Policy Studies

ISSN: 0144-2872 (Print) 1470-1006 (Online) Journal homepage: http://rsa.tandfonline.com/loi/cpos20

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To cite this article: Madison Cartwright (2018) Who cares about Reddit? Historical institutionalism and the fight against the Stop Online Piracy Act and the PROTECT Intellectual Property Act, Policy Studies, 39:4, 383-401, DOI: 10.1080/01442872.2018.1472757

To link to this article: https://doi.org/10.1080/01442872.2018.1472757

POLICY STUDIES
2018, VOL. 39, NO. 4, 383–401
https://doi.org/10.1080/01442872.2018.1472757

Routledge
Taylor & Francis Group

Who cares about Reddit? Historical institutionalism and the fight against the Stop Online Piracy Act and the PROTECT Intellectual Property Act

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ABSTRACT

In May 2011, the PROTECT Intellectual Property Act (PIPA) was introduced to the United States Senate boasting 31 sponsors from both the Democratic and Republican Party. By January 2012 PIPA, along with counterpart in the House of Representatives known as the Stop Online Piracy Act was indefinitely shelved. Many have attributed this dramatic shift to the widespread backlash against the bills from online activists. The case thus suggests that the Internet has emerged as a powerful tool in allowing ordinary citizens to displace the entrenched power of special interests groups. However, given the role of activists and their rhetorical framing strategies in the defeat of the bills, the case also has theoretical implications for historical institutionalism. Namely, how can historical institutionalism, which favours institutions over agency, especially when explaining continuity, account for this? Can historical institutionalism account for agency, institutions, continuity and change in a unified way? This article responds in two ways. First, it argues that internet companies, not activists, were crucial in explaining the defeat of the bills. Second, it argues, it proposes a unified historical institutionalist approach to research, capable of explaining agency within institutions in institutional continuity and change.

ARTICLE HISTORY
Received 19 December 2016
Accepted 13 March 2018

KEYWORDS
Historical institutionalism; Stop Online Piracy Act (SOPA); PROTECT Intellectual Property Act (PIPA); copyright; Internet

Introduction

Historical institutionalism is an approach to research that stresses how institutions shape the behaviour of political actors to effect political outcomes. In particular, it analyses how institutions are designed to benefit political "winners", creating policy feedback that entrenches certain actors in positions of power – making change difficult. Therefore, historical institutionalism has been criticized for failing to account for change, including policy change (Peters, Pierre, and King 2005). It has also been criticized for failing to account for the role of agency and discursive power (Schmidt 2009; Erikson 2015). The deficiencies of historical institutionalism in accounting for agency and change has also been acknowledged within the literature itself. Bell (2017), for example, argues that historical institutionalism has "bifurcated" to create two schools that explain either stability (path

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dependency) *or* change (agent-based incremental change). Furthermore, Bell argues that neither adequately accounts for the role of agency. However, Bell (2011) also rejects discursive institutionalism, arguing that by prioritizing discursive power too much, the approach ignores institutions almost entirely. That is, Bell argues that the literature is missing a unified account for the role of agency *within* institutions in explaining both stability *and* change.

This article will apply historical institutionalist analysis to explain the defeat of Stop Online Piracy Act (SOPA) and the PROTECT Intellectual Property Act (PIPA) – anti-online "piracy" reforms which were supported by the powerful copyright owning industries in 2011–2012. In doing so it examines how the approach measures up to its critic's arguments. It argues that critical juncture and agent-based approaches can be unified in an exogenously induced, but endogenously mitigated, model of change and continuity. This model can not only account for the agency of institutionally embedded political actors, but can also explain both continuity and change in the United States' (US) copyright law.

To do this the article proposes a framework – the Copyright Protection Cycle – which can be used to explain the process of copyright reform in the US for the past century. This analyses SOPA and PIPA within a broader process of incremental change following the development of the Internet and its use for "online piracy", while still accounting for the defeat of the bills themselves – representing institutional stability. Agency is important to this account, though not the agency of online activists realized through discursive power, but rather the agency of corporate interests realized through material power. The article thus argues that existing agent-based approaches within historical institutionalism can account for the role of agency *within* institutions in explaining both stability *and* change.

The article begins by introducing historical institutionalism and how it has been criticized for neglecting the role of agency and for failing to account for change. This discusses the two "bifurcated" schools identified by Bell (2017), and how both approach the question of institutional stability and change, and the relationship between the agency of political actors and institutions. These are the path dependent approach, which explains change through exogenous shocks called critical junctures, and the agent-based approach, which explains incremental change through endogenous efforts by political actors. The article applies each of these to the case of the defeat of SOPA and PIPA. It argues that the agent-based approach is more consistent with the evidence on how copyright reform in the US has historically occurred, as well as the defeat of SOPA and PIPA specifically. It thus argues that the defeat of SOPA and PIPA was not a crisis that redefined power asymmetries or illustrated the new role of online activists in shaping public policy. Rather, the defeat of the bills fits within a well-established process of copyright reform, called the Copyright Protection Cycle. The article thus makes a theoretical contribution to historical institutionalist literature, as well as an empirical contribution in explain the defeat of the bills – which has implications for other policy areas.

Historical institutionalism, agency and change

Historical institutionalists are interested in how time and sequencing influences the way that institutions affect political outcomes. This is because of "positive feedback", a

process by which "[e]ach step along a particular path produces consequences that increase the relative attractiveness of that path for the next round" (Pierson 2004, 18). Institutions are rules, norms and processes which empower or constrain actors. Institutions are designed for a particular purpose, often following a political struggle. Decisions on the design and function of institutions can lock-in power asymmetries between political actors, creating circumstances that favour some over others. Consequently, these favoured political actors will be better able to defend institutional arrangements from rivals in the future (Pierson 2015, 130). This institutional "stickiness" through positive feedback processes often referred to as "path dependency". Under path dependent conditions agency is severely constrained and change difficult to achieve. However, institutional change does, of course, occur. How to account for this change has been one of the key debates within historical institutionalist literature.

Scholars such as Schmidt (2009) have argued that historical institutionalism suppresses the agency of political actors too much to adequately account for this change. She instead advocates for *discursive institutionalism* which argues that change can occur through the application of discursive power. Discursive power is defined as the "ability of agents with good ideas to use discourse effectively … to build a discursive coalition for reform against entrenched interests" (Schmidt 2009, 533). Discursive institutionalism, as the name suggests, is still a branch of institutionalism and thus maintains that institutions have a role in explaining and shaping political outcomes. Discursive coalitions can become embedded in institutions, cementing them in positions of power, until a rival coalition challenges them.

For example, Erikson (2015) demonstrates this empirically through examining the work of anti-prostitution advocates in Sweden. These advocates used discursive power to reframe sex work as a criminal and not a health issue – a reframing that was eventually accepted by law makers and institutionalized in parliamentary committees (Erikson 2015, 461–464). This work thus illustrates how political actors use "jurisdictional framing strategies" to (re)define policy problems. Framing strategies will be assumed by coalitions of political actors, and eventually the government, leading to policy change. These new frames can then be institutionalized, meaning that if other actors want to change policies they will either have to "formulate policy in accordance with" the institutionalized frame "or have to question its credibility and push for a different frame" (Erikson 2015, 458). Framing affects how a policy problem is understood and thus what solutions should be used to address it.

Historical institutionalist scholars have responded to discursive institutionalism by arguing that discursive power does not actually add anything new to institutionalism as an approach (Bell 2011). Indeed, agency already has an important role to play in historical institutionalism – especially when explaining change. Therefore, discursive power is not needed to explain institutional change, while relying on it to do so marginalizes the importance of institutions, as Bell explains:

> By essentially eschewing a meaningful institutional analysis, recent constructivist or discursive institutionalists place almost all explanatory weight on agency and lose sight of institutions. In fact, they go further by eschewing a meaningful contextual analysis of agency and instead conflate agents with the ideational. (2011, 891)

Bell (2011, 890) also notes that there already exists an agent-based approach in historical institutionalism which accounts for the role of agents *within* institutional settings. The

distinction between formal and informal institutional rules is crucial to this agent-based account of change. Formal institutional rules are defined as rules that are "obligatory and subject to third-party enforcement" (Hacker, Pierson, and Thelen 2015, 183). Informal rules are the impact institutions actually have "on the ground" – that is, at the point of enforcement and compliance. The approach also has two variables: veto possibilities and discretion. Veto possibilities are high when actor(s) are able to block changes to rules or the practical affects they can have. Discretion relates to how the rules of the institution are interpreted, enforced and observed. There are four modes of institutional change Mahoney and Thelen (2010, 15–18) build from these two variables:

- Displacement – new formal rules replace existing formal rules.
- Layering – new formal rules are created to coexist with or complement existing formal rules.
- Drift – new *in*formal rules emerge as changes to external conditions impact how formal rules apply.
- Conversion – new *in*formal rules emerge as formal rules are reinterpreted.

The most likely mode of change under different situations is summarized in Table 1. As it illustrates, displacement occurs when veto possibilities are low and discretion is low, making it relatively easy for political actors to replace old rules with new ones, changing formal institutional rules. If, however, there are strong veto possibilities then incumbent interests will be able to block this change, so layering is pursued, introducing new rules that compliment and coexist alongside existing ones. If discretion is high, then new rules do not need to be introduced at all – it is instead possible to pursue informal institutional change and interpret and apply existing rules in a more favourable way. Therefore, when discretion is high but veto possibilities are low, political actors can convert existing rules so that their practical impact changes, while they stay formally the same. If, however, veto possibilities are also high, making this sort of change subject to blocking, then the practical impact of the rules and standards may nevertheless change over time as political actors instead seek to influence how the rules apply to changing exogenous conditions.

Both drift and conversion are similar in that they describe situations where formal rules remain the same but their informal impact "on the ground" changes. Conversion differs from drift primarily in that this change is due to active reinterpretation of the rules, while drift occurs due to policy inaction (Hacker, Pierson, and Thelen 2015, 185). Institutional structure determines between drift and conversion as the likely modes of change, as this depends on whether formal rules are flexible enough to be reinterpreted. Flexibility of formal rules thus acts as another variable in determining the likely mode of institutional change. Hacker, Pierson, and Thelen (2015, 189) refer to this variable as "precision" – with high precisions meaning low flexibility.

Table 1. Mahoney and Thelen's model for institutional change.

	Low discretion in interpreting/enforcing rules	High discretion in interpreting/enforcing rules
Strong veto possibilities	Layering	Drift
Weak veto possibilities	Displacement	Conversion

Source: Mahoney and Thelen (2010, 19).

However, Bell (2017) has recently argued that the problem for historical institutionalism is that scholars have not been able to marry this agent-based approach with the literature on path dependency. As a result, the challenge for historical institutional theorists is to account for the role of agency *within* institutions in explaining both stability *and* change. Overall, the historical institutionalist literature currently lacks a unified approach that is capable of doing this. Instead, Bell argues that the literature has "bifurcated" to create two schools that explain either stability *or* change, but not both.

Table 2 summarizes the dilemma Bell (2011, 2017) poses. It has two variables, agency and institutions, and two outcomes, stability and change. Bell (2017, 1–3) argues that the agent-based approach is good at explaining institutional change, but has little to say on institutional constraints, stasis and continuity. As such, it is limited to the bottom two quadrants of Table 2. Discursive institutionalism, meanwhile, is limited to the bottom left quadrant in explaining change due to its neglect of institutionally embedded actors, while its use of institutionalized frames for continuity in in the upper right quadrant. The other school to result from this bifurcation is the path dependency approaches which emphasize "sticky" institutional constraints, resulting in "overly-structuralist" accounts that have "little to say about agency or endogenous institutional change" (Bell 2017, 1). Therefore, path dependency is limited to the upper right quadrant of Table 2.

However, path dependency scholars do have an account for institutional change, which relies on so-called critical junctures. A critical juncture is defined as an exogenous crisis which loosens the usual institutional restraints on political actors – breaking path dependency. The critical juncture brought on by a crisis empowers actors to use discursive and framing strategies to define the "problems" the institutions are facing, and thus what solutions must be deployed through new institutions to address them. Thus,

> the *politics of ideas* is what ultimately determines the institutional outcome of a critical juncture … [as] powerful actors strategically promoting new social norms to manipulate the preferences of social groups may have more chances of success than during periods of stability. (Capoccia 2015, 165, emphasis in the original)

During a critical juncture, decision-makers have multiple options at their disposal. Once an option is chosen winners are once again empowered at the expense of the losers, leading to another period of path dependant institutional stability (Capoccia 2015, 151).

However, because if this narrow focus on exogenous shocks critical junctures essentially act as a *deus ex machina* in which "institutions explain everything until they explain nothing" (Thelen and Steinmo 1992, 15). That is, critical junctures don't explain change as being driven by agents *within* institutions, but rather by agents *free from* institutions (Bell 2011, 885). In this respect, they also suffer the same deficiency as discursive institutionalism in that they place "almost all explanatory weight on agency" (Bell 2011, 891) when explaining change. In fact, change occurs under a critical juncture similar to

Table 2. Bifurcation in historical institutionalist literature.

	Agency	Institutions
Stability		Institutionalized frames Path dependency
Change	Discursive power and "jurisdictional reframing" Critical junctures Drift, conversion, layering and displacement	Drift, conversion, layering and displacement

the way it occurs under discursive institutionalism through the use of jurisdictional reframing. Therefore, like discursive institutionalist accounts of change, critical junctures are in the bottom left quadrant of Table 2. Therefore, path dependency/critical junctures have the same placement in Table 2 as discursive institutionalism – illustrating Bell's (2011) critique that discursive institutionalism does not add new insight to explaining change.

The two "bifurcated" historical institutionalist schools thus rely on two different mechanisms of change, one exogenous (critical junctures) and one endogenous (agent-based change). However, this exogenous-endogenous dichotomy is a false one. In fact, agent-based approaches "can embrace endogenous change dynamics involving agent-centred strategic action set within a field of wider exogenous, though institutionally mediated, forces" (Bell 2011, 896). This article will develop an agent-based model of institutional change that incorporates both endogenous and exogenous forces to explain both change and continuity. In doing so it will illustrate that agent-based approaches are capable of explaining institutional *continuity* as well as change, and can do so in a manner that includes the role of both agency *and* institutions. Thus, the article offers a unified approach to historical institutionalist research. To illustrate how this model works, the article will apply it to the defeats of SOPA and PIPA in 2011–2012. By applying the model to this case, the article will also make an empirical contribution on the growing political influence of internet companies, with implications for contemporary policy debates on net neutrality and other areas.

SOPA and PIPA as a critical juncture

In 2011, SOPA and PIPA were introduced to the US House of Representatives and the Senate respectively. Both of the bills would have changed existing laws to compel internet companies to block access to websites associated with copyright infringement, or "online piracy" (Tremblay 2013, 831). The bills received strong support from many important stakeholders. For example, when PIPA was introduced to the Senate it boasted 31 sponsors from both the Democratic and Republican Party and a list of approximately 190 supporters, including pharmaceutical companies, Hollywood studios, software companies, manufacturers, unions and sporting codes among others (Leahy 2011). However, by January 2012 both PIPA and SOPA had become politically toxic and were indefinitely shelved. What explains this rapid change in fortune for these bills?

On the one hand, the defeat of SOPA and PIPA should not surprising for historical institutionalists. After all, under conditions of path dependency continuity is expected, and the defeat of the bills is essentially the survival of the status quo. However, just because the defeat of SOPA and PIPA resulted in continuity does not mean that agency was not at work. In fact, the power of the Internet in aiding the defeat of SOPA and PIPA could be considered a critical juncture. This is because critical junctures do not always result in actual change, as political actors can fail to effectively seize the opportunity created by critical junctures, resulting in "near misses" and continued stability (Capoccia and Kelemen 2007, 165–166; Capoccia 2015, 352). Indeed, scholars have applied a critical juncture analysis to SOPA and PIPA by defining the conflict as one between institutionally powerful "insiders" on the one hand, and institutionally weak "outsiders" on the other (Sell 2013). The exogenous crisis, meanwhile, is provided by the Internet itself – which

empowers the general public to engage in copyright law reform and challenge institutionalized interests.

The powerful actors included entrenched interests in copyright owning industries, such as film studios, record labels, publishing houses et cetera. As "winners" of pervious battles, copyright owning industries were favourably placed in the current institutional arrangements (Sell 2010, 2013). As a result, they enjoyed a number of benefits such as superior resources and access to lawmakers through extensive networks built over years of exploiting Washington's notorious "revolving door" (Sell 2013, 72–74). The weaker actors include activists from the general public, who were able to organize online to challenges these entrenched interests (Yoder 2012, 385). They accomplished this by rejecting the framing from copyright owners, which stressed the need to protect their intellectual property from theft. Instead, they used online networks to disseminate their own frames which focused on the corrupting effects of lobbying on the American political system. They also established a libertarian understanding of intellectual property and how it ought to relate to the "freedom" of the Internet and the constitutional right of free speech (Yoder 2012, 384; Berghofer and Sell 2015, 9). These frames were not contained to online spaces and eventually infiltrated the mainstream press (Benkler et al. 2015).

The activists did have the backing of large commercial interests too, namely internet companies such as Google and Facebook, as the bills undermined the limited liability they enjoyed under the current law (Tremblay 2013, 831). However, these commercial actors were initially resigned to the fact that the copyright industry would be victorious – as they have been historically (Sell 2013, 78). As the more powerful party *within the existing institutional setting* the copyright owning industries were expected to secure the reforms. Therefore, while the Internet allowed activists to "abridge" the power of corporate allies it did not eliminate them. Ultimately the anti-SOPA/PIPA campaigns did not take on corporate power, they aligned with part of it, namely the Internet industry (Bessant 2014, 227–228). Nevertheless, the institutional power of the copyright industry is argued to have been superior both to the commercial and civil society actors which opposed them. Institutional power asymmetries encourage the sort of coalition that emerged in opposition to the bills, as weaker actors work together to both pursue *and oppose* institutional change (Capoccia 2016, 1110).

However, under this analysis, what role did institutions actually play? For a critical juncture approach to apply, it must be argued that the path dependent outcome would have been for the bills to succeed due to the interests of copyright owners being institutionalized. However, it then needs to discount these institutions by arguing that an exogenous shock heightened the agency of political actors to successfully block the reforms. Of course, it could be argued that no such crisis was present or needed. Instead, the Internet acted as a means of building a discursive coalition which was able to challenge the institutionalized frame which favoured copyright owners. That is, discursive power explains the defeat of the bills. Whether this is an example of a critical juncture or discursive power rests on whether the role of the Internet could be considered an exogenous crisis or not. In any case, it's not clear why institutions which apparently favour copyright owners were unable to defend entrenched interests against institutionally weak opponents. Under both critical junctures and discursive institutionalism, institutions matter – except for when they don't.

Agent-based change and copyright: the Copyright Protection Cycle

The following will argue that the agent-based approach to institutional change is not only able to offer a unified explanation of the role of agency and institutions on change and continuity, but it offers a far superior account of the defeat of the SOPA and PIPA bills than the above critical juncture analysis. One reason for this is that the above literature, which focusses on the impact of online activists, relies on an insider/outsider understanding of copyright law making. As Sell (2013, 67) summarizes, copyright owners were "shocked" by their defeat because "[f]or the first time in thirty years, they did not achieve legislative victory". This, however, is not correct. Indeed, the role of commercial copyright *using* interests has been important to the political economy of copyright reform in the US for over a century. Since reforms to the *Copyright Act* in 1909, copyright reform in the US has followed a standard pattern in addressing new technologies as they arise and changing copyright law to accommodate them (Litman 1989). The manufacturers, distributers or providers of new technologies are important actors in this.

Applying the agent-based model of change to this history of copyright reform yields an analytical model for understanding copyright reform. It begins with the development of a new copyright using technology which disrupts the compromise embodied in existing law. Copyright using technologies are those that enable the general public to consume copyrighted work in some way. Over the years such "new" technologies have included self-playing pianos, broadcast radio and TV, video cassette recorders, MP3 players and, today, internet services such as Google's online search engine. Generally, copyright owners want to protect retain has much control over the sale, distribution and reproduction of their work as possible. This means protecting their so-called exclusive rights under copyright law. It also means keeping so-called limitations and exceptions under copyright law, which weaken their exclusive rights, as narrow as possible. Meanwhile, commercial copyright users do not care how wide the limitations and exceptions are necessarily, as long as they allow their particular use of copyrighted works without needing to get permission from owners, or to pay any royalties.

When a new technology emerges the incumbent copyright owners will mobilize to assert their exclusive right, either to get the technology shut down completely, or to get some sort of monetary compensation for the use of their work. However, the owners face high veto possibilities as both the existing copyright owners and the commercial interests associated with the new copyright using technology are capable of exercising enough political pressure to block major reforms through the Congress (Litman 1989). Facing a tough prospect of protecting their exclusive rights through legislative reform, copyright owners will instead choose to sue the manufacturers, distributers or providers of the technology (Litman 1989, 302). However, the rules themselves cannot be changed through the courts because only the Congress can change the actual law. Instead, the owners are seeking sympathetic application of existing formal rules. However, the formal rules under copyright law were negotiated to address very specific uses of copyright by "new" technologies in the past, resulting in laws which "enlarge the copyright pie and divided its pieces … so that no left overs remain" (Litman 1989, 317). That is, copyright laws tend to have high levels of precision saving little to no "pie" for future technologies. This results in one of two situations.

First, the highly precise rules can create confusion over how the formal rules apply to the new technology. In this case, the courts will have high levels of discretion in how they interpret and enforce the law. Of course, courts are bound by formal institutional rules. However, they are also reluctant to strike down new technology that benefits the public just because it has emerged faster than the ability of the Congress to legislate. As a result, existing rules, often ill-equipped to deal with new technologies, are "stretched" to accommodate them nonetheless – which changes their impact. We thus see the all conditions for institutional drift (Hacker, Pierson, and Thelen 2015, 184) being met:

- First, new technology alters the impact that formal rules have "on the ground".
- Second, lawmakers are aware of this, particularly as copyright owners mobilize against the new technology.
- Third, ambiguity in the law *could* be addressed through legislative reform.
- Fourth, this reform, however, is blocked by the interest associated with the new technology. This leads to informal institutional change through the courts.

Alternatively, highly precise laws may instead have low levels of ambiguity in how they apply to the new technology. In these circumstances, discretion is low because how formal institutional rules apply is straightforward. However, despite not being covered by the limitations and exemptions, the new technology may nevertheless offer significant public benefit and enjoy widespread public support. As such, the courts will want to preserve the technology. In these circumstances, the courts will seek to use flexible *principles* which are also included in US copyright laws, and which apply widely and in an ad-hoc manner. The most important of the flexible principles is what is known as the fair use doctrine, which gives copyright users broad scope to use copyrighted work, provided it meets a number of "fairness factors" (Litman 1989; Hughes 2017, 334–342). Principles such as fair use, by their nature, bring with them high discretion and *imprecision* because they apply in a board and flexible way. However, veto possibilities are low as copyright and technology lobbyists cannot pressure a court as they do the Congress. The court itself then becomes the main change agent, seeking an outcome that can support new technology, applying principles from copyright law to do so. The resulting informal change meets all the conditions of conversion (Hacker, Pierson, and Thelen 2015, 185):

- First, principles in copyright law such as fair use have high levels of imprecision and can be interpreted to serve multiple ends.
- Second, these ends are politically contests, as owners seek to reinforce their exclusive rights while users seek to be covered by limitations and exceptions.
- Third, by pursuing litigation through the courts, political actors are able to use fair use and other principles to serve their interests.
- Fourth, despite informal institutional change occurring, the copyright law itself has not changed.

The courts thus interpret how the law should be enforced through litigation against the new technology, resulting in either drift or conversion. This establishes a precedent which begins to bind courts, reducing their discretion in applying existing law. However, both owners and users will nevertheless want more clarity. This is particularly

the case as the markets for the copyright using technologies begin to mature and the companies behind them seek to reduce their risk through gaining explicit protection under limitations and exceptions written into law. Owners, meanwhile, are also eager to clarify the boundaries of how the limitations and exceptions apply to the new technology, which in turn clarifies their ability to assert their exclusive rights. This requires new legislation to address any lingering risks and ambiguities. As veto players, owners and users will vigilantly defend the concessions won in previous negotiations and any favourable court decisions since. This means that major changes to the existing law, and the compromise it embodies, will be extremely difficult. Instead, the reforms will address specific ambiguities to coexist with existing law. Copyright reforms thus result in layering as it builds on existing rules through compromises negotiated between the veto players.

This final step lays the ground for a future iteration of the reform process because it embodies a compromise of existing, not future, interests resulting in high-precision rules. Therefore, this model of reform is in fact a cycle – what is referred to in this research as the Copyright Protection Cycle. This cycle creates incremental change through endogenous processes. However, the cycle is set into motion due to an exogenous shock. That is, the Copyright Protection Cycle breaks down the exogenous-endogenous dichotomy that exists in the literature. It illustrates how critical junctures and agent-based change can be unified into an exogenously induced, but endogenously mitigated, process of change and continuity.

Figure 1 summarizes this cycle. It begins with an exogenous shock – the development of a new technology. In order to trigger a "turn" of the cycle this new technology must threaten the interests of incumbent copyright owners to assert or enforce their exclusive rights, and/or it must allow the use of copyrighted work in a manner that was unanticipated in previous iterations of the cycle and therefore largely unaddressed under existing formal institutional rules. The exogenous shock provided by the technology is thus a consequence of the endogenous process of change in the cycle, as new technologies only have this effect because of the tendency of the cycle to produce high-precision rules. The new technologies disrupt the status quo, however, reform through the Congress is blocked, leading to either drift or conversion through the courts. As discretion decreases but ambiguity remains, legislative reform is required. Copyright owner will protect their broad exclusive rights while copyright users will instead seek to explicitly protect their use of copyrighted work. This results in the final step, layering, in which new laws are passed to complement existing ones.

The Copyright Protection Cycle and the Internet

In the early 1990s, the emergence of a new technology – the Internet – triggered the beginning of a new turn of the Copyright Protection Cycle. In 1993, the Clinton Administration launched a policy review, led by the Information Infrastructure Task Force and chaired the Secretary of Commerce, to determine what reforms would be needed to address this new technology. This included a report specifically on intellectual property reforms, which focused almost entirely on copyright (Lehman and Brown 1995). In 1995, a bill based off of the recommendations of this report called the *NII Copyright Protection Act* ("the NII bill") was introduced to the Congress. However, the bill attracted strong criticism from online service providers (OSPs). An OSP includes companies and organizations

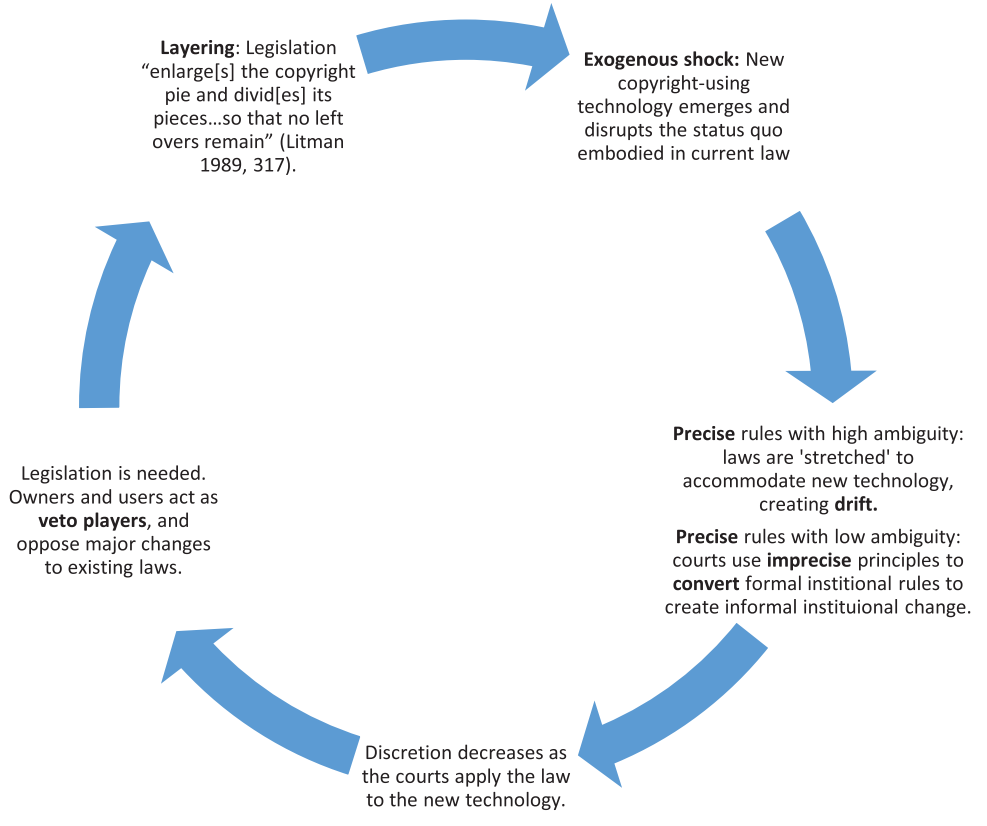

Figure 1. The Copyright Protection Cycle here.

that provide access to the Internet (such as Comcast or Time Warner Cable), as well as those that provide services over the Internet (such as Yahoo! email). In particular, OSPs were concerned with their liability for copyright infringement which may take place by users on their networks. They argued that the mass of information being transmitted meant that they could not be responsible for all of it, and that making them liable for the copyright infringement of others would cripple the development of the Internet (Black 1996; Burrington 1996; Heaton 1996).

The issue of liability had been litigated in the courts, however, this had resulted in inconsistencies, meaning that legislation was required to clarify if and when they were liable for the use of their networks for copyright infringement (Norris 2005, 8). After the OSPs began to pressure lawmakers in February 1996, closed negotiations between the industries for a compromise position began (Washington Telecom News 1996). However, the issue of liability in particular remained contentious. In May, the main OSPs held a press conference panning the NII bill, warning that the "legislation seems to bring back Big Brother and turn … the long distance carriers and the on-line service providers, into Internet police" (Barrington, Cerf, and Neel 1996). On 21 May, the bill was postponed for two weeks, and by June it was delayed indefinitely. The failure of the NII bill illustrated that OSPs, mainly telecommunication companies, had emerged as veto players in the Copyright Protection Cycle.

After the failure of the NII bill, copyright owners were eager for a legislative solution to address the protection of their exclusive rights on the Internet. Despite their hostility to limiting liability for OSPs, it was obvious that they would need to reach a compromise in order for reforms to pass the Congress. This compromise came in 1998 when the Congress passed the *Digital Millennium Copyright Act* (DMCA). The DMCA increased protection of copyrighted material online while including limitations on OSP liability. These limitations took the form of four "safe harbor" functions: conduit functions (automatic transmission), caching (creating temporary copies to allow quicker access), user storage and information location tools such as search engines (Balaban 2001, 262–264).

Peer-to-peer technology and the Copyright Protection Cycle

The DMCA compromise was disrupted almost immediately with the emergence of another exogenous shock, peer-to-peer (P2P) file sharing technology. P2P allows users on the Internet to share and download files directly from each other. P2P, like all technology, is neutral, however, it has come to be widely used for the distribution of infringing content – or "online piracy". Under the DMCA there was ambiguity over the liability of P2P operators used for copyright infringement, and as a result, they were promptly sued by copyright owners, which sought informal institutional change to outlaw the new technology. The first major causality of this litigation came in 2001 when P2P operator Napster voluntarily shut down after a prolonged legal battle with the Recording Industry Association of America (Beets 2001, 544). However, the ruling against Napster did not implicate P2P technologies more broadly (Bridy 2009, 585). By applying the DMCA in a way to target Napster but not P2P technology itself, the courts were creating informal institutional change and drift.

The post-Napster P2Ps made a number of technical work-arounds to avoid the same legal trouble as Napster but largely failed and many were forced to close through litigation (Giblin 2011, 140). However, one case in particular is important, which concerned a company called Grokster in a case decided in the Supreme Court. Napster and other cases have established precedent that helped Grokster's structure itself in a way to avoid liability. However, this also meant that there was less discretion. Meanwhile, the scale of infringement on Grokster was so massive the court had little choice but to rule against it. Thus, the court was "unclear about how to formulate the basis for liability without opening the floodgates to excessive liability" (Chan 2008, 299). To solve this dilemma the courts engaged in *conversion* by borrowing a principal from patent law known as "inducement". This made Grokster liable because it actively encouraged people to infringe content on its service (Bridy 2009, 587).

Despite the numerous legal victories infringement remains more prevalent than ever, especially as few illicit P2P operators stayed in the US, moving/establishing themselves in foreign jurisdictions beyond the reach of US copyright law (Chan 2008, 317–325; Tremblay 2013, 831–833). Modern P2P operators, particularly BitTorrent search engines such as The Pirate Bay, have survived not only litigation in their host-states, but also domain seizures by law enforcement, police raids and imprisonment of their founders. Facing these challenges, copyright owners have been seeking legislative means of targeting and shutting down access to websites dedicated to copyright infringement. SOPA and PIPA were a result of these efforts. However, a significant problem with

SOPA and PIPA is that they attempted to *displace* existing rules in the DMCA. By expanding the responsibility of OSPs for policing "online piracy", SOPA and PIPA were in essence an attempt to re-open the DMCA negotiations over OSP liability.

SOPA and PIPA as agent-based change an continuity

Through the Copyright Protection Cycle, it is possible to see the failure of the SOPA and PIPA reforms as an example of agent-based institutional change and continuity. First, the model is capable of explaining institutional stasis. The SOPA and PIPA reforms, as efforts aimed at displacement, were blocked by veto players in the Internet industry. On 15 November, 20 days after SOPA was introduced to the house, a letter of opposition was sent to the sponsors of SOPA and PIPA, signed by AOL, Google, eBay, Facebook, LinkedIn, Mozilla, Twitter, Yahoo! and Zynga Game Network. The letter, which also featured as a full-page advertisement in the *New York Times*, noted that:

> We are concerned that these measures pose a serious risk to our industry's continued track record of innovation and job-creation … . We are very concerned that the bills as written would seriously undermine the effective mechanism Congress enacted in the Digital Millennium Copyright Act (DMCA) to provide a safe harbor for Internet companies that act in good faith to remove infringing content from their sites. Since their enactment in 1998, the DMCA's safe harbor provisions for online service providers have been a cornerstone of the U.S. Internet and technology industry's growth and success. (AOL et al. 2011)

Thus the companies argued that the bills would displace key elements of existing institutions, namely safe harbours, which would undermine their industry. The letter would go onto stress their contribution to US Gross Domestic Product. Commercial copyright users therefore did not simply assume the frames that online activists had been promoting. They also stressed how displacing existing formal institutional rules would undermine their businesses and the competitiveness. This framing is consistent with that usually used during copyright reform efforts, and continued to be stressed by the industry throughout its campaign against the bills.

For example, at the 16 November public hearing on SOPA a Google representative spoke on behalf of the Internet industry more broadly (Oyama 2011, 98–99). They argued that the bill posed an unacceptable threat to the DMCA's safe harbour provisions, and advocated instead for measures that built from the baseline established by DMCA. Overall they asserted that "SOPA undermines the legal, commercial, and cultural architecture that has propelled the extraordinary growth of Internet over the past decade, a sector that has grown to $2 trillion in annual U.S. GDP, including $300 billion from online advertising" (Oyama 2011, 99). Google finished its testimony by setting its parameter for future negotiations for a census-based approach to curbing online infringement. This included protecting the DMCA, preserving current court precedent on liability, ensuring that legislation targets the "worst-of-the-worst" operators only, not interfering with the architecture of the Internet and dismantling barriers to the development of "compelling, legal offerings for copyrighted works" (Oyama 2011, 109). That is, a clear defence of the Internet industry's favoured elements of the current system and an appeal to layering over displacement.

Second, this was part of a broader process of institutional change in which existing formal rules were adapting to a new environment brought about by technological

development. This process has already resulted in informal institutional change through both drift and conversion. Meanwhile, the efforts to displace key informal institutional rules under the DMCA saw the emergence of a new coalition of commercial copyright users as a "veto player". The SOPA/PIPA battle suggests that internet industry has emerged as a political coalition distinct from that which existed during the DMCA negotiations – which was comprised mostly of telecommunications companies. Meanwhile, the mobilization of internet companies which provide services over the Internet was important to the defeat of SOPA and PIPA. Therefore, internet companies were not bandwagoning with the online activists, but rather assuming their veto position following an actual threat to the institutions that underpin their industry. While it is true the commercial interests were slower to move on PIPA than the online activists (Sell 2013; Benkler et al. 2015), it is also true that they mobilized quickly after SOPA was introduced to the House, and that just three months later *both* SOPA and PIPA were effectively blocked.

Therefore, the rise of internet companies such as Facebook and Google is changing the balance of power within and between political coalitions and how they view copyright law. For example, in October 2011, it emerged that Yahoo! had left the US Chamber of Commerce, which was a prominent supporter of PIPA (Romm 2011). By November 2011 there were reports that Google and the Consumer Electronics Association were threatening to do the same (Kang 2011). Meanwhile, more established computer and software companies and groups began to soften their support. For example, the Business Software Alliance, which had initially "commended" the introduction of SOPA and pledged to with lawmakers to "push this important legislation forward" (Business Software Alliance 2011), softened its support in November 2011 stating that "valid and important questions have been raised about the bill" which need to be "duly considered and addressed" (Holleyman 2011).

However, it could be argued, as some legal scholar have (Bridy 2012), that the scale of popular involvement in the anti-SOPA and PIPA campaigns was so massive that it truly represents a break in this long-term cycle of copyright reform which focusses on the compromise between commercial interests. This, again, views the power of online organizing as a critical juncture, disrupting this institutional arrangement and injecting new norms emphasizing the public good into the reform process. However, there are several reasons to suggest this is not the case. First, the commercial interests did not simply assume the frames that online activists had been promoting. Indeed, as shown above, they also stressed how displacing existing formal institutional rules would undermine their businesses and the competitiveness.

Second, the response of policy-makers wasn't to assume the narratives of the activists either, but to attempt to promote a compromise position between the commercial interests. For example, the Obama Administration, in a response (Phillips et al. 2012) to petitions against the bills, focused on how they could lead to "unjustified litigation that could discourage startup businesses and innovative firms from growing". Far from assuming a libertarian frame of intellectual property, the response instead repeated talking points from copyright owners over the importance of respecting their exclusive rights. It concluded that online "piracy" was a major issue that needed to be addressed, and called on "all private parties", including both copyright owners and "Internet platform providers" to work together on voluntary measures and to find a compromise position that

could be legislated (Phillips et al. 2012). That is, a call for the commercial interests to negotiate a compromise, as they traditionally have.

Indeed, since the failure of SOPA and PIPA the Congress has returned to a census-based approach to reforming copyright law. In 2013, the then-Register of Copyright, Maria Pallante, urged the Congress to conduct a comprehensive review of US copyright law, arguing that both the current law was failing to address contemporary copyright issues (Pallante 2013). In response, the House of Representatives Judiciary Committee held a series of hearings on copyright law, which ran from 2013 to 2015. Members of the Internet industry were well-represented in these hearings, defending the existing arrangement against any change, arguing that the DMCA's take down provisions and safe harbours strike the right balance, are effective and don't need to be changed. That is, there has been no major shift or fundamental reframing of copyright issues. Copyright reform is progressing as it has for over a century.

Last, the narrative of the "David" (i.e. the online activists) slaying the "Goliath" (the institutionally powerful copyright owners) ignores the fact that legislative defeats are common in copyright reform, especially if they displace important institutions that govern existing copyright using industries. The notion that SOPA and PIPA represented an unprecedented defeat is unsupported. It is certainly true that owners invested considerable resources in the bills, and were shocked by the level of opposition they faced (Sell 2013). However, SOPA and PIPA are merely the latest attempt by incumbent copyright owners to undermine new copyright using technology. Their failure, and the aftermath, fits within the Copyright Protection Cycle – a process which has defined copyright reform for many decades. This cycle is true to the history of copyright reform and applies the agent-based approach of Mahoney and Thelen (2010).

The article thus makes a theoretical and empirical contribution. First, it develops a historical institutionalist model which rejects the bifurcation that has emerged in the literature. This incorporates both exogenous critical junctures and agent-based endogenous change. In doing so, it can account for the role of agency *within* institutions in explaining both continuity *and* change. This is illustrated by applying the framework to the SOPA/PIPA case study, as Table 3 summarizes. As it shows, the Copyright Protection Cycle, by incorporating both exogenous and endogenous factors, addresses the dilemma outlined by Bell (2011, 2017) and shown in Table 2. This model could be applied other research in which political actors react to exogenous forces to pursue policy and law reform.

The second contribution is empirical. By applying the Copyright Protection Cycle, the article illustrates how the Internet industry has emerged as a significant actor in American politics by attributing the defeat of the SOPA and PIPA legislation to its ability to veto the

Table 3. A unified approach to SOPA and PIPA here.

	Agency	Institutions
Stability	SOPA and PIPA blocked by veto players (internet companies)	Courts are unable to change formal institutional rules in response to the exogenous shock The DMCA provides a baseline which internet companies defend
Change	Copyright owners respond to an exogenous shock (P2P technology) through litigation Later, copyright owners pursue SOPA and PIPA	Institutional drift and conversion through court decisions

bills. This has implications for other policy areas. For example, the Internet industry remains in policy battles with the telecommunication industry over net neutrality and cable top-boxes. This remains ongoing, after Obama-era decisions by the Federal Communications Commission have be reversed, undermined or abandoned under the Trump Administration. As the SOPA and PIPA debate illustrates, the Internet industry now wields considerable political clout that is on par with more mature industries. Policy reforms which entail institutional change – such as net neutrality – can expect robust opposition and may, despite recent developments, prove difficult to secure.

Conclusion

This article addresses some of the criticisms of historical institutionalism, form both outside and within the literature. Namely, it examines how historical institutionalism can account for not only institutions but also the agency of institutionally embedded actors. It also addresses the question of how the "bifurcated" literature can be reconciled to establish a unified approach to explaining institutional stability and change. The article argues that critical juncture and agent-based approaches can be unified in an exogenously induced, but endogenously mitigated, model of change and continuity. This approach can account for agency, institutions, stability and change. In doing so, the article makes a theoretical contribution by proposing an analytical framework that could be used in other research.

To illustrate how this model applies, the article examined the case study of the legislative failures of SOPA and PIPA. The existing literature on these defeats has stressed the discursive role of political actors – either through critical junctures or discursive coalition building. However, while these accounts show the role of agency in challenging institutionalized interests they do not account for actors within institutions, but rather actors free from them. The accounts also neglect important empirical factors, such as the fact that legislative defeat is common in copyright reform.

Applying the unified model instead yields the Copyright Protection Cycle. This Cycle provides an analytical framework which explains the history of copyright reform in the US for over a century. This Cycle also explains the failure of SOPA and PIPA, which would have displaced formal institutional rules, as a successful vetoing by the Internet industry. This industry mobilized once the threat of this displacement was imminent. The internet industry is now a veto player, concerned with limitations and exceptions, which must be included in negotiations in order for copyright reforms to be passed. These reforms must not displace existing institutional rules, but should instead build from them through institutional layering. Prominent internet businesses and lobbyist have made such appeals during and after the campaign against SOPA and PIPA. Applying the model to this case means that the article also makes an empirical contribution. If the defeat of the bills is a result of internet industry lobbying, not online activists, then there are implications for other policy areas where the industry is active – such as net neutrality and cable top-boxes.

Disclosure statement

No potential conflict of interest was reported by the author.

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