment changed. In the early twentieth century, speech and opinion were differentiated and abstracted from corporeality, understood as sites of primitive urges and action. In the latter part of the twentieth century, in contrast, speech was disarticulated from particular human speakers. Judges and justices began to debate and regulate speech without reference to the particular speakers involved—or to their rights or interests.

This way of reasoning about and ruling on speech was, I argue, associated with systems, in which the sources of speech were interchangeable

and might even be unclear. Rather than being structured around acts of advocacy, persuasion, publication, and dialogue, this understanding of speech is structured around the flow of information disarticulated from particular speakers, sometimes from human speakers entirely. In reasoning about speech without speakers, the judges and justices advance what I call a "posthuman conception of speech." I use the label of posthumanism somewhat differently, and with different conclusions, than do scholars like N. Katherine Hayles or Rosi Braidotti.[18] More than dematerialization, what is posthuman about some strains of recent legal reasoning is the way speech is disarticulated from persons and the ways in which agency and subjectivity have been redescribed in the process. In calling this conception of speech posthuman, I want to draw attention both to the way that this line of reasoning disarticulates messages from speakers and to the way that minds, thoughts, and beliefs have become less central to free speech law. I mean to highlight as well the drift in sources of knowledge or expertise that inform legal reasoning about the nature and boundaries of expression, from sociology, psychology, and philosophy (which I characterize as broadly humanist) toward economics and engineering.

The posthuman conception of speech is a way of defining expression that fits, or benefits, communication systems as much as or more than it does individual subjects. Within this posthuman conception, it becomes possible to argue that freedom of speech protects not persons but messages (artifacts). In this, the locus of legal protection and equality shifts from human actors to artifacts, and it is messages themselves that deserve equal protection, whether produced by machines, commercial entities, or individuals.[19] What is posthuman here is the ability to adjudicate rights without reference either to the particular agents who might claim them or to the different social interests involved.

This genealogy, then, shows how the liberal conception of speech as an index of a human mind was joined, and in some instances replaced, by a conception of speech in which individual agents are no longer central to create a complex and contradictory set of legal approaches and political outcomes. The posthuman conception of speech has not replaced the liberal humanist one; rather it exists alongside and in tension with it today. It is arguably the contradictions between the two that animate controversies over recent Supreme Court decisions regarding corporate speech. Saying that an op-ed, monetary exchanges, and patients' medical records all convey information and thus are equal as utterances obscures important differences among them. The conception of speech employed by the

Court in *Citizens United v. Federal Election Commission* (2010), in which the Supreme Court argued that corporations had speech rights, focused solely on the flow of information. The intent of individuals—and notions of individual reason, soul, or responsibility that go with these—has little place in such classificatory logics. Yet granting free speech rights to such entities seems to provide them with liberties associated with human agents (rights-bearing individuals) and, more broadly, with traditional liberal notions of agency. I would suggest that much of what is unsettling about decisions like *Citizens United* and similar cases (e.g., granting corporations immunity from regulation based on religious convictions) is just this mixture of liberal humanist conceptions of speech and posthuman ones.

New technologies and ways of talking about communication made these changes possible and, in some cases, gave them shape. In this process of influence, I suggest, the law and the rights people enjoy (or not) are not only sociocultural but also *technocultural artifacts*. In the genealogy traced in the following chapters, technologies of communication have offered new mechanisms and models for human communication and, in so doing, shifted legal conceptions of what it means to speak.

Historicizing Freedom of Speech

In order to introduce this genealogy, it may be helpful to have first an outline of the history of free speech jurisprudence. In what follows, I offer a condensed retelling of the dominant historiography of free speech law in the United States. In doing so, I aim to provide a framework for the chapters that follow, to introduce readers to the major themes and fault lines in the development of free speech law in the United States, and to highlight my intervention.

Histories of the "Free" in Free Speech

Per the dominant historiography, modern legal interpretations of the First Amendment emerged in the 1920s and 1930s in reaction to the governmental censorship of dissent in World War I (largely the result of the Espionage Act of 1917 and anti-immigrant sentiment and politics).[20] In the nineteenth century, freedom of speech had primarily been understood as an absence of prior restraint (laws explicitly restricting speech or publication on a particular topic or requirements of governmental approval before publication)

and was primarily adjudicated at the state level.[21] Generally, speech was considered a right and a responsibility, in which speakers might be held responsible after the fact for any negative effects of their speech, and the right to speak was thought by many to hinge on property rights (as in the saying that freedom of the press belongs to those who own them).[22] In the twentieth century, this nineteenth-century tradition evolved into a more robust free speech doctrine that greatly reduced the ability of the state, or the social majority, to restrict unpopular speech—what is often termed "the civil libertarian turn." This civil libertarian interpretation of the First Amendment prioritized robust debate and a plurality of views and voices as essential to democratic political processes. Protecting minority speech—often, unpopular speech—was essential to such debate and to democracy. Zechariah Chafee Jr. was the chief architect of this tradition, and Justices Oliver Wendell Holmes Jr. and Louis Brandeis were among its first converts.

This history is often painted as a more or less linear progress narrative, in which the ability of the state to regulate citizen speech in the name of security is steadily diminished and the rights of unpopular speakers (e.g., socialists, Jehovah's Witnesses, striking workers, civil rights activists) are protected. The restriction of regulation is understood as a liberal triumph that has produced a uniquely tolerant cultural and legal framework in contemporary US speech law.[23] Such histories, which dovetail with narratives of American exceptionalism, construct a simple heroes-and-villains template to deal with a set of highly complex issues that would better be painted in shades of gray.[24]

As others have pointed out, the civil libertarian turn was complicated and not uniformly progressive. Legal historians like David Rabban and Laura Weinrib point out that this civil libertarian turn, with its emphasis on political speech, overshadowed a host of other, more radical turn-of-the-century visions of freedom of speech. Feminists, utopian movements, and labor reform movements defined freedom of speech in broader and more cultural, radical, and often embodied terms, to include discussion of sex and birth control, a right to public nudity and other sexual and aesthetic forms of expression, as well as boycotts and agitation for workers' rights.[25] For many of these radicals, freedom of speech was not an end in and of itself but a means toward social justice and equality. Such expansive understandings of freedom of speech were eclipsed by the civil libertarian tradition that focused on political discourse and public opinion as the core terrain of the First Amendment. This civil libertarian tradition has given us broad protections against governmental interference in citi-

zen speech, protecting primarily against the creation of laws that restrict speech (though not many protections against the various ways that private entities like media outlets, or even the actions of other citizens, may restrict the ability of some to speak).[26] It provided the grounds for the "two-tier" system we have today, in which political speech is at the core of what the First Amendment protects ("pure speech") and other forms of speech (e.g., artistic, sexual, commercial) are more peripheral—a system that reifies a historically contingent and gendered public-private divide, often devaluing forms of speech associated with sexuality and reproduction or the home.[27]

The civil libertarian turn, in which justices became more solicitous toward freedom of speech and more attentive to the rights of dissenting speakers, from Jehovah's Witnesses to socialists, became the dominant approach of both free speech advocates (e.g., the American Civil Liberties Union) and Supreme Court justices by the late 1930s. The justices abandoned practices like the bad tendency test, in which lawmakers could restrict speech if they could convince judges that the expression in question had a vaguely defined "tendency" to harm public safety or morals, in favor of policies that protected dissenting or unpopular speech. (In its place, the justices in the 1930s required that lawmakers demonstrate that speech posed a "clear and present danger" to justify regulation, which would be replaced by the narrower exception for "incitement" to imminent lawless action in the 1960s.) They recognized pamphlet distribution (by unpopular religious minorities), strikes, and flag salutes as protected speech. In the 1940s, the Court sought to redress the imbalance in access to the venues of public speech wrought by mass media, designating the city streets and sound trucks as vehicles for working-class speech, making it harder for local authorities to regulate speech in such venues.

While the Court in the 1930s and early 1940s had sought to redress power imbalances and the way economics structured the ability to speak, by the late 1940s the Court was becoming more agnostic on the economics of speech.[28] That the Court should be concerned only with speech, abstracted from the economic conditions that might structure it (which were, on this theory, better addressed by the legislature), became orthodoxy in the 1950s and 1960s, so that even the progressivism of the 1960s did not reach to economic issues of access, or the way that economic inequalities structured the ability to speak. The 1960s saw the formalization and expansion of some activities—for example, wearing black armbands and the often silent occupation of segregated spaces utilized by civil rights

activists—as expressive conduct.[29] The decade also saw an expansion in the modes and manner of dissent, so that by the beginning of the 1970s the emotional tenor of profanity was protected as well as the general sentiment in a statement such as "Fuck the draft!"[30] Yet, as progressives note, this liberalism stopped short of addressing one of the deep problems of power of the era: the economic barriers of entry to the public sphere created by the dominance of commercial media systems and infrastructure.[31] Even in recognizing the right of the public to receive information in broadcast communication, the Court stopped short of attempting to create opportunities for the public to speak via the airwaves (a right of access). For some progressive legal scholars, the civil libertarian tradition had ossified into a formalism that was not only impartial (content neutral) but also impassive in the face of what many argued was the structural unraveling of the conditions necessary for democracy.[32]

This historiography renders the fact that the major beneficiaries of free speech law today are corporations as a hijacking of the freedoms of free speech. It follows that the answer to today's pressing problems resides in shifting the articulation of our expressive freedoms: new ways of articulating rights or new ways of invoking older traditions (e.g., forgotten progressive legal arguments, overlooked strains of liberalism or republicanism).[33] While the dominant historiography and prescriptions such as these teach us much about how we got to where we are today—and I find the "old" materialist arguments about the decoupling of speech and economics very powerful and persuasive—they overlook a significant portion of this history. Legal and media histories have been so focused on the "free" in free speech that changes in the deployment of free speech arguments as antiregulatory tools (or "weapons") naturally appear as political realignments—as in the idea, current at the moment, that conservatives have taken over free speech arguments, or liberals have abandoned them. In these arguments, the speech being fought over is a neutral ground, around which political affiliations shift. What these analyses miss, or even occlude, is that the ground is not stable; what counts as expression has changed in ways that have fundamentally altered what freedom of expression means. Take, for example, the expansion of speech rights in the 1930s and 1940s to include picketing and displaying or saluting a flag. These were not just expansions of existing expressive freedoms. Marching in the streets with or without signs and bending one's body to salute the flag are all activities (conduct); in being classified as expressive, these actions were turned into utterances.

This is not so much the expansion of an existing freedom as a transformation of the terrain on which a freedom is enacted, a right claimed.

If we ignore this history, we miss the broader stakes of contemporary battles over free speech—and the tools necessary to address the future of free speech. To bring into focus these stakes, and the technocultural forces shaping free speech law today and into the future, we need to change the scope of our analysis. Discussions of legal theory, precedent, or even liberalism are not sufficient to understand the vagaries of free speech law and opportunism. To understand or respond to the deep contradictions and corruptions of free speech law and discourse today, we need to understand the terrain on which the law is made: how different objects and actions are or are not read as expressive—and the normative considerations underpinning this categorization.[34] And in order to grasp this history, we need to attend to another set of material and discursive circumstances: those that constitute media history.

Toward a Media History of Free Speech

In 1789, when the First Amendment was drafted, the matter of mediation was not so diverse as it is today. The scope of freedom of expression was clear: the free speech clause of the amendment specifically guaranteed that Congress would not abridge "freedom of speech, or of the press." I argue that these were not vague sentiments at the time, but rather highly specific references to the primary technologies of publicity of the day: oratory and the printing press. In the eighteenth and nineteenth centuries, the law was quite clear and specific about the mechanisms of communication it covered. The meaning of speech and the press only became abstract, subject to debate and redefinition, after the means of mediation multiplied. It was only after these different, competing media opened up questions about whether communication in these different fora—or channels—counted as speech that the lay and technical meanings of speech diverged.

I argue that the First Amendment has always been shaped in subtle and overt ways by technology. It has, in other words, *always been a technocultural artifact*. This becomes clearer in the twentieth century. It was already true, however, in the eighteenth. In particular, the US guarantee of free speech bears the imprint of the printing press. The US Constitution was not crafted as a rare artifact, in which authority is invested in the original, but rather as a public, print document. It was printed and disseminated via newspapers so that everyone could hold a copy. In this way, it circulated

as a symbol of public sovereignty and governmental transparency.[35] Both the logistics and the logic of print were essential to the founding and to the legal culture it inaugurated. As scholars such as Michael Warner, Benedict Anderson, and Jürgen Habermas have argued, the printing press and circulation of printed matter have played a central role in defining the culture and norms of publicity that have defined democracy in the United States and Western Europe.[36] The First Amendment was crafted in this context, defining expressive liberties in terms of print technology and practices of public oration.[37]

The scope of the First Amendment was clear, a given, for many years. It was not until the proliferation of new technologies of communication—in particular, new technologies of mass communication—that the categories of speech and the press became matters of concern, the subject of deliberation and debate. In the late nineteenth century, developments like the buildout of a communications network via the telegraph and the introduction of media such as silent film and the radio were changing the experience of communication and also providing alternatives to the written or spoken word. Telegraphy turned words into invisible electrical signals by transferring words into a code and transmitting them via pulses of electricity—a seeming dematerialization of the word, a reversal of the work of writing and print.[38] Phonographs and photographs created systems of inscription to rival print (in which not only words but also sounds and images constituted "the record").[39] Telegraph and then radio networks physically and culturally connected the nation.

The newness and plurality of such media and their cultural ramifications made communication more visible and more curious. Communication became something to think about. In the late nineteenth century, communication became a rallying cry for public figures and politicians (religious figures, mentalists, and utopians alike) and an object of study for scholars trying to understand the changing society around them. From Charles Horton Cooley to George Herbert Mead and Robert E. Park, turn-of-the-century philosophers and sociologists placed communication at the center of their analyses of society, as would the generation of communication scholars that followed them, breaking away from fields such as sociology and political science to forge the new field. In the bodily metaphor for society common at the time, communication and the technologies that enabled it became the nervous system (the transportation system was the skeleton): the mechanism for coordinating the social body and public action, from voting and writing to more abstract notions of social unity and peace.[40]

For law as well, communication became strange. What once was a simple matter, taken for granted, became ambiguous. The proliferation of the means of communication, coupled with a proliferation of discourse on communication (especially as an essential component of politics and social organization), denaturalized old assumptions and created the necessity for thinking through and defining "speech." New modes of transmission, sending electrical signals or the human voice great distances over a wire, and new modes of inscription, recording ocular and aural data for posterity, sat alongside the old. These new media of inscription and transmission, by virtue of operating parallel to the spoken and printed world—and at times superseding it—highlighted the particularity of each. With print as only one of several means of publication of the news, it became necessary to ask whether the press referred to the act of publishing or to a particular social institution (the news). The rise of mass media like film and radio changed what it meant to speak, but it also increased the distance between speakers and audiences. With these changes to the means and meanings of public communication, a question opened and became pressing that would have, before this period, seemed too obvious to merit consideration: What is speech?

Plan of the Book

In the chapters that follow, this book investigates the ways that this question has been posed and answered at various moments in the history of free speech law. The question first appears in a 1915 case involving the censorship of film. There are no doubt many reasons for this. The fact that a case made it to the Supreme Court, that the claim that moving images should be protected under freedom of speech was credible, no doubt had to do with several sets of factors. As detailed in chapter 1, free speech claims were on the rise at the beginning of the twentieth century, both in popular discourse and in court. And businesses were turning to the law, and to the Constitution in particular, for protection from regulation. But this fact also had to do with the way that the medium raised questions about what it meant to speak. Film presented a new method and manner of conveying ideas that was difficult for judges and justices to place or classify. If moving pictures spoke, they did so largely without words. In this, the new medium raised many questions. Did the mute gestures of the actors communicate the same types of ideas as words? What types of thought or ideas must be

conveyed in order for a communication to be considered speech? What exactly were the organs of public opinion?

The book is arranged around such legal encounters, moments in which judges and justices engage in the work of defining and bounding the category of speech. Film and then radio, computer code, and algorithms have presented examples of communication that have troubled what legal scholars Jack Balkin and Reva Siegel define as the "regulatory scene": the background understandings (here, about the nature and purposes of communication) that provide coherence and meaning to legal principles.[41] These encounters provide the organizing structure of the book. In these cases, questions are raised and the legal category of speech solidified or revised—often with repercussions that are evident later in other areas of speech law (e.g., union organizing, as in *Hague v. CIO*).[42] Analyzing the ways that speech is defined—and redefined—across such cases brings to the fore a set of concerns and questions that are invisible within histories focused on the "free" in free speech. For example, how does one draw the line between speech and action (whether silent embodied gestures or processes carried out by computers)? How should we recognize the interests of listeners within a freedom of speech defined around individual acts of expression or publication? And how do we locate and define speakers in instances of distributed communication (whether via radio or in algorithmic processes and publications)?

The book opens with the first of these encounters, over whether silent motion pictures could be considered speech. Famously, in *Mutual v. Ohio* (1915), the Court answered no. Motion pictures were not speech. Examining the decision in *Mutual* and the legal briefs submitted by each side in the case alongside two other early film cases, the chapter examines how and why film was placed outside the category of expression. The reasoning employed to explain why films did not count as expression or opinion sheds light on how judges and justices of the day defined speech. It was not only that films were commercial entertainments that made them unfit for the category. They were also, more fundamentally, of a different order: copies rather than original publications, and closer to action or physical conduct than to ideas. It was a form of communication associated with the body, likened to the work of influence on crowds, as figured in turn-of-the-century social psychology and elite political fears of the crowd (which was understood to be composed of immigrants, workers, African Americans, and other less than fully formed citizens, such as women and children). Speech, in contrast, was defined in terms of an idealized rational and "civ-

ilized" discourse and public opinion, associated at the time primarily with the medium of print. Speech was, in many ways, defined in terms of a particular technology (print) and a population (educated white men).

Almost thirty years later, the Court would expand this definition of speech to include forms of expression formerly associated with crowds. In a 1943 case involving compulsory flag salutes in schools, the justices argued that (some) embodied gestures or actions could be considered speech. This seeming reversal, I argue in chapter 2, was the result of the debates about propaganda and the new mass media in the interwar years. The experience of propaganda highlighted the fact that the written and spoken word operated through irrationality and illegitimate vectors of influence, much like those attributed to film. The experience of propaganda taught elites that the frailties of reason formerly projected on "primitive" peoples were endemic in the public. In this context, it was unreasonable to think that only rational ideas merited protection. The legal conception of speech, borrowing from academic and popular discourse on communication, expanded to include the vague relays of connotation, suggestion, symbols, and embodied gestures. The case changed the terms and terrain of expression, laying the ground for later articulations of "expressive conduct" as well as for the inclusion of more sensational communications (including film) within the scope of free speech.

Chapter 3 takes up a different set of cases being decided in the 1930s and early 1940s. In these decisions, the justices were pioneering a parallel conception of speech as the dissemination of information, in which individual intent and authorship were no longer central or even essential. In cases dealing with the seemingly disparate problems of how to address the interests and rights of radio operators and the listening public and cases involving the rights of workers and religious minorities to distribute literature, the justices focused on freedom of speech as a right to distribute information or ideas, reconceptualizing speech rights in the shape of radio transmissions. In thinking about speech, the justices in these cases focused on messages and their distribution more than speakers and their individual rights. The chapter locates the conditions of emergence for this message-centric approach to speech not only in the social good theory of speech (political understandings of freedom) but also in the technical and cultural problems of radio (and to a lesser extent newspapers) in the 1930s. Radio in particular "spoke" via a technological and commercial structure that troubled the traditional link of speech to the mind of a particular speaker. Technically, radio broadcasts required the operation of several different people.

Rather than a deep analysis of a case or two, this chapter traverses a range of cases in order to demonstrate the development of a broad new conceptualization of speech without speakers.

Chapter 4 focuses on how this articulation of speakerless speech was taken up and used in the 1970s, to argue for the protection of messages created by corporate actors (who were not natural persons or holders of First Amendment rights), in decisions involving advertisements and corporations' involvement in elections. The chapter argues that these legal holdings were a logical extension of the earlier formulation of speech as the distribution of information, with a twist. By the 1970s, it was common in fields from communication to economics to conceptualize communication as a flow of information or data, from producer to recipient, thanks to the rise of both information theory and computation. In these cases, the posthuman conception of speech as an abstract, systems phenomenon, is realized. The locus of analysis of such communication was less the intent or sentiments of its producer and more the circulation of the message itself. In the hands of conservative justices in the 1970s, messages became the locus of equality and of the analysis of free speech claims. In other words, the freedoms of speech were not articulated to persons but rather to messages, artifacts of human communication.

While the Court has been happy to classify money as speech and to recognize corporate speakers under this posthuman conception of speech, the judicial approach to computational communication has not been so expansive. Chapter 5 examines how lower courts (where these cases have been heard to date) have responded to claims that computer programs and algorithmic outputs are speech. In cases involving the First Amendment status of computer code and algorithmic outputs, judges have returned to questions about speech and conduct and human will. At the dawn of the twenty-first century, in other words, we see a reprise of some of the debates that were current at the turn of the previous century: action versus expression and a definition of speech as the expression of human agency and intention. Yet much has changed in the way these debates play out in the legal decisions, the rationales employed, and the conclusions drawn. The notion of expressive conduct has been radically disembodied, and the subjectivity associated with speech has become technical and even perhaps mechanical. The terms of speech and speaking subjects in the law have, in other words, undergone a fundamental revision. The book concludes with a discussion of the political and social implications of this revision.

Media Technologies and Law: A Note on Method

In proposing a technologically driven history of free speech, I mean to highlight that media are not epiphenomenal but more foundational, even infrastructural, to freedom of speech; freedom of speech is not just applied to media but exists in and through media technologies. Other key drivers of legal change—wars and national politics; the activities and agitation of workers, dissidents, religious minorities, and social movements; and broader cultural shifts—have been described well elsewhere.[43] They become background in this book to bring to the fore the way changes in the means of communication—in the development of media technologies and industries—have shaped the legal category of speech through which speech rights are defined and exercised.

This is not just technological determinism. These communication technologies did not arrive on the scene autonomously, separate from society and politics. Yet, the shape of the technologies we devise and adopt matters. In adopting new communication technologies, we say yes to a host of implications, social roles, dynamics, and protocols. The affordances and implications of these media, in turn, enable different forms of social organization, politics, and knowledge.[44] When media are new, these implications are remarkable. The social roles favored, or in some instances created (as in the telephone), are evident and often subject to debate. The particularities of mediation—the social roles of communicants, ideas about perception or the archive, the divide between public and private—are subject to discussion, evaluation, and adjustments. Protocols and habits of use must be defined and adopted. That is, new media draw attention to or reflection on communication: the processes via which we engage in it, the social roles and power dynamics involved.

In making an argument along these lines, Lisa Gitelman compares media to scientific instruments. Both must be made to work or to represent. Once adopted, the particularities and partialities of each form of instrument are normalized and we see only the matter measured, the idea conveyed—the content. The mechanics of representation fade from view. It is only when such instruments are new, broken, or antiquated that we attend to the particularities of their instrumentality.[45] Similarly, the implications of mediation—the way that novel means of communication transformed the act of speaking, the social roles and dynamics of communication—were once subject to debate and discussion. My focus in this

book on early legal cases in which judges and justices confront and categorize media technologies when their means of mediation and communication were new, their codes and protocols remarkable, builds on this approach to technology.

As this focus suggests, my approach to legal decisions and texts is more cultural than legal in the strict sense of the discipline. My methods are discursive and archaeological. I understand legal documents and decisions as historical documents or texts. In analyzing these texts, I am less interested in their specific outcomes (their holdings) than in the arguments employed and the reasons given. Rather, I am interested in the law as discourse, which both archives historical conceptions of communication and, given the instrumentality of law, puts them into practice. I work to excavate these understandings, or statements about "speech," within the discursive and material context of their use. To do so, in the chapters that follow, I draw on the history of media technologies and infrastructures, the way they changed everyday acts and experiences of communication, and the way they shaped the knowledge created about communication.

The cases assembled here show that media technologies are central to free speech law in that they provide the experience and models that help populate and concretize the category of speech. The creation of symbolic speech, or the recognition that some actions can speak, is found in the experience of mass-mediated propaganda, the rise of radio, and concerns about latent meaning in communication research of the 1930s. And the notion of speech as the flow of information—a concept central to the free speech formalism that has in recent years expanded the speech rights of corporations—has its origins in the debates over radio in the 1930s and the mathematically inflected theories of communication that gained popularity after World War II. These concepts shape the application of the First Amendment today. If our speech rights today are shaped by past media and the debates that surrounded them, what will the future of free speech law and discourse look like? What current mediated interactions will offer new ways of defining speech in future legal cases? Computers literally speak for us in call centers and speak to us in "personal assistants" like Siri and Cortana; they petition for us via programs like Resistbot; armies of simple bots troll for various interested parties online in political campaigns and culture wars alike. As our choices of news, books, music, and other cultural artifacts become more

algorithmically driven, the authorship and intent of our preferences blur amid a hive of collective taste and the processing of machines.

This genealogy of the "speech" in free speech can give us new tools for talking about the First Amendment and for intervening in current and future legal debates. In unearthing a different set of sources that have shaped the legal category of speech—from technology to the production of knowledge about communication—I suggest a different way of talking about contemporary and future First Amendment decisions and a different set of precedents to anchor these arguments. In demonstrating the influence of technology and discourse on communication on free speech law, I point to an important area for media and legal historians and theorists to explore. In showing the historical variation of a category that is in practice either treated as technically settled or too evident to merit rigorous definition, I hope to make "speech" strange.

NOTES

Introduction

1. See Mattelart, *Mapping World Communications*; Carey, *Communication as Culture*, 201–230; Gitelman, *Always Already New*; Sterne, *Audible Past*; Peters, "Uncanniness." I borrow the reference to the uncanny aspect of radio from Peters.

2. Print and print circulation are key to many theories of the public from Jürgen Habermas's *Structural Transformation of the Public Sphere* to Michael Warner's *Letters of the Republic*.

3. Before *Hague v. CIO*, municipalities commonly viewed city streets and parks as the property of city government and saw the local police power to regulate activity in the interest of public safety and convenience as a reason to deny access to those who wished to speak on divisive means. In the early twentieth century, city ordinances and permitting practices often denied unions, socialists, anarchists, and feminists from speaking in public places. For more on the specifics of the unionization efforts in Jersey City and Mayor Hague's opposition to the CIO, see Casebeer, "Public."

4. Barbas, "Creating the Public Forum." The term "public forum" was likely borrowed from radio, where forums were staged as a means of granting citizen access and making a space for dialogue in the new broadcast medium.

5. They were, of course, seeking a broader right of advocacy, but the terms of the argument and decision emphasized the reserved activity of passing along public information. In doing so, the legal team for the CIO was building on a recent decision that had ruled that the First Amendment guarded not only against restrictions on publication but also on distribution: *Lovell v. City of Griffin*, 303 U.S. 444 (1938). That these cases made their way to the Court shows that the question of whether distribution was part of the expression covered under freedom of speech was not clear.

6. It is a genealogy in the Foucauldian sense; see Foucault, "Nietzsche, Genealogy, History"; and Foucault, *History of Sexuality*.

7. See Schauer, *Free Speech*.

8. Legal theorists have noted the lack of a clear, coherent definition or theory of speech in the law. See, e.g., Post, "Recuperating"; Greenman, "On Communication"; Bezanson, *Art and Freedom of Speech*; and Tushnet, Chen, and Blochner, *Free Speech beyond Words*.

9. Leslie Kendrick argues that commonsense or popular meanings have shaped this term of art. My analysis here adds specificity and historicity to what constitutes this common sense. Kendrick, "First Amendment Expansionism."

10. Bowker and Star, *Sorting Things Out*; Suchman, "Do Categories Have Politics?";

11 On the role of precedent in legal reasoning, see Dworkin, "Law as Interpretation"; and Lakier, "The Problem isn't the Use of Analogies."

12. Boyle, *Shamans, Software, and Spleens*, 144. He references determinations such as who counts as "men" under the law and what counts as "speech" as two examples of such covert moral determinations, or avoidance.

13. The Supreme Court has not yet decided a case involving the legal status of computer code or programs; to date, district court decisions are the most authoritative.

14. The most common normative theories are (1) individual self-fulfillment or liberty, (2) the search for truth (or, alternately and more skeptically, the idea that the marketplace is a better arbiter of truth than the state), (3) self-governance (democratic decision making), and (4) social stability (that discourse and debate are vehicles for incremental social change, as opposed to more abrupt and violent revolution). See, e.g., Sunstein, *Democracy and the Problem of Free Speech*; Emerson, "Toward a General Theory"; and Schauer, *Free Speech*.

15. Descartes, *Discourse*.

16. The hunger strikes staged by suffragettes in the 1910s to publicize the conditions of imprisonment and to advocate for their classification as political prisoners were a form of publicity, an attempt at public speech from behind prison walls, but were not legally legible as such. The examples of labor protests are discussed further in chapter 1. For more on the way that the speech of people associated too closely with the body is rendered mute, see Anzaldúa, "Speaking in Tongues"; Bordo, *Unbearable Weight*; and Warner, *Publics and Counterpublics*.

17. While they are commonly conflated, speech plus is in fact analytically distinct from the other two (expressive conduct/symbolic speech) with its own genealogy. This is elaborated in chapters 2 and 5.

18. Braidotti, *The Posthuman*; Hayles, *How We Became Posthuman*. Institutions and corporations play a large role as artificial entities in the law, and the decentering of subjects empowers these artificial entities as much as marginal groups.

19. The dynamics of disembodiment shift across the corpus of law examined here. In the early twentieth century, the disembodiment of speech was understood, and policed, along Cartesian lines. By the end of the century, the terms and policing were along the lines of human intent versus computer automation.

20. National security is often cited as the root of the World War I censorship. For more on the way that the repression of speech was based in anti-immigrant sentiment and censorship targeted at immigrants, see Graber, *Transforming Free Speech*. Further, progressive arguments for free speech in the postwar period, like those of Louis Brandeis, were likewise based in notions of ethnic and ideological pluralism. Scholarship like Rabban's "The

Emergence of Modern First Amendment Doctrine" complicates this history by pointing to other less narrowly political understandings of free speech before World War I. The work of Laura Weinrib in *The Taming of Free Speech* pushes more strongly against this origin story.

21. The First Amendment was not understood to apply to state laws until 1925. Before this, most free speech cases were made in terms of state constitutions, most of which guaranteed some form of freedom of speech and publication.

22. Graber, *Transforming Free Speech*. Most actual free speech jurisprudence took place at the state level in the nineteenth century. For more on how the states interpreted free speech during this period, see Blanchard, "Filling in the Void."

23. See, e.g., Bollinger, *Tolerant Society*. The plot points in this narrative are cases that set precedents limiting the ability of state and local governments to restrict speech in the name of public safety or national security. For some evangelists of civil libertarianism, this history reaches its apogee in the infamous Skokie case, in which the Court ruled that the city of Skokie, Illinois, could not prohibit Nazis from wearing swastikas on a march through a community of Holocaust survivors. Recent generations of legal historians have presented a less linear and progressive narrative of civil libertarian free speech law and advocacy. In addition to the work of Graber and Rabban, see Weinrib, *Taming of Free Speech*; Lakier, "Invention of Low-Value Speech"; and Barbas, "Creating the Public Forum."

24. John Durham Peters offers an extended analysis and critique of this liberal narrative in *Courting the Abyss*.

25. Rabban, *Free Speech*; Weinrib, *Taming of Free Speech*.

26. Of course, the intellectual history of free speech goes back much farther, to at least John Milton and John Locke in the seventeenth century. The history of free speech as a legal construct is linked to this longer intellectual and discursive history, but it is distinct from it; the gaps among popular conceptions of free speech, intellectual discourse on free speech as a normative ideal, and the actual legal protections of speech are considerable. On the way that the action and expression of some individuals can silence others, see Matsuda, *Words That Wound*; and Citron, "Cyber Civil Rights."

27. Graber, *Transforming Free Speech*; Sunstein, *Democracy and the Problem of Free Speech*. While references to political speech as "pure speech" or as the primary object of freedom of speech are still common in case law, following the cultural shifts in public and private in the late twentieth century, the line between political and nonpolitical speech has become more difficult to draw in legal arguments.

28. Graber, *Transforming Free Spe*ech.

29. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Garner v. Louisiana*, 368 U.S. 157 (1961); *Brown v. Louisiana*, 383 U.S. 131 (1966).

30. Famously, the Court also raised the bar for suing newspapers for libel, declaring books or other material obscene, and replaced the clear and present danger test with a more stringent standard of incitement of lawless behavior in the 1960s. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Memoirs v. Massachusetts*, 383 U.S. 313 (1966); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

31. Barron, "Access to the Press"; Kairys, "Freedom of Speech"; Stein, *Speech Rights*.

32. See, e.g., Graber, *Transforming Free Speech*; Kairys, "Freedom of Speech"; and Sunstein, *Free Speech and the Problem of Democracy*.

33. See, e.g., McChesney, "Free Speech and Democracy!"; Pickard, *America's Battle*; and Weiland, "Expanding the Periphery and Threatening the Core."

34. Kendrick, "First Amendment Expansionism."

35. Starr, *Creation of the Media*.

36. Habermas, *Structural Transformation*; Warner, *Letters of the Republic*; Anderson, *Imagined Communities*. Per Anderson, print was essential to establishing not only norms of publicity but also the affective bonds of nation, or nationalism.

37. The centrality of printing to free speech law and practice remains today. On the print bias of free speech, see Tiersma, *Parchment, Paper, Pixels*; and Marvin, "Theorizing the Flagbody."

38. On the materialization of the word, see Ong, *Orality and Literacy*.

39. Gitelman, *Always Already New*.

40. See Cooley, *Social Organization*; and Small and Vincent, "Psycho-physical Communicating Apparatus."

41. Balkin and Siegel, "Principles, Practices, and Social Movements," 929. The authors are interested in ways that social movements create cases that disrupt these assumptions and open up reinterpretation of constitutional principles. I suggest that new technologies and their uses can do something similar.

42. As is common in histories of free speech, the cases assembled are primarily Supreme Court cases (except in the final chapter, which considers cases that have not yet made their way up to the Supreme Court). The Court is where decisions on constitutional law are made and is also where the authoritative interpretation of the First Amendment takes place.

43. For example, Blanchard, *Revolutionary Sparks*; White, "First Amendment Comes of Age"; Graber, *Transforming Free Speech*; Rabban, *Free Speech*; Weinrib, *Taming of Free Speech*.

44. See Innis, *Empire and Communications*; Kittler, *Discourse Networks*; and many of the essays collected in Gumbrecht, *Materialities of Communication*. On this approach to law, see Vismann, *Files*; and Tiersma, *Parchment, Paper, Pixels*.

45. Gitelman, *Always Already New*. See also Marvin, *When Old Technologies Were New*; and Jackson, "Rethinking Repair."

Chapter 1: Moving Images

1. Lenning, "Myth and Fact."

2. Weinberger, "*Birth of a Nation* and the Making of the NAACP."

3. NAACP member W. E. B. Du Bois, looking back on the campaign against the film, remembered (in 1940) that it was a difficult bind, asking liberals to oppose free expression, but that the high barriers of entry to the mass medium of film had forced them to do so (the NAACP could not afford to mount a filmic "reply"). Du Bois, *Dusk of Dawn*.

4. Weinberger, "*Birth of a Nation* and the Making of the NAACP," 78; Lenning, "Myth and Fact"; Berquist and Greenwood, "Protest against Racism"; Grieveson, *Policing Cinema*.

5. Berquist and Greenwood, "Protest against Racism."