The Constitution in Cyberspace
Cases & Materials

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Net Total

Law, Politics and Property in Cyberspace

James Boyle

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~~*Telephone Cults and Mail Murders*~~ chapter 1

There are many uninteresting things to say about cyberspace. The newspapers prove it every day. Here we have a set of technological, economic and cultural changes that occasionally merit even the burbling enthusiasm of the Internet's devotees. Yet the newspaper coverage of the subject concentrates largely on things that have absolutely nothing to do with the Net itself.

Some time ago, for my sins, I got into some journalists' Rolodexes as a law professor who knew something about the Net. Now, whenever a web-designing cult commits collective suicide, a child is accosted by a pervert in a chat room, or a murderer persuades his victim to turn up by sending an e-mail message, I get a flood of calls looking for the "Internet angle." The trouble is that there rarely *is* an Internet angle. The murderers, sexual predators and crackpot religions are largely independent of the communications technology they happened to use. One reporter was particularly persistent in trying to get me to cough up an appropriate sound-bite. Searching for an analogy, I asked her whether, if I called her up and asked her out on a blind date and murdered her, she would think it was a "telephone-related murder"? She rang off shortly thereafter, probably more convinced of my emotional instability than by my argument. But the

analogy is worth pursuing and it has something to teach the technophiles as well as the tabloids.

In the early '90's — before ".com" could be found plastered all over the backs of buses — I went to a conference at Duke University devoted to explaining the technological wonders that lay in wait for us. At the culmination of the presentation one of the panelists said that, with access to better technology, we could actually have ordered a pizza on-line and had it delivered to us *right in this classroom*. There was a reverential pause at this piece of information, then a North Carolina voice spoke up hesitantly from the back of the room. "There's a phone on the wall, you know."

Imagine a *really* revolutionary communications technology. Imagine a future in which we have a communications system with unprecedented market penetration, reaching more than 94% of the families in the United States, the majority of households in the developed world and a substantial chunk of the entire world's population.[1] Imagine that the system would allow *real-time* communication, point to point, with terminals everywhere; so that in many cases you could actually send a message to your friends at their office desks, in their cars, or even on personal communicators small enough to fit into a shirt pocket. Make the system carry a live audio stream, (or perhaps even textual communication), through both analogue and digital protocols. Abolish practically all of the problems of systems incompatibility and make the prices absurdly low; for the price of a cup of coffee, or at least a short *latte*, you could maintain a real-time link to someone across the country for 10 minutes. Throw in the cost of a biscotti and, at a whim, you could tap out a simple string of numbers and be in contact with someone halfway around the world. Distances that used to take months and risk lives to travel would be annihilated by five seconds and a little keyboard work.

Beyond the social implications, imagine the effect it would have on commerce to have almost *every* business in the world, even the least technologically savvy, wired into the network. Goods could be purchased, prices compared, advice procured, and all the disadvantages of distance obliterated.

Amazingly, this little act of imaginative futurism was perfectly unnecessary. We already *have* such a system, though one would never know it reading the contemporary gushing accounts about the magic qualities of the Net. We have had some parts of this futuristic communications technology for ninety years, most of it for forty, all of it for ten. It is called the telephone and, more recently, the fax.

Everything that is said about the Net should be put to the "telephone test." We have been told that the Internet will revolutionise government, that e-mail will cut through corporate bureaucracy like a knife, that the Web would give children access to sexually explicit material of the foulest sort, or let terrorists exchange information across great distances. For each of these predictions, take the word "Net" or "e-mail" or "Web" and substitute the word "phone." Try the game of technological extrapolation for yourself with some of the most familiar claims about the Net.

The Telephone Test

"The telephone will mean a new era in government; even the illiterate constituent will have direct access to his or her representatives. Goodbye to smoke-filled rooms and the power of those who have the ear of the politicians. By simply "dropping a dime," anyone could be talking to the President himself, right at his desk. America will become the new Periclean Athens, with John and Jane Q. Public always "on the line" to give their views! Economically under-developed areas will be revitalised, with the poorest resident having access to the world-spanning communications technology of a "public phone", right there on the street outside their house. In the business world, the telephone will allow

the lowliest worker to contact, or "call," the CEO directly with a helpful suggestion, or to check her messages from the comfort of a "phone booth" in a local hostelry; goodbye to office cubicles and executive secretaries! Corporate bureaucracy will melt like butter under the pressure of such a technology, as organisation charts are undermined by the simple alphabetical ordering of the "telephone directory." Schools will be revolutionised, with the best teachers from around the country using "speaker-phones" to teach students in remote areas, while doctors will practice "telephone medicine," eliminating the need for time-consuming office visits.

Of course there are terrors to be faced in the world of the "phone." Unscrupulous porn merchants could offer sexual audio content for the payment of a fee. Because of the faceless anonymity of the transaction, even the youngest child could potentially "dial" one of these services: a worrying prospect to those parents who suspect that their children spend a lot more time "on the phone" than they do themselves. Indeed, parents tell us that the kids are the only ones in the household who can reprogram the "speed-dial numbers." Worse still, terrorists and criminals will doubtless seize on the potential of this technology. Vast criminal enterprises could be run by shadowy figures who simply "call in" their instructions to their underbosses; terrorists could exchange information and co-ordinate attacks, even across continental distances. With all of these dangers it seems undeniable that the technology should be heavily regulated and permanently monitored by law enforcement, and that all telephones should be fitted with child locks, but still, what a future!"

Internet Realism

The telephone test provides two, much needed, correctives to discussions of the Net. First, it imposes a little modesty on our futuristic predictions; True, the telephone has caused major changes to contemporary society, including some recognisable, if distant, versions of the predictions made above. (Indeed, the rapidity of the Net's growth comes in part because it could frequently use the existing phone-lines.) Yet our familiarity with the technology makes both the

optimistic prophecies and the doom-saying pessimism seem naively over-blown.[É] Corporate bureaucracy and unresponsive government have survived and even flourished in a "dialled world"; many children manage to grow up unscarred by phone sex and society has coped with the advent of the telephone-equipped terrorist. The effects of the Net will similarly fall short of what both its boosters and its critics might predict. Straight-line extrapolations from technological capability to social function are almost always wrong. Second, the telephone test helps us focus on the things that actually *are* interestingly different about the Net, about cyberspace, about a wired world; that is the goal of this book.

Despite the curmudgeonly skepticism of the telephone test, I will admit to being something of a starry-eyed Net devotee myself, but with a difference. What I love about the Net is its effect on *ideas*; the way in which it can undermine some of our certainties, can destabilise some of our notions about politics and markets and civil liberties and property. I like the fact that, at least at the moment, people's opinions on Internet issues lack the rote quality of much political debate. The Net actually *is* uncharted space in some senses; we have not yet decided how to "map" many of its conflicts onto our familiar political, economic and social categories. It is still possible to disagree fundamentally about where a particular controversy fits in our mental landscape and so viewpoints are hard to predict, opinions can still be shifted by discussion.

[É]Those who predict the future of the Net should be required to read the many excellent histories of the telephone or of radio, where they will find the same underlying optimistic claim that distance will be annihilated, the same utopian imagery, even the same apocalyptic predictions. My own favourites are that scarlet fever might be transmitted over the telephone line, (the first virus hoax?), that telephones would save the family farm, permitting it to compete with the giants of agribusiness, (a theme of a recent Microsoft commercial), or at least "save the farmer's wife from loneliness." Telephones were to usher in direct democracy and, less happily, they would encourage flirtatious speech of a kind that would never be allowed in face to face conversations. **ADD CITES**

Will a conservative libertarian think that heightened copyright protection on the Net is a defence of the sacred rights of private property, or an intrusive government regulation conferring monopolies on state-loving corporations? Will a card-carrying ACLU member support or oppose "filters" embedded in Internet browsers that allow users to exclude web sites that have been rated as somehow undesirable? Are filters merely a private aid to personal choice, or a hardwired version of Big Brother, the New York Times best-seller list or a McCarthy era blacklist?[2] How do the ideas of economics apply to an area where giving away your product can be seen as a smart business strategy? Is Bill Gates the ultimate monopolist, someone who has copyrighted the alphabet, or is he merely a smart business person in an intensely competitive market: a market characterised by increasing function, falling costs and wide consumer choice?

I have my own answers to these questions, and the reader will be left in no doubt about what they are, but the first goal of the book is to introduce the questions themselves. Admittedly, my list of interesting issues may seem quirky to a lot of readers. There are worthy books to be written on the effects of the Net on self-conception and on community, on labour and labour organising, on the structure of the corporation, on medicine and scientific research and so on. Personally, I am fascinated by ideas, large and small, by the clash of concepts, by struggles over the basic geography of the political and economic landscape. The issues gathered here reflect that set of interests, but their real common feature is simply that during the last five years of researching and writing about the Net, they have engaged and absorbed *me.* At the very least, I hope they will persuade the sceptical reader that there is something to cyberspace beyond the latest sex scandal that can have the word "Internet" crammed into its topic sentence.

Shibboleth and Anathema in Net Policy

I have to confess, though, that this book is intended to be more than a guidebook, a conceptual Baedeker to the puzzles that the Net poses for political theory, economic analysis and legal regulation. Like most tour-guides, I have an agenda. We are at a moment in history when a lot of important decisions are being made, by both public and private actors, about the future of the Net. Those decisions are influenced by assumptions held with varying degrees of conviction by people in and outside of the digital mafia. The assumptions that I want to focus on are the following:

- that it is almost impossible to exercise state power effectively in cyberspace because the technology, the geography and the content are all profoundly hostile to regulation. (The digital libertarians would add, "and a good thing too!")
- that the biggest danger to free expression on the Net is that of blundering attempts to censor it by ill-informed legislators (the Communications Decency Act of 1996 is the most obvious example) but that the First Amendment and the technology itself will combine to protect users of the Net and thus that speech is, and will continue to be, "free" in cyberspace.
- that to the extent there *are* problems of Net governance, there is a consensus in favour of neutral, technical solutions that facilitate private choice. We need a "V-chip" for the Net, in President Clinton's words.
- that copyright law does not currently apply to cyberspace, that the Net poses an enormous threat to intellectual property rights, and thus that we need to give copyright owners larger and more powerful rights, protected by harsher penalties in order to make up for the losses they will undoubtedly suffer from piracy.

This view is not particularly popular with people who are familiar with the Net, but it is frequently heard on Capitol Hill and in the mainstream press.

< that the key to the success of the Net is to get national governments to leave it alone (which they will have to do anyway, given the assumption of their technical, geographic and regulatory impotence). Left alone, free speech and laissez faire markets will produce a set of optimal results: a process that will only be accelerated by the incredible speed and efficiency of information flow on the Net. (Bill Gates is fondest of the "unregulated markets" part of this argument, the ACLU of the "unregulated speech" portion; interestingly, each is willing to pay lip-service to the other.)

In this book, I will argue that all of these assumptions are at least partly wrong: wrong in interesting ways with important consequences. I will happily concede that my descriptions are caricatured, that no-one makes all of these assumptions and many people make none of them, that they have varying effects on the making of policy, that they are sometimes majority views and sometimes minority views and so on and so on. I will concede all of this, because I believe that intellectual honesty would force anyone to admit that in fact these assumptions are widely held and frequently heard and that — if they are caricatures — they must at least be exaggerating a real feature in order to be recognisable.

My final and more general goal in writing this book is to try to use the Net to illuminate the wider world of policy, politics and culture. I said earlier that one of the things that attracted me to the study of the Net was the instability of the terrain. We divide our world up into contiguous and opposing territories -- public and private, property and sovereignty, regulation and laissez-faire, the family and the market -- "solving" problems by inquiring as to their

placement on this map. In the everyday world these divisions seem comparatively solid and lumpish to most people, even if clever academic critics may harp on their *theoretical* indeterminacy. On the Net things are different.

Scholars and policy wonks have generally responded to this situation by casting themselves as explorers and cartographers; their goal is to restore order and stability to this situation by introducing correct analogies and appropriate classifications; cyberspace would become more like normal space. From time to time in this book, I will engage in this project, but my real interest lies in the opposite direction: exporting some of the indeterminacy, openness and contingency of the conceptual landscape in cyberspace back into our discussions of regulation, property, liberty and economics in the "normal" world.

The great thing about classifications is cyberspace is that they are so obviously socially constructed, just "made-up." It is not entirely clear to me that making them seem as natural, normal and inevitable as some of our more familiar conceptual schemes is a good idea. In fact, quite the reverse. The final goal of this book, then, is to bring some of the open-ness of the Net back into meatspace; in the end, contingency and imagination may be cyberspace's most important exports.

A note on style may be in order. In this book I have tried to make a set of complex arguments more accessible than they normally are. Supplementary information and discussion that might break the flow of the text have been banished to the endnotes and I have tried to avoid too heavy a reliance on esoteric terms. I found this task extremely difficult and productive of much insecurity; specialised language gets invented for good as well as bad reasons. Distinctions often collapsed even by highbrow writers (like those between “rights,” “privileges” “powers” and “immunities” or between “public goods” and

"collective goods") actually matter a great deal, though they may make for lumpy reading. At the same time, the process of separating the essential distinction from the one that simply made the thesis harder to attack proved to be extremely helpful to my own thinking. Arguments often looked different without the encrustation of familiar terms and insiders' references. The reader will be the best judge of my success or failure. Either way, the process of writing this book, convinced me that the contemporary assumption that academic writing can and should be impenetrable to the non-specialist is both pernicious and wrong. On the other hand, popular assumptions to the contrary notwithstanding, sometimes ideas are just *hard*; extensive background knowledge or careful qualification may really be necessary to get a point across. I have a lot of people to thank for helping me to walk this tightrope, most notably Larry Lessig, but I owe my largest debt of gratitude, as always, to my wife Lauren Dame.

Libertarianism, Property & Harm chapter 2

"One big reason that the future will be libertarian is the arrival of the Information Age. . . . The Information Age is bad news for centralized bureaucracies. First, as information gets cheaper and more widely available, people will have less need for experts and authorities to make decision for them. . . . Second as information and commerce move faster, it will be increasingly difficult for sluggish governments to keep up. . . . Third, privacy is going to be easier to maintain. Governments will try to block encryption technology and demand that every computer come with a government key — like the "Clipper Chip" — but those efforts will fail. Governments will find it increasingly difficult to pry into citizens' economic lives. Finally, as techno-entrepreneur Bill Frezza puts it, "coercive force cannot be projected across a network." As digital bits become more valuable than coal mines and factories, it will be more difficult for governments to exert their control." David Boaz*, Libertarianism: A Primer*[3]

One of the first things that newcomers to online culture notice is the prevalently libertarian cast of thought and speech. There is a general suspicion and hostility toward state power and — although the participants might not describe it in those terms — a repeated defense of a core libertarian ideal; that it is wrong to infringe my individual liberty except where necessary to prevent me doing harm to another. Admittedly, it is sometimes hard to know how to interpret the passion and commitment behind these libertarian sentiments

because Internet discourse tends towards hyperbole, rant and damnation. Mike Godwin, the Electronic Frontier Foundation's lawyer, coined "Godwin's law" to describe the process; "When the number of people in a newsgroup rises above two, the probability of someone being called a fascist approaches unity." But even if one is unsure exactly how strongly people's views are held, it would be a strange journey across the world of Usenet newsgroups, chat rooms, and home-pages, or the world of Internet gurus, policy wonks and consultants, that did not show libertarianism to be the "default" point of argument, the place from which discussion begins.

It is quite possible that as the demographics of the average Internet user become a little more like the demographics of the average member of the world's population — namely less American, less rich, less technically educated, less white and less male[4] — this libertarianism will diminish. Anecdotal evidence supports the idea that there is some correlation between some of these characteristics and the intensity of libertarian sentiment, though Ayn Rand, Friedrich Hayek, and Camille Paglia would strongly argue otherwise. But the first generation of Net users have already put their stamp on the Net's politics and culture, formed its origin myths and moulded its discourse. What's more, as I will explain in a moment, there are certain structural features of the Net itself that make libertarianism a more attractive way to view the world. For both of those reasons, then, a set of views I will call "digital libertarianism" is likely to be central to the politics of the Internet.

Before I turn to digital libertarianism, it is worth looking at libertarian ideas more generally to see some of their central characteristics, to understand both the points of strength and the fault lines in libertarian analysis. I apologise to those who expected every page of this book to be firmly located in cyberspace. In this case, the journey really is necessary. Libertarianism is both familiar and

comfortable, so much so that it is often hard to realise that it is actually a point of view at all rather than simply "the way things are." Only by laying out its premises and contradictions is it possible to understand the particular opportunities and problems that the Net poses for libertarian thinking.

Baseline Problems and Nonsense-on-Stilts

Libertarianism has lots of attractions. It seizes a concept that has an obvious *cachet.* It is hard to imagine anyone saying "Give me regulation or give me death." It stakes out a position -- "let people make up their own damn minds" -- that seems a lot more attractive than some paternalist or statist alternative. The ideal of making one's own choices, ignoring the beliefs of the majority and forging one's own destiny is one that reaches far beyond teenage readers of *ATLAS SHRUGGED*. Above all, libertarianism generalises an argument that might seem selfish if made for an individual person (let me do what I want) into a positively altruistic universal principle; *everyone* should be allowed to do anything that causes no harm to others. The libertarian is protecting everyone's liberty, not merely his or her own.[5]

Underlying most of these attractions is the fact that libertarianism appears to solve the question of value. If we all agreed on what was right and what was wrong, beautiful and ugly, good sex and vile perversion, fine literature and porno trash, then there would be little need for libertarianism.[6] Who would want it? Who would need it? It is partly because we do not agree, precisely because we can remember times when others imposed their views on us, that we can find libertarianism appealing. We may be moved by a belief that individuals each following the dictates of their own desires will create a more beautiful, worthy and efficient society, or we may be moved by a kind of abstracted self-interest: protect the liberty of others lest your own be infringed. I am willing to allow you to practice a form of

sexual behaviour I find abhorrent, because I want to preserve my own right to listen to disco music, wear bicycle shorts and collect purple garden gnomes.[7]

Law's role in the libertarian scheme is that of the guardian: guardian of a set of shells which citizens may fill as they like. The law must protect guaranteed liberties, particularly property rights, and enforce contracts. It should do so without inquiring into the worthiness of the goals that individuals are pursuing with their rights and through their contracts. The state's job is to protect the shell, the box, not to assess the worth of the particular contents. Shylock, in the Merchant of Venice, is an unlikely proponent of the idea. Offered three thousand ducats to give up his right to a pound of Antonio's flesh, Shylock refuses, insisting that the law must protect the lawfully contracted desires of individuals; it cannot pick and choose between them because we cannot account for tastes, there is "no firm reason to be render'd." He offers a wonderfully absurd list of particular likes and dislikes and suggests that these shape our passions and values.

> Some men there are love not a gaping pig:
> Some that are mad if they behold a cat;
> And others when the bagpipe sings i'the nose,
> Cannot contain their urine: for affection,
> Masters oft passion, sways it to the mood
> Of what it likes or loathes.[8]

Unable to say that some choices are rational and others irrational without jeopardising the liberty of all and the rule of law itself, the state — here in the person of the Duke of Venice — must simply enforce the "bonds" or contracts that come before it.

> If you deny it, let the danger light
> Upon your charter and your city's freedom!
> You'll ask me why I rather choose to have
> A weight of carrion flesh than to receive
> Three thousand ducats. I'll not answer that—

But say it is my humour: is it answered?
What if my house be troubled with a rat,
And I be pleased to give ten thousand ducats
To have it banned? What, are you answered yet?[9]

But Shylock's plea brings up one of the basic problems for libertarianism; exactly what rules, what rights, what contracts must the state enforce? Libertarianism accepts the notion that values are relative and tries to solve the problems that relativism poses by letting individuals make their own choices and implement them, always with the limitation that they must not injure anyone else. So far so good. But we can only know what choices are legitimate, non-harmful, decisions by knowing what rights we have in the first place. If values are relative, how do we decide the rights we have, the boundaries between the freedom of my fist and the security of your nose.? The problem is not as simple as one might think.[É]

Do workers have the "right" to organise together and strike for higher wages or would that be a criminal conspiracy in restraint of trade? Do I have the "right" to copy your idea for a good business, your way of dressing, your invention of a new machine? Do corporations have the "right" to combine together to keep prices up? Does my neighbour upstream have the right to divert the flow of the river that feeds my land? Do I have the "right" to tell the town in obscene detail exactly what I think of my neighbour and his sexual practices, even if my opinions are unsupported by evidence and hurt both his feelings and his business? Does Antonio have the "right" to pledge a pound of flesh against Shylock's bond? Would Shylock have the "right" to collect, even if it meant Antonio's death?

[É] I will use the term "right" in the discussion that follows, though in fact the range of legally protected interests represented in these examples is actually much richer and more complex. The distinction does matter, but here I am trying to introduce the difficulty of drawing lines between harm and non-harm. The complexities of the legally protected interests involved will have to wait for another chapter.

In each of these situations, the question of whether a harm has been inflicted or a crime committed depends on the baseline set of rights that are chosen. If the workers have a "right" to organise and strike for higher wages, then state action that interferes with such a right is an interference with individual and collective liberty. If, on the other hand, a trade union counts as a criminal conspiracy in restraint of trade (a position that a number of legal systems once took), then unionised workers are harming their employers, and perhaps the entire society. State action to break up the this attempt at monopolistic collective action is not an interference with liberty, indeed it is a matter of duty. The problem of value that libertarianism seemed to solve merely reappears on the next level up -- the choice of the framework of rights within which I exercise my liberty. We cannot simply say "Well, individuals have a right to do anything that does not harm another" because that answer simply dissolves into another value-laden debate about what counts as "a harm" in the first place.

There are three possible lines of argument to solve this problem, none of them entirely satisfactory.

1. Positivism and the Civics Class: The first argument is a simple one. We assume that rights and harms are defined by whatever the local legal system says. If our legal system says that libel, price fixing and repeated offers to trade workplace advancement for sexual favours *are not* harms, but that public displays of genitalia, heresy or homosexual affection *are* harms, then we adjust our libertarian principles accordingly. The trouble with this line of thought is that it renders libertarianism entirely toothless as a critical ideal. Libertarianism becomes simply the injunction that one may do whatever the law does not forbid (or at least what the law does not

class as a form of civil damage.) Tomorrow, when the rules change, so will our rights. We might as well have stayed in civics class.

There are however more substantial versions of this idea. The more interesting ones are derived from the work of Friedrich Hayek. Hayek's 1944 book, *The Road to Serfdom,* dedicated to "socialists of all parties,"[10] is a sustained exploration of the dangers of "planning." In it, and in his more sustained and developed work on the subject, such as *Law, Legislation and Liberty*, Hayek argues that law must be generally applicable. Ideally it should also be "spontaneously developed." Above all, laws should not aim at some particular social goal, such as ameliorating the environment, encouraging the development of minority businesses or what have you.[11] To make law with a particular social goal in mind is to take the first step down the slippery slope towards the totalitarianism of the "planned society" and, in the process, to play favourites among social groups, taking the property of one and redistributing it to another. Laws should be general and should only be made when we are ignorant of their precise effects.

Alongside this hatred of goal-directed law-making, goes a romanticism that might seem unlikely to anyone who isn't a lawyer or a libertarian: a romanticism of the common law, the Anglo-American system of judge-made law that provides many of the ground-rules for the market: the rules of property, contract and civil damage. Libertarians love the common law because it seems to them to be not merely the foundation *of* the market but to bear a great similarity *to* the market. Like the market, the common law is an example of "spontaneous order," a method of organisation that does not come from a single, central source, but rather is developed in myriad individual interactions. In the process of making this argument, libertarians indulge in some rather dubious legal history.

> The market is not the only case of spontaneous order. . . .
> Consider. . .law. Today we think of laws as something passed

> by Congress, but the common law grew up long before any king or legislature sought to write it down. When two people had a dispute, they asked another to serve as judge. Sometimes juries were assembled to hear a case. Judges and juries were not supposed to "make" the law; rather, they sought to "find" the law, to ask what the customary practice was or what had been decided in similar cases. Thus, in case after case the legal order developed. . . . Law, language, money, markets — the most important institutions in human society — arose spontaneously.[12]

I, too, am a fan of the common law but I have to say that while this legal creation-myth has an important element of truth it is more misleading than accurate. True, the common law is a relatively decentralised law-making system in which the law is developed in many particular cases. In that sense, the common law determines value in a way that is more like a market than a command economy. Rules and prices emerge from many particular interactions rather than being set by a single will. This point is far from trivial. But it would be a mistake to move from that claim, as libertarians often do, to a claim that the common law is a realm where we find neither instrumental value judgements, political choices and directed intervention in society. In fact, the history of the common law is replete with directed state intervention, both structural and substantive, and with judges, such as Lord Mansfield, who had very definite goals in mind. Indeed, one commonly articulated defence of the common law is precisely that law could be made in particular cases by intelligent judges in ways that would further some set of social goals more precisely than the one-size-fits-all approach of legislation. In other words, the common law is frequently described by its boosters as a system for *better planning,* not the absence of planning. Having

a common law system allowed the state to wield a scalpel through the court system as well as a shovel through the legislature.[13]

Skeptics might believe that there is another reason that libertarians like the common law: simple outcome-preference. In many cases common law rules favourable to employers rather than workers, manufacturers rather than consumers, and landlords rather than tenants, were modified by progressive legislatures in the first three decades of the twentieth century.[14] Odes of praise to the common law, and mistrust of legislative modifications of it, allow libertarians to say that the *true* benchmark of rights is provided by the older rules, not the newer ones. Judged against this standard, of course, the rules that benefit employers, landlords and manufacturers simply *define* liberty and property rights whereas the rules that benefit workers, tenants and consumers are *interferences* with liberty. The rules one likes are the foundations of sacred property rights, those one does not like are meddlesome *regulation.* This is a nice trick and its equivalent will turn out to be very important in the regulation of cyberspace.

Nevertheless, skepticism about the libertarian use of the common law as a stalking horse should not obscure the importance of one of the issues that libertarians have raised. Suppose we leave aside the fantasy that the common law is a politically neutral set of universal rules deduced from particular cases and free from a particular instrumental agenda. This marks the abandonment of the libertarian project of finding in the common law a neutral set of baselines from which to measure liberty. Yet it still leaves us with an important question – one that the followers of Hayek deserve great credit for raising – namely, whether something about the common law's relatively more decentralised method of decision-making actually presents particular advantages in regulating society in general and the Net in particular? Is the common law, even if not entirely cyber*netic*, nevertheless somehow fitted to cyber*space?* That is a topic I will return

to later. For the moment, we must return to the broader libertarian project.

2. Making Rights Naturally: The second possible way to give libertarianism the definition of harm that it needs is to rely on the idea of natural rights. We assume that people have rights before (and after) any *legal* system is created. It is these natural rights that provide the line marking where your freedom leaves off and my right to be free of harm begins. These rights may be laid down by God, revealed to you by a burning bush or supposedly deduced from some *extremely* general postulates based on beliefs widely held in our particular society. (For example, everyone owns their body and can dispose of it as they will.) The natural rights idea is a little more promising, but it runs into two major problems: 1.) the idea of natural rights contradicts the very premises of libertarian thinking and 2.) the rights themselves are too vague actually to solve problems on any level of specificity.

The first problem is that libertarians seem to assume in their "natural rights" mode all the things they reject in their relativist mode. One of the reasons we need libertarianism is that much of modern philosophy, political theory and popular discourse rejects the notion that it is possible to come to objective conclusions about value judgments. Thus, libertarianism's big selling point is that it lets people make their own choices. To base our libertarian political system on a presumed set of objectively true "natural rights" is just solving the problem by assuming it out of existence, like solving an energy crisis by assuming perpetual motion machines. To put it another way, if we could actually agree on natural rights, then surely we are *not* living in a world of moral relativism in which libertarianism is both necessary and desirable?

This seems like a glaring problem to me, but it never appears to bother libertarians. The irony is that many libertarians have exactly the kind of faith in the objective truth of their personal set of *natural*

rights as a method of social organisation, that they mock in those who believe that their particular set of *moral values* provide a correct method of social organisation. The member of the Christian coalition who says that his moral and religious beliefs demonstrate that certain forms of speech and behaviour are objectively right and others objectively wrong is taken for a foolish zealot. The libertarian who asserts that individuals have exactly the set of natural rights that his particular culture or philosophy reveres is seen as a calm rationalist. This inconsistency in moral assumptions between the two levels of argument is one of the reasons that Bentham referred to natural rights as not just nonsense but nonsense on stilts.

The second problem with the idea that we all have natural rights is the terminal vagueness of the actual rights that are offered. With political systems and sets of rights, the devil is in the details. The more sophisticated libertarian philosophers — Robert Nozick for example — tend to build their libertarianism on extremely vague statements that command a high degree of acceptance in our society: for example, "individuals own their own bodies." Now it is worth noting that, while this is a pretty uncontroversial claim in any Western democracy, it is already sacrificing the extremes (albeit the silly extremes) of moral relativism. Large numbers of people through history have believed, and still believe, that women, children, black people, kulaks, slaves and so on did *not* own their own bodies. What's more, apart from relying on brute force, they actually had arguments to support their position. The arguments ranged from ingenious definitions (blacks aren't people), to the manifest necessities of God's plan, to the scientific truths of eugenics.[15]

Personally, it doesn't bother me much to think that an imposition of a libertarian system on such groups would actually restrict "rights" they believe they have when *to their eyes* there is no "harm" involved in, say, denying women the ability to own property.

I think it is inevitable[16] (and in this particular case, good) that values will be imposed on groups who disagree with those values. It is inevitable because definitions of "harm" will be socially contentious. My philosophy of state-neutrality tells me that we must restrict your community's ability to decide that kids should pray in your town's schools every morning; even as your school board is fined, I will still be sternly lecturing you the need for a type of "tolerance" that seems to you like the harshest and most dogmatic paternalism, the most *intolerant* imposition of an alien set of values.[17] As I walk away from the meeting, I will shake my head at some bigots' inability to respect the liberty of others; you, however, will do the same.

My point is that even with supremely vague statements such as "everyone owns their own body" we are already making contentious moral and political judgements. As a result of these judgements about "rights" and "harm," the "liberty" of some will be restricted and that of others protected.[18] This is no cause for resignation or despair, but we shouldn't try to cover it up with the comforting libertarian pretense that, unlike everyone else, *we* are being value-neutral and non-coercive because *our* system's definition of harm is somehow a fact, rather than a value.

So far, I have tried to argue that, while many libertarians like to pose as those who are truly value-neutral, "I despise what you say and would die for your right to say it," they cannot maintain that pose long enough even to state a few vague first principles. When the vague first principles turn more specific, then the fun really begins.

3. Property as a Solving Idea: Working from the idea that each person owns his or her own body, the next step in a libertarian argument is to derive from this basic property right a horde of other property rights acquired by purchase, transfer, sale and the like. Inside the castle of our property rights, each of us exercises absolute power,

with none to gainsay us. In fact, it is partly for this reason that libertarians (at least, meatspace libertarians) like the idea of abolishing the notion of public space. If space is public, such as a state-owned airport, public television station or online system, then we would have to balance claims of liberty. The religious devotee would claim a right to convince the polity to put up a creche and the atheist would claim that this infringed on *his* right to be free of the dogmas of established religion.

Now imagine that the public space has been privatised. Because the libertarian schema imagines property rights to be absolute and unlimited, there is no need to consider any countervailing interest. If it is my property, I may do with it as I want. Indeed, for many libertarians, the ideal situation is to make sure that *everything* is privately owned, thus simultaneously collapsing all civil rights into a single all-encompassing property right, and solving the problem of the clash of values over the use of public space. Murray Rothbard puts forward perhaps the most thoroughgoing version of the argument.

> [I]n the profoundest sense there *are* no rights but property rights.
> . . . .
> Freedom of speech is supposed to mean the right of everyone to say whatever he likes. But the neglected question is: Where? Where does a man have this right? He certainly does not have it on property on which he is trespassing. In short, he has this right only either on his *own* property or on the property of someone who has agreed, as a gift or in a rental contract, to allow him in the premises. In fact, then, there is no such thing as a separate "right to free speech"; there is only a man's *property* right: the right to do as he wills with his own or to make voluntary agreements with other property owners."[19]

> Boaz makes the same argument for slightly different reasons: Government money always comes with strings attached. And government must make rules for the property it controls, rules that will almost certainly offend some citizen-taxpayers. That's why it would be best to privatize as much property as possible, to depoliticize decision making about the use of property.[20]

I will call this argument 'the solving-idea of property.' Though it is not a new or unfamiliar idea,[21] it turns out to be particularly important when we turn to the politics and property of the digital environment. In areas ranging from cryptography and the assignment of domain names to the rise of "click-wrap" contracts, proponents of privatisation have touted its ability to "depoliticise" conflict and resolve clashes between parties, each of whom has a compelling argument to make about the use of some resource. Thus, for example, if a company wants to stop a reporter from bringing out certain facts about its operation, we would merely ask if the company "owns" those facts or not. If any compilation of facts is protected by a special database property right, as the United States recently argued should be the case,[22] then the reporter cannot extract the facts and use them.

The supposed advantage of this system is that we have avoided the need to make rules that decide who should own a particular domain-name, who should get access to a public forum, or what information a journalist should be able to report. By turning to "property rights" the decisions are supposed to be depoliticised. Yet they are not. "Property rights" are both the result and the manifestation of a continuing political struggle. The same arguments about rights of access to or use of public spaces will reappear as questions of the *extent* of private property rights.[23] Even if we do decide that there should be a special property right in compilations of facts, we will still need to make the decision whether or not that right entails the right to prevent the reporter from being able to report those

facts. These are political and social choices which constantly have to be fought and re-fought. The libertarian argues for private property rather than public property because "government must make rules for the property it controls, rules that will almost certainly offend some citizen-taxpayers."[24] The point this argument misses is that the same is true for the definition of *private* property.

The libertarian argument here proceeds as if the property rights were facts and, what's more, facts with natural and logically necessary implications. But within a legal system, even one designed by Hayek, von Mises and Nozick, things just would not turn out that way. Say that you own your house, that you have a "property right" in it. Your ownership will actually turn out to be a sheaf of legal rights, powers, immunities and privileges, stuffed into an envelope we call a property right; The right that most people think of first is that you can decide when to sell the house and for how much. Does that automatically mean that you may dam up the stream that feeds your neighbour's property or remove the bank of earth on which his wall rests? Can you block the light from his solar heater by erecting an extension? Prevent a household worker from expressing an opinion about the need for higher wages? Can you turn your house into a commercial establishment, a church or the site of an ongoing political demonstration, thus disrupting the slumbrous peace of the suburbs? Saying that you have "a property right" in the land does not answer any of these questions.[25]

The libertarian response to the point that property is actually a cluster of rights, privileges and powers is to say that the property owner should have a right to do anything which does not injure his neighbour. The law even has a Latin maxim to this effect; *sic utere tuo ut non alienum laedas*. But the argument has now moved full circle. Libertarians argued that as many issues as possible should be "solved" by assigning private property rights precisely because the political

debate about those issues would reveal conflicting and contradictory definitions of harm. They cannot now turn around and define property rights as "anything that does not harm one's neighbour." Are you "harmed" if, every time you walk through an airport, you are harassed by patchouli-scented bald guys dressed in orange robes who try to peddle you over-priced pamphlets touting a religion you find annoying? To turn the libertarian's argument on its head, if we cannot agree *here*, how can we assume that we will be able to agree on a definition of harm when private property is involved?

Faith in the power of property to solve questions of social policy behind our backs is particularly difficult to maintain in cyberspace -- though that does not seem to have affected its popularity. First, in cyberspace it is harder to fall victim to the physicalist fallacy that helps the libertarian move from a largely geographic claim about real estate (I am standing on *my property*) to a claim about the particular set of legal entitlements (therefore I have the right to do X.) Precisely because this is *cyber* space, geography seems less like destiny; on the Net even the question of *where things happen* is clearly a matter of social (and legal) convention.[26] When you sit in your house in Connecticut and use an Internet service provider in New York to gain access to a web bookstore, incorporated in Delaware and headquartered in Seattle, with "servers" in Palo Alto and London, where exactly is the contract formed?[27] Second, most of the property rights of cyberspace are rights in intellectual property and these are particularly obviously neither natural nor absolute. Legal scholars would point out that *all* property rights are socially created, limited in extent and qualified in relation both to certain types of actors and certain types of conduct. Even with a house or a car, then, the solving-idea of property is problematic, but with intellectual property its problems are just easier to see.[28] Could it really be the case that you have a *natural* right to prevent copying of a computer program (but

only for 75 years, and not to the extent that a competitor needs to copy your program in order to make her programs compatible with yours)?

Now, it will surprise no-one if I say that current wonkish conventional wisdom (outside of the Christian coalition) is that the state should stay out of the Net. The Net shouldn't be taxed, it shouldn't be censored (much) and it should be freed from the heavy-handed intervention of the government. Ira Magaziner, vilified for his role in the Clinton Administration's health care plans, was much caressed by digital policy-types when he produced a report that echoed this conclusion. Eager to show that they "got it" the authors of the report were careful to avoid Vice-President Gore's metaphor of the Information Superhighway, with its connotations of an Eisenhower-style, freeway-building, role for the government in creating the physical infrastructure for the Net. Instead, the report bent over backward to acknowledge the cardinal points of Internet orthodoxy; privatism, decentralization, deregulation.

> "The private sector should lead.... Even where collective agreements or standards are necessary, private entities should, where possible, take the lead in organizing them...Where governmental involvement is needed, its aim should be to support and enforce a predictable, minimalist, consistent and simple legal environment for commerce.. In some areas, government agreements may prove necessary to facilitate electronic commerce and protect consumers. In these cases, governments should establish a predictable and simple legal environment based on a decentralized, contractual model of law rather than one based on top-down regulation. Governments should recognize the unique qualities of the Internet. The genius and explosive success of the Internet can be attributed in part to its decentralized nature and to its tradition of bottom-up

> governance. These same characteristics pose significant logistical and technological challenges to existing regulatory models, and governments should tailor their policies accordingly. ..Existing laws and regulations that may hinder electronic commerce should be reviewed and revised or eliminated to reflect the needs of the new electronic age."[29]

Others have gone even further, seeing in cyberspace as uniquely hospitable to the ideal of deregulation; the state can't and shouldn't regulate the Net. But the idea of "deregulation" seems to imply the notion that there is an 'unregulated' set of affairs to which we can return; a world where the state hasn't interfered, hasn't picked winners or made politically contentious choices, but has left these decisions to the individual choices of private actors, each working within the sphere of their own property rights. It depends in part, that is, on the solving idea of property.

One thesis of this book is that many of the current ideological battles over the regulation of cyberspace stem from this peculiar emerging conflict. Net politics is dominated by classical liberalism and by a rhetoric of de- or non-regulation even more powerful than that seen in contemporary neo-liberal politics elsewhere. Yet, at the same time, Net politics frequently compels a particular and subversive recognition: that one of the pillars of that deregulatory faith; the existence of an a-political world of non-regulatory, property rights -- is undermined by the particular context of the Net *more obviously than it ever was in meatspace.* Crudely put, the dominant rhetoric of digital libertarianism both aggressively insists upon and aggressively undermines the solving idea of property rights. The Net, then is both uniquely hospitable to and uniquely hostile to, libertarian ideals; future chapters try to chart the transformations that are being wreaked in both libertarianism and the Net as a result.

The Internet Trinity chapter 3

For a long time, the Internet's enthusiasts have believed that it would be largely immune from state regulation. It was not so much that nation states would not want to regulate the Net, it was that they would be unable to do so; forestalled by the *technology of the medium*, the *geographical distribution of its users* and the *nature of its content*. This tripartite immunity came to be a kind of Internet Holy Trinity, faith in it was a condition of acceptance into the community. Indeed the ideas I am about to discuss are so well known on the Net, that they have actually acquired the highest status that a culture can confer; they have become cliches.

"The Net interprets censorship as damage and routes around it."[30]

This quote from John Gilmore, one of the Founders of the Electronic Frontier Foundation, has the twin advantages of being pithy and technologically accurate. It is not quite true to say, as the received wisdom has it, that the Internet was originally designed to survive a nuclear war though some of its most important protocols were influenced by that fear; it is true to say that the Net's distributed architecture and its technique of packet switching are built around the

problem of getting messages delivered despite blockages, holes and malfunctions.[31]

> The principles were simple. The network itself would be assumed to be unreliable at all times. It would be designed from the get-go to transcend its own unreliability. All the nodes in the network would be equal in status to all other nodes, each node with its own authority to originate, pass, and receive messages. The messages themselves would be divided into packets, each packet separately addressed. Each packet would begin at some specified source node, and end at some other specified destination node. Each packet would wind its way through the network on an individual basis. The particular route that the packet took would be unimportant. Only final results would count. Basically, the packet would be tossed like a hot potato from node to node to node, more or less in the direction of its destination, until it ended up in the proper place. If big pieces of the network had been blown away, that simply wouldn't matter; the packets would still stay airborne, lateralled wildly across the field by whatever nodes happened to survive. This rather haphazard delivery system might be "inefficient" in the usual sense (especially compared to, say, the telephone system) -- but it would be extremely rugged.[32]

Imagine the poor censor faced with such a system There is no central exchange to seize and hold; messages actively “seek out” alternative routes so that even if one path is blocked another may open up.

Here was the civil libertarian’s dream, a technology with *comparatively* low cost of entry to speakers and listeners alike, technologically resistant to censorship, yet politically and economically important enough that it cannot easily be ignored. The Net offers obvious advantages to the countries, research communities,

cultures and companies that use it, but it is extemely hard to control the amount and type of information available; access is like a tap that only has two settings — "off" and "full." For governments, this has been seen as one of the biggest problems posed by the Internet. For the Net's devotees, most of whom embrace some variety of libertarianism, the Net's structural resistance to censorship — or any externally imposed selectivity — is "not a bug but a feature."

"In Cyberspace, the First Amendment is a local ordinance."[33]

To the technological obstacles the Net raises against externally imposed content filtration, one must add the geographic obstacles raised by its global extent; since a document can as easily be retrieved from a server 5,000 miles away as one five miles away, geographical proximity and content availability are independent of each other. If the king's writ reaches only as far as the king's sword, then much of the content on the Net might be presumed to be free from the regulation of any *particular* sovereign.

As I pointed out before, the libertarian culture that dominates the Net at present starts from the premise that state intervention into private action is only necessary to prevent "harms." Seeing the Net as a "speech-dominated" realm of human activity in which harm would be comparatively hard to inflict, libertarians have been even more resistant to state regulation of the digital environment than of, the disdainfully named, "meatspace." "Sticks and stones can break my bones but bytes can never hurt me," or so goes their assumption. Thus, the postulate that a global Net cannot be regulated by national governments has been seen as an unequivocally positive thing.

John Perry Barlow's description of the First Amendment as a local ordinance has been read by many as a claim that our ultimate

faith should be in technology and geography rather than law to protect freedom of speech. Since individual sovereigns will neither be able to protect, nor to repress speech effectively because the medium in question stretches well beyond their borders, better to rely on TCP/IP[34] and a global net, rather than nine black robed judges on First Street, S.E., Washington DC.

The same faith in the power of geography and technology to make regulation impossible can be seen in discussions of encryption and, in particular, in the writings of the cypherpunks. Cypherpunks believe that advances in encryption technology, coupled with the global architecture of the Net, will permit the anonymous communication and transaction systems that are the prerequisite of privacy, but at the same time will put both communication, and economic activity beyond the reach of states.[35] Unbreakable codes, anonymous transaction systems, public key encryption, digital signatures and trusted private third party systems, will allow a virtual economy to flourish beyond the power of national governments. In this view, the encryption revolution is the final step in the ability of corporations and individuals to evade unwanted regulations by relocating their activities in the jurisdiction with the least restrictive laws. As Timothy May puts it "The ability to move data around the world at will, the ability to communicate to remote sites at will, means that a kind of 'regulatory arbitrage' can be used to avoid legal roadblocks."[36] Deprived of the power to tax and to regulate much of the economy, the state will wither away, ushering in 'crypto-anarchy,' a regime that has more of a libertarian than an anarchist tone.

> First, the "anarchy" here is not the anarchy of popular conception: lawlessness, disorder, chaos, and "anarchy." Nor is it the bomb-throwing anarchy of the 19th century "black" anarchists, usually associated with Russia and labor movements. Nor is it the "black flag" anarchy of

> anarcho-syndicalism and writers such as Proudhon. Rather, the anarchy being spoken of here is the anarchy of "absence of government" (literally, "an arch," without a chief or head). This is the same sense of anarchy used in "anarchocapitalism," the libertarian free market ideology which promotes voluntary, uncoerced economic transactions.[37]

The supporting citations in crypto-anarchist work show a mixture of the Austrian school of economists such as Hayek, with other libertarians and anarcho-capitalists who view the modern state as unable to deal with contemporary technology. David Friedman's *Machinery of Freedom*[38] and Ithièl de Sola Pool's, *Technologies of Freedom*[39] are frequently cited texts, as is Kevin Kelly's *Out of Control*.[40] (As one might expect from the prior chapter, little attention is paid to the role of the state in defining and policing property rights, or the political judgements that will be involved therein. Cypherpunks seem to imagine that most of the default rules in the economy will be set by digital possession and protection, not legal definition. I will return to this point later.)

Web politics exhibits a variety of types of technological determinism. Lewis Mumford's early work is particularly congenial; with its claim that technological progress would move societies away from rigid, bureaucratic hierarchies and towards decentralized networks. Hierarchy and centralization, in this view, were marks of earlier, more primitive communications and productive technologies. The trend was always to be towards the distributed network, rather than the centralized exchange or state-run telephone system. However in later years, Mumford was careful to point out that the mere spatial and technological decentralization was not sufficient to produce actual democratic decentralization. This side of his work seems, sadly to have missed attention by the digerati.

For the cypherpunks, this move towards state impotence is both desirable and technologically inevitable. Law enforcement agencies portray encryption primarily as a shield for drug traffickers, child pornographers, terrorists and spies to hide behind. This particular parade of horribles is so familiar that it is now dismissively referred to as "the Four Horsemen of the Infocalypse." But to the cypherpunks, many of whom have a libertarian, anarcho-capitalist view of the world, it is states rather than private actors who are most to be feared.

> If local laws can be bypassed technologically, the.. implications for personal liberty are of course profound. No longer can nation-states tell their citizen-units what they can have access to, not if these citizens can access the cyberspace world through anonymous systems. The implications are, as I see it, that the power of nation-states will be lessened, tax collection policies will have to be changed, and economic interactions will be based more on personal calculations of value than on societal mandates. Is this a Good Thing? Mostly yes. Crypto anarchy has some messy aspects, of this there can be little doubt. From relatively unimportant things like price-fixing and insider trading to more serious things like economic espionage, the undermining of corporate knowledge ownership, to extremely dark things like anonymous markets for killings. But let's not forget that nation-states have, under the guise of protecting us from others, killed more than 100 million people in this century alone. Mao, Stalin, Hitler, and Pol Pot, just to name the most extreme examples. It is hard to imagine any level of digital contract killings ever coming close to nationstate barbarism. (But I agree that this is something

> we cannot accurately speak about; I don't think we have much of a choice in embracing crypto anarchy or not, so I choose to focus on the bright side.)[41]

A slightly different tone, concentrating more on the need for privacy, can be found in Eric Hughes' founding 'Cypherpunk Manifesto.'[42] But Hughes, like May, makes clear that the primary protections of privacy in an information society will be *technological* and *geographical* rather than constitutional.

> We cannot expect governments, corporations, or other large, faceless organizations to grant us privacy out of their beneficence. It is to their advantage to speak of us, and we should expect that they will speak...We must defend our own privacy if we expect to have any. We must come together and create systems which allow anonymous transactions to take place. People have been defending their own privacy for centuries with whispers, darkness, envelopes, closed doors, secret handshakes, and couriers. The technologies of the past did not allow for strong privacy, but electronic technologies do.... Cypherpunks write code. We know that someone has to write software to defend privacy, and since some of us can't get privacy unless all of us do, we're going to write it. We publish our code so that our fellow Cypherpunks may practice and play with it. Our code is free for all to use, worldwide. We don't much care if you don't approve of the software we write. We know that software can't be destroyed and that a widely dispersed system can't be shut down.[43]

The Fourth Amendment too, it seems, is a local ordinance in cyberspace. But a civil libertarian tradition that puts its trust in technological and geographical freedom from regulation may be especially vulnerable if that freedom proves to be overstated.

"Information Wants to be Free"

I pointed out earlier that the political cartography of the Net is unstable. Issues have not yet been securely and safely settled in one area or another. Nothing illustrates this point better than the debate over intellectual property on-line. In the digital environment, is intellectual property just property, the precondition to an unregulated market, just another example of the rights that libertarians believe the state was specifically created to protect? Or is intellectual property actually *public regulation*, artificial rather than natural, an invented monopoly imposed by a sovereign state, a distorting and liberty-reducing intervention in an otherwise free domain?

While it would be hard to find anyone who believes entirely in either of these two stereotypes, recognisable versions of both do exist in the debate over intellectual property and — more interestingly — can be found across the political spectrum. George Gilder of the conservative Manhattan Institute, a fervent booster of capitalism and laissez faire, shows considerable skepticism about intellectual property[44] — Peter Huber, from the same conservative think tank, pronounces it the very acme of liberty, privacy and natural right.[45] The Clinton Administration attempts to extend intellectual property rights on-line[46] and is roundly criticised by both civil liberties groups and right wing intellectuals.[47] This isn't just a disagreement as to tactics among people who might be said to share the same ideology: it is a fundamental set of disputes over the very social construction and normative significance of a particular phenomenon -- as if the Libertarian party couldn't agree on whether its motto was to be "Taxation is theft" or "Property is theft."

In this contested terrain Stewart Brand's phrase "information wants to be free" marks out the territory of those who are sceptical of both the need for and the utility of restraints on the flow of information *and* who frequently extend that skepticism to intellectual

property rights. The phrase has now penetrated the culture sufficiently deeply that it is now actually parodied in *advertisements*.[48] Yet its ubiquitous nature may actually work to conceal the claims that it makes.

John Perry Barlow begins his famous essay "Selling Wine Without Bottles: The Economy of Mind on the Global Net" with this quote from Jefferson.

> If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density at any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property.[49]

The quotation expresses perfectly the mixture of Enlightenment values and upbeat public goods theory that typifies Net analysis of information flows. Information *is* costless to copy, *should* be spread

widely, and *cannot* be confined. Beyond the Jeffersonian credo lies a kind of Darwinian anthropomorphism. Information really does *want* to be free. Barlow credits Brand's phrase with recognizing

> both the natural desire of secrets to be told and the fact that they might be capable of possessing something like a "desire" in the first place. English biologist and philosopher Richard Dawkins proposed the idea of "memes," self-replicating patterns of information which propagate themselves across the ecologies of mind, saying they were like life forms. I believe they are life forms in every respect but a basis in the carbon atom. They self-reproduce, they interact with their surroundings and adapt to them, they mutate, they persist. Like any other life form they evolve to fill the possibility spaces of their local environments, which are, in this case the surrounding belief systems and cultures of their hosts, namely, us. Indeed, the sociobiologists like Dawkins make a plausible case that carbon-based life forms are information as well, that, as the chicken is an egg's way of making another egg, the entire biological spectacle is just the DNA molecule's means of copying out more information strings exactly like itself.[50]

Viewed through this lens, the Net is the ultimate natural environment for information and trying to regulate the Net is like trying to prohibit evolution.

The Trinity as Catechism

Taken together the three quotations assert that the technology of the medium, the geographical distribution of its users and the nature of its content all make the Net specially resistant to state regulation.

The state is too big, too slow, too geographically and technically limited to regulate a global citizenry's fleeting interactions over a mercurial medium.

Though I do not subscribe to the full-throated versions of any of these slogans, I have sympathy with each of them. It does excite me that the Net is highly resistant to externally imposed content filtration -- though I tend to worry about structural private filters as well as command-based public ones, and I recognise that speech and information can and will produce harm as well as good. I do think that the global nature of the Net is -- by and large -- a positive thing, though we need to pay more attention to things like the cost of the technology required to play the game, or the effects on workers of a networked economy in which companies can relocate around the world and find a new on-line workforce in an afternoon.[51] Finally, I am optimistic about the historical conjunction of technologies based on nearly costless copying and a political tradition that treats information in a more egalitarian way than other resources.[52]

It is possible, of course, to conjure up a world in which rampant info-kleptocracy undermines scientific and artistic development. I have argued elsewhere that the main danger is not that information will be unduly free, but that intellectual property rights will become so extensive that they will actually stifle innovation, free speech and educational potential. In any event, I want to set aside my agreement or disagreement with the values behind the Net catechism, and focus instead on the factual and legal assumptions on which it relies.

My argument is that digital libertarians should not be so quick to write off the state. In the chapters that follow, I argue that digital libertarianism has become the victim of four simplistic (and ideologically important) conceptions of law, technology, market and property:

First, **a positivist jurisprudence** eerily close to that of John Austin: law is seen as set of sovereign commands, backed by threats, aimed at a geographically defined population who render the sovereign habitual obedience and who are punished *ex post facto* for violations of these, paradigmatically criminal, norms. (One could hardly imagine a view of law better guaranteed to fail at regulating the Net.)

Second, a **historicist**, **meliorist** and **positivistic** vision of the development of **technology** in which communications technologies – particularly those involving distributed networks – are seen as inherently liberatory, while technical fixes to regulatory problems are seen as somehow neutral and facilitative, rather than as (also) value-laden and constraining.

Third, **a naive conception of the market and the private law rules which constitute it,** a vision that recalls to mind the formalist conceptualism of classical legal thought. Apart from technological fixes, contract is the preferred method of ordering in cyberspace, but everything learned about contract in the last fifty years has, it seems, been forgotten in the process.

Finally, **an incoherent vision of property** with relation to both **a.) state action** and, thus, the constitution **and b.) to the value and function of property's 'outside' –** that which is not owned, namely the fertile fields of the public domain.

Extrapolating from these tendencies in isolation, one would project a fairly unattractive future; a sort of high-tech Gilded Age with privatised censorship, digital spite fences, enormous concentrations of corporate power, regulatory impotence, and large scale enclosures of the public domain. But, thankfully, as we will see – things are not so simple. Indeed, the opposite way to portray each of the points I have made would be to say that the Net is the place where classical liberalism, technological meliorism and laissez-faire ideology become hardest to maintain. Ideologies are not static. One goal of this book

is to imagine the ways that the Net might actually redefine the ideology of neo-liberalism, rather than merely being shaped *by* it.

> *[T]he problems to which the theory of sovereignty [was] addressed were in effect confined to the general mechanisms of power, to the way in which its forms of existence at the higher level of society influenced its exercise at the lowest levels.. In effect, the mode in which power was exercised could be defined in its essentials in terms of the relationship sovereign-subject. But ..we have the .. emergence or rather the invention of a new mechanism of power possessed of a highly specific procedural techniques.. which is also, I believe, absolutely incompatible with the relations of sovereignty...It is a type of power which is constantly exercised by means of surveillance rather than in a discontinuous manner by means of a system of levies or obligations distributed over time....It presupposes a tightly knit grid of material coercions rather than the physical existence of a sovereign... This non-sovereign power, which lies outside the form of sovereignty, is disciplinary power..*Michel Foucault[53]

There is a branch of legal theory called Jurisprudence which, historically, has been devoted to discussions of the nature, function and binding power of the law. It would be strange to think that there is a Jurisprudence of the Net, and yet there is. If the discussions of law on the Net are anything to go by, when Netizens think of law, they tend to conjure up a positivist image, reminiscent of the work of the 19th century English legal theorist John Austin;[54] law is a command backed by threats, issued by a sovereign who

acknowledges no superior, directed to a geographically defined population which renders that sovereign habitual obedience.[55] Thus they think of the state's laws as blunt instruments incapable of imposing their will on the global subjects of the Net and their evanescent and geographically unsituated transactions. Indeed, if there was ever a model of law *designed* to fail at regulating the Net, it is the Austinian model.

Fortunately or unfortunately for the Net, however, the Austinian model is both crude and inaccurate, and that is where the work of the late Michel Foucault comes in.

Michel Foucault was one of the most interesting of post war French philosophers and social theorists. His work was wide-ranging, sometimes obscure,[56] indeed deliberately so, and his historical generalisations would have been be insufferable if they were not so often provocatively useful.[57] Above all, Foucault had the knack of posing problems in a new way -- re-orienting the inquiry in a way that was manifestly helpful for those who followed. This facility has been testified to by thinkers whose politics and methodology are very far from Foucault's own.[58]

Surveillance, Discipline and Architecture

From the point of view of this book, one of Foucault's most interesting contributions was to challenge a particular notion of power, power-as-sovereignty, and to juxtapose against it a vision of "surveillance" and of "discipline."[59] At the heart of this project was a belief that both our analyses of the operation of political power and our strategies for its restraint or limitation were inaccurate and misguided. In a series of essays and books, Foucault argued that, rather than the public and formal triangle of sovereign, citizen and right, we should focus on a series of subtler, private, informal and material forms of coercion organised around the concepts of

"discipline" and "surveillance." The paradigm for the idea of surveillance was the Panopticon, Bentham's plan for a prison constructed in the shape of a wheel around the hub of an observing warden, who at any moment *might* have the prisoner under observation through a nineteenth century version of the closed circuit TV.[60] Unsure of when authority might in fact be watching, the prisoner would strive always to conform his behaviour to its presumed desires; Bentham had struck upon a behavioralist equivalent of the superego, formed from uncertainty about when one was being observed by the powers that be. The echo of contemporary laments about the 'privacy-free state' is striking. To this Foucault added the notion of discipline -- crudely put, the multitudinous "private" methods of regulation of individual behaviour ranging from workplace time-and-motion efficiency directives to psychiatric evaluation.[61]

Foucault pointed out the apparent conflict between a formal language of politics organised around relations between sovereign and citizen, expressed through rules backed by sanctions, and an actual experience of power being exercised through multitudinous non-state sources, often dependent on material or technological means of enforcement. Writing in a manner that managed to be simultaneously coy and sinister, Foucault suggested that there was something strange going on in the coexistence of these two systems.

> Impossible to describe in the terminology of the theory of sovereignty from which it differs so radically, this disciplinary power ought by rights to have led to the disappearance of the grand juridical edifice created by that theory. But in reality, the theory of sovereignty has continued to exist not only as an ideology of right, but also to provide the organising principle of the legal codes.... Why has the theory of sovereignty persisted in this fashion..? For two reasons, I believe. On the one

> hand, it has been.. a permanent instrument of criticism of the monarchy and all the obstacles that can thwart the development of a disciplinary society. But at the same time, the theory of sovereignty, and the organisation of a legal code centered upon it, have allowed a system of right to be superimposed upon the mechanism[] of discipline in such a way as to conceal its actual procedures ....[62]

Foucault was not writing about the Internet. He was not even writing about the twentieth century. But his words provide a good starting place from which to examine the catechism of Net inviolability. They are a good starting point precisely because, when viewed within the discourse of sovereignty, of the promulgation and enforcement of Austinian "commands backed by threats" aimed at a defined territory and population, the Net does indeed look almost invulnerable. Things look rather different when viewed from the perspective of "a type of power which is constantly exercised by means of surveillance rather than in a discontinuous manner by means of a system of levies or obligations distributed over time [and which]... presupposes a tightly knit grid of material coercions rather than the physical existence of a sovereign." What's more, there is a sense in which the "system of right [is] superimposed upon the mechanism[] of discipline in such a way as to conceal its actual procedures"; the jurisprudence of digital libertarianism is not simply inaccurate, it may actually obscure our understanding of what is going on. Thus even the digerati may find the analysis that follows of interest; if only to see how far the Net can be made to treat censorship as a feature not a bug, how far local ordinances may reach in cyberspace, and how information's 'desire for freedom' may be curbed.

The examples I will give are drawn from different areas of regulation of communications technology. Some of them deal

explicitly with the Internet: the Communications Decency Act, the proposed NII Copyright Protection Act, the regulation of cryptography. Others are directed towards technologies outside of the Net, at least for the present: the V-chip, the Clipper chip, digital telephony and digital audio recorders. All of them share one thing -- the state has worked actively to embed or hardwire the legal regime in the technology itself. In most of them, the exercise of power is much more a matter of the quotidian shaping and surveillance of activity than of imposing sanctions after the fact. Yet these examples also present revealing differences -- illustrating a range of goals, tactics and results. Sometimes technology has been mandated by legislation, sometimes facilitated through state-sanctioned standard-setting bodies. Sometimes the legislation defines technological safe-harbours to sanctions that would otherwise apply and sometimes the state uses the power of the purse to create a *de facto* standard by refusing to purchase any equipment that does not conform to the desired technical/legal standards. I will begin with the Communications Decency Act, turn to the use of strict liability and digital fences in internet copyright policy and conclude with a sampler of hardwired regulation, drawn from a number of areas of communications technology.

Safe Harbours and Unintended Consequences

The Communications Decency act has been hailed as the nadir of Congressional regulation of communications technology. Badly drafted, inconsistently worded[63] and palpably unconstitutional, it appeared to most of the Internet community to be a case of technological ignorance run rampant. Here was a Congress regulating what it did not understand, and doing so in a way that would be practically futile because of the amount of content that came from beyond the jurisdiction of the United States. The reactions ranged from condescending amusement at the lack of Congress's technological

knowledge to proprietary anger that the law was overtly asserting its power over the electronic frontier. "Keep your laws off our Net" went the slogan.

When the CDA was struck down by two different three- judge panels[64] and then by a unanimous Supreme Court[65] the decisions were seen as an inevitable vindication of these libertarian views. The fact that the lower court opinions referred to the constitutional problems raised for the CDA by the fact that it could not reach much of the content on the Net merely sweetened the victory. Federal judges had come a long way towards recognising both the technological resistance of the Net to censorship and the fact that a global net could *never* be effectively regulated by a single national jurisdiction.[66] Two of the three parts of the Internet trinity had been acknowledged in the Federal Reporters. What's more they had actually been plugged into the framework of conventional First Amendment analysis. Given the fact that the CDA would be likely to be ineffective, could we possibly say that it passed strict First amendment scrutiny?[67] Wasn't this a case of substantially restricting "the freedom of speech" without effectively achieving the compelling state interest?

Seen through the lens provided by the jurisprudence of digital libertarianism, these reactions were entirely warranted. A command backed by threats uttered by a sovereign and directed towards a geographically defined population had met and been annihilated by a right held by citizens against intrusion by state power, in part because of the sovereign's inability to regulate those outside its borders. The Communications Decency Act vanishes as if it had never been -- an utter failure. Yet this analysis misses the developments surrounding the CDA: not the public criminal sanction but the shaping and development of privately deployed, materially based, technological methods of surveillance and censorship.

The Communications Decency Act aimed to protect minors from indecent material; however, if it did so by substantially limiting the speech of adults it would be held unconstitutional as overbroad; "burning down the house to roast the pig" in the words of Justice Frankfurter.[68] The CDA's answer to this problem was to create safe harbours for indecent but constitutionally protected speech aimed at adults, provided that speech was kept from the eyes of minors.[69] The Act offered a number of methods to achieve this goal, such as "requiring [the] use of a verified credit card, debit account, adult access code, or adult personal identification number."[70] Given the technology and economics of the Net, however, the most important safe harbour for non-profit organisations was clearly going to be that provided by §223(e)(5)(A), offering immunity to those who had used "any method which is feasible under available technology."[71]

It is here that the irony begins. When the Communications Decency Act was first proposed, a number of computer scientists and software engineers decided that they would do something more than merely railing against its unconstitutionality. They were convinced that an answer to the perceived need for regulation could be met within the language of the Net itself.[72] I am not using the "language of the Net" as part of some deconstructive or Saussurean trope, the idea was literally to provide a filtering system built into the language that makes the World Wide Web possible, Hyper Text Markup Language or HTML. Conceiving of technical solutions as intrinsically more desirable than the exercise of state power by a sovereign, as facilitators of private choice rather than threats of public sanction. they offered an alternative designed to show that the Communications Decency act was, above all, unnecessary. It is called the Platform for Internet Content Selection or 'PICS' and it allows tags rating a web page to be embedded within "meta-file" information provided by the page about itself.[73]

The system can be adapted to provide both first party and third party content labelling and rating.[74] It is touted as "value-neutral" because it *could* be used to promote any value-system. Sites could be rated for violence, for sexism, for adherence to some particular religious belief, for any set of criteria that was thought worthwhile. The third-party filtering site could be the Christian Coalition, the National Organization for Women or the Society for Protecting the Manifest Truths of Zoroastrianism. Of course in practice, we might believe that the PICS technology would be disproportionately used to favour a particular set of ideas and values and exclude others, just as we might believe that *in practice* a Lochner regime of "free contract" would actually favour some groups and hurt others, despite the fact that each is -- on its face -- value neutral. But this kind of legal realist insistence on looking at actual effects and scrutinising actual, rather than formal power, is much less a part of our First Amendment discourse than of our private law discourse as Owen Fiss, Jack Balkin, Cass Sunstein and Richard Delgado have each pointed out, though in very different contexts.[75]

While PICS and a variety of other systems offered a technical solution at the "speaker" end of the connection, other software programs also offered technical solutions at the listener end. These programs would not offer speakers a safe harbour from the reach of the Act. Rather they would "empower" computer users to protect their families from unwanted content through the use of software filters, thus raising in civil libertarians hearts the hope that the whole act was unnecessary. Programs such as SurfWatch, CyberPatrol, NetNanny and CyberSitter, would block access to unsuitable material and do so without the need for constant parental intervention.[76] Typically these programs maintained a list of forbidden sites as well as a text-search filter which would not load documents containing forbidden strings of words.

The irony that I mentioned is that these technical solutions were used by both sides in the dispute over the CDA. Those challenging the CDA argued that the availability of privately implemented technological fixes meant that the CDA failed First Amendment scrutiny: clearly it was not the least restrictive means available to achieve the objective. "Listener-centered" blocking software would allow parents to control what their children saw while "Speaker-centered," or third party, rating systems such as PICS would offer a private solution to the problem of rating the content available on the Net.

The government took the opposite position, arguing that the availability of systems such as PICS meant that the CDA was not overbroad. Adult speakers would not be burdened by the law because such systems provided adequate methods for adult speakers to segregate their indecent but protected speech from the eyes of minors. Thus, in their eyes, the PICS scheme, developed to destroy the CDA, actually saved it.[77] The Supreme Court ultimately disagreed, though Justice O'Connor left open the possibility that future technical developments might change that conclusion.[78] Before the decision was even handed down President Clinton was already signalling his political preference for a technical solution to the question of regulating speech on-line, talking vaguely of a "V-chip for the Net."[79] Bills have already been advanced in Congress which would require Internet Service Providers to provide filtering software to customers and aim at the development of an "E-chip."[80]

In January of 1999, Senators McCain and Hollings introduced S. 97, which would require that the schools and libraries receiving funds under the "E-rate" universal service internet access program "implement a technology" to block or filter material harmful to minors. [81] While schools would be *required* to use technological means, libraries with only one computer would be allowed to use other

reasonably effective alternative means. Presumably this includes more old-fashioned mechanisms, (such as yelling, pointing, claiming that you will go blind and threatening to tell your mother.) The determination of *what* material is harmful to minors would be made by "the school, school board, library or other authority responsible for making the required certification." Under the act, no agency or instrumentality of the Federal government is allowed to set, review or challenge those criteria. Notice the weird conjunction of mandating a system to restrict content, mandating *technological* rather than other means to accomplish that goal, while simultaneously respecting local decisions about the content of the proscribed category. To be sure, there are constitutional and ideological reasons for this zig-zag pattern of censoriousness, faith in technology and deference to localities. Indeed it is those implicit constitutional and ideological assumptions on which we should focus.

S.97 is far from being the only Bill to wave the magic wand of filtering software. The "Istook Amendment" went further. It would apply to any school or public library which receives Federal funds to acquire or operate a computer connected to the Internet, not merely those receiving universal service funds under the E-Rate. It would also require not only that the software is installed, but that it "is operational whenever that computer is used by minors, except that such software's operation may be temporarily interrupted to permit a minor to have access to information that is not obscene or otherwise unprotected by the Constitution under the direct supervision of an adult designated by such school or Library."[82] Indirect supervision by technological means is perfectly acceptable, indeed it is to be the norm.

So where does the on-line speech stand after the Supreme Court's decision in Reno v. ACLU? From the perspective of the digital libertarian, the Net remains unregulated and the Internet trinity is

undisturbed. From the perspective I have been developing here, things seem more mixed. As the CDA was being constitutionally voided, the technological "solutions" were proceeding apace, some because of the CDA, some in spite of the CDA; In contrast to the extensive attention given to CDA, much of this process was effectively insulated from scrutiny because of the assumptions about law and state I have been exploring here.

PICS is wonderful tool for content selection, and if one assumes a world very much like the idealised version of the marketplace of ideas, in many ways an unthreatening and beneficial one. Yet its technological goal -- to facilitate third as well as first party rating and blocking of content -- helps to weaken the Net's supposed resistance to censorship at the same moment that it helps provide a filter for user-based selection. If national networks can be more easily run through a kind of PICS-filtered firewall, what happens to the notion that the of Internet tap can only be turned to "off" or "full"? One wonders how China or Singapore or Iran would choose to employ this "value-neutral" system. The technological component of the Internet faith does not fall but it is weakened. The state may not be able to deploy Austinian sanctions backed by threats over the Net but the technology provided by PICS gives it a different arsenal of methods to regulate content: materially rather than juridically, by everyday softwired routing practices, rather than by threats of eventual sanction.

As for the listener based software filters, they present even more problems. Journalists studying these programs found that their list of selected sites was problematic and -- most importantly -- was actually hidden from the users.

> A close look at the actual range of sites blocked by these apps shows they go far beyond just restricting "pornography." Indeed, some programs ban access to newsgroups discussing gay and lesbian issues or topics

> such as feminism. Entire *domains* are restricted, such as HotWired. Even a web site dedicated to the safe use of fireworks is blocked. All this might be reasonable, in a twisted sort of way, if parents were actually aware of what the programs banned. But here's the rub: Each company holds its database of blocked sites in the highest security. Companies fight for market share based on how well they upgrade and maintain that blocking database. All encrypt that list to protect it from prying eyes.[83]

The programs turned out to ban sites ranging from the National Rifle Association to the National Organization for Women and to do so in a way that is often undetectable by their purchasers. Nevertheless enthusiasm for these programs continues unabated. President Clinton promises that government is working on an Internet V-Chip,[84] City libraries in Boston have installed blocking software on their computers.[85] Texas has considered mandating that Internet access companies make copies of these programs available to all their new customers.[86] Representative Markey introduced a Bill into this session of Congress which would require both the creation of an "E-chip" and the provision of free or "at cost" blocking software.[87] In Loudoun County, a Library Board adopted a bizarrely named "Policy on Internet Sexual Harassment" requiring that blocking software be installed on all library computers. They were sued by a group called Mainstream Loudoun who alleged that the blocking software "impermissibly blocks their access to protected speech such as the Quaker Home Page, the Zero Population Growth website, and the site for the American Association of University Women-Maryland."[88] The Federal District Court held that strict scrutiny should apply, that the policy was not narrowly tailored to serve a compelling governmental interest and thus that it violated the First Amendment.[89]

In constitutional terms, blocking and flitering raises interesting questions of state action. One of the attractions of the technical solution is often that it allows the state to enlist private parties to accomplish that which it is forbidden to accomplish directly.[É] But this state action problem is merely the constitutional incarnation of the political limitations of the jurisprudence of digital libertarianism -- its sole focus on state power, narrowly defined, its blindness towards the technical and economic shaping, rather than the legal sanctioning of the communications environment. A later chapter will take up these points in detail.

I do not want to overstate the effect of the mindset that I am describing. Not everyone in the digital world thinks this way. Libertarians too, have been worried by the dangers posed by technologically invisible filtering of communication -- indeed one of the most interesting thing about Internet politics is that they have forced libertarians to confront some of the tensions in their own ideas. Nor has the turn to software as a neutral principle gone entirely unnoticed; other commentators, most notably Larry Lessig,[90] have made the points I make here, some have even lamented the blindness imposed by an entirely libertarian focus.[91] Nevertheless, the result of the Supreme Court's decision in Reno v. ACLU will simply be to sharpen the turn to the kinds of filtering devices here and it is unlikely that this will leave the Net as free, or the state as powerless as the digerati seem to believe.

[É] In the Loudoun County case, this issue was not confronted directly. Partly because of some surprising statements in their own expert's testimony, the library's lawyers were driven to argue the case as if each site blocked had been a book deliberately removed by the library board itself, rather than simply a title they did not carry -- or, better still, a title not carried by a private distributor which had been chosen as the library's supplier because it provided a standard package of periodicals suitable for libraries – chosen, perhaps, after concerns were raised about inappropriate periodicals finding their way into the reading room. Future cases will almost certainly bring both the 'active exclusion'/`passive failure to purchase' point, and the state action point, more to the fore.

Privatised Panopticons & Digital Enclosures

chapter 5

I have argued elsewhere that the current government proposals for the "reform" of copyright on the Internet weigh only the costs of cheaper copying rather than its benefits, underestimate the importance of fair use to competition policy and free speech, fail to recognise the unique features of both intellectual property and networked environments, and apply bad economic analysis to an even worse depiction of current law.[92] Leaving aside the virtues or vices of these proposals aside for the moment, I will focus here on the methods by which they were to be implemented.

One of the key problems for any Internet copyright regime is enforcement. The Internet trinity I discussed earlier would seem to apply with particular strength to the problem of policing copyright on a global distributed network. The technology is resistant to control,

the subject matter of the regime is intangible and trivially easy to circulate, and both the content and the people regulated by the regime are frequently beyond the jurisdiction of the sovereign in question. The combination of these circumstances has produced a series of warnings that intellectual property law was doomed because neither its conceptual structure nor its enforcement mechanism could survive 'being digital.'[93] The best known of these warnings is also the best written.

> The riddle is this: if our property can be infinitely reproduced and instantaneously distributed all over the planet without cost, without our knowledge, without its even leaving our possession, how can we protect it? How are we going to get paid for the work we do with our minds? And, if we can't get paid, what will assure the continued creation and distribution of such work? Since we don't have a solution to what is a profoundly new kind of challenge, and are apparently unable to delay the galloping digitization of everything not obstinately physical, we are sailing into the future on a sinking ship. This vessel, the accumulated canon of copyright and patent law, was developed to convey forms and methods of expression entirely different from the vaporous cargo it is now being asked to carry. It is leaking as much from within as without. Legal efforts to keep the old boat floating are taking three forms: a frenzy of deck chair rearrangement, stern warnings to the passengers that if she goes down, they will face harsh criminal penalties, and serene, glassy-eyed denial.[94]

If one saw these technological transformations as mainly a threat to both the copyright owner and the enforcement power of the

state, how would one respond, particularly if one took seriously the difficulties in policing that the Internet trinity points out? One would try to focus on building the regime into the architecture of transactions in the first place -- both technically and economically -- rather than policing the transactions after the fact. More concretely, one would want to escape from the practical and legal limitations of a sovereign-citizen relationship.

Thus one might seek out private actors involved in providing Net services who are not quite as *mobile* as the flitting and frequently anonymous inhabitants of cyberspace. In this case, the parties chosen were the Internet Service Providers. One would pin liability on them and leave it up to them to prevent copyright infringement through technical surveillance, tagging and so on, and to spread the cost of the remaining copyright infringement over all the users of their service, rather than all the purchasers of the product in question. By enlisting these nimbler, technologically savvy players as one's private police, one would also gain another advantage; freedom from some of the constitutional and other restraints that would burden the state were it to act directly. Intrusions into privacy, automatic scrutiny of e-mail, curtailing of fair use rights so as to make sure that no illicit content was being carried; all of these would occur in the private realm, far from the scrutiny of public law. There are advantages to privatising the Panopticon, it turns out.

Given all these "advantages" it is unsurprising to find that strict liability for on-line service providers became a central feature in the Clinton administration White Paper,[95] the Bills implementing its ideas[96] and the US's proposals for the WIPO treaties in Geneva.[97] The specifics of this proposal were relatively simple. On-line service providers were to be made strictly liable for copyright violations committed by their subscribers -- in part this was done by an expansive definition of fixation so that even holding a document in RAM

memory as it was browsed, would constitute the creation of a copy.[98] Clearly then, the relatively more stable versions held in a server's disk cache or stored temporarily in its computers would count as copies. The theory also depended on the notion that we should analogize the on-line service provider to an innocent but infringing photoshop and thus impose strict liability as a direct infringer, rather than analogizing the service provider to a business that rented Xerox machines by which material *could* be copied illegally, which would be liable only if it was guilty of contributory infringement.[99] Notably this theory was rejected by the only court to have faced it squarely.[100]

In one sense this strategy is very similar to the use of strict liability elsewhere in the legal system -- and of course it can be understood entirely without reference to the Foucauldian gloss. Although one must note that the the conventional reasons for imposing strict liability are strikingly absent.[101]

With or without Foucault, however, thinking about the use of strict liability as an enforcement mechanism does illustrate the limitations of the Austinian view of the state's exercise of power. (Unsurprisingly perhaps, Austin argued against strict liability and judges under the influence of Austinian reasoning actually declared that strict liability was not true law.)[102] My central point here is not the undesirability of strict liability for on-line service providers, though the rationale, legal basis and constitutionality of such a system seem doubtful to me. Rather, I think that the possible impact of a strict liability system on actual privacy, speech and discourse indicates another limitation of the jurisprudence of digital libertarianism. Once again, the focus on public, criminal and sanction-backed acts by states exercising their power directly, tends to obscure and thus to undervalue the efficacy of efforts that rely on privatised enforcement and surveillance, cost spreading and the use of "material coercion rather than the physical existence of a sovereign."

It is to the latter point that I now turn. One prong of the Administration's plan for copyright on the Net depended on enrolling private actors to act as enforcement agents in a way that sidestepped the rights, duties and privileges between citizen and sovereign. The other prong depended on coating technological anti-copying devices with the authority of the law in such a way as to change the relative powers of current copyright holders on the one hand and their customers and future competitors on the other. The two most important provisions are the "copyright protection and management systems" section and the "integrity of copyright management information" sections initially proposed by the United States during the WIPO conference[103] and finally incarnated in the grandiosely named Digital Millennium Copyright Act of 1998.[104]

These two provisions seem on first sight to be entirely unobjectionable. The protection and management section prohibits the circumvention of technological measures that effectively control access to a copyrighted work. It also imposes civil liability on importers, manufacturers and distributors of devices that are primarily designed to circumvent a copyright protection system.[105] The management section imposes civil *and* criminal liability on someone who removes or tampers with copyright management information.[106] Obviously technological protections are going to be an important way by which digital intellectual property is safeguarded and these technological protections will include, among other things the kind of deeply embedded information that the management information section protects. Documents will keep track of how many times they are read and may complain if they are read too much or by the wrong person. Pamela Samuelson calls these "texts that rat on you." Digital books sold to one person may be encoded so that they can't be read by someone else on another computer. Given the possibility of documents that have the copyright details bound into in every packet

of data, and which also check themselves to be sure that no alterations have been made, quotation may be perceived as alteration. (Presumably internet service providers would also be encouraged to introduce some system of scanning which looked for altered or unauthorised packets of data.)

Western legal scholars are sometimes shocked when they discover that in some religiously pluralistic countries, most notably India, citizens have their own "personal law." A Muslim and a Hindu citizen of the same country, the same province, standing in the same room, may yet be subject to different legal systems, at least in matters of family law. The idea of bringing one's own legal regime with one, like a turtle carrying its own shell, seems strange to those inculcated with more universalistic assumptions about the nature of legal obligation. In several ways, the developments I have been describing present a fascinating analogy of the ideal of personal law. Virtual objects, texts, and programs might travel with their own hardwired personal 'law' – a set of rules and protocols that govern their operation. The legal realist insistence on breaking down "property" into an differentiated set of legally protected interests, partly in the name of more precise social engineering, is now carried one step further. Digital books may report back on how many times they are read and deactivate themselves if they are sold or transferred; sound recordings may automatically degrade each time they are copied; programs may shut themselves down, actively resist attempts at reverse engineering, or even encrypt your files and refuse to provide the password until a licensing fee is paid.

Of course, property owners have always used the physical characteristics of their products in an attempt to control the way that they are used so as to win maximum control or market advantage, even after ownership of those goods has been transferred: Planned obsolescence in consumer appliances, disposable razors with visibly

disappearing lubricating strips that signal the need to change blades even before the edge dulls, cigarettes with enhanced levels of nicotine that "encourage" users to smoke more. But the further one goes into the information economy, the greater the complexity, precision and fixity that can be given to these embedded codes of usage and the more they can actually respond to changes in the environment --actively rather than passively continuing the efforts of the code-writer to exercise control. Is this a qualitative or merely a quantitative change? I am relatively indifferent which way it is described; the point is simply that two sets of assumptions have to be revisited. First, if one imagined a marketplace in which the paradigmatic transfer of goods was an outright sale conveying practical dominion and a standardised suite of legally protected interests, the world of electronic commerce is likely to diverge from that paradigm with increasing speed. This point will turn out to be particularly important when I turn to the discussion of intellectual property. Second, assumptions about the uncontrollable, unregulable nature of information and information products -- a central tenet of the Internet trinity -- have to be modified in an important way. Information may succumb to regulation by a code that is binary rather than Napoleonic.

The point about all of this, is that there will be a continuing technological struggle between content providers, their customers, their competitors and future creators. Obviously it will sometimes be in the interest of content providers to make it as hard as possible for citizens to exercise their fair use rights. They will try to build technological and contractual fences around the material that they provide, not just to prevent it being stolen, but to prevent it from being used in ways that have not been paid for, even if those uses are privileged under current intellectual property law. They may want to stop their competitors from achieving “interoperability” or prevent their customers from selling second hand versions of their products. The

technical means to do this can be thought of digital fences. Sometimes those fences will be used to stop clear violations of existing rights. Sometimes they will be used to enclose the commons or the public domain. Thus by making it illegal or impractical for me to go around through or over the fence, the state adds its imprimatur to an act of digital enclosure. The Internet trinity tells us that information wants to be free and that the thick fingers of Leviathan are too clumsy to hold it back. The position is less clear if that information is guarded by digital fences which themselves are backed by a state power maintained through private systems of surveillance and control.

A Communications Sampler

The tendencies I have been describing here by no means end with the Communications Decency Act and the NII Copyright Protection Bill. In fact, the turn to privatised and technologically based enforcement to avoid practical and constitutional obstacles seems to be the rule rather than the exception.

Outside of the Net, the most obvious example of this is the V-Chip, a device to enable parents to restrict television programming through a "voluntary" rating system. While the rating system is voluntary, the device is mandated by section 551 of the Telecommunications Act of 1996.[107] The V-Chip decodes a set of ratings agreed to by private parties and suggested by a state-convened "private" board." It then blocks programming that is above a ratings threshold set by parents.[108] The attractiveness of this hardwired mix of public and private decisions can be judged by the spread of V-Chip analogies -- President Clinton's "V-Chip for the Net," Rep. Markey's "E-Chip." Why is this device so popular, not just as a device, but as a rhetorical trope? The answer, I think, is partly provided by the characteristics outlined here. The V-chip seems to be merely a neutral

facilitator of parental choice. The various acts of coercion involved -- the government making the television company insert the thing into the machine, the public-private board choosing which ratings criteria will be available for parents to use -- simply disappear into the background. Finally, the distributed privatised nature of the system promises that it might actually work -- though admittedly, state administration of the television system poses fewer headaches that state administration of the Net.

Another set of examples is provided by encryption policy. In the digital era, encryption is no longer merely the stuff of spy novels. It provides the walls, the boundaries, the ways of preventing unauthorized or unwanted entry. Faced with the development of a cryptography industry which would produce digital walls unbreakable by the state, the government responded by attempting to legislate its own backdoor The first proposal was that the encryption of all communications had to be through a government designed device -- known as the Clipper Chip. Your phone, fax or computer system would encrypt your communication using the algorithm hardwired into the Clipper Chip. The Clipper Chip utilizes a "key escrow" system under which the government maintains a "back door" key to decrypt all Clipper communications; a key that is supposed to be available only to law enforcement agencies who, most of the time, would have to get judicial approval of their actions. After considerable controversy, use of the Clipper Chip encryption system was declared “voluntary” for both the government and the private sector.

This might seem to be a partial vindication for the digital libertarian position. In fact, however, the Clipper project continues to have considerable influence on the domestic encryption industry because the government has, for the most part, adopted the Clipper Chip and has used its considerable purchasing power to make it a de

facto industry standard.[109] It would be harder to find a nicer example of a hardwired legal regime implemented through market power.

One of the arguments behind the Clipper Chip was that law enforcement agencies were merely striving to achieve the same level of physically permissible surveillance in a world of encoded transmissions as they currently possessed. With this as a baseline it was obvious that the material possibility for interception and decryption should be hardwired into the system itself. The same argument was made successfully over digital telephony. Realizing that new telephony technology, such as call forwarding, cellular telephones, and digital communications in general, present increasing challenges to wire tapping, Congress passed the Communications Assistance for Law Enforcement Act,[110] more commonly known as the "Digital Telephony Act." At its heart, the Digital Telephony Act requires that telecommunications companies make “tappability” a design criteria for the system. Everything recorded by the traditional "pen register" system, as well as a few new categories of information, must be digitally recorded. Under the Act, information regarding a subscriber's name, address, telephone toll billing records, telephone number, length of service and the types of services utilized are now available to the government.[111]

Technologically hardwired protections have also been implemented in order to protect intellectual property as in the Digital Audio Tape or (DAT) standard. Unlike compact disks, which until recently were “read-only,” digital audio tape technology allows users to make perfect copies of recordings. Fearing that this ability would lead to the development of an extensive market for copied tapes, the recording industry pushed for mandatory technological protection, which they received in the Audio Home Recording At of 1992.[112] This Act requires all DAT recorders to utilize the Serial Copy Management

System, which allows a first copy to be made onto DAT but prevents all subsequent copies.

These examples offer a cautionary note to the libertarian techno-optimists who believe that technology always grows out of governmental control and always in the direction of greater "liberty." Let us lay aside many of the assumptions behind that belief for a moment-- such as that governments are generally the greatest threat to daily "liberty" -- or conversely that liberty should be defined primarily around the absence of governmental restraint. Even with these qualifications the idea that the technological changes of the digital revolution are always outside the control of the state seems unproven,. In fact, at least state is working very hard to design its commands into the very technologies that, collectively are supposed to spell its demise. In fact, as these examples point out there are -- whether one likes them or not -- strong arguments that the "technologies of freedom" actually require an intensification of the mechanisms of surveillance, public and private, to which we are currently subjected. If the digital technologies enlarge our space for living, both conceptually and practically, the dangers posed by that expansion will prompt the demand -- often the very reasonable demand -- that the Panopticon be hardwired into the "technologies of freedom."[113]

Looked at in a vaguely Foucauldian light, the examples I have given so far seem to point to two conclusions, conclusions which may seem paradoxical. On the one hand, the studies indicate that the confident assumption that the state cannot regulate cyberspace is definitionally blind to some of the most important ways that some states, at least, could exert power. The jurisprudence of digital libertarianism could use a lot less John Austin and a lot more Michel Foucault. But one cannot simply limit the analysis to the available avenues of *state* power. *Discipline and Punish* was not a manual for state officials, but a challenge -- in some ways similar to the challenges

posed by legal realism and feminism -- to the very categories of public and private and to the belief that power begins and ends with the state. If the first conclusion of this book is that the state may actually have more power than the digerati believe, the second conclusion is that the attractiveness of technical solutions is that they apparently elide the question of power -- both private *and* public -- in the first place. The technology appears to be "just the way things are"; its origins are concealed, whether those origins lie in state-sponsored scheme or market-structured order, and its effects are obscured because it is hard to imagine the alternative. Above all, technical solutions are less contentious; we think of a legal regime as coercing, and a technological regime as merely shaping -- or even actively facilitating -- our choices. In the Lochner era a strikingly similar contrast was drawn between the coercive nature of public law and the free private world of a market that was merely shaped by neutral, facilitative rules of contract and property. The legal realists did a remarkably good job of pointing out the shortcomings of that picture of the market. If we are to have some alternatives to the jurisprudence of digital libertarianism we will have to offer a richer picture of Internet politics than that of the coercive (but impotent) state, the apolitical world of property rights and the neutral and facilitative technology.

The first task will be to investigate one of the most important manifestations of the line between public and private, politics and property, that-for-which-the-state-is-responsible and that which is just the way things work. This line goes by the name of the state action doctrine.

State Action and Private Action chapter 6

What does the Constitution cover? Whose conduct does the Bill of Rights regulate? Many non-lawyers never think about these issues at all. But by the evidence of talk-shows and Usenet newsgroups and letters to the editor, one popular assumption is that the Constitution and the Bill of Rights regulate a wide range of *private* behaviour. People who are fired by private companies, expelled by private schools, sanctioned by private universities, will often talk of the violations of "their constitutional rights." The First Amendment in particular is often assumed to guarantee individuals a wide range of immunity from regulation by powerful private actors.

There is an important error and two more subtle truths in this popular assumption. The error is a big one; with a couple of exceptions, the Constitution does not regulate private conduct *at all.* Or, to put it another way, it takes a state actor to violate the Constitution. If the city council allows Christians but not Jews to enter its doors, attend its meetings or run in its elections, it violates the Constitution (several times, in fact.) But if I choose Quakers but not Baptists as my friends, open my doors to the Mormon missionary but turn away the Salvation Army, or allow my children only to read about the faiths and ideologies I believe to be good, I violate no

provision of the Constitution. In fact, contrary to popular belief, if I am a racist inn-keeper or restauranteur who refuses to serve black patrons, I violate no constitutional right.[114] The same is true if I am the fundamentalist President of a private university. No constitutional violation occurs if I refuse to allow discussion of the theory of evolution, formally earmark my financial aid for students of Aryan descent or expel students found to be atheist.

Private conduct is certainly regulated by civil rights laws. There are laws affecting public accommodation, legislative riders to Federal financial aid provisions and a panoply of other rules. But private conduct is not directly reached by the Constitution. If the legislature wanted, all of these the civil rights laws could be repealed tomorrow with no constitutional comeback; the "Whites Only" section in a private restaurant would then be as legal as the No Smoking sign. The market would then decide whether or not white people would pay for the privilege of segregated dining. If the state *mandated* a "Whites Only" section in restaurants, that would be another thing. But so long as the decisions are made by private parties, nothing in the Constitution is relevant; to quote my colleague Burt Wechsler, the Constitution's writ covers the conduct of the municipal dog catcher in Gary, Indiana, but it does not cover the behaviour of Exxon or General Motors.

To return for a moment to the theme of an earlier chapter, it is important to realise that while libertarians embrace the constitutional limitations on what the state may do, they have often resisted statutes such as the Civil Rights Acts as an interference with private freedom. In 1963, Robert Bork -- who was then a libertarian, attacked the Interstate Accommodations Act, which prohibits racial discrimination in hotels and motels. He argued that it was a "principle of unsurpassed ugliness"[115] for the state to get involved in the private choices of individual citizens and business people. In the libertarian

view, while the Constitution may be colour-blind, there is no reason for individuals to be forced into the same affliction. For American law, the state action doctrine is the line beyond which the *constitution* should not go. Subject to a number of restrictions, the legislature can always go farther. For American libertarians, the state action doctrine has often marked the line beyond which *law* should not go. Private choice is private choice and should be left alone.

American *civil* libertarians, on the other hand, have often believed the opposite and have held up the civil rights statutes as one of the nation's proudest achievements. On the Net, then, the issue of state action is likely to be an important in two ways; first, how far does the Constitution reach? Second, what attitudes towards private choices in cyberspace are going to prevail? Those of the libertarians, so that any private decision is presumptively free of regulation? Those of the civil libertarians, so that certain categories of private choice might be forbidden -- just as racial discrimination is forbidden in many housing markets, restaurants and workplaces?

I said earlier that the popular perception of Constitutional rights contained a large error and a couple of important truths. The error is obvious; ignoring the requirement of state action altogether leads one to misunderstand the reach and power of the Constitution. The truths are more subtle. First, I think, non-lawyers are in one sense correct when they think of the Constitution as touching on private conduct. The Constitution is more than simply rules and rights. It presents a set of *ideals,* ideals of equality, liberty, free speech, due process. These ideals are seen to have moral implications outside the realm of state action. This is one reason why many civil rights statutes take constitutional requirements and, with a few modifications, apply them directly to private parties. It is easier to get the Congress to agree to forbid private parties from doing certain things, if the Supreme Court

has already said that the Constitution forbids *states* from doing those things.

The second truth in the non-legal view of the Constitution is that the state action distinction is not nearly as simple as most lawyers make it sound. It is all very well to say that the constitution only covers the actions of the state, but what counts as state action? Is it state action if I call a police officer to help me expel the Mormon missionary who will not leave my property? Is it state action if I am sued by my neighbours for selling my home to a black family, violating the terms of a racially restrictive covenant I had agreed to when I first purchased the house? Is a private utility company a state actor, if the state helps it to maintain its monopoly? The state is actually deeply implicated even in "private" economic actions; it defines, changes, and enforces property rights and definitions of civil harm in a way that inevitably involves complex decisions of public morality and policy. What conduct, then, is truly "private"? The question "what is state action" raises the same issues I discussed in the section on "the solving idea of property"; for the very good reason that they are actually the same problems under different names. Libertarianism's oscillation between ideas of *natural* rights and *neutral* property law will turn out to reappear at the heart of the state action doctrine. In cyberspace, with its open moral geography, its importance to free speech, its public/private architecture and its manifestly state-imposed property regimes, the twists and turns will only become more interesting.

State Action Doctrine and Speech

I want to start with a comparison of three cases that have long been favourites of teachers of American Constitutional Law. The first is Shelley v. Kraemer,[116] the second Flagg Brothers v. Brooks[117] and the third New York Times v. Sullivan.[118]

Shelley v. Kraemer

In Shelley, the Supreme Court had to decide whether enforcement by the courts of a racially restrictive private covenant counted as state action. The Shelley's, a black family, had been sold a house by a white real estate dealer called Bishop. The house was covered by a deed of covenant which provided that, "no part of said property . . . shall be . . . occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy . . . by people of the Negro or Mongolian Race." [119] According to the other residents in the area covered by this covenant, Bishop did not have the right to sell to persons of "the Negro or Mongolian Race" -- that was not part of his bundle of entitlements.

On the surface, this seems like a very easy case. The racially restrictive covenant was a private agreement, a contract that allocated property rights between the parties. Surely there was no state action involved, and thus the Constitution was not implicated? At first, the Supreme Court seemed to agree. Justice Vinson writing for the majority, laid out a framework that appeared to bode poorly for the Shelleys.

> Since the decision of this Court in the Civil Rights Cases, 1883, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.
>
> We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements

> are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.[120]

Thus, if all of the residents of the area had chosen to adhere to the terms of the covenant, the Shelley's could not have protested to the court. But in this case, the Shelley's wanted to take possession and were being sued by their neighbours. Their neighbours, in other words, were asking the courts of Mississippi to expel the Shelleys from the house in order to enforce the terms of the covenant. And that, the Supreme Court would not allow.

> We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.[121]

The power of this line of reasoning is obvious. Here was a willing buyer and a willing seller; only the state stood in the way of the transaction. Who could deny that the state was acting if it threw the Shelley's out of a house they had actually bought? The difficulty with this line of reasoning is equally obvious; from the neighbours' point of view, all that were asking was that a private deal should be enforced. One party to a contract should be legally prevented from breaching that contract by making a prohibited deal with someone else. If this is state action, what isn't? In every assertion of property rights, the state is always in the background. When the private white-only club throws out the black patron, the police can always be called if he tries

to resist. When I tell the pushy Republican campaigner get off my property, the threat of a trespass action always lies in the background. When the women-only college refuses to allow a student named "Robin Williams" to attend classes after discovering that he is a man, it is the law of contract and private property that allows them to enlist the state in their aid. Yet according to Shelley, any time that the state is actually *called upon* to implement private discriminatory agreements, there is state action. The critics of Shelley would say that this collapses the state action distinction altogether. There is no action so private that it cannot be converted into state action by someone who says, in effect, "make me." At that point, the state must be brought in to enforce the deal, the right, the judgement and, according to Shelley, we have state action.

The years have not been kind to the decision in Shelley. The Supreme Court has never formally overruled it, but they have said, many times that it is a "controversial" or "unhappy" decision and have in effect confined it to its own facts.[122] In case after case, the Supreme Court made the state action requirement harder and harder to meet. Is there state action if a discriminatory private club is given one of a limited number of state liquor licenses so that the state, in effect, restricts the number of places where blacks may drink? (The Supreme Court said "no.")[123] Is an electric utility company a state actor if it is pervasively regulated monopoly? (The Supreme Court said "no.")[124] A school received over 90% of its funds from the state, and was used by state agencies as one of the main ways to fulfil a statutory obligation to provide a suitable education for children with special needs. The state paid tuition, monitored the children and provided the diplomas. Was this state action? (The Supreme Court said "no.")[125] Why were the boundaries of the doctrine being contracted?

There are many reasons. One could resort to crude circularity and say that subsequent judges were more conservative (which we know because they made more conservative decisions). Certainly changes in the composition of the bench made a difference, and conservatives certainly were more reluctant to expose a wide range of behaviour to constitutional scrutiny, but that merely pushes the question back a little further. After all, the court of 1948 wasn't a wildly radical one. Why did liberals and conservatives -- on and off the bench -- hold a particular set of opinions about state action in 1948 and a different one in 1978? One reason is that, in 1948, it appeared the Congress and the states were never going to address racial segregation and inequality in private conduct (and perhaps not even in public schools). If one believed that the Constitution could not reach discriminatory covenants like those the Shelleys were trying to circumvent, then there was no hope for change. By the seventies, however, it was clear the Congress could pass, and in fact had passed, civil rights statutes that struck directly at private conduct. A court-interpreted Bill of Rights was no longer the only way of protecting "discrete and insular minorities"[126] from widespread patterns of private discrimination. (This assumes that the majority still *cares* about widespread private discrimination, an assumption which many -- on and off the court -- have doubted.)[127]

Flagg Brothers v. Brooks

The second case, Flagg Brothers v. Brooks, was argued in 1978, almost thirty years to the day after Shelley v. Kraemer. Both cases involved the Fourteenth Amendment, and both cases raised the question of whether the making and enforcement of the background rules of property and contract counts as state action. Yet much had changed, in the Supreme court, in state action doctrine and in the surrounding political culture. In Flagg Brothers, Shirley Brooks and her family were

evicted from their apartment in Mount Vernon, New York. The city marshal had her belongings stored at Flagg Brothers' warehouse. Later, after a series of disputes about fees, Flagg Brothers notified Brooks that they were going to sell her belongings under the terms of a statute passed by the New York State legislature The statute specifically allowed warehousemen to sell goods in their care and did not, Brooks argued, have the "due process" protections that the 14th Amendment required. The different ways that the majority and the dissent analysed the case are revealing. Justice (now Chief Justice) Rehnquist wrote the majority opinion. He thought that this situation did not fit in the pigeon-holes that prior cases had provided; there was no exclusive "public function" involved and thus no state action, particularly given the fact that there were other remedies available.

> These two branches of the public-function doctrine have in common the feature of exclusivity. Although the elections held by the Democratic Party and its affiliates were the only meaningful elections in Texas, and the streets owned by the Gulf Shipbuilding Corp. were the only streets in Chickasaw, the proposed sale by Flagg Brothers under § 7-210 is not the only means of resolving this purely private dispute...Presumably, respondent Jones, who alleges that she never authorized the storage of her goods, could have sought to [bring an action for the recovery of] her goods at any time under state law.[128]

For him, this was simply a case of one private party (Flagg Brothers) doing to another private party (Shirley Brooks) what they were allowed to by the property law of the state of New York. Ironically, Justice Rehnquist argues that an individual's property rights are only what the state says they are; property rights are simply whatever legally protected interests the State of New York chooses to give or withhold from its citizens -- the very position I described in the chapter on libertarianism and the solving idea of property.

> It is undoubtedly true, as our Brother Stevens says in dissent,.. that "respondents have a property interest in the possessions that the warehouseman proposes to sell." But that property interest is not a monolithic, abstract concept hovering in the legal stratosphere. It is a bundle of rights in personalty, the metes and bounds of which are determined by the decisional and statutory law of the State of New York. The validity of the property interest in these possessions which respondents previously acquired from some other private person depends on New York law, and the manner in which that same property interest in these same possessions may be lost or transferred to still another private person likewise depends on New York law.[129]

Thus the idea of "property rights" is merely a bag in which to hold whatever rights the state gives you today. Justice Rehnquist has clearly accepted the fact that property rights are in fact the result of state choices, and not natural rights or neutral deductions. This would seem to *expand* the state's responsibility for the content of its property rules, but Justice Rehnquist quickly turns around to argue the opposite; state action must be interpreted in a relatively restrictive way.

> It would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to "state action" even though no state process or state officials were ever involved in enforcing that body of law.[130]

It should be noted that despite Justice Rehnquist's mention of the fact that "no state officials" were involved in enforcing the law, other decisions by him and by the court implicitly *rejected* Shelley's focus on state enforcement, for the reason that *all* disputes could potentially be made to involve state officials.

Justice Marshall who, in a nice twist of fate, had been one of the lawyers for the Shelley's in 1948, disagreed with the majority's analysis

from beginning to end. First, he felt the majority was unrealistic to assume that Shirley Brooks had other legal remedies. The most likely other remedy involved posting a bond of twice the value of the property in question, something that Brooks clearly did not have.

> I cannot remain silent as the Court demonstrates, not for the first time, an attitude of callous indifference to the realities of life for the poor.
>
> . . . .
>
> Respondent Jones, according to her complaint, took home $87 per week from her job, had been evicted from her apartment, and faced a potential liability to the warehouseman of at least $335, an amount she could not afford.[123]

The rest of the dissent, in which Justice Marshall joined, concentrated on the errors they saw in the majority opinion's reasoning.

> The question is whether a state statute which authorizes a private party to deprive a person of his property without his consent must meet the requirements of the Due Process Clause of the Fourteenth Amendment. This question must be answered in the affirmative unless the State has virtually unlimited power to transfer interests in private property without any procedural protections.[124]

The majority had claimed that, though the state did in fact choose and change property rights, to call this behaviour state action would eviscerate the state action requirement. Almost every sort of private conduct ultimately involved those rules, so almost everything would be state action. The dissent saw a different slippery slope. The property rules were in fact, a creation of the state, even the majority admitted that. How could they *not* be state action? What's more, if private parties, acting under powers transferred to them by the state,

were immune from constitutional check, then the state could easily circumvent the constitution by transferring the property right in question to private parties and then letting *them* do the dirty work.

Both sides had a point, but it was the majority view that was to dominate in the years after Flagg Brothers. Whether the motive force was the experience of civil rights statutes, or simply the straightforward effect of presidential nominations, the Court's view of state action became ever narrower. Private parties directly authorised by the state were held not to be state actors. The fear that Constitutional limitations could be evaded by a technique of privatisation came to seem an increasingly real one.

But there is one area where this pullback, this narrowing in state action cases has not occurred. The story of that area begins with the famous case of New York Times v. Sullivan.

New York Times v. Sullivan

New York Times v. Sullivan was argued on January 6th 1964. Justice Brennan began the majority opinion by saying that the court was:

> required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct.[124]

The facts of New York Times v. Sullivan may be well-known to some; here is a brief summary for those unfamiliar with them. The case concerned a paid advertisement entitled "Heed Their Rising Voices" that appeared in the New York Times on March 29th 1960. The advertisement defended the "thousands of Southern Negro students . . . engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights."[125] It protested the "wave of terror" with which those protests had been met and appealed

for funds to support the student movement, the voting rights movement and the legal defense of Dr. Martin Luther King. After the ad appeared, the New York Times and "four Negro clergymen" were sued for libel by one L. B. Sullivan, an elected Commissioner of Montgomery, Alabama who was responsible for supervising the "Police Department, Fire Department, Department of Cemetery and Department of Scales." Mr. Sullivan was awarded $500,000 by an Alabama jury.[126]

The advertisement was indeed inaccurate; it claimed that the demonstrating students had sung "My Country "Tis of Thee," when in fact they had sung the national anthem. More seriously, the advertisement overstated the number of times that Dr. King had been arrested; he was actually arrested "only" four times, rather than seven. The advertisement was also supposed to have exaggerated the nature of the police response to the demonstrations as well as the degree of police complicity in the harassment of civil rights leaders.[127]

Given Mr. Sullivan's position as a supervisor of the police department, (to say nothing of the Department of Scales) the jury might have been convinced that his reputation would suffer in the eyes of the 35 readers of the New York Times then resident in Montgomery County. In any event it turned out that the jury did not need to reach this question. As Justice Brennan explained, the trial judge instructed the jury that the statements were libelous per se, and thus "'the law . . . implies legal injury from the bare fact of publication itself,' 'falsity and malice are presumed,' 'general damages need not be alleged or proved but are presumed,' and 'punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown.'"[128] These rulings were upheld by the Alabama Supreme Court.[129]

Libel laws are, of course, part of the private law of the state; they are part of the larger body of rules that dictate what we can do to

our fellow citizens without paying a price: knock down a supporting wall? Build a structure that blocks the sunlight from our neighbour's greenhouse? Utter false statements that may damage our neighbour's reputation? New York Times v. Sullivan is famous as a free speech landmark because, in a strong decision, the United States Supreme Court overturned the decision of the Alabama Supreme Court and indicated that the Federal Constitution imposed limits on the substantive content of the libel laws of the states.

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[130]

Although it is so important as a First Amendment decision, New York Times v. Sullivan is not often thought of as a case about state action, still less as a case that explores the paradoxes involved in applying the Constitution to the background rules of property, contract and tort. On further thought, this seems peculiar. After all, this was a lawsuit between private parties, not a direct public censorship by the state. Is New York Times v. Sullivan simply Shelley v. Kraemer for speech? The state action issue got short shrift in the case;

> We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny. The first is the proposition relied on by the State Supreme Court -- that "The Fourteenth Amendment is directed against State action and not private action." That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions

> on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. See, e. g., Alabama Code, Tit. 7, §§ 908-917. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

It is a state rule of law (common law in fact) and its *effects*, petitioners claim, impose restrictions on their constitutional freedoms. But this is a remarkably broad definition of state action. After all, on its face, the libel law of Alabama did not treat government officials or whites any differently than anyone else. We might believe that the jury or the judge was prejudiced against the plaintiffs and against Dr. King, but the court's ruling did not address that fact, it ruled that the underlying law must be struck down and a new rule put in its place. All might agree on the unconstitutionality of a private law rule that gave one level of damages in against legislative incumbents, and a lower level of damages in libel suits against their electoral opponents. All would agree on the unconstitutionality of a rule which declared that whites, but not blacks, could leave property to their children. The claim here, however, was about the effects of a *facially neutral private law* rule when used in *private litigation* by someone asserting rights that they had *as a private party*, and not as a state official.

True, Alabama libel law was being used here in a way that would probably frustrate the goal of wide open, robust debate, and the state was a player in the enforcement of any judgement. But the laws governing contract and property *could* be used by racists -- including racist government officials acting as private parties -- to frustrate the goals of integration and colour-blindness. They could even be used in a way that ultimately called upon state power to maintain segregated living patterns. Yet that had never been thought to produce a federal Constitutional requirement of a particular rule of private law

restricting the availability of race-conscious dispositions. My point here is that there is a sense in which this case creates in the area of First Amendment jurisprudence, a standard that equals and in some sense even exceeds Shelley v. Kraemer's sensitivity to the state's entanglement in the groundrules of contract, property and tort. Subsequent cases have continued the trend.[131]

There are lots of explanations for the Supreme Court's greater sensitivity in speech cases to the potential Constitutional effect of the powers conferred on private parties by private law. Justice Marshall was probably correct when he argued that there was a not a single standard of state action, but rather a sliding scale, depending on the value and type of the underlying right asserted -- though he made that comment in the context of equal protection doctrine. But why in the context of free speech? There are, of course, a number of explanations. The history of the First Amendment is certainly bound up with the laws of *criminal* libel, going back to the Alien and Sedition Acts, as well as to the use of civil libel to suppress criticism of the state. That history that may have made it easier for the Supreme Court to make the leap it did in Sullivan. But in addition to these explanations, there is another one, I believe.

Implicitly, the Supreme Court seemed to feel that speech torts were somehow less natural than other private law entitlements, less inevitably part of the assumed baseline from which one measured harms and benefits. Justice Rehnquist's comments in Flagg Brothers notwithstanding, it is a lot easier to fall into a naturalistic, libertarian vision of property rights when one is talking about conveying a house or ejecting a trespasser. These seem like "natural" incidents of property which the state is merely recognising. A rule that gives you a legally protected interest in your reputation seems a lot more like a choice, an action. And thus we come to the question which interests me here. Which vision of state action will operate on the Internet,

both as a matter of constitutional law, and as a matter of political assumption?

Cubby v. CompuServe (1991)

Cubby[132] was one of the first cases dealing with on-line liability for libel. In terms of the development of digital media, a case from 1991 is positively venerable. Yet it is still much studied, mainly for its use of analogies; to what should we analogise an on-line service? To a newspaper, a library, a bookstore? But Cubby also has a less-noticed side, its insistence on, and modest extension of, the ideas developed in New York Times v. Sullivan.

In 1991 CompuServe was one of the largest on-line services. In the days before the flowering of the Net, on-line access meant access to a particular library of data sources compiled and presented, though generally not authored, by a single company. CompuServe had just such a library, comprising "thousands of different information sources." Subscribers could also gain "access to 150 special interest "forums," which are comprised of electronic bulletin boards, interactive online conferences, and topical databases."

Cubby Incorporated claimed that it had been libelled in one of these fora and sued CompuServe, arguing that it should be held liable as if it was a "publisher" of the work in question. Publishers are held to a higher standard of liability; CompuServe would be held liable as if they had made the libelous claims themselves, regardless of specific knowledge. CompuServe, on the other hand, insisted that it had no knowledge of, or control over the contents of the electronic newsletter in question. Its lawyers argued that it should be held only to the lower standard of a "distributor." Distributors are only held liable for defamatory material if they knew, or should have known about the defamation. Under this standard, CompuServe would win. The court sided with CompuServe, quoting New York Times v. Sullivan to

support the position that the First Amendment applies to define and limit acceptable common law rules.

> The requirement that a distributor must have knowledge of the contents of a publication before liability can be imposed for distributing that publication is deeply rooted in the First Amendment, made applicable to the states through the Fourteenth Amendment. "The constitutional guarantees of the freedom of speech and of the press stand in the way of imposing" strict liability on distributors for the contents of the reading materials they carry. Smith v. California, 361 U.S. 147, 152-53, 4 L. Ed. 2d 205, 80 S. Ct. 215 (1959). In Smith, the Court struck down an ordinance that imposed liability on a bookseller for possession of an obscene book, regardless of whether the bookseller had knowledge of the book's contents...Although Smith involved criminal liability, the First Amendment's guarantees are no less relevant to the instant action: "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute." (citing New York Times Co. v. Sullivan).[133]

Interestingly, Judge Leisure's opinion suggests that the analogy in Cubby is constitutionally compelled. Of course, we *could* analogise CompuServe to a newspaper publisher; it would be ridiculous to think that the publisher of the New York Times knows about every single article that is printed every day. In reality, CompuServe's role is neither exactly like that of a publisher nor a distributor; indeed the fact that the roles line up differently in cyberspace than they do in print journalism is one of the great promises of the new media. But Judge Leisure finds that state courts applying state libel law *must* analogise

Compuserve to a distributor: in this case an electronic, for-profit library. It is not merely that the First Amendment imposes limitations on a branch of the state's private law, nor even that it actually provides compulsory components of that law such as the "actual malice" standard in Sullivan. Thus, the First Amendment mandates that, under state law, distributors not be held liable for the defamatory contents of their publications unless they knew or should have known about the defamation. But in Judge Leisure's opinion the First Amendment goes further; it tells us how to apply that law to the facts. It does not merely lay down the distinction between publisher and distributor but tells us into which of those conceptual boxes we must put on-line services; Cubby v. CompuServe suggests strongly that state libel law *could not* treat a service like CompuServe as a publisher.

It is my belief that Cubby and New York Times v. Sullivan point the way towards fascinating developments for constitutional law and political theory on the Net.

The online environment will bring to the surface the currently concealed contradictions in state action doctrine. On the Net, almost every problem is likely to be a matter of "speech" but also of "property"; will we treat such issues the way the Court treated the rule in Flagg Brothers, or the way that it treated the rule in Sullivan? On the Net, in part because of the developments that I pointed out in Chapters 2 & 3, regulation will increasingly depend on technological fixes on the one hand, and the background regime of private law, intellectual property, and default contract rules on the other. At the moment, both of these areas are seen as non-interventions, as systems that require no controversial distributional decisions from the state, and for whose outcomes the state is not responsible. I believe that, increasingly, however, that impression will be undermined by actual experience. Think for a moment of the kind of interaction that will actually take place on the Net.

Lets say that you build a digital fence which denies me the ability to do something I have currently have a "fair use" privilege to do; decompile your program in order to make mine interoperable, for example, or make use of a copyrighted image in a critical essay or a satire. I build a digital fence cutter to allow me to exercise the fair use privilege I had before. What is the state to do? Is this a case of me claiming a privilege to break your window so that I can trespass on your *property* and purloin your diary? The idea that the your rights could be trumped by my claim to make fair use of the diary would seem ludicrous; the claim that you are a state actor because the state defines your right to be free of trespass, equally so.[134] Or is this a case of you investing in that new-fangled barbed wire to fence off a portion of the open range, and then asking the state to have its goons back up your annexation and outlaw the possession of wire cutters?

In meatspace, the reality and "chosen-ness" of state enforcement, as well as its distributional consequences are often concealed by its familiarity, its association with concepts so commonplace as to be invisible. The right to have the state aid you in ejecting others from your land seems like a "natural" adjunct of property, hardly a choice at all. You might think that this is because human beings intuitively recognise a universal natural right in dominion over land. You might think that eons of dealing with real property disputes have formed welfare-maximising cultural norms about what property means, norms which the legal system "traces."[135] Either way, in cyberspace the veils of familiarity should obscure far less. Everything from the property involved to the space in which we interact is novel and obviously socially constructed; It should seem ludicrous to assert that an intellectual property right over a computer program or a digital image *automatically* or *naturally* carries with it a right to state aid in leveraging yourself into a greater position of market advantage through technology. The choices involved in the

construction of a property system should become more obvious, the connection to speech should heightens our awareness of the consequences of the underlying rules. We should be moved, in short, away from Flagg Brothers and towards New York Times v. Sullivan.

Let me say quickly, that this claim is a prediction and not a statement of current reality. Indeed, as I have tried to point out here and in the past, the courts have been positively myopic about the free speech consequences of intellectual property,[136] about the state action involved in conveying to a private party suzerainty over a chunk of the public domain. It is my hope and, somewhat less confidently, my prediction that then next ten years will change that myopia: that the Net will spark a reevaluation of the state action doctrine and, in particular, of its relationship to intellectual property -- a transformation as great as anything wrought by cases such as Shelley v. Kramer or Marsh v. Alabama. In cyberspace, I believe both that we should and that we actually will, move towards a much more expansive concept of state action, both as a matter of political theory and of constitutional law.

What will such a concept look like? After all, the traditional state action debate is composed of back-to-back slippery slopes. The defender of a narrow state action concept points out, correctly, that if the enforcement and definition of private property rules counts as state action, then everything becomes state action and liberty loses an invaluable refuge. The defender of a broad state action concept points out, correctly, that if the definition and enforcement of property rules is *not* state action, then many of the constitution's guarantees can be circumvented merely by privatising the function in question, by moving from the realm of sovereignty to the realm of property.

On one side, the slippery slope leads to a place where I can never decide which proselytisers to turn away from my door without violating the First Amendment. On the other side, the slippery slope

leads to a place where the the guarantees of the Bill of Rights can be avoided by engaging in a kind of constitutional two-step; privatize or propertize and then disown responsibility. A state Democratic Party proclaims itself a private club, and thus immune from constitutional review. Now a "white primary" can be held that ensures only white candidates will be presented to the public in the general election.[137] The state wants TV content-ratings that it cannot constitutionally impose, so it mandates that television manufacturers put a blocking chip in TV sets, (after all, the state could mandate air bags, why not blocking chips?) and creates a "private board" to set up categories of ratings which those chips will recognise (after all, its a *private* board, not a state entity.) The word Olympic is conveyed to a private body which then is free to discriminate against the Gay Olympics and in favour of the Special Olympics.

Is there any solid ground between these slippery slopes? Right now, the dividing line is formed from a series of unsatisfactory doctrinal compromises. The earlier court decisions talked of "public functions," about "nexus" or "encouragement" by the state; they saw state action in the White Primary cases and in "company towns" where corporations took on many of the functions of government.. The later courts use some of the same words, but with more modifiers -- 'traditional' or 'exclusive' government functions -- and a narrower conception of their ambit. Thus they saw no state action in Flagg Brothers or the Gay Olympics case. As for the V-Chip, it is widely, and perhaps wrongly, assumed to be constitutional. The privatisation strategy is alive and well: particularly in cases where technological filters or private property can fulfil some of the same functions as sovereign power.

There are a number of possible strategies to deal with the problem I have described here. The first, always popular, is compartmentalisation, passivity and denial. Property isn't state

action. Property isn't speech. Libel law isn't property. New York Times v. Sullivan isn't Shelley v. Kramer and anyway Shelley isn't good law. Being a copyright-holder is not a traditional government function. Where is the problem? We just muddle along without examining the tensions in our current system and, in particular, without subjecting intellectual property law to the same scrutiny that we subject the other groundrules of speech. For obvious reasons, I find this strategy deeply unsatisfactory. As a predictive matter, though, it would be unwise to underestimate its appeal.

The second possible strategy is that of disaggregation. We would have to acknowledge that there is not a single conception of state action, but rather a set of different conceptions, each keyed to a particular underlying interest, a particular set of underlying constitutional fears. We really do want a sphere of liberty for private conduct, but it turns out that such a sphere does not design itself. It has to be constructed according to a substantive theory of the good, and explicitly defended as such. This might lead us, for example, to a different conception of state action for *intellectual* property from our conception of state action for property more generally, a different law of state action for equal protection issues, as Justice Marshall suggested, or any of a million other possibilities. Such a scheme would be messy, and full of its own inner conflicts. Instead of description -- "the state is or is not acting" -- the legal system would have to engage in overt prescription.

The formula could be very general. "Should we say the state is acting here, given the underlying facts, interests and the threat posed by the label of either "privateness" or "publicness" to underlying constitutional values?" Alternatively, it could be much more specific -- keyed to categories of cases. For example, the courts might decide that their constitutional mandate required them to analyze each grant of an intellectual property right with the same searching scrutiny they now

turn on the law of libel and defamation, but that the operators of digital *networks* should be seen as private parties, even when they work from the basis of a state conveyed monopoly. And so on, and so on; an endless series of case-by-case analyses, each presenting in miniature the same problems that our current system displays in gross.

Are either of these two approaches better than denial and definition? The answer to that question depends on lots of things: including one's faith in the institutions that would administer any actual scheme, and the point at which one believes that reification -- the use of thing-like categories to decide cases -- becomes an enemy of justice.[138] At the very least, I would say that the Net will require a reexamination of the state action doctrine in two specific areas -- property and technical architecture.

First, intellectual property rules should be subject to at least the level of scrutiny that the courts currently apply to the private law of libel and defamation. Two actual recent legislative proposals, may help to illustrate the point. What if copyright law were changed by statute or interpreted by a court to hold find that operators of on-line services were liable for copyright infringement by their subscribers, whether or not they knew or could have known of the copyright violation? What if Congress created a new database right, that allowed effective ownership of facts? As I said before, the courts have had a remarkably constricted interpretation of state action where intellectual property was concerned. "This is not a case of government censorship, but a private plaintiff's attempt to protect its property rights."[139] Yet these kind of property rules have exactly the potential to affect speech that Justice Brennan saw in the New York Times case.

> Although this is a civil lawsuit between private parties, the.. courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been

> applied in a civil action and that it is common law only, though supplemented by statute.... The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

Second, we need to rethink the way to apply the state action doctrine to the *technological* architecture of the Net. Like the background rules of property contract and tort, the design of a network seems simply there, unchosen. This is particularly true if the architecture stems from decisions by "private parties."....

END OF EXCERPT

Conclusion chapter 10

One doesn't have to be Karl Marx to think that political and moral theories are rooted in a particular set of material and social conditions. This is obviously true at the extremes. In a world without scarcity, theories of distributive justice would have a very different configuration than in the world we live in. In a world where the inhabitants share a particular set of moral and political beliefs at such a deep level that alternatives are hard even to imagine, claiming a right to dissent is likely to seem like claiming a right to have hallucinations. But the point is also good at a much more mundane level; in politics, morality and especially in the law. The limits of possible are often the supporting walls on which a theory or norm is constructed.

The simplest kind of change that the Net may wreak on political theory and legal doctrine is this; by changing the boundaries of the possible it will change the shape of the problem, the arguments that seem convincing, the outcome of a familiar analysis. In a virtual community, the costs of "exit" are low. When Locke told those who didn't like the social contract that they could leave and go to the savage wilds of America, he was offering a choice that was *possible* but hardly practicable. If someone doesn't like the terms of my virtual community, I tell them to leave and go to America On-Line. This is both possible and practicable, if still a little demeaning. The phenomenon is just as clear in law. Some people see the fair use privilege in copyright law as merely a device to avoid the transaction costs that would be involved in seeking permissions. The Net can reduce many of those transaction costs to zero; thus they believe the fair use doctrine should be curtailed as a result.

There is, however, a more complex version of this phenomenon. At a certain point, these transformations begin to exercise a qualitative shift in our understanding. We understand the world in part by reasoning through analogies and paradigmatic cases.[140] Even when we think of an abstract concept such as property, or liberty, or prior restraint or market, we think about it with an implicit picture in mind, perhaps just a familiar context in which the concept is given meaning, or perhaps a paradigm case that encapsulates a particular set of hopes and fears with which the concept is associated. What happens when that familiar context, that paradigm case, is transformed by some change in society, culture and technology? Does the Net represent such a transformation?

"Because human beings are fated to live mostly on the surface of the earth, the pattern of entitlements to use land is a central issue in social organization."[141] So begins a well-known article on property which goes on to note that one reason for having private property rather than common ownership is that it fits the available surveillance technology; dogs are remarkably good at detecting intruders and robbers but poor at detecting the shirker and the pilferer among a host of familiar inhabitants. Private property with clear geographical boundary lines is offered as a rational solution to the problems inherent in policing a variety of self-serving forms of behaviour that are socially undesirable. Indeed the very idea of absolute property, the Blackstonian bundle of rights that is much celebrated but never found in reality, is defined in terms of legally protected interests attendant to real estate.[142]

Now, to the gurus of the Net that first sentence is untrue. They do not believe that "human beings are fated to live mostly on the surface of the earth." They believe that we will increasingly live in cyberspace, and that for large portions of our life it would be as silly for the country in which we sit to have jurisdiction over us, as it would be for the country that made the keyboard on which I am now typing. They do not imagine that houses and cars and food will disappear; but they do doubt the authority, practicality and conceptual coherence of importing meatspace rules to a virtual world. In brief, they claim to be citizens of cyberspace -- a lot of the time. To anyone unfamiliar with the Net, this will seem silly, perhaps charmingly naive; a mixture of semantic confusion and romantic prediction. As to the romance, there is no doubt. There is no better indication of this frame of mind than John Perry Barlow's 1996 Declaration of the Independence of Cyberspace. [143]

> Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty

> where we gather. .. Your legal concepts of property, expression, identity, movement, and context do not apply to us. They are based on matter, There is no matter here.[É]

John Perry Barlow has rediscovered the idea that the state will be left only to "the administration of things" though he means something very different by that phrase than Marx did. Like most of the digital libertarians, he believes that concepts of property are based on control over matter. Even intellectual property, he thinks, is based on a requirement of some kind of fixation, control over "the bottle not the wine."[144] Most property lawyers would disagree, believing that property in general, and intellectual property in particular, has long been abstracted, disaggregated and "de-corporealised," freed from the surly bonds of earth and worked matter. But that may not be the point. I pointed out that cyberspace was both an easy and a hard case for libertarianism. Easy because the Net seems mainly to deal in speech, a libertarian stronghold, because "harms" seem intangible and exit-strategies easy, because the system itself has a distinctly Hayekian quality as a spontaneous and decentralised order. Easy, above all, because the libertarians believe that the state won't physically be able to do anything beyond fulfilling the role of the nightwatchman, and perhaps not even that. But the Net is also hard for libertarian ideas, precisely because the *obvious* social construction of the space, contingency of the groundrules and intangibility of the property deny libertarians recourse to the easy facticity of property and market; deny them the naturalistic definition of harm, the literal "reification" of "my land, goddam it." At what point do our repeated experiences of this kind of world, this kind of technology, of fences that report both intruders without and shirkers within, of digital objects that carry their own personal law, at what point do these experiences start to change our core conceptions of property, liberty and the relationship of the state to the market? I have no easy answer. But -- the pervasive skepticism of the telephone test notwithstanding -- I have enough suspicion to be uncomfortable dismissing Barlow's *Declaration* with the comfortable assumption that things will indeed remain the same. To be sure, many of these iconoclastic claims were made about radio in the 20's, to be sure, most of the people currently on-line are either

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[É] 'Though of course, standing over the typing cybernaut, there may well still be policemen, with clubs' -- says the skeptic. 'Yes, at least until the inability to tax an encrypted virtual economy on a dispersed network deprives the state of lots of its revenues and many of its goons' says the digital libertarian. And so the debate continues...

checking their stocks, buying things or trying to figure out where the dirty pictures are. But the opposite sin of believing in the inherently transformatory power of the technology before one, is the fallacy of stasis. There is an appealing Catalan farewell that, I am told, translates roughly to "Let no new thing arise." This is not a parting wish that captures the world of the Net.

I began this book by making fun of Internet romanticism, by proposing the cynical realism of the telephone test to chasten our enthusiasm. But of course, who would write a book like this but someone who was secretly infected by the romance and idealism of the Net? The idea of completing the Gutenberg revolution, making it feasible for the primary school teacher and the crank, the revolutionary autodidact and the Librarian of Congress all to offer their knowledge to the public, the idea of spreading information across the world with a marginal cost for each copy of vanishingly close to zero, and doing it on a communications architecture still deeply resistant to external control, if this doesn't stir you at all then you have missed one of the grand passions of your time.

Endnotes for Excerpts

1. The most recent statistics available for American telephone penetration show that 94.1% of American households have telephones. *See, 94.1 Percent of Households Have Telephones*, COMM. TODAY, Aug. 3, 1998, *available in* 1998 WL 11731425. The comparable figure for world telephone penetration is 36% of households, with 62% of the world's phone lines located in 23 developing countries that contain 15% of the world's population. *See*, *ITU Official Sees Progress in Connecting Developing Nations*, COMM. DAILY, Sept. 18, 1998, *available in* 1998 WL 10697316. For a comprehensive discussion of varying rates of "teledensity" (the number of main telephone lines per 100 inhabitants) throughout the world, see WORLD TELECOMMUNICATION DEVELOPMENT REPORT 1998.

2. I owe the analogy to Marc Rotenberg.

3. DAVID BOAZ, LIBERTARIANISM: A PRIMER 284 (1997).

4.Some recent studies suggest that this demographic shift is already taking place. For statistical support for the conventional wisdom concerning the average Internet user, see, for example, *Y Chromosomes Still Rule on the Net*, INTERACTIVE PR, June 19, 1998, *available at* 1998 WL 5383141 (reporting the results of a RelevantKnowledge survey, that "[t]he average Internet user is male, relatively young and well read. . . . Nearly 77 percent of all Web users are between the ages of 18 and 49, with 39 percent being under 34. Slightly more than half of Web users have college degrees, while only a quarter of the overall population can say they graduated from institutions of higher learning."). For indications of a change in the profile of the average user, see, for example, *COMPUTER/ONLINE NOTICES: Current and Future Internet Users Profiled*, RES. ALERT, Mar. 20, 1998, *available at* 1998 WL 9079434 (reporting the results of a Strategis Group survey, that "[t]he average Internet user is almost as likely to be female (46%) as male, is between ages 35 and 44 (32%), has earned a college degree (58%) and resides in a household with an average annual income of $54,000. . . .").

For predictions that the average Internet user will more closely resemble the average American, see Cyberatlas, *38 Million Americans Getting Wired*, <http://cyberatlas.com/big_picture/demographics/mainstream.html> (visited Jan. 19, 1999), which reports the results of several recent surveys. Intelliquest, for example, reports that 72.6 million Americans currently have Internet access, while 40 million Americans are planning to go online. Of these new arrivals, Intelliquest "found that 51 percent of those planning to get Internet access are over the age of 35. Almost

half (49 percent) of the group have a high school education or less. More than half of those planning to go online (58 percent) make less than $50,000 a year." *Id.*

For international trends, see, for example, IDC, *IDC Predictions '99: The "Real" Internet Emerges*, <http://www.idc.com/F/Ei/123199ci.html> (visited Jan. 18, 1999). IDC predicts that in 1999 "[w]omen will become the online majority in the United States" and that "[t]he United States will become an online minority." *Id.* "In 1999, the Internet will enter a wholly new stage, one in which the virtual world looks a lot like the real world." *Id.* See also the Computer Industry Almanac, <http:www.c-i-a.com/199801pr.html> (visited Jan. 23, 1999), which reports that "[t]he countries with the most Internet users are the large industrialized countries plus some of the smaller industrialized countries that were early adopters of the Internet. Examples are Finland, Sweden, Norway, and Switzerland. Over time these smaller industrialized countries will be replaced by the most populous countries such as China and Russia." *Id.*

5. Ayn Rand would have rejected this idea, believing as she did that "altruism" is "the ethical theory which regards man as a sacrificial animal, which holds that man has no right to exist for his own sake, that service to others is the only justification of his existence, and that self-sacrifice is his highest moral duty." *See, e.g.*, AYN RAND, THE VIRTUE OF SELFISHNESS 32–33 (1965) The end result however would have been much the same.

6. Libertarianism can also be seen as a response to the problem of the bad ruler or dominating private party who attempts to take away your liberty even though he or she knows the act to be wrong; evil domination, not moral disagreement would seem to be the source of danger. Yet though libertarianism may be a way of building a community of resistance against such aggression, its appeal is only to those who are willing to concede that reasonable people differ about conceptions of the good and who actually draw some practical conclusions from that point. Put more crudely, what use is making libertarian arguments *to the bad guy*? The Inquisition sees my moral relativism as merely another proof of heresy and the slaver just doesn't care what I think. The people who might be convinced are those who accept some of my premises about the subjectivity of value, but haven't thought through their implications. In a world without widespread agreement that values are relative, at least at the margins, libertarianism is irrelevant as a moral or political doctrine.

7. While I have libertarian sympathies myself at many points, everyone draws the line somewhere; I would not like to be understood to be advocating disco.

8. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1, ln. 47–52 (M.M. Mahood ed., New Cambridge Shakespeare 1987) (c. 1598).

9. *Id.* at ln. 38–46.

10. FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM, at ii (1944).

11. [T]he rules governing a spontaneous order must be independent of purpose and be the same, if not necessarily for all members, at least for whole classes of members not individually designated by name. They must, as we shall see, be rules applicable to an unknown and indeterminable number of persons and instances. They will have to be applied by the individuals in the light of their respective knowledge and purposes; and their application will be independent of any common purpose, which the individual need not even know. In the terms we have adopted this means that the general rules of law that a spontaneous order rests on aim at an abstract order, the particular or concrete content of which is not known or foreseen by anyone[.]

1 FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY (1973). {?}

12. BOAZ, *supra* note 3, at 41.

13. This tension between the way that lawyers think of common law and the classical liberal version of the common law, produces some tensions, as when Hayek quotes Lord Mansfield approvingly in the context of a passage that portrays the common law judge as a person who

> is not concerned with any ulterior purpose which somebody may have intended the rules to serve and of which he must be largely ignorant;.. [in fact] he will have to apply the rules even if in the particular instance the known consequences will appear to him to be wholly undesirable.

HAYEK, *supra* note ?, at 87. *See also, Economic Symposium: F.A. Hayek and Contemporary Legal Thought*, 23 SW. U. L. REV. 425 (1994); Robert D. Cooter, *Decentralized Law for a Complex Economy*, 23 SW. U. L. REV. 443 (1994); *But see* Robert Gordon, *Hayek and Cooter on Custom and Reason*, 23 Sw. U. L. Rev. 453 (1994).

> In contrast [to Cooter], Hayek is decidedly more ambivalent about customary communities. Apparently, the kind of spontaneous order he most admires is the kind developed in the most abstract markets--markets not "embedded" in face-to-face relationships, kinship or religious ties, in craft guilds obeying a traditional regulatory order or in local customary practices. By analogy, he extends his admiration for the spontaneous order of markets to the "common law"--whose judges, like market actors, are constantly making interstitial adjustments to a dynamic ongoing system of practices that is not the deliberate rational construction of any single social agent. He refers with approval to the legal theorists of the evolutionary common-law mind, Mathew Hale, Blackstone, Burke, Savigny--all of whom locate the common law's genius in its tracking of social custom, at least "reasonable" custom: In its "English" or "bottom-up" character as opposed to "French" or "top-down" systems, what Hayek calls "constructivist" systems.
>
> . . . .

But, as Gordon points out, Hayek did not value this spontaneous order as a reflection of some underlying set of particular cultural norms, but rather as a series of evolutionary approximations of an underlying set of extremely abstract, universal norms of market function.

> [d]espite bows to the common law's evolutionary particularism, he sides with the abstracters and generalizers.... The reader may plainly infer a bias toward the global norms, that is, the norms of the spontaneous orders generated between trading communities of strangers, and against those of more particularistic relational obligations generated within local communities (Cooter's or Robert Ellickson's normative communities).

Id. at 454, 455, 457 (footnotes omitted). The debate about the Net, too, presents a clash between those who value the Net's anarchic technical standard setting activities and its inchoate process of commercial norm-formation as a reflection of community values (the republic of cybernauts) on the one hand, or merely as manifestations of a deeper underlying rationality or beneficial equilibrium.

14. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992); PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD (1998); SIMPLE RULES FOR A COMPLEX WORLD (1995).

15. For a scarily eloquent example see GEORGE FITZHUGH, CANNIBALS ALL! (C. Vann Woodward ed., Belknap Press 1960) (1857).

16. Inevitable for a number of reasons, one being the difficulty of coming up with a definition of moral neutrality, that is itself morally neutral. When, in the name of moral relativism, we choose not to interfere with clitoridectomy or suttee because all values are relative and socially constructed, we are nonetheless applying a meta-moral set of assumptions called moral relativism to a culture that does not share them. When we choose instead to say that our universalist Kantian, human rights tradition tells us that this behaviour is wrong, we are again imposing our values. There is no neutral position. Most people use the act/omission distinction to solve this problem, thus decisively privileging the moral systems that rely on such a distinction.

17. {?}

18. *See* Robert Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUMB. L.R. 603 (1943).

> Bargaining power would be different were it not that the law endows some with rights that are more advantageous than those with which it endows others.
>
> It is with these unequal rights that men bargain and exert pressure on one another. These rights give birth to the unequal fruits of bargaining. There may be sound reasons of economic policy to justify all the economic inequalities that flow from unequal rights. If so, these reasons must be more specific than a broad policy of private property and freedom of contract. With different rules as to assignment of property rights, particularly by way of inheritance or government grant, we could have just as strict a protection of each person's property rights, and just as little governmental interference with freedom of contract, but a very different pattern of economic relationships. Moreover, by judicious legal limitation on the bargaining power of the economically and legally stronger, it is conceivable that the economically weak would acquire greater freedom of contract than they now have—freedom to resist more effectively the bargaining power of the strong, and to obtain better terms.
>
> . . . .

> We shall have governmental intervention anyway, even if unplanned, in the form of the enforcement of property rights assigned to different individuals according to legal rules laid down by the government. It is this unplanned governmental intervention which restricts economic liberty so drastically and so unequally at present.

Id. at 627–28. *See also*, James Boyle, *Introduction* to CRITICAL LEGAL STUDIES (James Boyle ed., 1992); BARBARA FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ-FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT (1998); Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEG. STUD. FORUM 327 (1991), *reprinted as an essay in* DUNCAN KENNEDY, SEXY DRESSING, ETC., ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY 83 (1993).

19. MURRAY N. ROTHBARD, POWER AND MARKET: GOVERNMENT AND THE ECONOMY 176 (1970).

20. BOAZ, *supra* note 3, at 92–93.

21. *See, e.g.*, Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 820 (1935) ("Legal arguments couched in (terms of 'magic solving words' like property) are necessarily circular, since these terms are themselves creations of law, and such arguments add precisely as much to our knowledge as Moliere's physician's discovery that opium puts men to sleep because it contains a dormative principle.").

22. *See*, Collections of Information Antipiracy Act, H.R. 2562, 105th Cong. (1998). The bill states in relevant part that "Any person who extracts, or uses in commerce, all or a substantial part, measured either quantitatively or qualitatively, of a collection of information gathered, organized, or maintained by another person through the investment of substantial monetary or other resources, so as to harm the actual or potential market of that other person, . . . for a product or service that incorporates that collection of information and is offered or intended to be offered for sale or otherwise by that other person in commerce, shall be liable to that person. . . ." This bill was passed by House May 19, 1998, but not taken up by Senate. *Cf.* Basic Proposal for the Substantive Provisions of the Treaty on Intellectual Property in Respect of Databases to be Considered by the Diplomatic Conference, CRNR/DC/6, Aug. 30, 1996.

23. *See generally* Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975; Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1477 (1996); Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991); ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, U. CHI. L. REV. 711 (1986). .

24. BOAZ, *supra* note 3, at {?}.

25. *Cf.* Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315 (1993).

26. Where did you buy that book? In your study as you clicked the button, in whatever state or country the bookstores' server is located? Or in the state where Amazon.com is incorporated? Of course, legal systems have been making determinations like these over contracts or harms at a distance since long before the arrival of the Net. The difference is that, on the Net, that is pretty much all there is. *See* David R. Johnson & David Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1367 (1996) ("While these electronic communications play havoc with geographic boundaries, a new boundary, made up of the screens and passwords that separate the virtual world from the "real world" of atoms, emerges. This new boundary defines a distinct Cyberspace that needs and can create its own law and legal institutions. Territorially based law-makers and law-enforcers find this new environment deeply threatening."). *See also*, Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1, 1 (1996); For an appropriately sceptical response, stressing the similarity between this jurisdictional issue and others, and arguing against the "Federal Circuit for Cyberspace" line of thought, see, Jack L. Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, 5 IND. J. GLOBAL LEGAL STUD. 475 (1998)

27. The answer is probably either Seattle, or wherever Amazon says the contract is formed.

28. To be sure, anyone who engages in a historical and comparative study of rights in tangible property would soon realise the same thing about them, too.

29. See the *Statement of Principles* from the Clinton Administration's A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE (available at <http://www.ecommerce.gov/framewrk.htm#PRINCIPLES>).

30. There are a variety of versions of the claim but the content is pretty consistent. *See, e.g.,* John Perry Barlow, Passing the Buck on Porn (visited June 24, 1996) <http://www.eff.org/pub/Publications/John_Perry_Barlow/HTML/porn_and_responsibility.html> "The Internet, in the words of ... John Gilmore, 'deals with censorship as though it were a malfunction and routes around it.'" Judith Lewis, *Why Johnny Can't Surf*, LA WEEKLY, Feb. 21, 1997, at 43. "[I]t's not easy to push standards of decency on a network that, as ... John Gilmore put it (though even he can't remember where), treats censorship as damage and routes around it."

31. *See generally*, Todd Flaming, *An Introduction to the Internet*, 83 ILL. B.J., 311, (1995); JOSHUA EDDINGS, HOW THE INTERNET WORKS 13 (1994); BRUCE STERLING, SHORT HISTORY OF THE INTERNET (Feb. 1993), (available at <gopher://gopher.isoc.org:70/00/Internet/history/short.history.of.Internet>). The writing closest to my own position on these issues comes from Larry Lessig; *see generally* Lawrence Lessig, *The Zones Of Cyberspace*, 48 STAN. L. REV. 1403 (May 1996),*The Path Of Cyberlaw* 104 YALE L.J. 1743 (May 1995). For a very interesting libertarian argument focusing on the importance of geography and geographical metaphors see David R. Johnson & David Post, *Law And Borders--the Rise Of Law In Cyberspace* 48 STAN. L. REV. 1367 (May 1996).

32. Bruce Sterling, *Short History of the Internet* THE MAGAZINE OF FANTASY AND SCIENCE FICTION, February 1993 http://www.forthnet.gr/forthnet/isoc/short.history.of.internet

33. John Perry Barlow, Leaving the Physical World (visited June 24, 1997) <http://www.eff.org/pub/Publications/John_Perry_Barlow/HTML/leaving_the_physical_world.html> (discussing the inapplicability of physical-world standards in Cyberspace).

34. TCP/IP (the acronym for Transmission Control Protocol/Internet Protocol) is the name of the communications protocol that enables much of the Net's traffic. See the *Webopedia* at <http://webopedia.internet.com/TERM/T/TCP_IP.html>:

> IP specifies the format of packets, also called datagrams, and the addressing scheme. Most networks combine IP with a

> higher-level protocol called Transport Control Protocol (TCP), which establishes a virtual connection between a destination and a source.
>
> IP by itself is something like the postal system. It allows you to address a package and drop it in the system, but there's no direct link between you and the recipient. TCP/IP, on the other hand, establishes a connection between two hosts so that they can send messages back and forth for a period of time.

Id.

35. "Since we desire privacy, we must ensure that each party to a transaction have knowledge only of that which is directly necessary for that transaction. Since any information can be spoken of, we must ensure that we reveal as little as possible. In most cases personal identity is not salient. When I purchase a magazine at a store and hand cash to the clerk, there is no need to know who I am. When I ask my electronic mail provider to send and receive messages, my provider need not know to whom I am speaking or what I am saying or what others are saying to me; my provider only need know how to get the message there and how much I owe them in fees. When my identity is revealed by the underlying mechanism of the transaction, I have no privacy. I cannot here selectively reveal myself; I must *always* reveal myself. Therefore, privacy in an open society requires anonymous transaction systems. Until now, cash has been the primary such system. An anonymous transaction system is not a secret transaction system. An anonymous system empowers individuals to reveal their identity when desired and only when desired; this is the essence of privacy. .Privacy in an open society also requires cryptography. If I say something, I want it heard only by those for whom I intend it. If the content of my speech is available to the world, I have no privacy. Eric Hughes, *A Cypherpunk's Manifesto* (1993)
http://www.replay.com/cpunk/manifesto.html

36. Timothy May, *Crypto-Anarchy and Virtual Communities*
<http://powergrid.electriciti.com/1.01/cryptoanarchy.html>

37. *Id.*

38. DAVID FRIEDMAN, MACHINERY OF FREEDOM: GUIDE TO A RADICAL CAPITALISM (1989).

39. Ithièl de Sola Pool, TECHNOLOGIES OF FREEDOM (1983).

40. KEVIN KELLY, OUT OF CONTROL: THE RISE OF NEO-BIOLOGICAL CIVILIZATION (1994)

41. *Id.*

42. Eric Hughes, A Cypherpunk's Manifesto (1993)
http://www.replay.com/cpunk/manifesto.html

43. *Id.*

44.One of the strongest statements of his position comes in the manifesto he co-authored with a number of other prominent members of the digerati. "Unlike the mass knowledge of the Second Wave -- public good knowledge that was useful to everyone because most people's information needs were standardized -- Third Wave customized knowledge is by nature a private good. If this analysis is correct, *copyright and patent protection of knowledge (or at least many forms of it) may no longer be necessary*. In fact, the marketplace may already be creating vehicles to compensate creators of customized knowledge outside the cumbersome copyright/ patent process, as suggested by John Perry Barlow." George Gilder, Esther Dyson, Jay Keyworth, Alvin Toffler, *A Magna Carta for the Knowledge Age,* 11 NEW PERSPECTIVES QUARTERLY 26 (1994) (emphasis added).

45.Huber, in fact, has taken a direct shot at the notion that "information wants to be free." *See* Peter Huber, *Tangled Wires: The Intellectual Confusion and Hypocrisy of the Wired Crowd*, SLATE, Oct. 18, 1996 at <http://www.slate.com/Features/TangledWires/TangledWires.asp>. Huber labels the intellectual property rights skeptics as hypocrites whose real attitude is merely a desire for liberal redistribution of everyone else's stuff. His views are frankly dismissive; he is criticising a group of people, some of whom have argued in favour of maintaining the existing intellectual property rules in cyberspace and others of whom have argued that reliance on rules rather than technological innovation would actually inhibit the operation of capitalism online. Yet his description of this "Wired Crowd," many of whom make Ayn Rand sound like Vladimir Ilyich, is that their

position is that of a hypocritical New Dealer -- "My property is mine; yours is for sharing." *Id.* Wired, we are supposed to believe, is the Economic and Philosophical Manuscripts in cyberspace. (Would that it were true! In fact, Wired's ideal of scathing social commentary is to claim that someone's modem is slow.) Huber seeks to restore normative appeal to intellectual property by arguing that it "is just a commercial form of privacy law. Indeed for some, it's the only kind of privacy they still own." This powerful argument suffers a little from the example that follows. "Madonna can no longer stop you from gazing at her breasts. Copyright at least makes you pay for the pleasure." *Id.* Our sympathies are with her.. (and with him if this is the best illustration that comes to mind.) Stopping the world from gazing at her breasts has never seemed to be particularly high on Madonna's list of priorities -- at least as a matter of "privacy." True, Madonna might prefer a legal regime which would allow her to wring the maximum commercial advantage in every market for images of her and references to her -- for example by making people like Huber pay if they wished to use her as an example, restricting the fair use privilege, limiting news reporting and biography to authorized images and so on. Yet it is not clear why this desire, in itself, makes the notion of such a regime normatively compelling as a matter of social policy. There is also a danger in labelling critics of extensive intellectual property rights "anti-privacy." If there is a "privacy" interest consisting solely in the extraction of the maximum rent for one's intellectual property, then was the Justice Department's investigation of Microsoft's allegedly anti-competitive practices an attempt to cut down on Bill Gates' "privacy" interest in Windows 95? Or are we referring simply to spin-off effects in a particular case? Are Federal automobile emissions standards "anti-privacy"if they make it harder for me to leave the paparazzi in the dust? Intellectual property *can* be used to preserve privacy and I have used a stout and WASP-y pair of wingtips to hammer in a nail; this does not mean that the manufacturers of Birkenstock sandals are "anti-carpentry." There are indeed profound and interesting linkages and tensions between property and privacy, and this point has been made for some time. *Compare* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 113 (1890). *with* Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127 (Jan. 1993). Yet, as these articles both show, intellectual property most definitely is not "*just* a commercial form of privacy law."

46. *See generally* INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (Sept. 1995)

47.*See* James Boyle, *Intellectual Property Policy On-Line: A Young Person's Guide,* 10 HARV. J.L. & TECH. 47, 52 (1996)

48. One advertisement for Internet services shows a long haired hippy type, saying vacuously, "information wants to be free"; the pitch asks whether or not you want this person running your business on the Web. Hippy types may have pioneered the Web, it implies, but now they are being shouldered aside by hard-headed business people.

49.John Perry Barlow, *Selling Wine Without Bottles: The Economy of Mind on the Global Net*, WIRED 2.03 (1993) at 86 (visited Jun. 24, 1997) <http://www.eff.org/pub/Publications/John_Perry_Barlow/HTML/idea_economy_article.html> (quoting 13 THE WRITINGS OF THOMAS JEFFERSON 333-34 (Albert E. Bergh ed., 1907) (letter from Jefferson to Isaac McPherson, Aug. 13, 1813)).

50.John Perry Barlow, *Selling Wine Without Bottles: The Economy of Mind on the Global Net*, (visited Jan 20 1999)

<http://www.eff.org/pub/Publications/John_Perry_Barlow/HTML/idea_economy_article.html>

51.Global, lightspeed mobility of *labour* is not something that Adam Smith had contemplated; is it a quantitative or a qualitative distinction?

52.*See* JAMES BOYLE, SHAMANS, SOFTWARE AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY at 182-83 (Harvard University Press 1996) "To someone like me, who believes a lot of our social ills come from the restriction of egalitarian norms, [the] fact [that our current ideas about information have strong egalitarian underpinnings] has an optimistic ring." *See also* Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1847 (May 1995) "[T]he Supreme Court has based its jurisprudence on an idealized view of the world, a view that doesn't quite correspond to the world in which we live.... [T]his idealized world ... is much closer to the electronic media world of the future than it is to the print and broadcast media world of the present. If my predictions are right, the new technologies will make it much easier for all ideas, whether backed by the rich or the poor, to participate in the marketplace. ... [D]uring the print age, the Supreme Court created a First Amendment for the electronic age. The fictions the Court found necessary to embrace are turning, at least in part, into fact."

53. Michel Foucault, Two Lectures, *in* MICHAEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977, 78, 104 (Colin Gordon ed. & Colin Gordon et al. trans., 1980).

54. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (H.L.A. Hart ed. 1954) *See also* James Boyle, *Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Power, and Essentialism*, 135 U. PA. L. REV. 383 (Jan. 1987).

55. One of the reasons for this may be the overwhelmingly libertarian cast to Internet politics in the United States. Libertarians tend to concentrate on state power rather than private power, they tend to focus on the obvious restraints on freedom imposed by criminal law's impact against the citizen, rather than the subtler restraints imposed by the rules constituting and structuring market and other relationships. Both ideas 'fit' the Austinian image. By making a criminal statute the paradigm of the *exercise* of state power, and the citizen's right against the government the paradigm of its *limitation*, the libertarian codes his normative ideas about political problems and solutions into the very image of law itself.

56. "You will recall my work here, such as it has been ... None of it does more than mark time. Repetitive and disconnected, it advances nowhere. Since indeed it never ceases to say the same thing, it perhaps says nothing. It is tangled up into an indecipherable, disorganised muddle. In a nutshell, it is inconclusive. Still, I could claim that after all these were only trails to be followed, it mattered little where they led; indeed, it was important that they did not have a predetermined starting point and destination. They were merely lines laid down for you to pursue or to divert elsewhere, or re-design as the case might be. They are, in the final analysis, just fragments, and it is up to you or me to see what we can make of them. For my part, it has struck me that I might have seemed a bit like a whale that leaps to the surface of the water disturbing it momentarily with a tiny jet of spray and lets it be believed, or pretends to believe, or wants to believe, or himself does in fact believe, that down in the depths where no one sees him any more, where he is no longer witnessed nor controlled by anyone, he follows a more profound, coherent and reasoned trajectory. Well, anyway, that was more or less how I at least conceived the situation; it could be that you perceived it differently." Michel Foucault, Two Lectures, *in* MICHAEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977, 78-79 (Colin Gordon ed. & Colin Gordon et al. trans., 1980).

57. *What Is an Author?*, in TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM 141 (Josue V. Harari ed., 1979), DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan ed. & trans., 1979)

58. *See, e.g.*, RICHARD POSNER, SEX AND REASON at 23, 182 (Harv. Univ. Press 1992) (describing Foucault's writings on sexuality as "remarkable" and "eloquent").

59. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan ed. & trans., 1979)

60. JANET SEMPLE, BENTHAM'S PRISON: A STUDY OF THE PANOPTICON PENITENTIARY (1993); The two writers to have used Foucault's ideas most notably in the legal privacy and cyberspace context are J.M. Balkin, *What is a Postmodern Constitutionalism?* 90 MICH. L. REV. 1966, 1987 (1992) and Larry Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L. J. 869, 895 (Summer 1996) (citing MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON at 139-40 (Alan Sheridan ed. & trans., 1979)). Larry Lessig's work on the regime of "code" is the closest to my project here and I have profited enormously from it.

61. In many ways, Foucault himself was most interested in a portion of this analysis that I shall pursue here only episodically. In a series of works on the treatment of insanity and on penology he argued that the emergence of the academic and intellectual "disciplines" as we know them now is reciprocally linked in important ways to this minute and quotidian regulation of behaviour. At the same time, retrofitting some of his earlier work on the human sciences into this new theoretical mold, he suggested that our conception of "an individual" was not some naturally occurring fact of nature from which analyses could begin, but instead, in part, a result of the concatenation of discipline and surveillance. Elsewhere I have explored the connections between power and knowledge (James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (April 1995)), and the effects of the construction of subjectivity (James Boyle, *Is Subjectivity Possible? The Postmodern Subject in Legal Theory*, 62 U. CO. L. REV. 489 (1991)). While there are interesting things to be said about the construction of subjectivity in cyberspace, my goal here is more mundane.

62. Michel Foucault, Two Lectures, *in* MICHAEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977, 78, 105 (Colin Gordon ed. & Colin Gordon et al. trans., 1980).

63.Compare 47 U.S.C. §223(a)(1)(A)(ii) "obscene, lewd, lascivious, filthy, or indecent" with §223(a)(1)(B)(ii) "obscene or indecent" and §223(d)(1)(B) "in terms patently offensive as measured by contemporary community standards." None of these terms are defined and it is not clear that they are intended to be distinct from each other. The Telecommunications Act of 1996, PUB. L. NO. 104-104, tit. V, §§ 501- 61, 110 Stat. 56 (1996). With some reservations the courts that have scrutinised the Act have treated both phrases as equivalent to "indecency" as defined in Pacifica (FCC v. Pacifica Foundation, 438 U.S. 726 (1978)). The Supreme Court Perhaps in desperation the government ended up by declaring that the Act was intended to regulate only "commercial pornography" – a phrase that appears nowhere within it. ACLU v. Reno, 929 F. Supp. 824, 854-55 (E.D. Pa. 1996). The Child Online Protection Act, by contrast, criminalizes "any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." *See* Child Online Protection Act, H.R. 3783, 105th Cong. (1998). The bill defines its harm broadly:

> The term `material that is harmful to minors' means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that--
>
> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Id.

64.*See* ACLU, 929 F. Supp. 824 (E.D. Pa. 1996). In striking down the CDA, the Three Judge Panel held that "[j]ust as the strength of the Internet is chaos, so the strength of our liberty depends upon the chaos and cacophony of the unfettered speech the First Amendment protects. For these reasons, I without hesitation hold that the CDA is unconstitutional on its face." *Id.* at 883 (Dalzel, J., concurring).

65.Reno v. ACLU, No. 96-511, WL 348012 (U.S. June 26, 1997).

66.ACLU v. Reno, 929 F.Supp. 824, 832 (E.D. Pa. 1996). (discussing findings of fact) "There is no centralized storage location, control point, or communications channel for the Internet, and it would not be technically feasible for a single entity to control all of the information conveyed on the Internet."
But cf. Chief Justice Rehnquist's question during oral arguments (visited Jun. 24, 1997) <http://www.aclu.org/news/n103196b.html> "But if 70 percent [of indecent speech on the Internet] is shielded and 30 percent isn't, what kind of an argument is that against the constitutionality of the statute?"

67.Charles Nesson & David Marglin, *The Day the Internet Met the First Amendment: Time and the Communications Decency Act,* 10 HARV. J.L. & TECH. 113, 115 (Fall 1996).

68.Butler v. Michigan, 352 U.S. 380, 383 (1957), *quoted in* Sable Communications v. FCC, 492 U.S. 115, 127.

69.The Telecommunications Act of 1996, PUB. L. NO. 104-104, 110 Stat. 56 (1996) (to be codified at 47 U.S.C. §223(e)(5)(A)).

70.The Telecommunications Act of 1996, PUB. L. NO. 104-104, 110 Stat. 56 (1996) (to be codified at 47 U.S.C. §223(e)(5)(B)).

71.The Telecommunications Act of 1996, PUB. L. NO. 104-104, 110 Stat. 56 (1996) (to be codified at 47 U.S.C. §223(e)(5)(A)).

(5) It is a defense to a prosecution under subsection (a)(1)(B) or (d) of this section, or under subsection (a)(2) of this section with respect to the use of a facility for an activity under subsection (a)(1)(B) of this section that a person--

(A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology;

72.*See* Paul Resnick and Jim Miller, *The CDA's Silver Lining*, WIRED (1996) vol. 4(8) at 109.

73.*See generally* Albert Vezza, *Platform for Internet Content Selection: What Does It Do?* (visited Jun. 24, 1997) <http://www.w3.org/PICS/951030/AV/StartHere.html>

74.First party rating is rating provided by the person posting the information. Third party rating is rating provided by some other entity. World Wide Web Consortium, *PICS Statement of Principles* (visited Jun. 24, 1997) <http://www.w3.org/PICS/principles.html>

75.See Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1424-25, ("Today abolition of the fairness doctrine can be passed off as just one more instance of 'deregulation.' It seems to me, however, that there is much to regret in this stance of the Court and the [First Amendment] Tradition upon which it rests. The received Tradition presupposes a world that no longer exists and that is beyond our capacity to recall--a world in which the principal political forum is the street corner."), LIBERALISM DIVIDED (Westview Press 1996), J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375 (1990) ("In assessing what constitutes substantial overbreadth or vagueness, I do not think it inappropriate to employ common sense judgments about the way the world works. Although the distinction between public power and private power is significant, even more significant for me are what power relations (public or private) exist in the standard case in which the statute operates."), Richard Delgado, *First Amendment Formalism Is Giving Way to First Amendment Legal Realism*, 29 HARV. C.R.-C.L. L. REV. 169 (Winter 1994) ("The transition to the new [legal realist] paradigm is, however, far from complete."). *But cf.* Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193, 195-97 (Dec. 1996) ("The theoretical advances celebrated by Delgado and other progressive critics of the First Amendment are not really advances at all. They are simply refurbished versions of arguments used since the beginning of modern First Amendment jurisprudence to justify government authority to control the speech (and thought) of citizens. ... Moreover, despite the different objectives of the new censors, their reasons for supporting government control over speech are not significantly different from those of their reactionary predecessors. ... The postmodern censorship theory offered by this new generation of politically progressive legal scholars is neither progressive nor, for that matter, even "postmodern." In the end, it is just censorship.")

76. *See generally* Kathryn Munro, *Filtering Utilities*, PC MAGAZINE, Vol. 16, No. 7 (Apr. 8, 1997) at 235 (describing and reviewing various filtering software products).

77. For a fuller version of this argument, *see* James Boyle et al., *Before the Supreme Un-Court of the United States* (visited Jun. 24, 1997) <http://www.wcl.american.edu/pub/faculty/boyle/unreno.htm> (Justice Un-Scalia, dissenting)

78. "Despite this progress, the transformation of cyberspace is not complete. Although gateway technology has been available on the World Wide Web for some time now, id., at 845; Shea v. Reno, 930 F. Supp. 916, 933-934 (SDNY 1996), it is not available to all Web speakers, 929 F. Supp., at 845-846, and is just now becoming technologically feasible for chat rooms and USENETnewsgroups, Brief for Federal Parties 37-38. Gateway technology is not ubiquitous in cyberspace, and because without it "there is no means of age verification," cyberspace still remains largely unzoned--and unzoneable. 929 F. Supp., at 846; Shea, supra, at 934. User based zoning is also in its infancy. For it to be effective, (i) an agreed upon code (or "tag") would have to exist; (ii) screening software or browsers with screening capabilities would have to be able to recognize the "tag"; and (iii) those programs would have to be widely available--and widely used--by Internet users. At present, none of these conditions is true. Screening software "is not in wide use today" and "only a handful of browsers have screening capabilities." Shea, supra, at 945-946. There is, moreover, no agreed upon "tag" for those programs to recognize. 929 F. Supp., at 848; Shea, supra, at 945." Reno v. ACLU, No. 96-511, WL 348012 at 24 (U.S. June 26, 1997) (O'Connor, J., concurring in part and dissenting in part).

79. Remarks by President Clinton at Town Hall meeting in Bridgeport, W. Va. (May 22, 1997) "[I]t may be that what we have to do is to try to develop something like the equivalent of what we are developing for you for television, like the V-chip ... It's technically more difficult with the Internet. ... But I think that is the answer; something like the V-chip for televisions, and we are working on it."

80. *See, e.g.,* ED MARKEY, EMPOWERMENT ACT (Fed. Doc. Clearing House 1997) (press release June 19, 1997).

81. S. 97 Children's Internet Protection Act. S.97 would amend Section 254 of the Communications Act of 1934 (47 U.S.C. 254) to "require implementation of a

technology" to block or filter material harmful to minors. While schools would be *required* to use technological means, libraries with only one computer would be allowed to use another reasonably effective alternative means. One presumed this includes old-fashioned mechanisms, (such as yelling, pointing and telling your mother.) The determination of *what* material is harmful to minors would be made by "the school, school board, library or other authority responsible for making the required certification." Under the act, no agency or instrumentality of the Federal government is allowed to set, review or challenge those criteria. Notice the weird conjunction of mandating restriction of content and mandating *technological* rather than other means to accomplish the goal, while simultaneously respecting local decisions about the content of the proscribed category.

82. Child Protection Act of 1998, attached as an amendment to the FY99 budget for Labor, HHS and Education.

83.Declan McCullagh and Brock Meeks, *Keys to the Kingdom* (visited Jun. 24, 1997)
<http://www.eff.org/pub/Publications/Declan_McCullagh/cwd.keys.to.the.kingdom.0796.article>

84.*See, e.g.*, Safe Schools Internet Act of 1998, S. 1619 & H.R. 3177, 105th Cong. (1998). This bill would require that elementary and secondary schools and public libraries receiving federal Internet access subsidies install (but not necessarily activate) "a system for computers with Internet access to filter or block matter deemed to be inappropriate for minors." The bill stipulates that "[t]he determination of what matter is inappropriate for minors shall be made by the school, school board, library, ..." and "[n]o agency or instrumentality of the United States Government . . . may establish criteria . . . (or) review the determination." Originally introduced by Sen. McCain in February of 1998, the bill passed the Senate but stalled in the House Commerce Committee. See also the Child Protection Act of 1998, also known as the "Istook Amendment." This bill contained comparatively broader language. It would require any elementary or secondary school or public library receiving federal funds "for the acquisition or operation of any computer that is accessible to minors and that has access to the Internet," to "install software on that computer . . . to prevent minors from obtaining access to any obscene information using that computer," and to "ensure that such software is operational whenever that computer is used by minors, except that such software's operation may be temporarily interrupted to permit a minor to have access to information that is not

obscene or otherwise unprotected by the Constitution under the direct supervision of an adult." This bill was attached to the FY99 appropriation bill for Labor, Health & Human Services, and Education, but did not appear in the final Omnibus Appropriations Act.

On the state level, more than a dozen states have passed content-filtering legislation and similar legislation is currently pending in at least ten others. *See* ACLU, *Cyber-Liberties: Online Censorship in the States*, http://www.aclu.org/issues/cyber/censor/stbills.html>.

85.Geeta Anand, *Library OK's limits on 'Net access; Compromise calls for filter software only on computers used by children*, BOSTON GLOBE, Mar. 22, 1997, at A1.

86.Marc Ferranti, *Site-filtering issue goes to state level*, INFOWORLD, Apr. 21, 1997, at 60.

87.ED MARKEY, EMPOWERMENT ACT (Fed. Doc. Clearing House 1997) (press release June 19, 1997).

88. Mainstream Loudoun v. Board of Trustees of the Loudoun Country Library, 2 F.Supp.2d 783, 787 (1998).

89. Mainstream Loudoun v. Board of Trustees of the Loudoun Country Library, 24 F.Supp.2d 552 (1998).

90.

91."Although many people were surprised at [the revelations in the McCullagh and Meeks article], it was in fact completely predictable from a historical perspective. Too much discussion of the future of unfettered electronic communications takes place in a social vacuum, from an extremely simplistic viewpoint (I refer to this the "net.libertarian" mindset). Because of a perspective that might be rendered "government action bad, private action good" there's great unwillingness to think about complicated social systems, of private parties acting as as agents of censorship." Seth Finkelstein, *Internet Blocking Programs and Privatized Censorship*, THE ETHICAL SPECTACLE, August 1996 <http://www.spectacle.org/896/finkel.html>

92.*See* James Boyle, *Intellectual Property Online: A Young Person's Guide*, 10 HARV. J. L. & TECH. 47 (1996); JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS 18-20, 51-61, 162-63 (1996); James Boyle, *Q: Is Congress turning the Internet into an information toll road? Yes: The Senate would whack away at 'fair use' of electronic documents needed for news and education*, INSIGHT, Jan. 15, 1996; James Boyle, *Sold Out* N.Y. TIMES, March 31, 1996, § 2, at 2.

93.*See* NICHOLAS NEGROPRONTE, BEING DIGITAL (1995).

94.*See* John Perry Barlow, *Selling Wine Without Bottles: The Economy of Mind on the Global Net*, <http://www.eff.org/pub/Publications/John_Perry_Barlow/HTML/idea_economy_article.html>

95.UNITED STATES DEPARTMENT OF COMMERCE, INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS at 114-24 (Sept 1995) ("White Paper"); James Boyle, *Intellectual Property Online: A Young Person's Guide*, 10 HARV. J. L. & TECH. 47, 58-111 (1996); Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators,* 13 CARDOZO ARTS & ENT. L. J. 345 (1995); *Cf., Religious Technology Center v. Netcom,* 907 F. Supp. 1361, 1377 (N.D. Calif. 1995) (stating that strict liability for ISPs "would chill the use of the Internet because every access provider or user would be subject to liability when a user posts an infringing work to a Usenet newsgroup." *Id.* at 1377).

96.*See* NII Copyright Protection Act of 1995, S. 1284, 104th Cong. (1995), H.R. 2441, 104th Cong. (1995).

97.*See* WIPO Copyright Treaty, Dec. 23, 1996, CRNR/DC/94 (visited June 26, 1997) <http://www.wipo.org/eng/diplconf/distrib/94dc.htm>; *See also, News from WIPO* (visited June 26, 1997) <http://www.hrrc.org/wiponews.html> (detailing course of deliberations during the Diplomatic Conference).

98.*See* James Boyle, *Intellectual Property Online: A Young Person's Guide,* 10 HARV. J. L. & TECH. 47, 830194 (1996) (discussing MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir.1993)).

99.*Id.* at 103-04.

100.*See* Religious Technology Center v. Netcom, 907 F. Supp. 1361 (N.D. Calif. 1995); *See also,* Playboy Enterprises, Inc. v. Chuckleberry Publications, Inc., 939 F. Supp. 1032 (1996); Sega Enterprises, Ltd. v. Maphia, 948 F. Supp. 923 (1996);

101.We impose strict liability on manufacturers on products for a number of reasons -- one of which is that we believe the state could not possibly inspect every product and every design in the market-place. Simply by forcing manufacturers to internalise the costs of injuries caused by their products, we produce a strong, private set of incentives that in turn encourage internal mechanisms of review and product redesign. *See* GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); *See also,* Guido Calabresi, *First Party, Third Party, and Product Liability Systems: Can Economic Analysis of Law Tell Us Anything About Them?*, 69 IOWA L. REV. 833 (1984); A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS at 97-106 (2d ed. 1989). Plaintiffs become private attorneys-general. There are however, also some striking differences between the familiar example of the use of strict liability in the tort setting and the imposition of strict liability on internet service providers. In product liability, the conventional range of reasons for imposing strict liability on the manufacturers includes the claims that:

- They are generally the cheapest cost-avoiders -- in other words, they are best able to respond to liability for damage by making changes that could prevent the damage
- They are generally the best loss spreaders -- in other words, they are best able to pass the cost of unavoidable or cost-justified damage on to the appropriate group, consumers of the good in question.
- They are generally in an advantageous position in terms of knowledge and effective power -- at least as compared to the relatively powerless individual consumer. *See* Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440-43 (1944) (Traynor, J., concurring).

In the online setting, none of these claims is obviously correct. In some cases service providers may be able to prevent illicit copying relatively cheaply without imposing large social costs. On many other occasions however, it seems that the costs of their enforcement may outweigh the benefits -- in the form of transaction costs required to ensure compliance, for example, or draconian restrictions of the fair use privileges of their subscribers so as to be sure that illicit copying is not being carried on. (Since ISP's would pay for all detected copyright infringements, but

would not be forced to internalise the cost to their customers of restricting fair use, the incentives would be asymmetrically anti-consumer.) Leaving aside the efficiency costs of enforcement by service providers, there is also the question of whether they are the cheapest cost-avoider. In many cases, the party best situated to avoid the cost of copyright infringement will be the owner of the copyright. Whether by developing technical solutions or by fine-tuning their business plan so as to minimise the incentives to violate copyright in the first place, copyright owners might well be the cheapest cost-avoiders. If that is true, it would actually be inefficient to allow them to rely on another party for enforcement of their rights.

Beyond the question of the cheapest cost-avoider is the question of best loss spreader and here too it is hard to be confident that the ISP's are the appropriate parties. The economic analysts' mantra is "activities should internalise their full costs." If the costs of a good or activity are not passed on to those who use the good or engage in the activity, then those individuals will make inefficient choices. Thus, for example, if the price of gasoline does not reflect the environmental damage done by gasoline, that damage becomes a negative externality, and gasoline is inefficiently priced relative to its "true" costs. Over what group then, should the costs -- i.e. the copyright owner's forgone profit -- of illicit copying be imposed? The inquiry is a fascinating one, with more layers than I can fully explore here. It is complicated by the fact that the "costs" imposed by the illicit copying of an information good are economically different in some ways from the costs imposed by theft of material goods. As a content provider, I can make a rational economic decision to sell my good across some cheap but "leaky" medium, which lowers my costs of advertising and distribution and increases the number of unauthorised copies circulating. I may even believe that some of the unauthorised copies provide a *benefit* to me -- making my word processing program a de facto standard in the industry or establishing my band as the best known, thus increasing the market for future products. But let us leave aside the joys of pointing out that economic analysis depends on questions of interpretation that cannot themselves be decided according to economic criteria. There is at the very least, strong reason to doubt that users of on-line services, rather than purchasers of the good in question, are the appropriate group over whom the costs of illicit copying should be spread. This would, in fact, actively undermine the competitive incentives to companies to develop their own anti-copying methods.

Finally, the asymmetry of power and knowledge that occurs when Mrs. McPherson confronts the Buick Motor Company, is by no means as clear when Microsoft wants Netcom to do its enforcement work. For all of these reasons, the imposition of strict liability on ISP's does look rather different than its imposition on manufacturers of defective products. If there is an advantage to this scheme, that

advantage redounds mainly to the content providers; such a plan would shift enforcement costs from owners and allow them to reap the benefits of the Net without fully bearing its costs.

102.*See* 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 136 (5th ed. 1885)

103.*See* WIPO Copyright Treaty, Dec. 23, 1996, CRNR/DC/94 (visited June 26, 1997) <http://www.wipo.org/eng/diplconf/distrib/94dc.htm>; *See also, News from WIPO* (visited June 26, 1997) <http://www.hrrc.org/wiponews.html> (detailing course of deliberations during the Diplomatic Conference).

104.*See infra* note ___.

105.*See supra* note 52 at § 1201.

106.*See supra* note 52 at § 1204.

107.Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

108.See, Kristin S. Burns, *Protecting the Child: The V-Chip Provisions of the Telecommunications Act of 1996*, 7 DEPAUL-LCA J. ARTS & ENT. L. 143 (1996); David V. Scott, *The V-Chip Debate: Blocking Television Sex, Violence, and the First Amendment*, 16 LOY. L.A. ENT. L. J. 741 (1996).

109.*See* Howard S. Dakoff, *The Clipper Chip Proposal: Deciphering the Unfounded Fears that are Wrongfully Derailing its Implementation*, 29 J. MARSHIALL L. REV. 475, 482-84 (1996) (discussing the use of the government's purchasing power to create a de facto encryption system); *See also*, Richard L. Field, *1996: Survey of the Year's Developments in Electronic Cash Law and the Laws Affecting Electronic Banking in the United States*, 46 AM. U. L. REV. 967, 993 (1997); Ira S. Rubenstein, *Export Controls on Encryption Software* 748 PLI/COMM 309 (1996); A. Michael Froomkin, *The Metaphor is the Key, Cryptograpy, the Clipper Chip, and the Constitution,* 143 U. PA. L. REV. 709 (1995).

110. Pub. L. No. 103 - 414, 108 Stat. 4279 (1994) (codified at 47 U.S.C.A. s 1001 -10 (Supp. 1995)

111.18 U.S.C. s 2703(c)(1)(C) (1994). See Susan Friewald, *Uncertain Privacy: Communication Attributes After the Digital Telephony Act,* 69 S. CAL. L. REV. 949 (1996).

112.17 U.S.C. §§ 1001-1010 (1994).

113.Ithièl de Sola Pool, TECHNOLOGIES OF FREEDOM (Harv. Univ. Press 1983).

114. More precisely, under current interpretations of constitutional law, I violate no constitutional right.

115. *See* Robert Bork, *Civil Rights--A Challenge*, NEW REPUBLIC, Aug. 31, 1963, at 21.

116. Shelley v. Kraemer, 334 U.S. 1 (1948).

117. Flagg Brothers, 436 U.S. 149 (1978).

118. New York Times v. Sullivan, 376 U.S. 254 (1964).

119.Shelley v. Kraemer, 334 U.S. 1, 4–5 (1948).

120. Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (footnote omitted).

121. Shelley v. Kraemer, 334 U.S. 1, 19 (1948).

122. Shelley was also dramatically contracted by Washington v. Davis, 426 U.S. 229, 253 (1976), which required proof of state intent to discriminate. The contemporary court has a very narrow understanding of discrimination; they would be unlikely to accept proof of intent in the mere enforcement of a discriminatory agreement.

123. *See* Moose Lodge 107 v. Irvis, 407 U.S. 163 (1972).

124. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

125. See Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

126. United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

127. A second reason is less benign. The earlier rulings were driven by a court that saw racism as an ill that was woven into American life, an ill that could be struck against and ameliorated if not cured, provided the discriminators were not given broad immunity by doctrines of standing or state action. A majority of the current court seems to see much of racism as intractable, or unreachable, or perhaps, saddest of all, just not that important. The majority is also considerably more worried about the state "changing the rules for blacks." Thus they have been more interested in erecting barriers, whether of standing or state action, or "intent," to plaintiffs trying to assert equal protection claims. The argument that the majority on the current court is in fact deeply concerned with principles of colour blindness would be easier to make if the court had not been willing to relax requirements of standing dramatically in cases involving stigmatic injury to *white* plaintiffs placed in majority *black* districts. *See* Shaw v. Reno, 113 S. Ct. 2816 (1993). *See also*, David Kairys, *Unexplainable on Grounds Other Than Race*, 45 AM. U. L. REV. 729 (1996).

128. *See* Flagg Brothers v. Brooks, 436 U.S. 149, 159–60 (1978).

129. *See* Flagg Brothers v. Brooks, 436 U.S. 149, 160 n..10 (1978).

130.

123. Flagg Brothers v.Brooks, 436 U.S. 149, 166–67 (1978).

124. Flagg Brothers v.Brooks, 436 U.S. 149, 169 (1978).

124. New York Times v. Sullivan, 376 U.S. 254, 256 (1964).

125. *Id.*

126. *Id.*

127. *Id.* at 258–59.

128. *Id.* at 262.

129. *See* New York Times v. Sullivan, 273 Ala. 656, 144 So.2d 25 (1962).

130. New York Times v. Sullivan, 376 U.S. 254, 265 (1964).

131. *See, e.g.*, Denver Area Education Telecommunications Consortium Inc. v. F.C.C., 116 S. Ct. 2374 (1996) (statute that permitted operators of leased cable lines to exclude "indecent" programming comprised state action).

132. Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991).

133. *Id.* at 139–40.

134. *Id. Cf.* Bell v. Maryland, 378 U.S. 226 (1964), where a three person plurality held that the state may not use the general criminal trespass laws to enforce a de facto system of segregation by white restaraunteurs. In a heated dissent, Justice Black argued that property owners have a due process right to use their property as they wish.

135. Some of the most interesting recent writing about property has used game-theory to stress the way in which both private norms and -- to a lesser extent -- state rules, tend to track the equilibria that would be produced by rational actors "repeat playing" commonly occurring situations and adapting their strategies and norms accordingly. *See, e.g.*, ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991). Ian Ayres, *supra* note {?}. Now of course it is possible, and to some extent likely, that in a new arena such as cyberpspace, actors will try to analogize to situations and norms with which they are more familiar. Indeed, it is a fascinating question to ponder exactly how we try to fit a new situation into the matrix of adaptive strategies and norms we have developed in other settings. It is precisely for this reason, that so much debate about the Net is carried on in the analogical mode. "Its like a public park." No, its like a private courier delivery service!" See Boyle, Shamans *supra* note . But however the process takes place, the new area does not have the solid inevitable feel of the more familiar context; people will disagree about where it "fits." Is protecting one's encrypted software from competitors' attempts to recapture their prior fair use privilege to decompile an example of self-help or annexation? Thus, even if one believed that meatspace property norms seem natural because they express rationally derived coordination solutions to a set of ubiquitous conflicts, rather than because they were a reflection of a single set of transcendental rights, one would

still have considerable doubt about thow those norms mapped onto cyberspace.

136. Dallas Cowboys quote, SFAA v. USOC

137. Cf. Smith v. Allwright (1944); Terry v. Adams (1953).

138. Schauer, Presumptive Positivism

139. Dallas Cowboys

140. Rubenfeld, Winter, Levi

141. Ellickson, Property in Land

142. Ellickson -- bundle -- quote never found. Cf. Rose, Yale Law Journal -- Property Canon -- the anxiety in continuation of Blackstone's quotation.

143. http://www.eff.org/pub/Publications/John_Perry_Barlow/barlow_0296.declaration

144. Selling Wine Without Bottles; The Economy of Mind on the Global Net

Nathan Newman, Net Loss:
Government, Technology and the Political Economy of Community in the Age of the Internet
(http://socrates.berkeley.edu/~newman/)

Chapter 1:

Introduction

"The post-information age will remove the limitations of geography. Digital living will include less and less dependence upon being in a specific place at a specific time, and the transmission of place itself will start to become possible." --Nicholas Negroponte, director of MIT's Media Lab in his book *Being Digital*[1]
"National economies are swiftly breaking down into regional and sectoral parts--subnational economies with distinctive and differing problems of their own." -- Futurist Alvin Toffler on regional economies in *The Third Wave*[2]
===
The new "information economy" seems to evoke a contradictory debate on regions and decentralization. On one hand, we have technologists like Nicholas Negropante seeing local regions disappearing as important entities in the face of the "spaceless" techno logy of information exchange.
On the other hand, futurists like Alvin Toffler and his political disciples like Newt Gingrich have argued that the microchip is the midwife of regional rebirth and the deathnell for central political decision-making
How do we explain this contradiction?
The Internet has emerged as the focus for much of the strongest hype and substance in debates on this new economy. It has become the defining economic event of the end of the 20th century - a fact reflected by the obsessive media attention and to the raw economic explosion of companies associated with it.
The Internet is seen as the metaphor, even the embodiment, of the new information age, of a post-industrial economy, and of a new paradigm in workplace and company organization. Information in this view, rather than raw materials, have become the substan ce of commerce and the Internet is the highway of the new era.
Most strikingly, the Internet is seen as the herald of the globalization of the economy and the triumph of a deregulated marketplace. In this vision, the economics of place have given way to telecommuting, global production and just-in-time delivery of g oods and information from all points on the globe. In such a world, economic regions become an oxymoron as the economy becomes a matter of bits and e-mail in cyberspace, not transit and meetings in local space. The "Third Wave" in this scenario leaves eco nomic regions as the archaic leftovers of the industrial age. Governments, those stalwart institutions tied to such geography, become impotent and unimportant in this new global information society.
Now, there are truths in each of these ideas, but the truths obscure the underlying reality of transformation rather than decline in both the vibrancy of local economic activity and the importance of government action.
On the face of it, it's nonsensical to argue that new information technologies like the Internet show the irrelevancy of national governments and economies. The Internet is one of the crowning achievements of central government in the last few decades--planned over decades, funded by a ser ies of federal agencies,

and overseen by a national network of experts. And its success is not merely an exemplar of technical achievement but is also an exemplar of the efficiency of government planning over purely private economic development. In the absence of the open standards of the Internet developed and promoted by the federal government, almost all analysts admit that the private vision of toll road information services promoted by industry would not have created the surge of explosive economic innovation we are currently seeing around the Internet. It is only with the success of the Internet (and the profits to be made) that industry is now decrying the interference of government in information access.

The most striking counter to the vision of global placelessness is the very existence of Silicon Valley, the region most associated with the rise of the Internet. If any region were to collapse on the wave of cyber-communication, it would be Northern California's "hotwired" Silicon Valley. Contrary to what some might expect, Silicon Valley not only survives but is thriving, expanding and even consolidating its role as the geographic focus of a supposedly geography-free revolution. From network router companies like 3Com to Web tool makers like Netscape to the multimedia upstarts of San Francisco's "multimedia gulch", companies in Northern California seem to be refusing to let geography die its proper death.

But at a deeper level, the vibrancy of the Silicon Valley regional economy is not in defiance of globalizing trends due to the Internet but that regional strength was in many ways the precondition for the triumph of the Internet. Fundamental technological change like the Internet requires more than the introduction of new products; it requires fundamental transformations in a whole array of mutually supporting institutions, goods, services and standards that must all advance together. While this can happen between people and companies in different places, the organic trust and interaction of those living in the same region has always been a key factor in such broad-based technological advancement, whether in the car industry in Detroit or in the financial districts of Wall Street.

As economic theorists dating back to Alfred Marshall have noted, regional "industrial districts" have always been a breeding ground for specialized innovation where day-to-day interaction support the trust and human interaction needed for such co-dependent innovation. If anything, the intense technological specifications needed in high technology and the rapid technological change we live under just accentuate the need for ongoing local interaction and Silicon Valley has just emerged as the premier space for innovation in networking technology.

In its origins, Silicon Valley itself is largely the creature of federal spending and effort; its pioneering firms like Hewlett-Packard and Varian grew based on defense contracts during World War II and its aftermath which pumped billions of dollars into the Bay Area economy, just as federal research dollars poured into the region via universities like the University of California at Berkeley and Stanford along with government laboratories like NASA's Ames Research Center. The Internet itself was a project directed for a quarter of a century by federal government agencies in association largely with regionally-based university computer departments.

Yet despite what might be seen as the continuity from the past in the role of both regions and government in advancing technology and its associated economic benefits, there is a justified sense that something has radically changed in the economy. While Silicon Valley designers may cluster together at Palo Alto bars, the computer components powering their tools have scattered to factories throughout the country and the third world. Industry itself is using the new technology to extend itself globally as production becomes a global process. Business to business interactions are in turn reshaped as the cost of communication at large

distances drops to virtually zero. The Internet promises a global marketing venue reaching consumers around the world. For in dustries like software companies or banks where the transfer of ideas and commitments (rather than physical goods) are the key, the Internet promises an even more radical reshaping of where and how they distribute core services.

Community in regions increasingly takes the form of regional business associations emerging like kudzu across the economic landscape. It is through these business-based associations, tied to local, state and federal government, that the innovations of sp ecific regions are harvested to leverage corporate profits and global economic changes such as the Internet. This horizontal approach of business-to-business community alliances has largely supplanted the vestiges of the vertical cross-class collaboration s that had once somewhat tied the economic fates of rich and poor together within regions. It is these local horizontal business linkages, supported by the federal government, that were key to the emergence of the mutually reinforcing technologies and ins titutional changes that sped the dominance of the Internet in economic life.

Inequality within economic regions has increased, just as inequality has increased across the country and the globe. What is disappearing is not the importance of geography but the singularity of a "region", of the shared economic fate of those sharing t he same physical space. Instead, information technology is being used to link the professional elites of regions within a space of shared innovation in order to market that space to a global marketplace, even as the less skilled workers of regions find th emselves locked in geography that whipsaws wages downwards through that same global competition.

The institutions that once linked investments and broad-based economic development within regions - local banks, power utilities and the local telephone company - are being rapidly supplanted by global competitors competing and fracturing local markets i n favor of global niches serving different economic strata within regions. This in turn has undermined the shared regional economic development strategies tied to such institutions that had once linked labor unions, community groups and elite businesses i n some degree of cross-class collaboration around regional goals.

In this transformation, government is not merely the victim of a deterministic technological trend but has been the trend's enabler through specific political decisions made. Beyond the creation of the Internet, the federal government promoted a program largely mislabeled "deregulation" that deliberately fractured regional banking, utility and telephone institutions in favor of national and global competitors. But government did not disappear in this change of policy: in fact, federal regulation of telec ommunications activity crucial to the new information age has accelerated as a whole range of subsidies, interconnection rules, and anti-trust interventions has radically reshaped the economic map at the behest of government regulators and judges.

What has changed within regions is the relative power of global corporations in dictating local government policy and wage levels of lower-skilled workers within specific regions. The economic action of technology innovation may happen overwhelmingly wit hin local venues, but corporations have the ability due to the new technology to quickly pick and choose new venues outside the control of local government and grassroots actors who desperately try to negotiate with these global partners. The lack of the traditional regional economic anchors like community banks and local utilities who once mediated some degree of regional growth alliance has left local actors with few allies for broader economic development.

With this, we see the present reality of local governments teetering on the edge of insolvency and austerity while abandoning any serious thrust for equality. Instead, we end up with a form of local government that

increasingly markets services to global corporations over the needs of local lower-income citizens while using tax breaks to lure and keep business in their regions. The Internet and related information technologies promote an increasingly national and global retail market, thereby further und ercutting local government revenues dependent on sales taxes on locally purchased goods.

For local government, the promise of the new technology to enhance democracy gives way increasingly to a blurring of the lines between government functions and business interests as "public-private partnerships" and privatization undermine local politica l control. Desperate for revenue, local governments have increasingly begun marketing information about their own citizens to corporations, even as those same global corporations use the Internet to rapidly survey and play off local governments against ea ch other in bidding for corporate location decisions. The fragmentation of utilities leads to increasing inequality in telecommunications between richer and poorer towns and between schools serving richer and poorer students.

There is a sad irony (and a political agenda) in calls for returning budgetary decision-making powers to local governments prostrate before the power of global corporations to dictate local policy. That this "decentralization" agenda is occurring even as federal regulators increasingly displace local government control over banks, utilities and telecommunications just emphasizes that the ambiguity over the globalizing and decentralizing effects of the new information economy are not merely technological contradictions but political and ideological contradictions that are shaping the economic landscape.

The Focus of this Book

This book is intended to be a case study in the interactions of government, technology and the changing role of regions in our economy using the emergence of the Internet in Silicon Valley as the focus. At one level, the modest goal is to tell that h istory in the context of the issues raised in the previous section and throw new light on the dynamics of a region and technology too often discussed in purely economistic or technological terms.

The more ambitious goal is to use that case study to build the broader case for how technology, government and regions are interacting with each other in this new economic era. Obviously, Silicon Valley as an early consumer as well as producer of network ing technology is a key region in understanding these dynamics, even as its uniqueness make it a problematic region for complete generalization to other areas. The Internet as well is a radically unique innovation whose lessons will only be partly applica ble to lesser breakthroughs. Still, Silicon Valley's very precociousness as a high-tech region makes its evolution a credible model for insights into the fate of other regions where technological innovation is increasingly supplanting raw commodity produc tion. As well, the dynamics of economic inequality and the corporate undercutting of integrated regional economic development that this book will explore is inevitably even more pronounced in regions that are at the periphery, and therefore at the mercy, of global production.

The study of the interaction of information technology like the Internet and the particular area of Silicon Valley highlights the highly mediated nature of regions, by the technology that shapes new industries, by the federal investments that fuel the gr owth of new population sectors and new innovations, by the shaping of new business relationships that grow around such new industries and by how global markets themselves interact heavily with core regions that produce the innovation fueling those global markets. The particularity of the story of the evolution of the Internet and its interaction with the Silicon Valley region, like the unique story of all technologies and regions, helps to undermine the simplistic models of universal economic

development, models that favor abstract "market rules" while ignoring the specific history of government and social interaction that lie at the creation of each new market.

As well, the emphasis on the federal government's role in the evolution of both Silicon Valley and the Internet inevitably raises more universal issues of how and why the federal government acts in technology and economic development areas. In detailing specific issues of controversy, the experience of other regions will be used to highlight similarities and contrasts to throw greater light on these universal dynamics. While no region will be treated with the same integrated and comprehensive view with which Northern California will be treated, these comparisons will help to enrich the overall case study of the region.

Since this book will highlight some of the bleaker implications of technology, it is worth emphasizing that my view is not anti-technology in any sense. In fact, one of the main purposes of this story is to refute the technological determinism of both the optimists of the Right and the technological pessimists of the Left in favor of an analysis that sees the key interaction between political choices and the direction of technology with its specific social outcomes. It is through the application of technology and the social structure created to absorb that technology that the positives and negatives of technology manifest themselves.

In his *The Visible Hand,* Alfred Chandler wrote of the wholesale transformation of capitalism as a system between the 19th and 20th centuries due to the combined effects of communication and transportation technology along with radical changes in managerial systems.[3] With the Internet and related information technologies, relations of production are being reshaped as deeply in the transition from the 20th to the 21th century.

At the heart of any changes in production are changes in power relations and the Internet itself embodies changing social forces that are themselves reshaping which political and economic actors will hold power in the new era. Karl Polanyi emphasized the way historically that the underlying government-created infrastructure of rules of exchange under capitalism shaped all actors in the economy; those rules set the environment for how economic conflict and technology played out in the rise of industrialization. In the same way, the Internet is less the cables and wires tying homes and offices together than a system of contested rules for information exchange that are constraining the shape of power in the new information age. At the heart of this book is how the battle over those contested rules are reshaping regional economies and politics in the modern era.

Summary of Argument and Chapter Outline

Chapter 2

To fully engage with the question of what we are to make of regional economies and their relation to local government, we have to return to the underlying, inconvenient truth that economic and especially technological innovation has sprung not from the garages of local companies but from the long-term investments of centralized government. Not that individual creativity was unimportant but if Isaac Newton could acknowledge he stood on the shoulders of "giants" in his breakthroughs, the creators of the latest Internet gee-gaw can fess up to the economic and historical investments by national governments that made their innovations possible.

The Internet is just the most recent (albeit dramatic) permeating technology that was the child of centralized government planning and economic support. From aerospace to biotechnology, the government has played

a key and usually leading role in technolo gical advance and with corporate research labs cutting back on basic research, that role is unlikely to diminish in the future.

The Internet may be highly identified with the Silicon Valley region but it was, much to the annoyance of cyberlibertarians, born in the bureaucratic halls of Washington, D.C. It came out of a whole set of institutions and a milieu of innovation directly and purposefully funded by federal agencies, primarily in the Advanced Research Projects Agency (ARPA) but also out of a host of other technology-oriented bureaucracies. The federal government created a national network of experts who could guide the Int ernet to economic viability, laid the wires and funded the computers where it was tested and developed its initial critical mass, and funded many of Internet companies in today's headlines as contractors for federal government projects or agencies.

The reality is that no corporate research laboratory and no local government could operate on the decades-long time frame needed for the development of the Internet. Broad-based innovation requires generations of innovation with little commercial payback . In most such technologies, and the Internet was no exception, the need for public discussion and collaboration on the basic science makes it impossible for any one company to enjoy the fruits of proprietary discoveries. As analysts like Kenneth Flamm ha ve argued[4], the federal government funded the breakthrough research that created the basic form of the computer in the 1960s. Federal funding created the advances of time-sharing minicomputers and most of the networking technology that is the heart of high technology to this day. Commercialization increased the speed and lowered the price of each of these innovations but the driving engine for its creation was the federal government.

In the case of the social infrastructure and technical standards necessary for the Internet, the government's role was even more indispensable. A stew of proprietary corporate networking technologies were developed in the 1980s, but no private corporatio n was going to support the long-term creation of open standards by themselves in the absence of the government. Over decades, ARPA and other federal agencies like the National Science Foundation would concentrate their funding and support on standards tha t facilitated the most open network connections possible and, through strategic support for those protocols in the UNIX operating system (via programmer Bill Joy who later helped found computer maker Sun Microsystems), would help spread them throughout th e computing world. The federal government would organize and fund an emerging professional network of computer experts to oversee and guide the emerging connections between government, universities and the slowly building commercial sector involved in the Internet.

And through the creation of public space and the harnessing of volunteer energies in its early stages, the federal government encouraged a stream of free, quickly shared software that promoted continual innovation on the network. Far beyond traditional co nceptions of industrial policy investing a few dollars in promising industries, the federal government fundamentally created the whole framework of a new electronic marketplace of common standards, thereby breaching the monopolistic divides of what had be en rather stunted proprietary systems.

The initial commercialization of the Internet would be done largely by direct government spin-offs or companies relying on government contracts for their origin. The companies that took over the management of the backbone wires carrying most of the traff ic would include UUNET, a direct spin-off from the Department of Defense, BBN with long-time contract ties with the government, and MCI which was

involved in contracts throughout the 1980s in building the original National Science Foundation backbone of the Internet. And Silicon Valley firms that would be at the heart of its commercialization, such as Sun, Cisco and Oracle all got their start based largely on selling to government agencies. Or, as in the case of Netscape, such firms would raid the talent of the government centers that built the Internet to commercialize government-created software like the Mosaic web browser and servers.

In all these ways, the federal context for the development of the industry surrounding the Internet is inescapably national and based in initiatives flowing from the federal government. In evaluating the role of regional economies, then, it is critical to see them not as initiators but respondents to a national and global economic context.

Technical Background

A Brief History of the Internet

by

Barry Leiner et al.

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Introduction

The Internet has revolutionized the computer and communications world like nothing before. The invention of the telegraph, telephone, radio, and computer set the stage for this unprecedented integration of capabilities. The Internet is at once a world-wide broadcasting capability, a mechanism for information dissemination, and a medium for collaboration and interaction between individuals and their computers without regard for geographic location.

The Internet represents one of the most successful examples of the benefits of sustained investment an commitment to research and development of information infrastructure. Beginning with the early research in packet switching, the government, industry and academia have been partners in evolving and deploying this exciting new technology. Today, terms like "bleiner@computer.org" and "http://www.acm.org" trip lightly off the tongue of the random person on the street. [1]

This is intended to be a brief, necessarily cursory and incomplete history. Much material currently exis about the Internet, covering history, technology, and usage. A trip to almost any bookstore will find shelves of material written about the Internet. [2]

In this paper, [3] several of us involved in the development and evolution of the Internet share our views of its origins and history. This history revolves around four distinct aspects. There is the technological evolution that began with early research on packet switching and the ARPANET (and related technologies), and where current research continues to expand the horizons of the infrastructure along several dimensions, such as scale, performance, and higher level functionality. There is the operations

and management aspect of a global and complex operational infrastructure. There is the social aspect, which resulted in a broad community of *Internauts* working together to create and evolve the technology. And there is the commercialization aspect, resulting in an extremely effective transition of research results into a broadly deployed and available information infrastructure.

The Internet today is a widespread information infrastructure, the initial prototype of what is often call the National (or Global or Galactic) Information Infrastructure. Its history is complex and involves mar aspects - technological, organizational, and community. And its influence reaches not only to the technical fields of computer communications but throughout society as we move toward increasing use of online tools to accomplish electronic commerce, information acquisition, and community operation

Origins of the Internet

The first recorded description of the social interactions that could be enabled through networking was a series of memos written by J.C.R. Licklider of MIT in August 1962 discussing his "Galactic Network" concept. He envisioned a globally interconnected set of computers through which everyone could quickly access data and programs from any site. In spirit, the concept was very much like the Internet of today. Licklider was the first head of the computer research program at DARPA, [4] starting in October 1962. While at DARPA he convinced his successors at DARPA, Ivan Sutherland, Bob Taylor, and MIT researcher Lawrence G. Roberts, of the importance of this networking concept.

Leonard Kleinrock at MIT published the first paper on packet switching theory in July 1961 and the first book on the subject in 1964. Kleinrock convinced Roberts of the theoretical feasibility of communications using packets rather than circuits, which was a major step along the path towards computer networking. The other key step was to make the computers talk together. To explore this, in 1965 working with Thomas Merrill, Roberts connected the TX-2 computer in Mass. to the Q-32 in California with a low speed dial-up telephone line creating the first (however small) wide-area computer network ever built. The result of this experiment was the realization that the time-shared computers could work well together, running programs and retrieving data as necessary on the remote machine, but that the circuit switched telephone system was totally inadequate for the job. Kleinrock's convictio of the need for packet switching was confirmed.

In late 1966 Roberts went to DARPA to develop the computer network concept and quickly put together his plan for the "ARPANET", publishing it in 1967. At the conference where he presented the paper, there was also a paper on a packet network concept from the UK by Donald Davies and Roger Scantlebury of NPL. Scantlebury told Roberts about the NPL work as well as that of Paul Baran and others at RAND. The RAND group had written a paper on packet switching networks for secure voice in the military in 1964. It happened that the work at MIT (1961-1967), at RAND (1962-1965), and at NPL (1964-1967) had all proceeded in parallel without any of the researchers knowing about the other work. The word "packet" was adopted from the work at NPL and the proposed line speed to be used in the ARPANET design was upgraded from 2.4 kbps to 50 kbps. [5]

In August 1968, after Roberts and the DARPA funded community had refined the overall structure and specifications for the ARPANET, an RFQ was released by DARPA for the development of one of the key components, the packet switches called Interface Message Processors (IMP's). The RFQ was won in December 1968 by a group headed by Frank Heart at Bolt Beranek and Newman (BBN). As the BBN team worked on the IMP's with Bob Kahn playing a major role in the overall ARPANET

architectural design, the network topology and economics were designed and optimized by Roberts working with Howard Frank and his team at Network Analysis Corporation, and the network measurement system was prepared by Kleinrock's team at UCLA. [6]

Due to Kleinrock's early development of packet switching theory and his focus on analysis, design and measurement, his Network Measurement Center at UCLA was selected to be the first node on the ARPANET. All this came together in September 1969 when BBN installed the first IMP at UCLA and the first host computer was connected. Doug Engelbart's project on "Augmentation of Human Intellect' (which included NLS, an early hypertext system) at Stanford Research Institute (SRI) provided a second node. SRI supported the Network Information Center, led by Elizabeth (Jake) Feinler and including functions such as maintaining tables of host name to address mapping as well as a directory o the RFC's. One month later, when SRI was connected to the ARPANET, the first host-to-host message was sent from Kleinrock's laboratory to SRI. Two more nodes were added at UC Santa Barbara and University of Utah. These last two nodes incorporated application visualization projects, with Glen Culler and Burton Fried at UCSB investigating methods for display of mathematical function using storage displays to deal with the problem of refresh over the net, and Robert Taylor and Ivan Sutherland at Utah investigating methods of 3-D representations over the net. Thus, by the end of 1969 four host computers were connected together into the initial ARPANET, and the budding Internet was off the ground. Even at this early stage, it should be noted that the networking research incorporated both work on the underlying network and work on how to utilize the network. This tradition continues to this day.

Computers were added quickly to the ARPANET during the following years, and work proceeded on completing a functionally complete Host-to-Host protocol and other network software. In December 1970 the Network Working Group (NWG) working under S. Crocker finished the initial ARPANET Host-to-Host protocol, called the Network Control Protocol (NCP). As the ARPANET sites completed implementing NCP during the period 1971-1972, the network users finally could begin to develop applications.

In October 1972 Kahn organized a large, very successful demonstration of the ARPANET at the International Computer Communication Conference (ICCC). This was the first public demonstration o this new network technology to the public. It was also in 1972 that the initial "hot" application, electronic mail, was introduced. In March Ray Tomlinson at BBN wrote the basic email message send and read software, motivated by the need of the ARPANET developers for an easy coordination mechanism. In July, Roberts expanded its utility by writing the first email utility program to list, selectively read, file, forward, and respond to messages. From there email took off as the largest network application for over a decade. This was a harbinger of the kind of activity we see on the World Wide Web today, namely, the enormous growth of all kinds of "people-to-people" traffic.

The Initial Internetting Concepts

The original ARPANET grew into the Internet. Internet was based on the idea that there would be multiple independent networks of rather arbitrary design, beginning with the ARPANET as the pioneering packet switching network, but soon to include packet satellite networks, ground-based packet radio networks and other networks. The Internet as we now know it embodies a key underlying technical idea, namely that of open architecture networking. In this approach, the choice of any

individual network technology was not dictated by a particular network architecture but rather could be selected freely by a provider and made to interwork with the other networks through a meta-level "Internetworking Architecture". Up until that time there was only one general method for federating networks. This was the traditional circuit switching method where networks would interconnect at the circuit level, passing individual bits on a synchronous basis along a portion of an end-to-end circuit between a pair of end locations. Recall that Kleinrock had shown in 1961 that packet switching was a more efficient switching method. Along with packet switching, special purpose interconnection arrangements between networks were another possibility. While there were other limited ways to interconnect different networks, they required that one be used as a component of the other, rather thar acting as a *peer* of the other in offering end-to-end service.

In an open-architecture network, the individual networks may be separately designed and developed and each may have its own unique interface which it may offer to users and/or other providers. includin other Internet providers. Each network can be designed in accordance with the specific environment and user requirements of that network. There are generally no constraints on the types of network that can be included or on their geographic scope, although certain pragmatic considerations will dictate what makes sense to offer.

The idea of open-architecture networking was first introduced by Kahn shortly after having arrived at DARPA in 1972. This work was originally part of the packet radio program, but subsequently became a separate program in its own right. At the time, the program was called "Internetting". Key to making the packet radio system work was a reliable end-end protocol that could maintain effective communication in the face of jamming and other radio interference, or withstand intermittent blackout such as caused by being in a tunnel or blocked by the local terrain. Kahn first contemplated developing a protocol local only to the packet radio network, since that would avoid having to deal with the multitude of different operating systems, and continuing to use NCP.

However, NCP did not have the ability to address networks (and machines) further downstream than a destination IMP on the ARPANET and thus some change to NCP would also be required. (The assumption was that the ARPANET was not changeable in this regard). NCP relied on ARPANET to provide end-to-end reliability. If any packets were lost, the protocol (and presumably any applications it supported) would come to a grinding halt. In this model NCP had no end-end host error control, since the ARPANET was to be the only network in existence and it would be so reliable that no error control would be required on the part of the hosts.

Thus, Kahn decided to develop a new version of the protocol which could meet the needs of an open-architecture network environment. This protocol would eventually be called the Transmission Control Protocol/Internet Protocol (TCP/IP). While NCP tended to act like a device driver, the new protocol would be more like a communications protocol.

Four ground rules were critical to Kahn's early thinking:

> Each distinct network would have to stand on its own and no internal changes could be required to any such network to connect it to the Internet.

Communications would be on a best effort basis. If a packet didn't make it to the final destination, it would shortly be retransmitted from the source.

Black boxes would be used to connect the networks; these would later be called gateways and routers. There would be no information retained by the gateways about the individual flows of packets passing through them, thereby keeping them simple and avoiding complicated adaptation and recovery from various failure modes.

There would be no global control at the operations level.

Other key issues that needed to be addressed were:

Algorithms to prevent lost packets from permanently disabling communications and enabling them to be successfully retransmitted from the source.

Providing for host to host "pipelining" so that multiple packets could be enroute from source to destination at the discretion of the participating hosts, if the intermediate networks allowed it.

Gateway functions to allow it to forward packets appropriately. This included interpreting IP headers for routing, handling interfaces, breaking packets into smaller pieces if necessary, etc.

The need for end-end checksums, reassembly of packets from fragments and detection of duplicates, if any.

The need for global addressing

Techniques for host to host flow control.

Interfacing with the various operating systems

There were also other concerns, such as implementation efficiency, internetwork performance, but these were secondary considerations at first.

Kahn began work on a communications-oriented set of operating system principles while at BBN and documented some of his early thoughts in an internal BBN memorandum entitled "Communications Principles for Operating Systems". At this point he realized it would be necessary to learn the implementation details of each operating system to have a chance to embed any new protocols in an efficient way. Thus, in the spring of 1973, after starting the internetting effort, he asked Vint Cerf (ther at Stanford) to work with him on the detailed design of the protocol. Cerf had been intimately involved in the original NCP design and development and already had the knowledge about interfacing to

existing operating systems. So armed with Kahn's architectural approach to the communications side and with Cerf's NCP experience, they teamed up to spell out the details of what became TCP/IP. The give and take was highly productive and the first written version [7] of the resulting approach was distributed at a special meeting of the International Network Working Group (INWG) which had been set up at a conference at Sussex University in September 1973. Cerf had been invited to chair this group and used the occasion to hold a meeting of INWG members who were heavily represented at the Sussex Conference.

Some basic approaches emerged from this collaboration between Kahn and Cerf:

> Communication between two processes would logically consist of a very long stream of bytes (they called them octets). The position of any octet in the stream would be used to identify it.
>
> Flow control would be done by using sliding windows and acknowledgments (acks). The destination could select when to acknowledge and each ack returned would be cumulative for all packets received to that point.
>
> It was left open as to exactly how the source and destination would agree on the parameters of the windowing to be used. Defaults were used initially.
>
> Although Ethernet was under development at Xerox PARC at that time, the proliferation of LANs were not envisioned at the time, much less PCs and workstations. The original model was national level networks like ARPANET of which only a relatively small number were expected to exist. Thus a 32 bit IP address was used of which the first 8 bits signified the network and the remaining 24 bits designated the host on that network. This assumption, that 256 networks would be sufficient for the foreseeable future, was clearly in need of reconsideration when LANs began to appear in the late 1970s.

The original Cerf/Kahn paper on the Internet described one protocol, called TCP, which provided all the transport and forwarding services in the Internet. Kahn had intended that the TCP protocol support a range of transport services, from the totally reliable sequenced delivery of data *(virtual circuit model*) to a *datagram* service in which the application made direct use of the underlying network service, which might imply occasional lost, corrupted or reordered packets.

However, the initial effort to implement TCP resulted in a version that only allowed for virtual circuits This model worked fine for file transfer and remote login applications, but some of the early work on advanced network applications, in particular packet voice in the 1970s, made clear that in some cases packet losses should not be corrected by TCP, but should be left to the application to deal with. This led to a reorganization of the original TCP into two protocols, the simple IP which provided only for addressing and forwarding of individual packets, and the separate TCP, which was concerned with service features such as flow control and recovery from lost packets. For those applications that did no want the services of TCP, an alternative called the User Datagram Protocol (UDP) was added in order to provide direct access to the basic service of IP.

A major initial motivation for both the ARPANET and the Internet was resource sharing - for example allowing users on the packet radio networks to access the time sharing systems attached to the

ARPANET. Connecting the two together was far more economical that duplicating these very expensive computers. However, while file transfer and remote login (Telnet) were very important applications, electronic mail has probably had the most significant impact of the innovations from that era. Email provided a new model of how people could communicate with each other, and changed the nature of collaboration, first in the building of the Internet itself (as is discussed below) and later for much of society.

There were other applications proposed in the early days of the Internet, including packet based voice communication (the precursor of Internet telephony), various models of file and disk sharing, and early "worm" programs that showed the concept of agents (and, of course, viruses). A key concept of the Internet is that it was not designed for just one application, but as a general infrastructure on which new applications could be conceived, as illustrated later by the emergence of the World Wide Web. It is the general purpose nature of the service provided by TCP and IP that makes this possible.

Proving the Ideas

DARPA let three contracts to Stanford (Cerf), BBN (Ray Tomlinson) and UCL (Peter Kirstein) to implement TCP/IP (it was simply called TCP in the Cerf/Kahn paper but contained both components). The Stanford team, led by Cerf, produced the detailed specification and within about a year there were three independent implementations of TCP that could interoperate.

This was the beginning of long term experimentation and development to evolve and mature the Interne concepts and technology. Beginning with the first three networks (ARPANET, Packet Radio, and Packet Satellite) and their initial research communities, the experimental environment has grown to incorporate essentially every form of network and a very broad-based research and development community. [REK78] With each expansion has come new challenges.

The early implementations of TCP were done for large time sharing systems such as Tenex and TOPS 20. When desktop computers first appeared, it was thought by some that TCP was too big and complex to run on a personal computer. David Clark and his research group at MIT set out to show that a compact and simple implementation of TCP was possible. They produced an implementation, first for the Xerox Alto (the early personal workstation developed at Xerox PARC) and then for the IBM PC. That implementation was fully interoperable with other TCPs, but was tailored to the application suite and performance objectives of the personal computer, and showed that workstations, as well as large time-sharing systems, could be a part of the Internet. In 1976, Kleinrock published the first book on the ARPANET. It included an emphasis on the complexity of protocols and the pitfalls they often introduce. This book was influential in spreading the lore of packet switching networks to a very wide community.

Widespread development of LANS, PCs and workstations in the 1980s allowed the nascent Internet to flourish. Ethernet technology, developed by Bob Metcalfe at Xerox PARC in 1973, is now probably the dominant network technology in the Internet and PCs and workstations the dominant computers. This change from having a few networks with a modest number of time-shared hosts (the original ARPANET model) to having many networks has resulted in a number of new concepts and changes to the underlying technology. First, it resulted in the definition of three network classes (A, B, and C) to accommodate the range of networks. Class A represented large national scale networks (small number

of networks with large numbers of hosts); Class B represented regional scale networks; and Class C represented local area networks (large number of networks with relatively few hosts).

A major shift occurred as a result of the increase in scale of the Internet and its associated management issues. To make it easy for people to use the network, hosts were assigned names, so that it was not necessary to remember the numeric addresses. Originally, there were a fairly limited number of hosts, so it was feasible to maintain a single table of all the hosts and their associated names and addresses. The shift to having a large number of independently managed networks (e.g., LANs) meant that having a single table of hosts was no longer feasible, and the Domain Name System (DNS) was invented by Paul Mockapetris of USC/ISI. The DNS permitted a scalable distributed mechanism for resolving hierarchical host names (e.g. www.acm.org) into an Internet address.

The increase in the size of the Internet also challenged the capabilities of the routers. Originally, there was a single distributed algorithm for routing that was implemented uniformly by all the routers in the Internet. As the number of networks in the Internet exploded, this initial design could not expand as necessary, so it was replaced by a hierarchical model of routing, with an Interior Gateway Protocol (IGP) used inside each region of the Internet, and an Exterior Gateway Protocol (EGP) used to tie the regions together. This design permitted different regions to use a different IGP, so that different requirements for cost, rapid reconfiguration, robustness and scale could be accommodated. Not only the routing algorithm, but the size of the addressing tables, stressed the capacity of the routers. New approaches for address aggregation, in particular classless inter-domain routing (CIDR), have recently been introduced to control the size of router tables.

As the Internet evolved, one of the major challenges was how to propagate the changes to the software, particularly the host software. DARPA supported UC Berkeley to investigate modifications to the Unix operating system, including incorporating TCP/IP developed at BBN. Although Berkeley later rewrote the BBN code to more efficiently fit into the Unix system and kernel, the incorporation of TCP/IP into the Unix BSD system releases proved to be a critical element in dispersion of the protocols to the research community. Much of the CS research community began to use Unix BSD for their day-to-day computing environment. Looking back, the strategy of incorporating Internet protocols into a supported operating system for the research community was one of the key elements in the successful widespread adoption of the Internet.

One of the more interesting challenges was the transition of the ARPANET host protocol from NCP to TCP/IP as of January 1, 1983. This was a "flag-day" style transition, requiring all hosts to convert simultaneously or be left having to communicate via rather ad-hoc mechanisms. This transition was carefully planned within the community over several years before it actually took place and went surprisingly smoothly (but resulted in a distribution of buttons saying "I survived the TCP/IP transition" TCP/IP was adopted as a defense standard three years earlier in 1980. This enabled defense to begin sharing in the DARPA Internet technology base and led directly to the eventual partitioning of the military and non- military communities. By 1983, ARPANET was being used by a significant number of defense R&D and operational organizations. The transition of ARPANET from NCP to TCP/IP permitted it to be split into a MILNET supporting operational requirements and an ARPANET supporting research needs.

Thus, by 1985, Internet was already well established as a technology supporting a broad community of researchers and developers, and was beginning to be used by other communities for daily computer communications. Electronic mail was being used broadly across several communities, often with different systems, but interconnection between different mail systems was demonstrating the utility of broad based electronic communications between people.

Transition to Widespread Infrastructure

At the same time that the Internet technology was being experimentally validated and widely used amongst a subset of computer science researchers, other networks and networking technologies were being pursued. The usefulness of computer networking - especially electronic mail - demonstrated by DARPA and Department of Defense contractors on the ARPANET was not lost on other communities and disciplines, so that by the mid-1970s computer networks had begun to spring up wherever funding could be found for the purpose. The U.S. Department of Energy (DoE) established MFENet for its researchers in Magnetic Fusion Energy, whereupon DoE's High Energy Physicists responded by building HEPNet. NASA Space Physicists followed with SPAN, and Rick Adrion, David Farber, and Larry Landweber established CSNET for the (academic and industrial) Computer Science community with an initial grant from the U.S. National Science Foundation (NSF). AT&T's free-wheeling dissemination of the UNIX computer operating system spawned USENET, based on UNIX' built-in UUCP communication protocols, and in 1981 Ira Fuchs and Greydon Freeman devised BITNET, which linked academic mainframe computers in an "email as card images" paradigm.

With the exception of BITNET and USENET, these early networks (including ARPANET) were purpose-built - i.e., they were intended for, and largely restricted to, closed communities of scholars; there was hence little pressure for the individual networks to be compatible and, indeed, they largely were not. In addition, alternate technologies were being pursued in the commercial sector, including XNS from Xerox, DECNet, and IBM's SNA. [8] It remained for the British JANET (1984) and U.S. NSFNET (1985) programs to explicitly announce their intent to serve the entire higher education community, regardless of discipline. Indeed, a condition for a U.S. university to receive NSF funding for an Internet connection was that "... the connection must be made available to ALL qualified users or campus."

In 1985, Dennis Jennings came from Ireland to spend a year at NSF leading the NSFNET program. He worked with the community to help NSF make a critical decision - that TCP/IP would be mandatory for the NSFNET program. When Steve Wolff took over the NSFNET program in 1986, he recognized the need for a wide area networking infrastructure to support the general academic and research community, along with the need to develop a strategy for establishing such infrastructure on a basis ultimately independent of direct federal funding. Policies and strategies were adopted (see below to achieve that end.

NSF also elected to support DARPA's existing Internet organizational infrastructure, hierarchically arranged under the (then) Internet Activities Board (IAB). The public declaration of this choice was the joint authorship by the IAB's Internet Engineering and Architecture Task Forces and by NSF's Network Technical Advisory Group of RFC 985 (Requirements for Internet Gateways), which formally ensured interoperability of DARPA's and NSF's pieces of the Internet.

In addition to the selection of TCP/IP for the NSFNET program, Federal agencies made and implemented several other policy decisions which shaped the Internet of today.

> Federal agencies shared the cost of common infrastructure, such as trans-oceanic circuits. They also jointly supported "managed interconnection points" for interagency traffic; the Federal Internet Exchanges (FIX-E and FIX-W) built for this purpose served as models for the Network Access Points and "*IX" facilities that are prominent features of today's Internet architecture.
> To coordinate this sharing, the Federal Networking Council [9] was formed. The FNC also cooperated with other international organizations, such as RARE in Europe, through the Coordinating Committee on Intercontinental Research Networking, CCIRN, to coordinate Internet support of the research community worldwide.
>
> This sharing and cooperation between agencies on Internet-related issues had a long history. An unprecedented 1981 agreement between Farber, acting for CSNET and the NSF, and DARPA's Kahn, permitted CSNET traffic to share ARPANET infrastructure on a statistical and no-metered-settlements basis.
>
> Subsequently, in a similar mode, the NSF encouraged its regional (initially academic) networks of the NSFNET to seek commercial, non-academic customers, expand their facilities to serve them, and exploit the resulting economies of scale to lower subscription costs for all.
>
> On the NSFNET Backbone - the national-scale segment of the NSFNET - NSF enforced an "Acceptable Use Policy" (AUP) which prohibited Backbone usage for purposes "not in support of Research and Education." The predictable (and intended) result of encouraging commercial network traffic at the local and regional level, while denying its access to national-scale transport, was to stimulate the emergence and/or growth of "private", competitive, long-haul networks such as PSI, UUNET, ANS CO+RE, and (later) others. This process of privately-financed augmentation for commercial uses was thrashed out starting in 1988 in a series of NSF-initiated conferences at Harvard's Kennedy School of Government on "The Commercialization and Privatization of the Internet" - and on the "com-priv" list on the net itself.
>
> In 1988, a National Research Council committee, chaired by Kleinrock and with Kahn and Clark as members, produced a report commissioned by NSF titled "Towards a National Research Network". This report was influential on then Senator Al Gore, and ushered in high speed networks that laid the networking foundation for the future information superhighway.

In 1994, a National Research Council report, again chaired by Kleinrock (and with Kahn and Clark as members again), Entitled "Realizing The Information Future: The Internet and Beyond" was released. This report, commissioned by NSF, was the document in which a blueprint for the evolution of the information superhighway was articulated and which has had a lasting affect on the way to think about its evolution. It anticipated the critical issues of intellectual property rights, ethics, pricing, education, architecture and regulation for the Internet.

NSF's privatization policy culminated in April, 1995, with the defunding of the NSFNET Backbone. The funds thereby recovered were (competitively) redistributed to regional networks to buy national-scale Internet connectivity from the now numerous, private, long-haul networks.

The backbone had made the transition from a network built from routers out of the research community (the "Fuzzball" routers from David Mills) to commercial equipment. In its 8 1/2 year lifetime, the Backbone had grown from six nodes with 56 kbps links to 21 nodes with multiple 45 Mbps links. It had seen the Internet grow to over 50,000 networks on all seven continents and outer space, with approximately 29,000 networks in the United States.

Such was the weight of the NSFNET program's ecumenism and funding ($200 million from 1986 to 1995) - and the quality of the protocols themselves - that by 1990 when the ARPANET itself was finally decommissioned[10], TCP/IP had supplanted or marginalized most other wide-area computer network protocols worldwide, and IP was well on its way to becoming THE bearer service for the Global Information Infrastructure.

The Role of Documentation

A key to the rapid growth of the Internet has been the free and open access to the basic documents, especially the specifications of the protocols.

The beginnings of the ARPANET and the Internet in the university research community promoted the academic tradition of open publication of ideas and results. However, the normal cycle of traditional academic publication was too formal and too slow for the dynamic exchange of ideas essential to creating networks.

In 1969 a key step was taken by S. Crocker (then at UCLA) in establishing the Request for Comments (or RFC) series of notes. These memos were intended to be an informal fast distribution way to share ideas with other network researchers. At first the RFCs were printed on paper and distributed via snail mail. As the File Transfer Protocol (FTP) came into use, the RFCs were prepared as online files and accessed via FTP. Now, of course, the RFCs are easily accessed via the World Wide Web at dozens of sites around the world. SRI, in its role as Network Information Center, maintained the online directories. Jon Postel acted as RFC Editor as well as managing the centralized administration of required protocol number assignments, roles that he continues to this day.

The effect of the RFCs was to create a positive feedback loop, with ideas or proposals presented in one RFC triggering another RFC with additional ideas, and so on. When some consensus (or a least a consistent set of ideas) had come together a specification document would be prepared. Such a specification would then be used as the base for implementations by the various research teams.

Over time, the RFCs have become more focused on protocol standards (the "official" specifications), though there are still informational RFCs that describe alternate approaches, or provide background information on protocols and engineering issues. The RFCs are now viewed as the "documents of record" in the Internet engineering and standards community.

The open access to the RFCs (for free, if you have any kind of a connection to the Internet) promotes the growth of the Internet because it allows the actual specifications to be used for examples in college classes and by entrepreneurs developing new systems.

Email has been a significant factor in all areas of the Internet, and that is certainly true in the development of protocol specifications, technical standards, and Internet engineering. The very early RFCs often presented a set of ideas developed by the researchers at one location to the rest of the community. After email came into use, the authorship pattern changed - RFCs were presented by joint authors with common view independent of their locations.

The use of specialized email mailing lists has been long used in the development of protocol specifications, and continues to be an important tool. The IETF now has in excess of 75 working groups, each working on a different aspect of Internet engineering. Each of these working groups has a mailing list to discuss one or more draft documents under development. When consensus is reached on a draft document it may be distributed as an RFC.

As the current rapid expansion of the Internet is fueled by the realization of its capability to promote information sharing, we should understand that the network's first role in information sharing was sharing the information about it's own design and operation through the RFC documents. This unique method for evolving new capabilities in the network will continue to be critical to future evolution of the Internet.

Formation of the Broad Community

The Internet is as much a collection of communities as a collection of technologies, and its success is largely attributable to both satisfying basic community needs as well as utilizing the community in an effective way to push the infrastructure forward. This community spirit has a long history beginning with the early ARPANET. The early ARPANET researchers worked as a close-knit community to accomplish the initial demonstrations of packet switching technology described earlier. Likewise, the Packet Satellite, Packet Radio and several other DARPA computer science research programs were multi-contractor collaborative activities that heavily used whatever available mechanisms there were to coordinate their efforts, starting with electronic mail and adding file sharing, remote access, and eventually World Wide Web capabilities. Each of these programs formed a working group, starting with the ARPANET Network Working Group. Because of the unique role that ARPANET played as an infrastructure supporting the various research programs, as the Internet started to evolve, the Network Working Group evolved into Internet Working Group.

In the late 1970's, recognizing that the growth of the Internet was accompanied by a growth in the size of the interested research community and therefore an increased need for coordination mechanisms, Vint Cerf, then manager of the Internet Program at DARPA, formed several coordination bodies - an International Cooperation Board (ICB), chaired by Peter Kirstein of UCL, to coordinate activities with some cooperating European countries centered on Packet Satellite research, an Internet Research Group which was an inclusive group providing an environment for general exchange of information, and

an Internet Configuration Control Board (ICCB), chaired by Clark. The ICCB was an invitational body to assist Cerf in managing the burgeoning Internet activity.

In 1983, when Barry Leiner took over management of the Internet research program at DARPA, he and Clark recognized that the continuing growth of the Internet community demanded a restructuring of the coordination mechanisms. The ICCB was disbanded and in its place a structure of Task Forces was formed, each focused on a particular area of the technology (e.g. routers, end-to-end protocols, etc.). The Internet Activities Board (IAB) was formed from the chairs of the Task Forces. It of course was only a coincidence that the chairs of the Task Forces were the same people as the members of the old ICCB, and Dave Clark continued to act as chair.

After some changing membership on the IAB, Phill Gross became chair of a revitalized Internet Engineering Task Force (IETF), at the time merely one of the IAB Task Forces. As we saw above, by 1985 there was a tremendous growth in the more practical/engineering side of the Internet. This growth resulted in an explosion in the attendance at the IETF meetings, and Gross was compelled to create substructure to the IETF in the form of working groups.

This growth was complemented by a major expansion in the community. No longer was DARPA the only major player in the funding of the Internet. In addition to NSFNet and the various US and international government-funded activities, interest in the commercial sector was beginning to grow. Also in 1985, both Kahn and Leiner left DARPA and there was a significant decrease in Internet activity at DARPA. As a result, the IAB was left without a primary sponsor and increasingly assumed the mantle of leadership.

The growth continued, resulting in even further substructure within both the IAB and IETF. The IETF combined Working Groups into Areas, and designated Area Directors. An Internet Engineering Steering Group (IESG) was formed of the Area Directors. The IAB recognized the increasing importance of the IETF, and restructured the standards process to explicitly recognize the IESG as the major review body for standards. The IAB also restructured so that the rest of the Task Forces (other than the IETF) were combined into an Internet Research Task Force (IRTF) chaired by Postel, with the old task forces renamed as research groups.

The growth in the commercial sector brought with it increased concern regarding the standards process itself. Starting in the early 1980's and continuing to this day, the Internet grew beyond its primarily research roots to include both a broad user community and increased commercial activity. Increased attention was paid to making the process open and fair. This coupled with a recognized need for community support of the Internet eventually led to the formation of the Internet Society in 1991, under the auspices of Kahn's Corporation for National Research Initiatives (CNRI) and the leadership of Cerf, then with CNRI.

In 1992, yet another reorganization took place. In 1992, the Internet Activities Board was re-organized and re-named the Internet Architecture Board operating under the auspices of the Internet Society. A more "peer" relationship was defined between the new IAB and IESG, with the IETF and IESG taking a larger responsibility for the approval of standards. Ultimately, a cooperative and mutually supportive relationship was formed between the IAB, IETF, and Internet Society, with the Internet Society taking on as a goal the provision of service and other measures which would facilitate the work of the IETF.

The recent development and widespread deployment of the World Wide Web has brought with it a new community, as many of the people working on the WWW have not thought of themselves as primarily network researchers and developers. A new coordination organization was formed, the World Wide Web Consortium (W3C). Initially led from MIT's Laboratory for Computer Science by Tim Berners-Lee (the inventor of the WWW) and Al Vezza, W3C has taken on the responsibility for evolving the various protocols and standards associated with the Web.

Thus, through the over two decades of Internet activity, we have seen a steady evolution of organizational structures designed to support and facilitate an ever-increasing community working collaboratively on Internet issues.

Commercialization of the Technology

Commercialization of the Internet involved not only the development of competitive, private network services, but also the development of commercial products implementing the Internet technology. In th early 1980s, dozens of vendors were incorporating TCP/IP into their products because they saw buyers for that approach to networking. Unfortunately they lacked both real information about how the technology was supposed to work and how the customers planned on using this approach to networking. Many saw it as a nuisance add-on that had to be glued on to their own proprietary networking solutions: SNA, DECNet, Netware, NetBios. The DoD had mandated the use of TCP/IP in many of its purchases but gave little help to the vendors regarding how to build useful TCP/IP products.

In 1985, recognizing this lack of information availability and appropriate training, Dan Lynch in cooperation with the IAB arranged to hold a three day workshop for ALL vendors to come learn about how TCP/IP worked and what it still could not do well. The speakers came mostly from the DARPA research community who had both developed these protocols and used them in day to day work. About 250 vendor personnel came to listen to 50 inventors and experimenters. The results were surprises on both sides: the vendors were amazed to find that the inventors were so open about the way things worked (and what still did not work) and the inventors were pleased to listen to new problems they had not considered, but were being discovered by the vendors in the field. Thus a two way discussion was formed that has lasted for over a decade.

After two years of conferences, tutorials, design meetings and workshops, a special event was organized that invited those vendors whose products ran TCP/IP well enough to come together in one room for three days to show off how well they all worked together and also ran over the Internet. In September of 1988 the first Interop trade show was born. 50 companies made the cut. 5,000 engineers from potential customer organizations came to see if it all did work as was promised. It did. Why? Because the vendors worked extremely hard to ensure that everyone's products interoperated with all of the other products - even with those of their competitors. The Interop trade show has grown immensely since then and today it is held in 7 locations around the world each year to an audience of over 250,000 people who come to learn which products work with each other in a seamless manner, learn about the latest products, and discuss the latest technology.

In parallel with the commercialization efforts that were highlighted by the Interop activities, the vendor began to attend the IETF meetings that were held 3 or 4 times a year to discuss new ideas for extensions of the TCP/IP protocol suite. Starting with a few hundred attendees mostly from academia

and paid for by the government, these meetings now often exceeds a thousand attendees, mostly from the vendor community and paid for by the attendees themselves. This self-selected group evolves the TCP/IP suite in a mutually cooperative manner. The reason it is so useful is that it is comprised of all stakeholders: researchers, end users and vendors.

Network management provides an example of the interplay between the research and commercial communities. In the beginning of the Internet, the emphasis was on defining and implementing protoco that achieved interoperation. As the network grew larger, it became clear that the sometime ad hoc procedures used to manage the network would not scale. Manual configuration of tables was replaced by distributed automated algorithms, and better tools were devised to isolate faults. In 1987 it became clear that a protocol was needed that would permit the elements of the network, such as the routers, to be remotely managed in a uniform way. Several protocols for this purpose were proposed, including Simple Network Management Protocol or SNMP (designed, as its name would suggest, for simplicity, and derived from an earlier proposal called SGMP) , HEMS (a more complex design from the research community) and CMIP (from the OSI community). A series of meeting led to the decisions that HEMS would be withdrawn as a candidate for standardization, in order to help resolve the contention, but that work on both SNMP and CMIP would go forward, with the idea that the SNMP could be a more near-term solution and CMIP a longer-term approach. The market could choose the one it found more suitable. SNMP is now used almost universally for network based management.

In the last few years, we have seen a new phase of commercialization. Originally, commercial efforts mainly comprised vendors providing the basic networking products, and service providers offering the connectivity and basic Internet services. The Internet has now become almost a "commodity" service, and much of the latest attention has been on the use of this global information infrastructure for suppor of other commercial services. This has been tremendously accelerated by the widespread and rapid adoption of browsers and the World Wide Web technology, allowing users easy access to information linked throughout the globe. Products are available to facilitate the provisioning of that information and many of the latest developments in technology have been aimed at providing increasingly sophisticated information services on top of the basic Internet data communications.

History of the Future

On October 24, 1995, the FNC unanimously passed a resolution defining the term Internet. This definition was developed in consultation with members of the internet and intellectual property rights communities. *RESOLUTION: The Federal Networking Council (FNC) agrees that the following language reflects our definition of the term "Internet". "Internet" refers to the global information system that -- (i) is logically linked together by a globally unique address space based on the Internet Protocol (IP) or its subsequent extensions/follow-ons; (ii) is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite or its subsequent extensions/follow-ons, and/or other IP-compatible protocols; and (iii) provides, uses or makes accessible, either publicly or privately, high level services layered on the communications and related infrastructure described herein.*

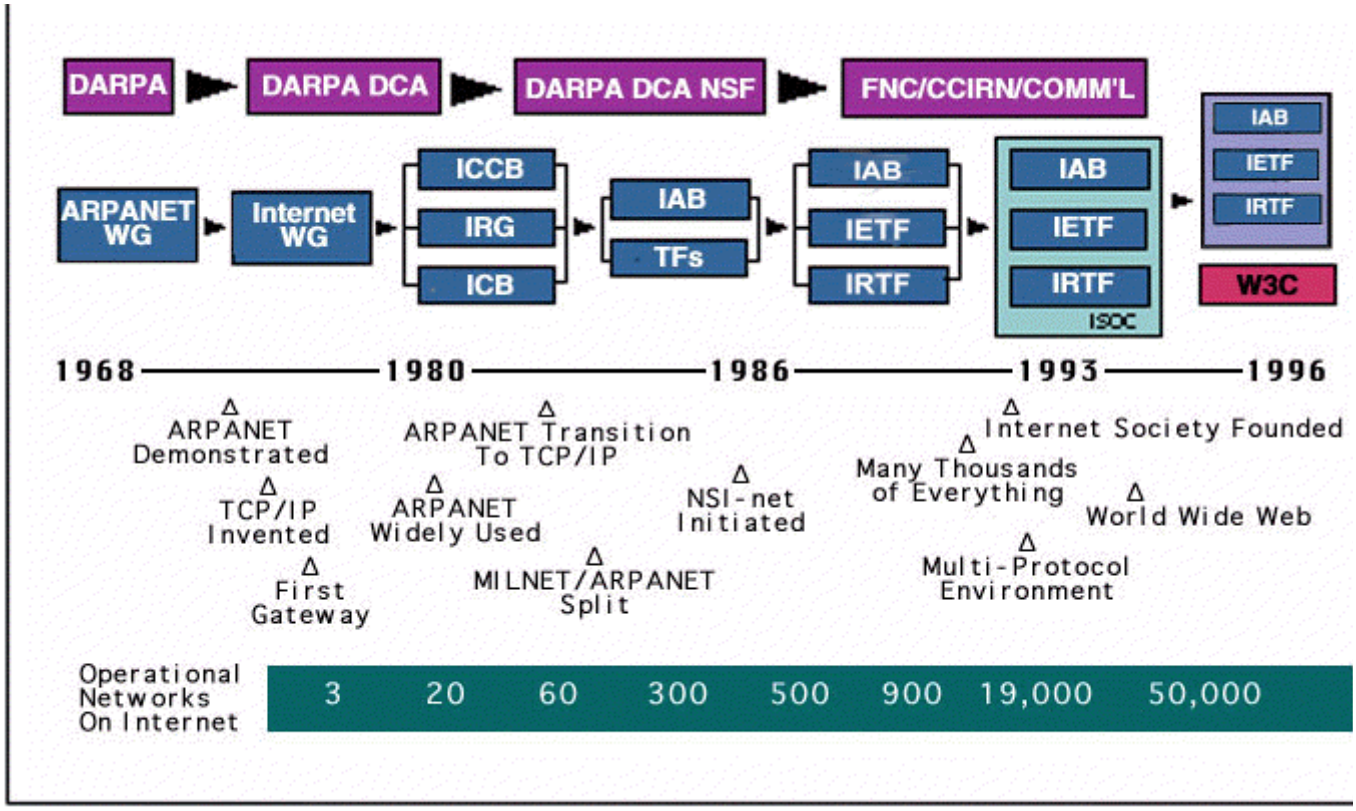
The Internet has changed much in the two decades since it came into existence. It was conceived in the era of time-sharing, but has survived into the era of personal computers, client-server and peer-to-peer computing, and the network computer. It was designed before LANs existed, but has accommodated

that new network technology, as well as the more recent ATM and frame switched services. It was envisioned as supporting a range of functions from file sharing and remote login to resource sharing an collaboration, and has spawned electronic mail and more recently the World Wide Web. But most important, it started as the creation of a small band of dedicated researchers, and has grown to be a commercial success with billions of dollars of annual investment.

One should not conclude that the Internet has now finished changing. The Internet, although a network in name and geography, is a creature of the computer, not the traditional network of the telephone or television industry. It will, indeed it must, continue to change and evolve at the speed of the computer industry if it is to remain relevant. It is now changing to provide such new services as real time transpo in order to support, for example, audio and video streams. The availability of pervasive networking (i.e., the Internet) along with powerful affordable computing and communications in portable form (i.e. laptop computers, two-way pagers, PDAs, cellular phones), is making possible a new paradigm of nomadic computing and communications.

This evolution will bring us new applications - Internet telephone and, slightly further out, Internet television. It is evolving to permit more sophisticated forms of pricing and cost recovery, a perhaps painful requirement in this commercial world. It is changing to accommodate yet another generation of underlying network technologies with different characteristics and requirements, from broadband residential access to satellites. New modes of access and new forms of service will spawn new applications, which in turn will drive further evolution of the net itself.

The most pressing question for the future of the Internet is not how the technology will change, but ho the process of change and evolution itself will be managed. As this paper describes, the architecture of the Internet has always been driven by a core group of designers, but the form of that group has changed as the number of interested parties has grown. With the success of the Internet has come a proliferation of stakeholders - stakeholders now with an economic as well as an intellectual investment in the network. We now see, in the debates over control of the domain name space and the form of the next generation IP addresses, a struggle to find the next social structure that will guide the Internet in th future. The form of that structure will be harder to find, given the large number of concerned stake-holders. At the same time, the industry struggles to find the economic rationale for the large investment needed for the future growth, for example to upgrade residential access to a more suitable technology. If the Internet stumbles, it will not be because we lack for technology, vision, or motivatio It will be because we cannot set a direction and march collectively into the future.



Timeline

Footnotes

[1] Perhaps this is an exaggeration based on the lead author's residence in Silicon Valley.

[2] On a recent trip to a Tokyo bookstore, one of the authors counted 14 English language magazines devoted to the Internet.

[3] An abbreviated version of this article appears in the 50th anniversary issue of the *CACM*, Feb. 97. The authors would like to express their appreciation to Andy Rosenbloom, CACM Senior Editor, for both instigating the writing of this article and his invaluable assistance in editing both this and the abbreviated version.

[4] The Advanced Research Projects Agency (ARPA) changed its name to Defense Advanced Research Projects Agency (DARPA) in 1971, then back to ARPA in 1993, and back to DARPA in 1996. We refer throughout to DARPA, the current name.

[5] It was from the RAND study that the false rumor started claiming that the ARPANET was somehow related to building a network resistant to nuclear war. This was never true of the ARPANET, only the unrelated RAND study on secure voice considered nuclear war. However, the later work on Internetting did emphasize robustness and survivability, including the capability to withstand losses of large portions of the underlying networks.

[6] Including amongst others Vint Cerf, Steve Crocker, and Jon Postel. Joining them later were David Crocker who was to play an important role in documentation of electronic mail protocols, and Robert

Braden, who developed the first NCP and then TCP for IBM mainframes and also was to play a long term role in the ICCB and IAB.

[7] This was subsequently published as V. G. Cerf and R. E. Kahn, "A protocol for packet network interconnection" *IEEE Trans. Comm. Tech.*, vol. COM-22, V 5, pp. 627-641, May 1974.

[8] The desirability of email interchange, however, led to one of the first "Internet books": *!%@:: A Directory of Electronic Mail Addressing and Networks*, by Frey and Adams, on email address translation and forwarding.

[9] Originally named Federal Research Internet Coordinating Committee, FRICC. The FRICC was originally formed to coordinate U.S. research network activities in support of the international coordination provided by the CCIRN.

[10] The decommisioning of the ARPANET was commemorated on its 20th anniversary by a UCLA symposium in 1989.

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Cyberspace and the American Dream: A Magna Carta for the Knowledge Age

by Esther Dyson, George Gilder, George Keyworth, and Alvin Toffler

Release 1.2, August 22, 1994

This statement represents the cumulative wisdom and innovation of many dozens of people. It is based primarily on the thoughts of four "co-authors": Ms. Esther Dyson; Mr. George Gilder; Dr. George Keyworth; and Dr. Alvin Toffler. This release 1.2 has the final "imprimatur" of no one. In the spirit of the age: It is copyrighted solely for the purpose of preventing someone else from doing so. If you have it, you can use it any way you want.

Preamble

The central event of the 20th century is the overthrow of matter. In technology, economics, and the politics of nations, wealth -- in the form of physical resources -- has been losing value and significance The powers of mind are everywhere ascendant over the brute force of things.

In a First Wave economy, land and farm labor are the main "factors of production." In a Second Wave economy, the land remains valuable while the "labor" becomes massified around machines and larger industries. In a Third Wave economy, the central resource -- a single word broadly encompassing data, information, images, symbols, culture, ideology, and values -- is *actionable* knowledge.

The industrial age is not fully over. In fact, classic Second Wave sectors (oil, steel, auto-production) have learned how to benefit from Third Wave technological breakthroughs -- just as the First Wave's agricultural productivity benefited exponentially from the Second Wave's farm-mechanization.

But the Third Wave, and the *Knowledge Age* it has opened, will not deliver on its potential unless it adds social and political dominance to its accelerating technological and economic strength. This mean repealing Second Wave laws and retiring Second Wave attitudes. It also gives to leaders of the advanced democracies a special responsibility -- to facilitate, hasten, and explain the transition.

As humankind explores this new "electronic frontier" of knowledge, it must confront again the most profound questions of how to organize itself for the common good. The meaning of freedom, structure of self-government, definition of property, nature of competition, conditions for cooperation, sense of community and nature of progress will each be redefined for the Knowledge Age -- just as they were redefined for a new age of industry some 250 years ago.

What our 20th-century countrymen came to think of as the "American dream," and what resonant thinkers referred to as "the promise of American life" or "the American Idea," emerged from the turmoi of 19th-century industrialization. Now it's our turn: The knowledge revolution, and the Third Wave of historical change it powers, summon us to renew the dream and enhance the promise.

The Nature of Cyberspace

The Internet -- the huge (2.2 million computers), global (135 countries), rapidly growing (10-15% a month) network that has captured the American imagination -- is only a tiny part of cyberspace. So just what is cyberspace?

More ecosystem than machine, cyberspace is a bioelectronic environment that is literally universal: It exists everywhere there are telephone wires, coaxial cables, fiber-optic lines or electromagnetic waves This environment is "inhabited" by knowledge, including incorrect ideas, existing in electronic form. It connected to the physical environment by portals which allow people to see what's inside, to put

knowledge in, to alter it, and to take knowledge out. Some of these portals are one-way (e.g. television receivers and television transmitters); others are two-way (e.g. telephones, computer modems).
Most of the knowledge in cyberspace lives the most temporary (or so we think) existence: Your voice, on a telephone wire or microwave, travels through space at the speed of light, reaches the ear of your listener, and is gone forever.
But people are increasingly building cyberspatial "warehouses" of data, knowledge, information and *mis*information in digital form, the ones and zeros of binary computer code. The storehouses themselve display a physical form (discs, tapes, CD-ROMs) -- but what they contain is accessible only to those with the right kind of portal and the right kind of key.
The key is software, a special form of electronic knowledge that allows people to navigate through the cyberspace environment and make its contents understandable to the human senses in the form of written language, pictures and sound.
People are adding to cyberspace -- creating it, defining it, expanding it -- at a rate that is already explosive and getting faster. Faster computers, cheaper means of electronic storage, improved softwar and more capable communications channels (satellites, fiber-optic lines) -- each of these factors independently add to cyberspace. But the real explosion comes from the combination of all of them, working together in ways we still do not understand.
The bioelectronic *frontier* is an appropriate metaphor for what is happening in cyberspace, calling to mind as it does the spirit of invention and discovery that led ancient mariners to explore the world, generations of pioneers to tame the American continent and, more recently, to man's first exploration o outer space.
But the exploration of cyberspace brings both greater opportunity, and in some ways more difficult challenges, than any previous human adventure.
Cyberspace is the land of knowledge, and the exploration of that land can be a civilization's truest, highest calling. The opportunity is now before us to empower every person to pursue that calling in his or her own way.
The challenge is as daunting as the opportunity is great. The Third Wave has profound implications for the nature and meaning of property, of the marketplace, of community and of individual freedom. As it emerges, it shapes new codes of behavior that move each organism and institution -- family, neighborhood, church group, company, government, nation -- inexorably beyond standardization and centralization, as well as beyond the materialist's obsession with energy, money and control.
Turning the economics of mass-production inside out, new information technologies are driving the financial costs of diversity -- both product and personal -- down toward zero, "demassifying" our institutions and our culture. Accelerating demassification creates the potential for vastly increased hum freedom.
It also spells the death of the central institutional paradigm of modern life, the bureaucratic organizatio (Governments, including the American government, are the last great redoubt of bureaucratic power on the face of the planet, and for them the coming change will be profound and probably traumatic.)
In this context, the one metaphor that is perhaps least helpful in thinking about cyberspace is -- unhappily -- the one that has gained the most currency: The Information Superhighway. Can you

imagine a phrase less descriptive of the nature of cyberspace, or more misleading in thinking about its implications? Consider the following set of polarities:

Information Superhighway	/	*Cyberspace*
Limited Matter	/	Unlimited Knowledge
Centralized	/	Decentralized
Moving on a grid	/	Moving in space
Government ownership	/	A vast array of ownerships
Bureaucracy	/	Empowerment
Efficient but not hospitable	/	Hospitable if you customize it
Withstand the elements	/	Flow, float and fine-tune
Unions and contractors	/	Associations and volunteers
Liberation from First Wave	/	Liberation from Second Wave
Culmination of Second Wave	/	Riding the Third Wave

The highway analogy is all wrong," explained Peter Huber in Forbes this spring, "for reasons rooted in basic economics. Solid things obey immutable laws of conservation -- what goes south on the highway must go back north, or you end up with a mountain of cars in Miami. By the same token, production and consumption must balance. The average Joe can consume only as much wheat as the average Jane can grow. Information is completely different. It can be replicated at almost no cost -- so every individual can (in theory) consume society's entire output. Rich and poor alike, we all run information deficits. We all take in more than we put out."

The Nature and Ownership of Property

Clear and enforceable property rights are essential for markets to work. Defining them is a central function of government. Most of us have "known" that for a long time. But to create the new cyberspace environment is to create *new* property -- that is, new means of creating goods (including ideas) that serve people.

The property that makes up cyberspace comes in several forms: Wires, coaxial cable, computers and other "hardware"; the electromagnetic spectrum; and "intellectual property" -- the knowledge that dwells in and defines cyberspace.

In each of these areas, two questions that must be answered. First, what does "ownership" *mean*? What is the nature of the property itself, and what does it mean to own it? Second, once we understand what ownership means, *who* is the owner? At the level of first principles, should ownership be public (i.e. government) or private (i.e. individuals)?

The answers to these two questions will set the basic terms upon which America and the world will enter the Third Wave. For the most part, however, these questions are not yet even being asked. Instead, at least in America, governments are attempting to take Second Wave concepts of property and ownership and apply them to the Third Wave. Or they are ignoring the problem altogether.

For example, a great deal of attention has been focused recently on the nature of "intellectual property' -- i.e. the fact that knowledge is what economists call a "public good," and thus requires special treatment in the form of copyright and patent protection.

Major changes in U.S. copyright and patent law during the past two decades have broadened these protections to incorporate "electronic property." In essence, these reforms have attempted to take a

body of law that originated in the 15th century, with Gutenberg's invention of the printing press, and apply it to the electronically stored and transmitted knowledge of the Third Wave.

A more sophisticated approach starts with recognizing how the Third Wave has fundamentally altered the nature of knowledge as a "good," and that the operative effect is not technology per se (the shift from printed books to electronic storage and retrieval systems), but rather the shift from a mass-production, mass-media, mass-culture civilization to a demassified civilization.

The big change, in other words, is the demassification of actionable knowledge.

The dominant form of new knowledge in the Third Wave is perishable, transient, *customized* knowledge: The right information, combined with the right software and presentation, at precisely the right time. Unlike the mass knowledge of the Second Wave -- "public good" knowledge that was useful to everyone because most people's information needs were standardized -- Third Wave customized knowledge is by nature a private good.

If this analysis is correct, copyright and patent protection of knowledge (or at least many forms of it) may no longer be unnecessary. In fact, the marketplace may already be creating vehicles to compensate creators of customized knowledge outside the cumbersome copyright/patent process, as suggested last year by John Perry Barlow:

"One existing model for the future conveyance of intellectual property is real-time performance, a medium currently used only in theater, music, lectures, stand-up comedy and pedagogy. I believe the concept of performance will expand to include most of the information economy, from multi-casted soap operas to stock analysis. In these instances, commercial exchange will be more like ticket sales to a continuous show than the purchase of discrete bundles of that which is being shown. The other model of course, is service. The entire professional class -- doctors, lawyers, consultants, architects, etc. -- are already being paid directly for their intellectual property. Who needs copyright when you're on a retainer?"

Copyright, patent and intellectual property represent only a few of the "rights" issues now at hand. Here are some of the others:

- Ownership of the electromagnetic spectrum, traditionally considered to be "public property," is now being "auctioned" by the Federal Communications Commission to private companies. Or is it? Is the very limited "bundle of rights" sold in those auctions really property, or more in the nature of a use permit -- the right to use a part of the spectrum for a limited time, for limited purposes? In either case, are the rights being auctioned defined in a way that makes technological sense?
- Ownership over the infrastructure of wires, coaxial cable and fiber-optic lines that are such prominent features in the geography of cyberspace is today much less clear than might be imagined. Regulation, especially price regulation, of this property can be tantamount to confiscation, as America's cable operators recently learned when the Federal government imposed price limits on them and effectively confiscated an estimated $___ billion of their net worth. (Whatever one's stance on the FCC's decision and the law behind it, there is no disagreeing with the proposition that one's ownership of a good is less meaningful when the government can step in, at will, and dramatically reduce its value.)

- The nature of capital in the Third Wave -- tangible capital as well as intangible -- is to depreciate in real value much faster than industrial-age capital -- driven, if nothing else, by Moore's Law, which states that the processing power of the microchip doubles at least every 18 *months*. Yet accounting and tax regulations still require property to be depreciated over periods as long as 30 *years.* The result is a heavy bias in favor of "heavy industry" and against nimble, fast-moving baby businesses.

Who will define the nature of cyberspace property rights, and how? How can we strike a balance between interoperable open systems and protection of property?

The Nature Of The Marketplace

Inexpensive knowledge destroys economies-of-scale. Customized knowledge permits "just in time" production for an ever rising number of goods. Technological progress creates new means of serving old markets, turning one-time monopolies into competitive battlegrounds.

These phenomena are altering the nature of the marketplace, not just for information technology but fo all goods and materials, shipping and services. In cyberspace itself, market after market is being transformed by technological progress from a "natural monopoly" to one in which competition is the rule. Three recent examples:

- The market for "mail" has been made competitive by the development of fax machines and overnight delivery -- even though the "private express statutes" that technically grant the U.S. Postal Service a monopoly over mail delivery remain in place.
- During the past 20 years, the market for television has been transformed from one in which there were at most a few broadcast TV stations to one in which consumers can choose among broadcast, cable and satellite services.
- The market for local telephone services, until recently a monopoly based on twisted-pair copper cables, is rapidly being made competitive by the advent of wireless service and the entry of cable television into voice communication. In England, Mexico, New Zealand and a host of developing countries, government restrictions preventing such competition have already been removed and consumers actually have the freedom to choose.

The advent of new technology and new products creates the potential for *dynamic competition* -- competition between and among technologies and industries, each seeking to find the best way of serving customers' needs. Dynamic competition is different from static competition, in which many providers compete to sell essentially similar products at the lowest price.

Static competition is good, because it forces costs and prices to the lowest levels possible for a given product. Dynamic competition is better, because it allows competing technologies and new products tc challenge the old ones and, if they really are better, to replace them. Static competition might lead to faster and stronger horses. Dynamic competition gives us the automobile.

Such dynamic competition -- the essence of what Austrian economist Joseph Schumpeter called "creative destruction" -- creates winners and losers on a massive scale. New technologies can render instantly obsolete billions of dollars of embedded infrastructure, accumulated over decades. The transformation of the U.S. computer industry since 1980 is a case in point.

In 1980, everyone knew who led in computer technology. Apart from the minicomputer boom, mainframe computers *were* the market, and America's dominance was largely based upon the position of a dominant vendor -- IBM, with over 50% world market-share.

Then the personal-computing industry exploded, leaving older-style big-business-focused computing with a stagnant, piece of a burgeoning total market. As IBM lost market-share, many people became convinced that America had lost the ability to compete. By the mid-1980s, such alarmism had reached from Washington all the way into the heart of Silicon Valley.

But the real story was the renaissance of American business and technological leadership. In the transition from mainframes to PCs, a vast new market was created. This market was characterized by dynamic competition consisting of easy access and low barriers to entry. Start-ups by the dozens took on the larger established companies -- and won.

After a decade of angst, the surprising outcome is that America is not only competitive internationally, but, by any measurable standard, America dominates the growth sectors in world economics -- telecommunications, microelectronics, computer networking (or "connected computing") and software systems and applications.

The reason for America's victory in the computer wars of the 1980s is that dynamic competition was allowed to occur, in an area so breakneck and pell-mell that government would've had a hard time controlling it _even had it been paying attention_. The challenge for policy in the 1990s is to permit, even encourage, dynamic competition in every aspect of the cyberspace marketplace.

The Nature of Freedom

Overseas friends of America sometimes point out that the U.S. Constitution is unique -- because it states explicitly that power resides with the people, who delegate it to the government, rather than the other way around.

This idea -- central to our free society -- was the result of more than 150 years of intellectual and political ferment, from the Mayflower Compact to the U.S. Constitution, as explorers struggled to establish the terms under which they would tame a new frontier.

And as America continued to explore new frontiers -- from the Northwest Territory to the Oklahoma land-rush -- it consistently returned to this fundamental principle of rights, reaffirming, time after time that power resides with the people.

Cyberspace is the latest American frontier. As this and other societies make ever deeper forays into it, the proposition that ownership of this frontier resides first *with the people* is central to achieving its tru potential.

To some people, that statement will seem melodramatic. America, after all, remains a land of individua freedom, and this freedom clearly extends to cyberspace. How else to explain the uniquely American phenomenon of the hacker, who ignored every social pressure and violated every rule to develop a set of skills through an early and intense exposure to low-cost, ubiquitous computing.

Those skills eventually made him or her highly marketable, whether in developing applications-softwar or implementing networks. The hacker became a technician, an inventor and, in case after case, a creator of new wealth in the form of the baby businesses that have given America the lead in cyberspatial exploration and settlement.

It is hard to imagine hackers surviving, let alone thriving, in the more formalized and regulated democracies of Europe and Japan. In America, they've become vital for economic growth and trade leadership. Why? Because Americans still celebrate individuality over conformity, reward achievement over consensus and militantly protect the right to be different.

But the need to affirm the basic principles of freedom is real. Such an affirmation is needed in part because we are entering new territory, where there are as yet no rules -- just as there were no rules on the American continent in 1620, or in the Northwest Territory in 1787.

Centuries later, an affirmation of freedom -- by this document and similar efforts -- is needed for a second reason: We are at the end of a century dominated by the mass institutions of the industrial age. The industrial age encouraged *conformity* and relied on *standardization*. And the institutions of the day -- corporate and government bureaucracies, huge civilian and military administrations, schools of a types -- reflected these priorities. Individual liberty suffered -- sometimes only a little, sometimes a lo

- In a Second Wave world, it might make sense for government to insist on the right to peer into every computer by requiring that each contain a special "clipper chip."
- In a Second Wave world, it might make sense for government to assume ownership over the broadcast spectrum and demand massive payments from citizens for the right to use it.
- In a Second Wave world, it might make sense for government to prohibit entrepreneurs from entering new markets and providing new services.
- And, in a Second Wave world, dominated by a few old-fashioned, one-way media "networks," it might even make sense for government to influence which political viewpoints would be carried over the airwaves.

All of these interventions might have made sense in a Second Wave world, where standardization dominated and where it was assumed that the scarcity of knowledge (plus a scarcity of telecommunications capacity) made bureaucracies and other elites better able to make decisions than the average person.

But, whether they made sense before or not, these and literally thousands of other infringements on individual rights now taken for granted make no sense at all in the Third Wave.

For a century, those who lean ideologically in favor of freedom have found themselves at war not only with their ideological opponents, but with a time in history when the value of conformity was at its peak However desirable as an ideal, individual freedom often seemed impractical. The mass institutions of th Second Wave required us to give up freedom in order for the system to "work."

The coming of the Third Wave turns that equation inside-out. The complexity of Third Wave society is too great for any centrally planned bureaucracy to manage. Demassification, customization, individuality, freedom -- these are the keys to success for Third Wave civilization.

The Essence of Community

If the transition to the Third Wave is so positive, why are we experiencing so much anxiety? Why are the statistics of social decay at or near all-time highs? Why does cyberspatial "rapture" strike millions o prosperous Westerners as lifestyle *rupture*? Why do the principles that have held us together as a nation seem no longer sufficient -- or even wrong?

The incoherence of political life is mirrored in disintegrating personalities. Whether 100% covered by health plans or not, psychotherapists and gurus do a land-office business, as people wander aimlessly

amid competing therapies. People slip into cults and covens or, alternatively, into a pathological privatism, convinced that reality is absurd, insane or meaningless. "If things are so good," Forbes magazine asked recently, "why do we feel so bad?"

In part, this is why: Because we constitute the final generation of an old civilization and, at the very sam time, the first generation of a new one. Much of our personal confusion and social disorientation is traceable to conflict *within us* and within our political institutions -- between the dying Second Wave civilization and the emergent Third Wave civilization thundering in to take its place.

Second Wave ideologues routinely lament the breakup of mass society. Rather than seeing this enriche diversity as an opportunity for human development, they attach it as "fragmentation" and "balkanization." But to reconstitute democracy in Third Wave terms, we need to jettison the frightening but false assumption that more diversity automatically brings more tension and conflict in society.

Indeed, the exact reverse can be true: If 100 people all desperately want the same brass ring, they may be forced to fight for it. On the other hand, if each of the 100 has a different objective, it is far more rewarding for them to trade, cooperate, and form symbiotic relationships. Given appropriate social arrangements, diversity can make for a secure and stable civilization.

No one knows what the Third Wave communities of the future will look like, or where "demassification" will ultimately lead. It is clear, however, that cyberspace will play an important role knitting together in the diverse communities of tomorrow, facilitating the creation of "electronic neighborhoods" bound together not by geography but by shared interests.

Socially, putting advanced computing power in the hands of entire populations will alleviate pressure o highways, reduce air pollution, allow people to live further away from crowded or dangerous urban areas, and expand family time.

The late Phil Salin (in Release 1.0 11/25/91) offered this perspective: "[B]y 2000, multiple cyberspace will have emerged, diverse and increasingly rich. Contrary to naive views, these cyberspaces will not al be the same, and they will not all be open to the general public. The global network is a connected 'platform' for a collection of diverse communities, but only a loose, heterogeneous community itself. J as access to homes, offices, churches and department stores is controlled by their owners or managers most virtual locations will exist as distinct places of private property."

"But unlike the private property of today," Salin continued, "the potential variations on design and prevailing customs will explode, because many variations can be implemented cheaply in software. And the 'externalities' associated with variations can drop; what happens in one cyberspace can be kept from affecting other cyberspaces."

"Cyberspaces" is a wonderful *pluralistic* word to open more minds to the Third Wave's civilizing potential. Rather than being a centrifugal force helping to tear society apart, cyberspace can be one of the main forms of glue holding together an increasingly free and diverse society.

The Role of Government

The current Administration has identified the right goal: Reinventing government for the 21st Century. To accomplish that goal is another matter, and for reasons explained in the next and final section, it is not likely to be fully accomplished in the immediate future. This said, it is essential that we understand what it really means to create a Third Wave government and begin the process of transformation.

Eventually, the Third Wave will affect virtually everything government does. The most pressing need, however, is to revamp the policies and programs that are slowing the creation of cyberspace. Second Wave programs for Second Wave industries -- the status quo for the status quo -- will do little damage in the short run. It is the government's efforts to apply its Second Wave modus operandi to the fast-moving, decentralized creatures of the Third Wave that is the real threat to progress. Indeed, if there is to be an "industrial policy for the knowledge age," it should focus on removing barriers to competition and massively deregulating the fast-growing telecommunications and computing industries
One further point should be made at the outset: Government should be as strong and as big as it needs to be to accomplish its central functions effectively and efficiently. The reality is that a Third Wave government will be vastly smaller (perhaps by 50 percent or more) than the current one -- this is an inevitable implication of the transition from the centralized power structures of the industrial age to the dispersed, decentralized institutions of the Third. But smaller government does not imply weak government; nor does arguing for smaller government require being "against" government for narrowly ideological reasons.

Indeed, the transition from the Second Wave to the Third Wave will require a level of government *activity* not seen since the New Deal. Here are five proposals to back up the point.

1. The Path to Interactive Multimedia Access

The "Jeffersonian Vision" offered by Mitch Kapor and Jerry Berman has propelled the Electronic Frontier Foundation's campaign for an "open platform" telecom architecture:

"The amount of electronic material the superhighway can carry is dizzying, compared to the relatively narrow range of broadcast TV and the limited number of cable channels. Properly constructed and regulated, it could be open to all who wish to speak, publish and communicate. None of the interactive services will be possible, however, if we have an eight-lane data superhighway rushing into every home and only a narrow footpath coming back out. Instead of settling for a multimedia version of the same entertainment that is increasingly dissatisfying on today's TV, we need a superhighway that encourages the production and distribution of a broader, more diverse range of programming" (New York Times 11/24/93 p. A25).

The question is: What role should government play in bringing this vision to reality? But also: Will incentives for the openly-accessible, "many to many," national multimedia network envisioned by EFF harm the rights of those now constructing thousands of non-open local area networks?

These days, interactive multimedia is the daily servant only of avant-garde firms and other elites. But the same thing could have been said about word-processors 12 years ago, or phone-line networks six years ago. Today we have, in effect, universal access to personal computing -- which no political coalition ever subsidized or "planned." And America's *networking* menu is in a hyper-growth phase. Whereas the accessing software cost $50 two years ago, today the same companies hand it out free -- to get more people on-line.

This egalitarian explosion has occurred in large measure because government has stayed out of these markets, letting personal computing take over while mainframes rot (almost literally) in warehouses, and allowing (no doubt more by omission than commission) computer networks to grow, free of the kinds of regulatory restraints that affect phones, broadcast and cable.

All of which leaves reducing barriers to entry and innovation as the only effective near-term path to Universal Access. In fact, it can be argued that a near-term national interactive multimedia network is impossible unless regulators permit much greater collaboration between the cable industry and phone companies. The latter's huge fiber resources (nine times as extensive as industry fiber and rising rapidly could be joined with the huge asset of 57 million broadband links (i.e. into homes now receiving cable-TV service) to produce a new kind of national network -- multimedia, interactive and (as costs fall) increasingly accessible to Americans of modest means.

That is why obstructing such collaboration -- in the cause of forcing a competition between the cable and phone industries -- is socially elitist. To the extent it prevents collaboration between the cable industry and the phone companies, present federal policy actually thwarts the Administration's own goals of access and empowerment.

The other major effect of prohibiting the "manifest destiny" of cable preserves the broadcast (or narrowband) television model. In fact, stopping an interactive multimedia network perpetuates John Malone's original formula -- which everybody (especially Vice-President Gore and the FCC) claims to oppose because of the control it leaves with system owners and operators.

The key condition for replacing Malone's original narrowband model is true bandwidth abundance. When the federal government prohibits the interconnection of conduits, the model gains a new lease on life. In a world of bandwidth scarcity, the owner of the conduit not only can but must control access to it -- thus the owner of the conduit also shapes the content. It really doesn't matter who the owner is. Bandwidth scarcity will require the managers of the network to determine the video programming on it. Since cable is everywhere, particularly within cities, it would allow a closing of the gap between the knowledge-rich and knowledge-poor. Cable's broadband "pipes" *already* touch almost two-thirds of American households (and are easily accessible to another one-fourth). The phone companies have broadband fiber. A hybrid network -- co-ax plus fiber -- is the best means to the next generation of cyberspace expansion. What if this choice is blocked?

In that case, what might be called cyberspace democracy will be confined to the computer industry, where it will arise from the Internet over the years, led by corporate and suburban/exurban interests. While not a technological calamity, this might be a *social* perversion equivalent to what "Japan Inc." did to its middle and lower classes for decades: Make them pay 50% more for the same quality vehicles that were gobbling up export markets.

Here's the parallel: If Washington forces the phone companies and cable operators to develop supplementary and duplicative networks, most other advanced industrial countries will attain cyberspace democracy -- via an interactive multimedia "open platform" -- before America does, despite this nation's technological dominance.

Not only that, but the long-time alliance of East Coast broadcasters and Hollywood glitterati will have a new lease on life: If their one-way video empires win new protection, millions of Americans will be deprived of the tools to help build a new interactive multimedia culture.

A contrived competition between phone companies and cable operators will not deliver the two-way, multimedia and more civilized tele-society Kapor and Berman sketch. Nor is it enough to simply "get the government out of the way." Real issues of antitrust must be addressed, and no sensible framework

exists today for addressing them. Creating the conditions for universal access to interactive multimedi
will require a fundamental rethinking of government policy.

2. Promoting Dynamic Competition

Technological progress is turning the telecommunications marketplace from one characterized by "economies of scale" and "natural monopolies" into a prototypical competitive market. The challenge fo government is to encourage this shift -- to create the circumstances under which new competitors and new technologies will challenge the natural monopolies of the past.

Price-and-entry regulation makes sense for natural monopolies. The tradeoff is a straightforward one: The monopolist submits to price regulation by the state, in return for an exclusive franchise on the market.

But what happens when it becomes economically desirable to have more than one provider in a market? The continuation of regulation under these circumstances stops progress in its tracks. It prevents new entrants from introducing new technologies and new products, while depriving the regulated monopolist of any incentive to do so on its own.

Price-and-entry regulation, in short, is the antithesis of dynamic competition.

The alternative to regulation is antitrust. Antitrust law is designed to prevent the acts and practices that can lead to the creation of new monopolies, or harm consumers by forcing up prices, limiting access to competing products or reducing service quality. Antitrust law is the means by which America has, for over 120 years, fostered competition in markets where many providers can and should compete.

The market for telecommunications services -- telephone, cable, satellite, wireless -- is now such a market. The implication of this simple fact is also simple, and price/entry regulation of telecommunications services -- by state and local governments as well as the Federal government -- should therefore be replaced by antitrust law as rapidly as possible.

This transition will not be simple, and it should not be instantaneous. If antitrust is to be seriously appli to telecommunications, some government agencies (e.g. the Justice Department's Antitrust Division) w need new types of expertise. And investors in regulated monopolies should be permitted time to re-evaluate their investments given the changing nature of the legal conditions in which these firms wil operate -- a luxury not afforded the cable industry in recent years.

This said, two additional points are important. First, delaying implementation is different from delaying enactment. The latter should be immediate, even if the former is not. Secondly, there should be no half steps. Moving from a regulated environment to a competitive one is -- to borrow a cliche -- like changing from driving on the left side of the road to driving on the right: You can't do it gradually.

3. Defining and Assigning Property Rights

In 1964, libertarian icon Ayn Rand wrote:

"It is the proper task of government to protect individual rights and, as part of it, formulate the laws by which these rights are to be implemented and adjudicated. It is the government's responsibility to defin the application of individual rights to a given sphere of activity -- to define (i.e. to identify), not create, invent, donate, or expropriate. The question of defining the application of property rights has arisen frequently, in the wake of oil rights, vertical space rights, etc. In most cases, the American government

has been guided by the proper principle: It sought to protect all the individual rights involved, not to abrogate them." ("The Property Status of the Airwaves," Objectivist Newsletter, April 1964)

Defining property rights in cyberspace is perhaps the single most urgent and important task for government information policy. Doing so will be a complex task, and each key area -- the electromagnetic spectrum, intellectual property, cyberspace itself (including the right to privacy) -- involves unique challenges. The important points here are:

First, this is a "central" task of government. A Third Wave government will understand the importance and urgency of this undertaking and begin seriously to address it; to fail to do so is to perpetuate the politics and policy of the Second Wave.

Secondly, the key principle of ownership by the people -- private ownership -- should govern every deliberation. Government does not own cyberspace, the people do.

Thirdly, clarity is essential. Ambiguous property rights are an invitation to litigation, channeling energy into courtrooms that serve no customers and create no wealth. From patent and copyright systems for software, to challenges over the ownership and use of spectrum, the present system is failing in this simple regard.

The difference between America's historic economic success can, in case after case, be traced to our wisdom in creating and allocating clear, enforceable property rights. The creation and exploration of cyberspace requires that wisdom to be recalled and reaffirmed.

4. Creating Pro-Third-Wave Tax and Accounting Rules

We need a whole set of new ways of accounting, both at the level of the enterprise, and of the economy.

"GDP" and other popular numbers do nothing to clarify the magic and muscle of information technology. The government has not been very good at measuring service-sector output, and almost all institutions are incredibly bad at measuring the productivity of *information*. Economists are stuck with a set of tools designed during, or as a result of, the 1930s. So they have been measuring less and less important variables with greater and greater precision.

At the level of the enterprise, obsolete accounting procedures cause us to systematically *overvalue* physical assets (i.e. property) and *undervalue* human-resource assets and intellectual assets. So, if you are an inspired young entrepreneur looking to start a software company, or a service company of some kind, and it is heavily information-intensive, you will have a harder time raising capital than the guy next door who wants to put in a set of beat-up old machines to participate in a topped-out industry.

On the tax side, the same thing is true. The tax code always reflects the varying lobbying pressures brought to bear on government. And the existing tax code was brought into being by traditional manufacturing enterprises and the allied forces that arose during the assembly line's heyday.

The computer industry correctly complains that half their product is depreciated in six months or less - yet they can't depreciate it for tax purposes. The U.S. semiconductor industry faces five-year depreciation timetables for products that have three-year lives (in contrast to Japan, where chipmakers can write off their fabrication plants in one year). Overall, the tax advantage remains with the long, rather than the short, product life-cycle, even though the latter is where all design and manufacturing ar trending.

It is vital that accounting and tax policies -- both those promulgated by private-sector regulators like the Financial Accounting Standards Board and those promulgated by the government at the IRS and elsewhere -- start to reflect the shortened capital life-cycles of the Knowledge Age, and the increasing role of *intangible* capital as "wealth."

5. Creating a Third Wave Government

Going beyond cyberspace policy per se, government must remake itself and redefine its relationship to the society at large. No single set of policy changes that can create a future-friendly government. But there are some yardsticks we can apply to policy proposals. Among them:

- **Is it based on the factory model, i.e. on standardization, routine and mass-production?** If so, it is a Second Wave policy. Third Wave policies encourage uniqueness.
- **Does it centralize control?** Second Wave policies centralize power in bureaucratic institutions; Third Wave policies work to spread power -- to empower those closest to the decision.
- **Does it encourage geographic concentration?** Second Wave policies encourage people to congregate physically; Third Wave policies permit people to work at home, and to live wherever they choose.
- **Is it based on the idea of mass culture -- of everyone watching the same sitcoms on television -- or does it permit, even encourage, diversity within a broad framework of shared values?** Third Wave policies will help transform diversity from a threat into an array of opportunities.

A serious effort to apply these tests to every area of government activity -- from the defense and intelligence community to health care and education -- would ultimately produce a complete transformation of government as we know it. Since that is what's needed, let's start applying.

Grasping the Future

The conflict between Second Wave and Third Wave groupings is the central political tension cutting through our society today. The more basic political question is not who controls the last days of industrial society, but who shapes the new civilization rapidly rising to replace it. Who, in other words, will shape the nature of cyberspace and its impact on our lives and institutions?

Living on the edge of the Third Wave, we are witnessing a battle not so much over the nature of the future -- for the Third Wave will arrive -- but over the nature of the transition. On one side of this battle are the partisans of the industrial past. On the other are growing millions who recognize that the world's most urgent problems can no longer be resolved within the massified frameworks we have inherited.

The Third Wave sector includes not only high-flying computer and electronics firms and biotech start-ups. It embraces advanced, information-driven manufacturing in every industry. It includes the increasingly data-drenched services -- finance, software, entertainment, the media, advanced communications, medical services, consulting, training and learning. The people in this sector will soon be the dominant constituency in American politics.

And all of those confront a set of constituencies made frightened and defensive by their mainly Second Wave habits and locales: Command-and-control regulators, elected officials, political opinion-molders, philosophers mired in materialism, traditional interest groups, some broadcasters and newspapers --

and every major institution (including corporations) that believes its future is best served by preserving the past.

For the time being, the entrenched powers of the Second Wave dominate Washington and the statehouses -- a fact nowhere more apparent than in the 1993 infrastructure bill: Over $100 billion for steel and cement, versus one lone billion for electronic infrastructure. Putting aside the question of whether the government should be building electronic infrastructure in the first place, the allocation of funding in that bill shows the Second Wave swamping the Third.

Only one political struggle so far contradicts the landscape offered in this document, but it is a big one Passage of the North American Free Trade Agreement last November. This contest carried both sides beyond partisanship, beyond regionalism, and -- after one climactic debate on CNN -- beyond personality. The pro-NAFTA coalition opted to serve the opportunity instead of the problem, and the future as opposed to the past. That's why it constitutes a standout model for the likely development of a Third Wave political dialectic.

But a "mass movement" for cyberspace is still hard to see. Unlike the "masses" during the industrial age this rising Third Wave constituency is highly diverse. Like the economic sectors it serves, it is demassified -- composed of individuals who prize their differences. This very heterogeneity contribute to its lack of political awareness. It is far harder to unify than the masses of the past.

Yet there are key themes on which this constituency-to-come can agree. To start with, liberation -- from Second Wave rules, regulations, taxes and laws laid in place to serve the smokestack barons and bureaucrats of the past. Next, of course, must come the creation -- creation of a new civilization, founded in the eternal truths of the American Idea.

It is time to embrace these challenges, to grasp the future and pull ourselves forward. If we do so, we will indeed renew the American Dream and enhance the promise of American life.

Conference Paper

John Perry Barlow

A Cyberspace Compendium

A Declaration of the Independence of Cyberspace

Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.

We have no elected government, nor are we likely to have one, so I address you with no greater authority than that with which liberty itself always speaks. I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear.

Governments derive their just powers from the consent of the governed. You have neither solicited nor received ours. We did not invite you. You do not know us, nor do you know our world. Cyberspace does not lie within your borders. Do not think that you can build it, as though it were a public construction project. You cannot. It is an act of nature and it grows itself through our collective actions

You have not engaged in our great and gathering conversation, nor did you create the wealth of our marketplaces. You do not know our culture, our ethics, or the unwritten codes that already provide our society more order than could be obtained by any of your impositions.

You claim there are problems among us that you need to solve. You use this claim as an excuse to invade our precincts. Many of these problems don't exist. Where there are real conflicts, where there are wrongs, we will identify them and address them by our means. We are forming our own Social Contract . This governance will arise according to the conditions of our world, not yours. Our world is different.

Cyberspace consists of transactions, relationships, and thought itself, arrayed like a standing wave in th web of our communications. Ours is a world that is both everywhere and nowhere, but it is not where bodies live.

We are creating a world that all may enter without privilege or prejudice accorded by race, economic power, military force, or station of birth.

We are creating a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity.
Your legal concepts of property, expression, identity, movement, and context do not apply to us. They are all based on matter, and there is no matter here.
Our identities have no bodies, so, unlike you, we cannot obtain order by physical coercion. We believe that from ethics, enlightened self-interest, and the commonweal, our governance will emerge . Our identities may be distributed across many of your jurisdictions. The only law that all our constituent cultures would generally recognize is the Golden Rule. We hope we will be able to build our particular solutions on that basis. But we cannot accept the solutions you are attempting to impose.
In the United States, you have today created a law, the Telecommunications Reform Act, which repudiates your own Constitution and insults the dreams of Jefferson, Washington, Mill, Madison, DeToqueville, and Brandeis. These dreams must now be born anew in us.
You are terrified of your own children, since they are natives in a world where you will always be immigrants. Because you fear them, you entrust your bureaucracies with the parental responsibilities y are too cowardly to confront yourselves. In our world, all the sentiments and expressions of humanity, from the debasing to the angelic, are parts of a seamless whole, the global conversation of bits. We cannot separate the air that chokes from the air upon which wings beat.
In China, Germany, France, Russia, Singapore, Italy and the United States, you are trying to ward off the virus of liberty by erecting guard posts at the frontiers of Cyberspace. These may keep out the contagion for a small time, but they will not work in a world that will soon be blanketed in bit-bearing media.
Your increasingly obsolete information industries would perpetuate themselves by proposing laws, in America and elsewhere, that claim to own speech itself throughout the world. These laws would declare ideas to be another industrial product, no more noble than pig iron. In our world, whatever the human mind may create can be reproduced and distributed infinitely at no cost. The global conveyance of thought no longer requires your factories to accomplish.
These increasingly hostile and colonial measures place us in the same position as those previous lovers of freedom and self-determination who had to reject the authorities of distant, uninformed powers. We must declare our virtual selves immune to your sovereignty, even as we continue to consent to your rul over our bodies. We will spread ourselves across the Planet so that no one can arrest our thoughts.
We will create a civilization of the Mind in Cyberspace. May it be more humane and fair than the world your governments have made before.(Davos, Switzerland. February 8, 1996)

The First Amendment

Congress shall encourage the practice of Judeo-Christian religion by its own public exercise thereof ar shall make no laws abridging the freedom of responsible speech, unless such speech is in a digitized form or contains material which is copyrighted, classified, proprietary, or deeply offensive to non-Europeans, non-males, differently-abled or alternatively preferenced persons; or the right of the people peaceably to assemble, unless such assembly is taking place on corporate or military property or within an electronic environment, or to make petitions to the Government for a redress of grievance

unless those grievances relate to national security. (From *Bill O' Rights Lite*, Mar. 1993, in *The Complete ACM Columns Collection*)

On Copyright

In the days during which copyright evolved, there was much to be said for protecting the publishers. It is unlikely that Tom Paine wrote *Common Sense* with a pecuniary motive, but producing the world-shattering volume of this volume -- which today would translate into the production of about 15(million copies -- required the enthusiastic cooperation of publishers who were less nobly driven. Both God and Mammon were served, though only Mammon required the protection of law.

The printers who produced those books were, as I've said, operating under the same economic assumptions that have always driven the economy of atoms -- namely, that there is a relationship between scarcity and value. It serves nobody's interests to flood the market with more product than it can absorb. Copyright was created, as Mr. [Charles] Mann has suggested in his article, to preserve that necessary scarcity.

On the other hand, Paine's ideas -- the spirit contained in those objects with "Common Sense" embossed on their spines -- increased in value with each fresh mind that encountered them, until they attained a level of collective belief capable of changing the world. In this case, as in many other examples of information economy at work, the real value lay in abundance, not scarcity, since only in abundance could those ideas foment viable revolutionary momentum.

Something equally revolutionary has now taken place. A new means of distributing creative spirit has arisen that does not require its being embedded into objects. Thanks to the Internet it is increasingly possible for anybody, anywhere, to reproduce and distribute their own creative spirit to any interested mind on the planet at essentially zero cost.

Suddenly it is becoming possible for Paine's latter-day equivalents to achieve a critical mass of belief without the massive manufacture of objects within which to spread them. Now the spirit may remain spirit, passing insubstantially from one mind to the next, without physical embodiment. No longer does freedom of the press belong to those who own one, to paraphrase A. J. Liebling. No longer is there an advantage endowed to those who, in Twain's phrase, "buy ink by the barrel."

Ideas are empowered -- indeed, enfranchised -- not by the willingness of publishers to print them, but by their own credibility. Through an amplifying cascade of mouse clicks, they reproduce until they have reached sufficient mind-share to change politics.

. . . .

[T]here are many moves presently underway by the world's information mongers -- the publishers, the licensors, and the distributors -- to seriously criminalize the reproduction of all copyrighted material. These efforts have taken deep root in both Washington and Geneva, where money talks and truth can take a hike.

And it is not simply that the Motion Picture Association, say, can muster more campaign donations tha I can that makes these efforts so powerful. Copyright is the best international instrument for shutting people up when they threaten the status quo. A country may be limited to proscribing expression that resides on servers within its own borders, but thanks to the Berne Convention, no country is limited to

its borders when it comes to proscribing expressions that contain any expressions that might be copyrighted.

Copyright has been and will be used to maintain the authority of the already powerful on a global basis. For that reason, I fear Larry Lessig's resort to law. As I've said before, you can't own free speech. But many will attempt to control it by that means. And they will do with a harshness that increases in direct proportion to their growing sense of fragility.

. . . .

Mr. Mann's argument that publishers and distributors will continue to provide editorial services that merit their owning all they edit seems entirely without value. Yes, the Internet is filled with inconsequence, but it is also, like any ecosystem, developing a remarkable ability to collectively distinguish nutrients from toxins.

This could hardly be said of the information mongers. One can scarcely begin to imagine the genius tha has been forever silenced in publishing houses over the past five hundred years simply because of the immense and arbitrary power of single individuals to find such weird light economically unworthy of th industrial energies of their firms.

On the Internet, millions of people are conducting this great edit. Worthy material that might not pass through one narrow cultural filter may well be discovered and massively reproduced by another -- if those millions are both legally and technically permitted to see it in the first place. (From *Roundtable: Life, Liberty, and . . . the Pursuit of Copyright?*, *Atlantic Unbound*, Sept. 1998)

On Intellectual Property

Humanity now seems bent on creating a world economy primarily based on goods which take no material form. In doing so, we may be eliminating any predictable connection between creators and a fair reward for the utility or pleasure others may find in their works.

Without that connection, and without a fundamental change in consciousness to accommodate its loss, we are building our future on furor, litigation, and institutionalized evasion of payment except in response to raw force. We may return to the Bad Old Days of property.

. . . .

Since it is now possible to convey ideas from one mind to another without ever making them physical, we are now claiming to own ideas themselves and not merely their expression. And since it is likewise now possible to create useful tools which never take physical form. we have taken to patenting abstractions, sequences of virtual events, and mathematical formulae--the most un-real estate imaginable.

In certain areas, this leaves rights of ownership in such an ambiguous condition that once again propert adheres to those who can muster the largest armies. The only difference is that this time the armies consist of lawyers.

Threatening their opponents with the endless Purgatory of litigation, over which some might prefer dea itself, they assert claim to any thought which might have entered another cranium within the collective body of the corporations they serve. They act as though these ideas appeared in splendid detachment from all previous human thought. And they pretend that thinking about a product is somehow as good as manufacturing, distributing, and selling it.

What was previously considered a common human resource, distributed among the minds and libraries of the world, as well as the phenomena of nature herself, is now being fenced and deeded. It is as though a new class of enterprise had arisen which claimed to own air and water.

What is to be done? While there is a certain grim fun to be had in it, dancing on the grave of copyright and patent will solve little, especially when so few are willing to admit that the occupant of this grave is even deceased and are trying to up by force what can no longer be upheld by popular consent.

The legalists, desperate over their slipping grip, are vigorously trying to extend it. Indeed, the United States and other proponants of GATT are making are making adherance to to our moribund systems of intellectual property protection a condition of membership in the marketplace of nations. For example China will be denied Most Favored nation trading status unless they agree to uphold a set of cuturally alien principles which are no longer even sensibly applicable in their country of origin.

In a more perfect world, we'd be wise to declare a moratorium on litigation, legislation, and international treaties in this area until we had a clearer sense of the terms and conditions of enterprise Cyberspace. Ideally, laws ratify already developed social consensus. They are less the Social Contract itself than a series of memoranda expressing a collective intent which has emerged out of many millior of human interactions.

Humans have not inhabited Cyberspace long enough or in sufficient diversity to have developed a Social Contract which conforms to the strange new conditions of that world. Laws developed prior to consensus usually serve the already established few who can get them passed and not society as a whole. (From *Selling Wine Without Bottles: The Economy of Mind on the Global Net*)

On Encryption

Over a year ago, in a condition of giddier innocence than I enjoy today, I wrote the following about the discovery of Cyberspace: "Imagine discovering a continent so vast that it may have no other side. Imagine a new world with more resources than all our future greed might exhaust, more opportunities than there will ever be entrepreneurs enough to exploit, and a peculiar kind of real estate which expands with development."

One less felicitous feature of this terrain which I hadn't noticed at the time was a long-encamped and immense army of occupation.

This army represents interests which are difficult to define. It guards the area against unidentified enemies. It meticulously observes almost every activity undertaken there, and continuously prevents most who inhabit its domain from drawing any blinds against such observation.

This army marshals at least 40,000 troops, owns the most advanced computing resources in the world, and uses funds the dispersal of which does not fall under any democratic review.

Imagining this force won't require the inventive powers of a William Gibson. The American Occupatior Army of Cyberspace exists. Its name is the National Security Agency.

. . . .

Without the comfortably familiar presence of the Soviets to hate and fear, we can expect to see a sharp increase in over-rated bogeymen and virtual states of emergency. This is already well under way. I think we can expect our drifting and confused hardliners to burn the Reichstag repeatedly until they have managed to extract from our induced alarm the sort of government which makes them feel safe.

This process has been under way for some time. One sees it in the war on terrorism, against which pursuit "no liberty is absolute," as Admiral Turner put it. This, despite the fact that, during last year for which I have a solid figure, 1987, only 7 Americans succumbed to terrorism.

You can also see it clearly under way in the War on Some Drugs. The Fourth Amendment to the Constitution has largely disappeared in this civil war. And among the people I spoke with, it seemed a common canon that drugs (by which one does not mean Jim Beam, Marlboros, Folger's, or Halcion) were a sufficient evil to merit the government's holding any more keys it felt the need for.

One individual close to the [Ad Hoc Authentication Task Force, TR45.3] committee said that at least some of the afore-mentioned "spook wannabes" on the committee were "interested in weak cellular encryption because they considered warrants not to be "practical" when it came to pursuing drug dealers and other criminals using cellular phones."

In a miscellaneously fearful America, where the people cry for shorter chains and smaller cages, such privileges as secure personal communications are increasingly regarded as expendable luxuries. As Whitfield Diffie put it, "From the consistent way in which Americans seem to put security ahead of freedom, I rather fear that most of them would prefer that all electronic traffic was open to government decryption right now if they had given it any thought."

In any event, while I found no proof of an NSA-FBI conspiracy to gut the American cellular phone encryption standard, it seemed clear to me that none was needed. The same results can be delivered by a cultural "auto-conspiracy" between like-minded hardliners and cellular companies who will care about privacy only when their customers do.

You don't have to be a hand-wringing libertarian like me to worry about the domestic consequences of the NSA's encryption embargoes. They are also, as stated previously, bad for business, unless, of course, the business of America is no longer business but, as sometimes seems the case these days, crime control.

As Ron Rivest (the "R" in RSA) said to me, "We have the largest information based economy in the world. We have lots of reasons for wanting to protect information, and weakening our encryption systems for the convenience of law enforcement doesn't serve the national interest."

. . . .

Taken together with NSA's continued assertion of its authority over encryption, a pattern becomes clear. The government of the United States is so determined to maintain law enforcement's traditional wire-tapping abilities in the digital age that it is willing to fundamentally cripple the American economy do so. This may sound hyperbolic, but I believe it is not.

The greatest technology advantage this country presently enjoys is in the areas of software and telecommunications. Furthermore, thanks in large part to the Internet, much of America is already wired for bytes, as significant an economic edge in the Information Age as the existence of a railroad system was for England one hundred fifty years ago.

If we continue to permit the NSA to cripple our software and further convey to the Department of Justice the right to stop development the Net without public input, we are sacrificing both our economic future and our liberties. And all in the name of combatting terrorism and drugs.

This has now gone far enough. I have always been inclined to view the American government as pretty benign as such creatures go. I am generally the least paranoid person I know, but there is something

scary about a government which cares more about putting its nose in your business than it does about keeping that business healthy. (From *Decrypting the Puzzle Palace*, June 1992, in *The Complete ACM Columns Collection*)

Mandated encryption standards would fly against the First Amendment, which surely protects the manner of our speech as clearly as it protects the content. Whole languages (most of them patois) have arisen on this planet for the purpose of making the speaker unintelligible to authority. I know of no instance where, even in the oppressive colonies where such languages were formed, that the slave-owners banned their use.

Furthermore, the encryption software itself is written expression, upon which no ban may be constitutionally imposed. (What, you might ask then, about the constitutionality of restrictions on algorithm export. I'd say they're being allowed only because no one ever got around to testing from that angle.)

The First Amendment also protects freedom of association. On several different occasions, most notably NAACP v. Alabama ex rel. Patterson and Talley vs. California, the courts have ruled that requiring the disclosure of either an organization's membership or the identity of an individual could le to reprisals, thereby suppressing both association and speech. Certainly in a place like Cyberspace where everyone is so generally "visible," no truly private "assembly" can take place without some technical means of hiding the participants.

It also looks to me as if the forced imposition of a key escrow system might violate the Fourth and Fift Amendments.

The Fourth Amendment prohibits secret searches. Even with a warrant, agents of the government must announce themselves before entering and may not seize property without informing the owner. Wire-taps inhabit a gray-ish area of the law in that they permit the secret "seizure" of an actual conversation by those actively eavesdropping on it. The law does not permit the subsequent secret seizure of a record of that conversation. Given the nature of electronic communications, an encryption key opens not only the phone line but the filing cabinet.

Finally, the Fifth Amendment protects individuals from being forced to reveal self-incriminating evidence. While no court has ever ruled on the matter vis a vis encryption keys, there seems something involuntarily self-incriminating about being forced to give up your secrets in advance. Which is, essentially, what mandatory key escrow would require you to do.

For all these protections, I keep thinking it would be nice to have a constitution like the one just adopted by our largest possible enemy, Russia. As I understand it, this document explicitly forbids governmental restrictions on the use of cryptography.

For the moment, we have to take our comfort in the fact that our government...or at least the parts of it that state their intentions...avows both publicly and privately that it has no intention to impose key escrow cryptography as a mandatory standard. It would be, to use Podesta's mild word, "imprudent." But it's not Podesta or anyone else in the current White House who worries me. Despite their claims to the contrary, I'm not convinced they like Clipper any better than I do. In fact, one of them...not Podesta...called Clipper "our Bay of Pigs," referring to the ill-fated Cuban invasion cooked up by the

CIA under Eisenhower and executed (badly) by a reluctant Kennedy Administration. The comparison may not be invidious.

It's the people I can't see who worry me. These are the people who actually developed Clipper/Skipjack and its classified algorithm, the people who, through export controls, have kept American cryptography largely to themselves, the people who are establishing in secret what the public can or cannot employ to protect its own secrets. They are invisible and silent to all the citizens they purportedly serve save those who sit the Congressional intelligence committees.

In secret, they are making for us what may be the most important choice that has ever faced American democracy, that is, whether our descendants will lead their private lives with unprecedented mobility and safety from coercion, or whether every move they make, geographic, economic, or amorous, will be visible to anyone who possesses whatever may then constitute "lawful authority."

. . . . A Policy on Cryptography

- There should no law restricting any use of cryptography by private citizens.
- There should be no restriction on the export of cryptographic algorithms or any other instruments of cryptography.
- Secret agencies should not be allowed to drive public policies.
- The taxpayer's investment in encryption technology and related mathematical research should be made available for public and scientific use.
- The government should encourage the deployment of wide-spread encryption.
- While key escrow systems may have purposes, none should be implemented that places the keys in the hands of government.
- Any encryption standard to be implemented by the government should developed in an open and public fashion and should not employ a secret algorithm.

And last, or perhaps, first...

- There should be no broadening of governmental access to private communications and records unless there is a public consensus that the risks to safety outweigh the risks to liberty and will b effectively addressed by these means.

(From *A Plain Text on Crypto*, Oct. 1993, in *The Complete ACM Columns Collection*)

On Censorship

The Internet is too widespread to be easily dominated by any single government. By creating a seamless global-economic zone, borderless and unregulatable, the Internet calls into question the very idea of a nation-state. No wonder nation-states are rushing to get their levers of control into cyberspac while less than 1% of the world's population is online.

What the Net offers is the promise of a new social space, global and antisovereign, within which anybody, anywhere can express to the rest of humanity whatever he or she believes without fear. There is in these new media a foreshadowing of the intellectual and economic liberty that might undo all the authoritarian powers on earth.

That's why Germany, the People's Republic of China and the U.S. are girding to fight the Net, using the popular distaste for prurience as their longest lever. After all, who is willing to defend depictions of sexual intercourse with children and animals? Moving through the U.S. Congress right now is a telecommunications-reform bill that would impose fines of as much as $100,000 for "indecency" in cyberspace. Indecent (as opposed to obscene) material is clearly protected in print by the First Amendment, and a large percentage of the printed material currently available to Americans, whether it be James Joyce's Ulysses or much of what's in Cosmopolitan magazine, could be called indecent. As would my saying, right here, right now, that this bill is full of shit.

Somehow Americans lost such protections in broadcast media, where coarse language is strictly regulated. The bill would hold expression on the Net to the same standards of purity, using far harsher criminal sanctions-including jail terms-to enforce them. Moreover, it would attempt to impose those standards on every human who communicates electronically, whether in Memphis or Mongolia. Sounds crazy, but it's true.

If the U.S. succeeds in censoring the Net, it will be in a position to achieve far more than smut reduction. Any system of control that can stop us from writing dirty words online is a system that can control our collective conversation in other, more important ways. If the nation-states perfect such methods, they may own enough of the mind of mankind to perpetuate themselves far beyond their usefulness. (From *Thinking Locally, Acting Globally*, TIME, Jan. 15, 1996)

On Spontaneous Order

one of the aspects of the electronic frontier which I have always found most appealing--and the reason Mitch Kapor and I used that phrase in naming our foundation--is the degree to which it resembles the 19th Century American West in its natural preference for social devices which emerge from it conditions rather than those which are imposed from the outside.

Until the west was fully settled and "civilized" in this century, order was established according to an unwritten Code of the West which had the fluidity of etiquette rather than the rigidity of law. Ethics we more important than rules. Understandings were preferred over laws, which were, in any event, largely unenforceable.

I believe that law, as we understand it, was developed to protect the interests which arose in the two economic "waves" which Alvin Toffler accurately identified in The Third Wave. The First Wave was agriculturally based and required law to order ownership of the principal source of production, land. In the Second Wave, manufacturing became the economic mainspring, and the structure of modern law grew around the centralized institutions which needed protection for their reserves of capital, manpower, and hardware.

Both of these economic systems required stability. Their laws were designed to resist change and to assure some equability of distribution within a fairly static social framework. The possibility spaces ha to be constrained to preserve the predictability necessary to either land stewardship or capital formation.

In the Third Wave we have now entered, information to a large extent replaces land, capital, and hardware, and as I have detailed in the preceding section, information is most at home in a much more

fluid and adaptable environment. The Third Wave is likely to bring a fundamental shift in the purposes and methods of law which will affect far more than simply those statutes which govern intellectual property.

The "terrain" itself--the architecture of the Net--may come to serve many of the purposes which could only be maintained in the past by legal imposition. For example, it may be unnecessary to constitutionally assure freedom of expression in an environment which, in the words of my fellow EFF co-founder John Gilmore, "treats censorship as a malfunction" and re-routes proscribed ideas around it Similar natural balancing mechanisms may arise to smooth over the social discontinuities which previously required legal intercession to set right. On the Net, these differences are more likely to be spanned by a continuous spectrum which connects as much as it separates.

And, despite their fierce grip on the old legal structure, companies which trade in information are likel to find that in their increasing inability to deal sensibly with technological issues, the courts will not produce results which are predictable enough to be supportive of long-term enterprise. Every litigation becomes like a game of Russian roulette, depending on the depth the presiding judge's clue-impairmen Uncodified or adaptive "law," while as "fast, loose, and out of control" as other emergent forms, is probably more likely to yield something like justice at this point. In fact, one can already see in development new practices to suit the conditions of virtual commerce. The life forms of information a evolving methods to protect their continued reproduction. (From *Selling Wine Without Bottles: The Economy of Mind on the Global Net*)

On The Great Work

Earlier in this century, the French philosopher and anthropologist Teilhard de Chardin wrote that evolution was an ascent toward what he called "The Omega Point," when all consciousness would converge into unity, creating the collective organism of Mind. When I first encountered the Net, I had forgotten my college dash through Teilhard's *Phenomenon of Man*. It took me a while to remember where I'd first encountered the idea of this immense and gathering organism.

Whether or not it represents Teilhard's vision, it seems clear we are about some Great Work here . . . the physical wiring of collective human consciousness. The idea of connecting every mind to every oth mind in full-duplex broadband is one which, for a hippie mystic like me, has clear theological implications, despite the ironic fact that most of the builders are bit wranglers and protocol priests, a proudly prosaic lot. What Thoughts will all this assembled neurology, silicon, and optical fiber Think? Teilhard was a Roman Catholic priest who never tried to forge a SLIP connection, so his answers to that question were more conventionally Christian than mine, but it doesn't really matter. We'll build it and then we'll find out.

And however obscure our reasons, we do seem determined to build it. Since 1970, when the Arpanet was established, it has become, as Internet, one of the largest and fastest growing creations in the history of human endeavor. Internet is now expanding as much as 25% a month, a curve which plotted on a linear trajectory would put every single human being online in a few decades.

Or, more likely, not. Indeed, what we seem to be making at the moment is something which will unite only the corporate, military, and academic worlds, excluding the ghettos, hick towns, and suburbs where most human minds do their thinking. We are rushing toward a world in which there will be

Knows, constituting the Wired Mind, and the Know Nots, who will count for little but the labor and consumption necessary to support it.

If that happens, the Great Work will have failed, since, theological issues aside, its most profound consequence should be the global liberation of everyone's speech. A truly open and accessible Net will become an environment of expression which no single government could stifle.

(From *The Great Work*, Jan. 1992, in *The Complete ACM Columns Collection*)

Law And Borders--The Rise of Law in Cyberspace

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Introduction

Global computer-based communications cut across territorial borders, creating a new realm of human activity and undermining the feasibility--and legitimacy--of applying laws based on geographic boundaries. While these electronic communications play havoc with geographic boundaries, a new boundary, made up of the screens and passwords that separate the virtual world from the "real world" of atoms, emerges. This new boundary defines a distinct Cyberspace that needs and can create new law and legal institutions of its own. Territorially-based law-making and law-enforcing authorities find this new environment deeply threatening. But established territorial authorities may yet learn to defer t the self-regulatory efforts of Cyberspace participants who care most deeply about this new digital trade in ideas, information, and services. Separated from doctrine tied to territorial jurisdictions, new rules v emerge, in a variety of online spaces, to govern a wide range of new phenomena that have no clear parallel in the nonvirtual world. These new rules will play the role of law by defining legal personhood and property, resolving disputes, and crystallizing a collective conversation about core values.

I. Breaking Down Territorial Borders

A. Territorial Borders in the "Real World"

We take for granted a world in which geographical borders--lines separating physical spaces--are of primary importance in determining legal rights and responsibilities: "All law is *prima facie* territorial."\1\ Territorial borders, generally speaking, delineate areas within which different sets of legal rules apply. There has until now been a general correspondence between borders drawn in physical space (between nation states or other political entities) and borders in "law space." For example, if we were to superimpose a "law map" (delineating areas where different rules apply to particular behaviors) onto a political map of the world, the two maps would overlap to a significant degree, with clusters of homogenous applicable law and legal institutions fitting within existing physical borders, distinct from neighboring homogenous clusters.

1. The Trademark Example

Consider a specific example to which we will refer throughout this article: trademark law--schemes for the protection of the associations between words or images and particular commercial enterprises. Trademark law is distinctly based on geographical separations.\2\ Trademark rights typically arise within a given country, usually on the basis of use of a mark on physical goods or in connection with the provision of services in specific locations within that country. Different countries have different trademark laws, with important differences on matters as central as whether the same name can be used in different lines of business. In the United States, the same name can even be used for the same line of business if there is sufficient geographic separation of use to avoid confusion.\3\ In fact, there are many local stores, restaurants, and businesses with identical names that do not interfere with each other because their customers do not overlap. The physical cues provided by different lines of business allow most marks to be used in multiple lines of commerce without dilution of the other users' rights.\4\ There is no global registration scheme\5\; protection of a particularly famous mark on a global basis requires registration in each country. A trademark owner must therefore also be constantly alert to territorially-based claims of abandonment, and to dilution arising from uses of confusingly similar marks and must master the different procedural and jurisdictional laws of various countries that apply in each such instance.

2. When Geographic Boundaries for Law Make Sense

Physical borders are not, of course, simply arbitrary creations. Although they may be based on historical accident, geographic borders for law make sense in the real world. Their relationship to the development and enforcement of legal rules is logically based on a number of related considerations.

Power.

Control over physical space, and the people and things located in that space, is a defining attribute of sovereignty and statehood.\6\ Law-making requires some mechanism for law enforcement, which in turn depends (to a large extent) on the ability to exercise physical control over, and to impose coercive sanctions on, law-violators. For example, the U.S. government does not impose its trademark law on a Brazilian business operating in Brazil, at least in part because imposing sanctions on the Brazilian business would require assertion of physical control over those responsible for the operation of that business. Such an assertion of control would conflict with the Brazilian government's recognized monopoly on the use of force over its citizens.\7\

Effects.
The correspondence between physical boundaries and boundaries in "law space" also reflects a deeply rooted relationship between physical proximity and the effects of any particular behavior. That is, Brazilian trademark law governs the use of marks in Brazil because that use has a more direct impact on persons and assets located within that geographic territory than anywhere else. For example, the existence of a large sign over "Jones' Restaurant" in Rio de Janeiro is unlikely to have an impact on the operation of "Jones' Restaurant" in Oslo, Norway, for we may assume that there is no substantial overlap between the customers, or competitors, of these two entities. Protection of the former's trademark does not--and probably should not--affect the protection afforded the latter's.
Legitimacy.
We generally accept the notion that the persons within a geographically defined border are the ultimate source of law-making authority for activities within that border.\8\ The "consent of the governed" implies that those subject to a set of laws must have a role in their formulation. By virtue of the preceding considerations, the category of persons subject to a sovereign's laws, and most deeply affected by those laws, will consist primarily of individuals who are located in particular physical space Similarly, allocation of responsibility among levels of government proceeds on the assumption that, fo many legal problems, physical proximity between the responsible authority and those most directly affected by the law will improve the quality of decision making, and that it is easier to determine the wi of those individuals in physical proximity to one another.
Notice.
Physical boundaries are also appropriate for the delineation of "law space" in the physical world because they can give notice that the rules change when the boundaries are crossed. Proper boundaries have signposts that provide warning that we will be required, after crossing, to abide by different rules, and physical boundaries -- lines on the geographical map -- are generally well-equipped to serve this signpost function.\9\
B. The Absence of Territorial Borders in Cyberspace
Cyberspace radically undermines the relationship between legally significant (online) phenomena and physical location. The rise of the global computer network is destroying the link between geographical location and: (1) the *power* of local governments to assert control over online behavior; (2) the *effects* of online behavior on individuals or things; (3) the *legitimacy* of the efforts of a local sovereign to enforce rules applicable to global phenomena; and (4) the ability of physical location to give *notice* of which sets of rules apply.
The Net thus radically subverts a system of rule-making based on borders between physical spaces, at least with respect to the claim that cyberspace should naturally be governed by territorially defined rules.
Cyberspace has no territorially-based boundaries, because the cost and speed of message transmission on the Net is almost entirely independent of physical location: Messages can be transmitted from any physical location to any other location without degradation, decay, or substantial delay, and without any physical cues or barriers that might otherwise keep certain geographically remote places and people separate from one another.\10\ The Net enables transactions between people who do not know, and in many cases cannot know, the physical location of the other party. Location remains vitally important,

but only location within a *virtual* space consisting of the "addresses" of the machines between which messages and information are routed.

The system is indifferent to the *physical* location of those machines, and there is no necessary connection between an Internet address and a physical jurisdiction.

Although a domain name, when initially assigned to a given machine, may be associated with a particular Internet Protocol address corresponding to the territory within which the machine is physica located (e.g., a ".uk" domain name extension), the machine may move in physical space without any movement in the logical domain name space of the Net. Or, alternatively, the owner of the domain name might request that the name become associated with an entirely different machine, in a different physical location.\11\ Thus, a server with a ".uk" domain name may not necessarily be located in the United Kingdom, a server with a ".com" domain name may be anywhere, and users, generally speaking, are not even aware of the location of the server that stores the content that they read. Physical borders no longer can function as signposts informing individuals of the obligations assumed by entering into a new, legally significant, place, because individuals are unaware of the existence of those borders as the move through virtual space.

The power to control activity in Cyberspace has only the most tenuous connections to physical locatio Many governments first respond to electronic communications crossing their territorial borders by try to stop or regulate that flow of information as it crosses their borders.\12\ Rather than deferring to efforts by participants in online transactions to regulate their own affairs, many governments establish trade barriers, seek to tax any border-crossing cargo, and respond especially sympathetically to claims that information coming into the jurisdiction might prove harmful to local residents. Efforts to stem th flow increase as online information becomes more important to local citizens. In particular, resistance "transborder data flow" (TDF) reflects the concerns of sovereign nations that the development and use of TDF's will undermine their "informational sovereignty,"\13\ will negatively impact on the privacy of local citizens,\14\ and will upset private property interests in information.\15\ Even local governments the United States have expressed concern about their loss of control over information and transactions flowing across their borders.\16\

But efforts to control the flow of electronic information across physical borders--to map local regulat and physical boundaries onto Cyberspace--are likely to prove futile, at least in countries that hope to participate in global commerce.\17\ Individual electrons can easily, and without any realistic prospect detection, "enter" any sovereign's territory. The volume of electronic communications crossing territor boundaries is just too great in relation to the resources available to government authorities to permit meaningful control.

U.S. Customs officials have generally given up. They assert jurisdiction only over the physical goods that cross the geographic borders they guard and claim no right to force declarations of the value of materials transmitted by modem.\18\ Banking and securities regulators seem likely to lose their battle impose local regulations on a global financial marketplace.\19\ And state Attorneys General face serious challenges in seeking to intercept the electrons that transmit the kinds of consumer fraud that, conducted physically within the local jurisdiction, would be more easily shut down.

Faced with their inability to control the flow of electrons across physical borders, some authorities stri to inject their boundaries into the new electronic medium through filtering mechanisms and the

establishment of electronic barriers.\20\ Others have been quick to assert the right to regulate all onlin trade insofar as it might adversely impact local citizens. The Attorney General of Minnesota, for example, has asserted the right to regulate gambling that occurs on a foreign web page that was accessed and "brought into" the state by a local resident.\21\ The New Jersey securities regulatory agency has similarly asserted the right to shut down any offending Web page accessible from within the state.\22\

But such protective schemes will likely fail as well.

First, the determined seeker of prohibited communications can simply reconfigure his connection so a to appear to reside in a different location, outside the particular locality, state, or country. Because the Net is engineered to work on the basis of "logical," not geographical, locations, any attempt to defeat the independence of messages from physical locations would be as futile as an effort to tie an atom anc a bit together. And, moreover, assertions of law-making authority over Net activities on the ground that those activities constitute "entry into" the physical jurisdiction can just as easily be made by any territorially-based authority.

If Minnesota law applies to gambling operations conducted on the World Wide Web because such operations foreseeably affect Minnesota residents, so, too, must the law of any physical jurisdiction from which those operations can be accessed. By asserting a right to regulate whatever its citizens may access on the Net, these local authorities are laying the predicate for an argument that Singapore or Iraq or any other sovereign can regulate the activities of U.S. companies operating in cyberspace from a location physically within the United States.

All such Web-based activity, in this view, must be subject simultaneously to the laws of all territorial sovereigns.

Nor are the effects of online activities tied to geographically proximate locations. Information availabl on the World Wide Web is available simultaneously to anyone with a connection to the global network. The notion that the effects of an activity taking place on that Web site radiate from a physical location over a geographic map in concentric circles of decreasing intensity, however sensible that may be in th nonvirtual world, is incoherent when applied to Cyberspace. A Web site physically located in Brazil, to continue with that example, has no more of an effect on individuals in Brazil than does a Web site physically located in Belgium or Belize that is accessible in Brazil. Usenet discussion groups, to take another example, consist of continuously changing collections of messages that are routed from one network to another, with no centralized location at all; they exist, in effect, everywhere, nowhere in particular, and only on the Net.\23\

Nor can the legitimacy of any rules governing online activities be naturally traced to a geographically situated polity. There is no geographically localized set of constituents with a stronger claim to regulat than any other local group; the strongest claim to control comes from the participants themselves, and they could be anywhere.

The rise of an electronic medium that disregards geographical boundaries also throws the law into disarray by creating entirely new phenomena that need to become the subject of clear legal rules but that cannot be governed, satisfactorily, by any current territorially-based sovereign. For example, electronic communications create vast new quantities of transactional records and pose serious questions regarding the nature and adequacy of privacy protections. Yet the communications that create

these records may pass through or even simultaneously exist in many different territorial jurisdictions.\24\ What substantive law should we apply to protect this new, vulnerable body of transactional data?\25\ May a French policeman lawfully access the records of communications traveling across the Net from the United States to Japan? Similarly, whether it is permissible for a commercial entity to publish a record of all of any given individual's postings to Usenet newsgroups, o whether it is permissible to implement an interactive Web page application that inspects a user's "bookmarks" to determine which other pages that user has visited, are questions not readily addressed by existing legal regimes--both because the phenomena are novel and because any given local territoria sovereign cannot readily control the relevant, globally dispersed, actors and actions.\26\

Because events on the Net occur everywhere but nowhere in particular, are engaged in by online personae who are both "real" (possessing reputations, able to perform services, and deploy intellectual assets) and "intangible" (not necessarily or traceably tied to any particular person in the physical sense) and concern "things" (messages, databases, standing relationships) that are not necessarily separated from one another by any physical boundaries, no physical jurisdiction has a more compelling claim tha any other to subject these events exclusively to its laws.

1. The Trademark Example.

The question who should regulate or control Net domain names presents an illustration of the difficulti faced by territorially-based law-making. The engineers who created the Net devised a "domain name system" that associates numerical machine addresses with easier-to-remember names. Thus, an Interne Protocol machine address like "36.21.0.69" can be derived, by means of a lookup table, from "leland.stanford.edu."

Certain letter extensions (".com," ".edu," ".org," and ".net") have developed as global domains with no association to any particular geographic area.\27\ Although the Net creators designed this system as a convenience, it rapidly developed commercial value, because it allows customers to learn and remember the location of particular Web pages or e-mail addresses. Currently, domain names are registered with specific parties who echo the information to "domain name servers" around the world. Registration generally occurs on a "first come, first served" basis,\28\ generating a new type of propert akin to trademark rights, but without inherent ties to the trademark law of any individual country. Defining rights in this new, valuable property presents many questions, including those relating to transferability, conditions for ownership (such as payment of registration fees), duration of ownership rights, and forfeiture in the event of abandonment, however defined. Who should make these rules? Consider the placement of a "traditional" trademark on the face of a World Wide Web page. This page can be accessed instantly from any location connected to the Net. It is not clear that any given country's trademark authorities possess, or should possess, jurisdiction over such placements. Otherwise, any us of a trademark on the net would be subject simultaneously to the jurisdiction of every country. Should Web page advertising a local business in Illinois be deemed to infringe a trademark in Brazil just because the page can be accessed freely from Brazil? Large U.S. companies may be upset by the appearance on the Web of names and symbols that overlap with their valid U.S.-registered trademarks. But these same names and symbols could also be validly registered by another party in Mexico whose "infringing" marks are now, suddenly, accessible from within the United States. Upholding a claim of infringement or dilution launched by the holder of a U.S.-registered trademark, solely on the basis of a

conflicting mark on the Net, exposes that same trademark holder to claims from other countries when the use of their U.S.-registered mark on the Web would allegedly infringe a similar mark in those foreign jurisdictions.

2. Migration of Other Regulated Conduct to the Net.

Almost everything involving the transfer of information can be done online: education, health care, banking, the provision of intangible services, all forms of publishing, and the practice of law. The laws regulating many of these activities have developed as distinctly local and territorial. Local authorities certify teachers, charter banks with authorized "branches," and license doctors and lawyers. The law has in essence presumed that the activities conducted by these regulated persons cannot be performed without being tied to a physical body or building subject to regulation by the territorial sovereign authority, and that the effects of those activities are most distinctly felt in geographically circumscribe areas. These distinctly local regulations cannot be preserved once these activities are conducted by globally dispersed parties through the Net. When many trades can be practiced in a manner that is unrelated to the physical location of the participants, these local regulatory structures will either delay the development of the new medium or, more likely, be superseded by new structures that better fit the online phenomena in question.\29\

Any insistence on "reducing" all online transactions to a legal analysis based in geographic terms presents, in effect, a new "mind-body" problem on a global scale. We know that the activities that have traditionally been the subject of regulation must still be engaged in by real people who are, after all, at distinct physical locations. But the interactions of these people now somehow transcend those physical locations. The Net enables forms of interaction in which the shipment of tangible items across geographic boundaries is irrelevant and in which the location of the participants does not matter. Effort to determine "where" the events in question occur are decidedly misguided, if not altogether futile.

II. A New Boundary for Cyberspace

Although geographic boundaries may be irrelevant in defining a legal regime for Cyberspace, a more legally significant border for the "law space" of the Net consists of the screens and passwords that separate the tangible from the virtual world. Traditional legal doctrine treats the Net as a mere transmission medium that facilitates the exchange of messages sent from one legally significant geographical location to another, each of which has its own applicable laws.

Yet, trying to tie the laws of any particular territorial sovereign to transactions on the Net, or even tryir to analyze the legal consequences of Net-based commerce as if each transaction occurred geographically somewhere in particular, is most unsatisfying.

A. Cyberspace as a Place

Many of the jurisdictional and substantive quandaries raised by border-crossing electronic communications could be resolved by one simple principle: conceiving of Cyberspace as a distinct "place" for purposes of legal analysis by recognizing a legally significant border between Cyberspace and the "real world."

Using this new approach, we would no longer ask the unanswerable question "where" in the geographical world a Net-based transaction occurred. Instead, the more salient questions become: What rules are best suited to the often unique characteristics of this new place and the expectations of

those who are engaged in various activities there? What mechanisms exist or need to be developed to determine the content of those rules and the mechanisms by which they can enforced?
Answers to these questions will permit the development of rules better suited to the new phenomena in question, more likely to be made by those who understand and participate in those phenomena, and more likely to be enforced by means that the new global communications media make available and effective.

1. The New Boundary is Real.

Treating Cyberspace as a separate "space" to which distinct laws apply should come naturally, because entry into this world of stored online communications occurs through a screen and (usually) a "password" boundary.\30\ There is a "placeness" to Cyberspace because the messages accessed there are persistent and accessible to many people.\31\ You know when you are "there." No one accidentally strays across the border into Cyberspace.\32\ To be sure, Cyberspace is not a homogenous place; groups and activities found at various online locations possess their own unique characteristics and distinctions, and each area will likely develop its own set of distinct rules.\33\ But the line that separate online transactions from our dealings in the real world is just as distinct as the physical boundaries between our territorial governments--perhaps more so.\34\
Crossing into Cyberspace is a meaningful act that would make application of a distinct "law of Cyberspace" fair to those who pass over the electronic boundary.
As noted, a primary function and characteristic of a border or boundary is its ability to be perceived by the one who crosses it.\35\ As regulatory structures evolve to govern Cyberspace-based transactions, it will be much easier to be certain which of those rules apply to your activities online than to determin which territorial-based authority might apply its laws to your conduct. For example, you would know to abide by the "terms of service" established by CompuServe or America Online when you are in their online territory, rather than guess whether Germany, or Tennessee, or the SEC will succeed in asserting their right to regulate your activities and those of the "placeless" online personae with whom you communicate.

2. The Trademark Example.

The ultimate question who should set the rules for uses of names on the Net presents an apt microcosm for examining the relationship between the Net and territorial-based legal systems. There is nothing more fundamental, legally, than a name or identity--the right to legally recognized personhood is a predicate for the amassing of capital, including the reputational and financial capital, that arises from sustained interactions. The domain name system, and other online uses of names and symbols tied to reputations and virtual locations, exist operationally only on the Net. These names can, of course, be printed on paper or embodied in physical form and shipped across geographic borders. But such physical uses should be distinguished from electronic use of such names in Cyberspace, because publishing a name or symbol on the Net is not the same as intentional distribution to any particular jurisdiction. Instead, use of a name or symbol on the Net is like distribution to all jurisdictions simultaneously. Recall that the non-country-specific domain names like ".com," and ".edu" lead to the establishment of online addresses on a global basis. And through such widespread use, the global domain names gained proprietary value. In this context, assertion by any local jurisdiction of the right t set the rules applicable to the "domain name space" is an illegitimate extra-territorial power grab.

Conceiving of the Net as a separate place for purposes of legal analysis will have great simplifying effects. For example, a global registration system for all domain names and reputationally significant names and symbols used on the Net would become possible. Such a Net-based regime could take account of the special claims of owners of strong global marks (as used on physical goods) and "grandfather" these owners' rights to the use of their strong marks in the newly opened online territory. But a Net-based global registration system could also fully account for the true nature of the Net by treating the use of marks on Web pages as a global phenomenon, by assessing the likelihood of confusion and dilution in the online context in which such confusion would actually occur, and by harmonizing any rules with applicable engineering criteria, such as optimizing the overall size of the domain name space.

A distinct set of rules applicable to trademarks in Cyberspace would greatly simplify matters by providing a basis to resist the inconsistent and conflicting assertions of geographically local prerogativ If one country objects to the use of a mark on the Web that conflicts with a locally registered mark, the rebuttal would be that the mark has not been used inside the country at all, but only on the Web. If a company wants to know where to register its use of a symbol on the Net, or to check for conflicting prior uses of its mark, the answer will be obvious and cost effective: the designated registration authority for the relevant portion of the Net itself. If we need to develop rules governing abandonment, dilution, and conditions on uses of particular types of domain names and addresses, those rules--applicable specifically to Cyberspace--will be able to reflect the special characteristics of this new electronic medium.\36\

B. Other Cyberspace Regimes

Once we take Cyberspace seriously as a distinct place for purposes of legal analysis, many opportunities to clarify and simplify the rules applicable to online transactions become available.

1. Defamation Law

Treating messages on the Net as transmissions from one place to another has created a quandary for those concerned about liability for defamation: Messages may be transmitted between countries with very different laws, and liability may be imposed on the basis of "publication" in multiple jurisdictions with varying standards.\37\ In contrast, the approach that treats the global network as a separate place would consider any allegedly defamatory message to have been published only "on the Net" (or in some distinct subsidiary area thereof)--at least until such time as distribution on paper occurs.\38\

This re-characterization makes more sense. A person who uploads a potentially defamatory statement would be able more readily to determine the rules applicable to his own actions. Moreover, because the Net has distinct characteristics, including an enhanced ability of the allegedly defamed person to reply, the rules of defamation developed for the Net could take into account these technological capabilities --perhaps by requiring that the opportunity for reply be taken advantage of in lieu of monetary compensation for certain defamatory net-based messages. \39\ The distinct characteristics o the Net could also be taken into account when applying and adapting the "public figure" doctrine in a context that is both global and highly compartmentalized and that blurs the distinction between private and public spaces.

2. Regulation of Net-Based Professional Activities.

The simplifying effect of "taking Cyberspace seriously" likewise arises in the context of regimes for regulating professional activities. As noted, traditional regulation insists that each professional be licensed by every territorial jurisdiction where she provides services.\40\
This requirement is infeasible when professional services are dispensed over the Net and potentially provided in numerous jurisdictions. Establishing certification regimes that apply only to such activities the Net would greatly simplify matters. Such regulations would take into account the special features o Net-based professional activities like tele-medicine or global law practice by including the need to avoid any special risks caused by giving online medical advice in the absence of direct physical contact with a patient or by answering a question regarding geographically local law from a remote location.\41
Using this new approach, we could override the efforts of local school boards to license online educational institutions, treating attendance by students at online institutions as a form of "leaving hom for school" rather than characterizing the offering of education online as prosecutable distribution of disfavored materials into a potentially unwelcoming community that asserts local licensing authority.

3. Fraud and Antitrust.

Even an example that might otherwise be thought to favor the assertion of jurisdiction by a local sovereign--protection of local citizens from fraud and antitrust violations--shows the beneficial effect a Cyberspace legal regime.
How should we analyze "markets" for antitrust and consumer protection purposes when the companies at issue do business only through the World Wide Web?
Cyberspace could be treated as a distinct marketplace for purposes of assessing concentration and market power. Concentration in geographic markets would only be relevant in the rare cases in which such market power could be inappropriately leveraged to obtain power in online markets--for example by conditioning access to the net by local citizens on their buying services from the same company (su as a phone company) online. Claims regarding a right to access to particular online services, as distinct from claims to access particular physical pipelines, would remain tenuous as long as it is possible to create a new online service instantly in any corner of an expanding online space.\42\
Consumer protection doctrines could also develop differently online--to take into account the fact that anyone reading an online ad is only a mouse click away from guidance from consumer protection agencies and discussions with other consumers. Can Minnesota prohibit the establishment of a Ponzi scheme on a Web page physically based in the Cayman islands but accessed by Minnesota citizens through the Net? Under the proposed new approach to regulation of online activities, the answer is clearly no. Minnesota has no special right to prohibit such activities. The state lacks enforcement power, cannot show specially targeted effects, and does not speak for the community with the most legitimate claim to self-governance. But that does not mean that fraud might not be made "illegal" in at least large areas of Cyberspace. Those who establish and use online systems have a interest in preserving the safety of their electronic territory and preventing crime. They are more likely to be able to enforce their own rules. And, as more fully discussed below, insofar as a consensually based "law of the Net" needs to obtain respect and deference from local sovereigns, new Net-based law-making institutions have an incentive to avoid fostering activities that threaten the vital interests of territorial governments.

4. Copyright Law.

We suggest, not without some trepidation, that "taking Cyberspace seriously" could clarify the current intense debate about how to apply copyright law principles in the digital age. In the absence of global agreement on applicable copyright principles, the jurisdictional problems inherent in any attempt to apply territorially-based copyright regimes to electronic works simultaneously available everywhere o the globe are profound. As Jane Ginsburg has noted:

> A key feature of the GII [Global Information Infrastructure] is its ability to render works of authorship pervasively and simultaneously accessible throughout the world.

The principle of territoriality becomes problematic if it means that posting a work on the GII calls into play the laws of every country in which the work may be received when . . . these laws may differ substantively.

Should the rights in a work be determined by a multiplicity of inconsistent legal regimes when the worl is simultaneously communicated to scores of countries? Simply taking into account one country's laws the complexity of placing works in a digital network is already daunting; should the task be further burdened by an obligation to assess the impact of the laws of every country where the work might be received? Put more bluntly, for works on the GII, there will be no physical territoriality . . . . Without physical territoriality, can legal territoriality persist?\43\

But treating Cyberspace as a distinct place for purposes of legal analysis does more than resolve the conflicting claims of different jurisdictions: It also allows the development of new doctrines that take account the special characteristics of the online "place."

The basic justification for copyright protection is that bestowing an exclusive property right to control the reproduction and distribution of works on authors will increase the supply of such works by offerin authors a financial incentive to engage in the effort required for their creation. \44\ But even in the "rea world," much creative expression is entirely independent of this incentive structure, because the author primary reward has more to do with acceptance in a community and the accumulation of reputational capital through wide dissemination than it does with the licensing and sale of individual copies of works.\45\ And that may be more generally true of authorship in Cyberspace; because authors can now, for the first time in history, deliver copies of their creations instantaneously and at virtually no cc anywhere in the world, one might expect authors to devise new modes of operation that take advantage of, rather than work counter to, this fundamental characteristics of the new environment.\46\

One such strategy has already begun to emerge: giving away information at no charge -- what might be called the "Netscape strategy" \47\ -- as a means of building up reputational capital that can subsequently be converted into income (e.g., by means of the sale of services). As Esther Dyson has written::

> Controlling copies (once created by the author or by a third party) becomes a complex challenge. You can either control something very tightly, limiting distribution to a small, trusted group, or you can rest assured that eventually your product will find its way to a large nonpaying audience _ if anyone cares to have it in the first place. . . .

Much chargeable value will be in certification of authenticity and reliability, not in the content. Brand name, identity, and other marks of value will be important; so will security of supply. Customers will pay for a stream of information and content from a trusted source. For example, the umbrella of The

New York Times sanctifies the words of its reporters. The content churned out by Times reporters is valuable because the reporters undergo quality-control, and because others believe them. . . .
The trick is to control not the copies of your work but instead a relationship with the customers -- subscriptions or membership. And that's often what the customers want, because they see it as an assurance of a continuing supply of reliable, timely content.\48\

A profound shift of this kind in regard to authorial incentives fundamentally alters the applicable balanc between the costs and benefits of copyright protection in Cyberspace, calling for a reappraisal of long-standing principles.\49\ So, too, do other unique characteristics of Cyberspace severely challenge traditional copyright concepts.\50\ The very ubiquity of file "copying" -- the fact that one cannot access any information whatsoever in a computer-mediated environment without making a "copy" of that information\51\ -- implies that any simple-minded attempt to map traditional notions of "copying" onto Cyberspace transactions will have perverse results.\52\ Application of the "first sale" doctrine (allowing the purchaser of a copyrighted work to freely resell the copy she purchased) is problematic when the transfer of a lawfully owned copy technically involves the making of a new copy before the old one is eliminated,\53\ as is defining "fair use" when a work's size is indeterminate, ranging from (1) an individual paragraph sold separately on demand in response to searches to (2) the entire database from which the paragraph originates, something never sold as a whole unit.\54\

Treating Cyberspace as a distinct location allows for the development of new forms of intellectual property law, applicable only on the Net, that would properly focus attention on these unique characteristics of this new, distinct place while preserving doctrines that apply to works embodied in physical collections (like books) or displayed in legally significant physical places (like theaters). Curr debates about applying copyright law to the Net often do, implicitly, treat it as a distinct space, at least insofar as commercial copyright owners somewhat inaccurately refer to it as a "lawless" place. \55\ The civility of the debate might improve if everyone assumed the Net should have an appropriately different law, including a special law for unauthorized transfers of works from one realm to the other; we could, in other words, regulate the smuggling of works created in the physical world, by treating the unauthorized uploading of a copy of such works to the Net as infringement. This new approach would help promoters of electronic commerce focus on developing incentive-producing rules to encourage authorized transfers into Cyberspace of works not available now, while also reassuring owners of existing copyrights to valuable works that changes in the copyright law for the Net would not require changing laws applicable to distributing physical works. It would also permit the development of new doctrines of implied license and fair use that, as to works first created on the Net or imported with the author's permission, appropriately allow the transmission and copying necessary to facilitate their use within the electronic realm.\56\

III. Will Responsible Self-Regulatory Structures Emerge on the Net?

Even if we agree that new rules should apply to online phenomena, questions remain about who sets the rules and how they are enforced. We believe the Net can develop its own effective legal institutions.

The Trademark Example.

In order for the domain name space to be administered by a legal authority that is not territorially based new law-making institutions will have to develop. Many questions that arise in setting up this system wi need answers--decisions about whether to create a new top level domain, whether online addresses

belong to users or service providers\57\, and whether one name impermissibly interferes with another, thus confusing the public and diluting the value of the pre-existing name.\58\ The new system must also include procedures to give notice in conflicting claims, to resolve these claims, and to assess appropriate remedies (including, possibly, compensation) in cases of wrongful use. If the Cyberspace equivalent of eminent domain develops, questions may arise over how to compensate individuals when certain domain names are destroyed or redeployed for the public good of the Net community.\59\ Someone must also decide threshold membership issues for Cyberspace citizens, including how much users must disclose (and to whom) about their real-world identities to use e-mail addresses and domain names for commercial purposes. Implied throughout this discussion is the recognition that these rules will only be meaningful and enforceable if Cyberspace citizens view whomever makes these decisions as a legitimate governing body.

Experience suggests that the community of online users and service providers is up to the task of developing a self-governance system.\60\ The current domain name system evolved from decisions made by engineers and the practices of Internet service providers.\61\ Now that trademark owners are threatening the company that administers the registration system, the same engineers who established the original domain name standards are again deliberating whether to alter the domain name system to take these new policy issues into account.\62\ Who has the ultimate right to control policy in this area remains unclear.\63\

Every system operator who dispenses a password imposes at least some requirements as conditions of continuing access, including paying bills on time or remaining a member of a group entitled to access (e.g. students at a university).\64\ System operators (sysops) have an extremely powerful enforcement tool at their disposal to enforce such rules--banishment. \65\ Moreover, communities of users have marshaled plenty of enforcement weapons to induce wrongdoers to comply with local conventions such as rules against flaming,\66\ shunning,\67\ mailbombs, and more.\68\ And both sysops and users have begun explicitly to recognize that formulating and enforcing such rules should be a matter for principled discussion, not an act of will by whoever has control of the power switch.\69\

While many of these new rules and customs apply only to specific, local areas of the global network, some standards apply through technical protocols on a nearly universal basis. And widespread agreement already exists about core principles of "netiquette" in mailing lists and discussion groups\70\--although, admittedly, new users have a slow learning curve and the Net offers little formal "public education" regarding applicable norms.\71\ Dispute resolution mechanisms suited to this new environment also seem certain to prosper.\72\ Cyberspace is anything but anarchic; its distinct rule sets are becoming more robust every day.

Perhaps the most apt analogy to the rise of a separate law of Cyberspace is the origin of the Law Merchant--a distinct set of rules that developed with the new, rapid boundary-crossing trade of the Middle Ages.\73\ Merchants could not resolve their disputes by taking them to the local noble, whose established feudal law mainly concerned land claims. Nor could the local lord easily establish meaningful rules for a sphere of activity he barely understood, executed in locations beyond his control. The result of this jurisdictional confusion, arising from a then-novel form of boundary-crossing communications, was the development of a new legal system--*Lex Mercatoria*.\74\ The people who cared most about and best understood their new creation formed and championed this new law, which did not destroy or

replace existing law regarding more territorially-based transactions (e.g. transferring land ownership). Arguably, exactly the same type of phenomenon is developing in Cyberspace right now.\75\
Governments cannot stop electronic communications coming across their borders, even if they want to do so. Nor can they credibly claim a right to regulate the Net based on supposed local harms caused by activities that originate outside their borders and that travel electronically to many different nations; one nation's legal institutions should not, therefore, monopolize rule-making for the entire Net. Even s established authorities likely will continue to claim that they must analyze and regulate the new online phenomena in terms of some physical locations. After all, the people engaged in online communicatior still inhabit the material world. And, so the argument goes, local legal authorities must have authority t remedy the problems created in the physical world by those acting on the Net. The rise of responsible law-making institutions within Cyberspace, however, will weigh heavily against arguments that would claim that the Net is "lawless" and thus tie regulation of online trade to physical jurisdictions. As noted, sysops acting alone or collectively have the power of banishment to control wrongful actions online.\7
Thus, for online activities that minimally impact the vital interests of sovereigns, the self-regulating structures of Cyberspace seem better suited than local authorities to deal with the Net's legal issues.\7

IV. Local Authorities, Foreign Rules: Reconciling Conflicts

What should happen when conflicts arise between the local territorial law (applicable to persons or entities by virtue of their location in a particular area of physical space) and the law applicable to particular activities on the Net? The doctrine of "comity," as well as principles applied when delegating authority to self-regulatory organizations, provide us with guidance for reconciling such disputes.
The doctrine of comity, in the Supreme Court's classic formulation, is "the recognition which one natic allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protections of its law."\78\
It is incorporated into the principles set forth in the Restatement (Third) of Foreign Relations Law of tl United States, in particular Section 403, which provides that "a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable,"\79\ and that when a conflict between the laws of two states arises, "each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction [and] should defer to the other state if that state's interest is clearly greater.").\8
It arose as an attempt to mitigate some of the harsher features of a world in which lawmaking is an attribute of control over physical space but in which persons, things, and actions may move across physical boundaries, and it functions as a constraint on the strict application of territorial principles tha attempts to reconcile "the principle of absolute territorial sovereignty [with] the fact that intercourse between nations often demand[s] the recognition of one sovereign's lawmaking acts in the forum of another." \81\ In general, comity reflects the view that those who care more deeply about and better understand the disputed activity should determine the outcome. Accordingly, it may be ideally suited tc handle, by extension, the new conflicts between the a-territorial nature of cyberspace activities and the legitimate needs of territorial sovereigns and of those whose interests they protect on the other side of the cyberspace border. This doctrine does not disable territorial sovereigns from protecting the interes

of those individuals located within their spheres of control, but it calls upon them to exercise a signific degree of restraint when doing so.

Local officials handling conflicts can also learn from the many examples of delegating authority to self-regulatory organizations. Churches are allowed to make religious law.\82\ Clubs and social organizations can, within broad limits, define rules that govern activities within their spheres of interest.\83\ Securities exchanges can establish commercial rules, so long as they protect the vital interests of the surrounding communities.

In these cases, government has seen the wisdom of allocating rule-making functions to those who best understand a complex phenomenon and who have an interest in assuring the growth and health of their shared enterprise.

Cyberspace represents a new permutation of the underlying issue: How much should local authorities defer to a new, self-regulating activity arising independently of local control and reaching beyond the limited physical boundaries of the sovereign. This mixing of both tangible and intangible boundaries leads to a convergence of the intellectual categories of comity in international relations and the local delegation by a sovereign to self-regulatory groups. In applying both the doctrine of "comity" and the idea of "delegation"\84\ to Cyberspace, a local sovereign is called upon to defer to the self-regulatory judgments of a population partly, but not wholly, composed of its own subjects.\85\

Despite the seeming contradiction of a sovereign deferring to the authority of those who are not its ow subjects, such a policy makes sense, especially in light of the underlying purposes of both doctrines. Comity and delegation represent the wise conservation of governmental resources and allocate decisions to those who most fully understand the special needs and characteristics of a particular "sphere" of being. Although Cyberspace represents a new sphere that cuts across national boundaries, the fundamental principle remains.

If the sysops and users who collectively inhabit and control a particular area of the Net want to establish special rules to govern conduct there, and if that rule set does not fundamentally impinge upo the vital interests of others who never visit this new space, then the law of sovereigns in the physical world should defer to this new form of self-government.

Consider, once again, the trademark example. A U.S. government representative has stated that, since the government paid for the initial development and administration of the domain name system, it "own the right to control policy decisions regarding the creation and use of such names.\86\ Obviously, government funds, in addition to individual efforts on a global scale, created this valuable and finite nev asset. But the government's claim based on its investment is not particularly convincing. In fact, the United States may be asserting its right to control the policies governing the domain name space primarily because it fears that any other authority over the Net might force it to pay again for the ".gov" and ".mil" domain names used by governmental entities.\87\ To assuage these concerns, a Net-based authority should concede to the governments on this point. For example, it should accommodate the military's strong interest in remaining free to regulate and use its ".mil" addresses.\88\ A new Net-base standards-making authority should also accommodate the government's interests in retaining its own untaxed domain names and prohibiting counterfeiting. Given responsible restraint by the Net-based authority and the development of an effective self-regulatory scheme, the government might well then

decide that it should not spend its finite resources trying to wrest effective control of non-governmenta domain names away from those who care most about facilitating the growth of online trade.
Because controlling the flow of electrons across physical boundaries is so difficult, a local jurisdictio that seeks to prevent its citizens from accessing specific materials must either outlaw all access to the Net--thereby cutting itself off from the new global trade--or seek to impose its will on the Net as a whole. This would be the modern equivalent of a local lord in medieval times either trying to prevent th silk trade from passing through his boundaries (to the dismay of local customers and merchants) or purporting to assert jurisdiction over the known world. It may be most difficult to envision local territorial sovereigns deferring to the law of the Net when the perceived threat to local interests arises from the very free flow of information that is the Net's most fundamental characteristic--when, for example, local sovereigns assert an interest in seeing that their citizens are not adversely affected by information that the local jurisdiction deems harmful but that is freely (and lawfully) available elsewhe Examples include the German government's attempts to prevent its citizens access to prohibited materials\89\, or the prosecution of a California bulletin board operator for making material offensive local "community standards" available for downloading in Tennessee.\90\
Local sovereigns may insist that their interest (in protecting their citizens from harm) is paramount, an easily outweighs any purported interest in making this kind of material freely available. But the opposir interest is not simply the interest in seeing that individuals have access to ostensibly obscene material, is the "meta-interest" of Net citizens in preserving the global free flow of information.
If there is one central principle on which all local authorities *within* the Net should agree, it must be tha territorially local claims to restrict online transactions (in ways unrelated to vital and localized interes a territorial government) should be resisted. This is the Net equivalent of the First Amendment, a principle already recognized in the form of the international human rights doctrine protecting the right communicate.\91\
Participants in the new online trade must oppose external regulation designed to obstruct this flow. Thi naturally central principle of online law bears importantly on the "comity" analysis, because it makes clear that the need to preserve a free flow of information across the Net is just as vital to the interests the Net as the need to protect local citizens against the impacts of unwelcome information may appear from the perpective of a local territorial sovereign.\92\
For the Net to realize its full promise, online rule-making authorities must not respect the claims of territorial sovereigns to restrict online communications when unrelated to vital and localized governmental interests.

V. Internal Diversity

One of a border's key characteristics is that it slows the interchange of people, things, and information across its divide. Arguably, distinct sets of legal rules can only develop and persist where effective boundaries exist. The development of a true "law of Cyberspace," therefore, depends upon a dividing line between this new online territory and the nonvirtual world. Our argument so far has been that the new sphere online is cut off, at least to some extent, from rule-making institutions in the material worl and requires the creation of a distinct law applicable just to the online sphere.
But we hasten to add that Cyberspace is not, behind that border, a homogeneous or uniform territory behind that border, where information flows without further impediment. Although it is meaningless to

speak of a French or Armenian portion of Cyberspace, because the physical borders dividing French or Armenian territory from their neighbors cannot generally be mapped onto the flow of information in Cyberspace, the Net has other kinds of internal borders delineating many distinct internal locations that slow or block the flow of information.

Distinct names and (virtual) addresses, special passwords, entry fees, and visual cues --software boundaries--can distinguish subsidiary areas from one another. The Usenet newsgroup "alt.religion.scientology" is distinct from "alt.misc.legal," each of which is distinct from a chat room or Compuserve or America Online which, in turn, are distinct from the Cyberspace Law Institute listserve or Counsel Connect. Users can only access these different forums through distinct addresses or phone numbers, often navigating through login screens, the use of passwords, or the payment of fees. Indeed, the ease with which internal borders, consisting entirely of software protocols, can be constructed is one of Cyberspace's most remarkable and salient characteristics; setting up a new Usenet newsgroup, or a "listserver" discussion group, requires little more than a few lines of code.\93\

The separation of subsidiary "territories" or spheres of activity within Cyberspace and the barriers to exchanging information across these internal borders allow for the development of distinct rule sets and for the divergence of those rule sets over time.\94\

The processes underlying biological evolution provide a useful analogy.\95\ Speciation--the emergence over time of multiple, distinct constellations of genetic information from a single, original group--can occur when the original population freely exchanges information (in the form of genetic material) among its members.

In other words, a single, freely-interbreeding population of organisms cannot divide into genetically distinct populations; while the genetic material in the population changes over time, it does so more or less uniformly--e.g. the population of the species *Homo erectus* becomes a population of *Homo sapiens*--and cannot give rise to more than one contemporaneous, distinct genetic set. Speciation requires, at a minimum, some barrier to the interchange of genetic material between subsets of the original homogeneous population. Ordinarily, a physical barrier suffices to prevent one subgroup from exchanging genetic data with another. Once this "border" is in place, divergence within the "gene pool"--the aggregate of the underlying genetic information--in each of the two subpopulations can occur.\96\ Over time, this divergence may be substantial enough that even when the physical barrier disappears, the two subgroups can no longer exchange genetic material--i.e., they have become separate species.

Rules, like genetic material, are self-replicating information.\97\

The internal borders within Cyberspace will thus allow for differentiation among distinct constellations such information--in this case rule-sets rather than species. Content or conduct acceptable in one "area of the Net may be banned in another. Institutions that resolve disputes in one "area" of Cyberspace may not gain support or legitimacy in others. Local sysops can, by contract, impose differing default rules regarding who has the right, under certain conditions, to replicate and redistribute materials that originate with others. While Cyberspace's reliance on bits instead of atoms may make *physical* boundaries more permeable, the boundaries delineating digital online "spheres of being" may become *less* permeable. Securing online systems from unauthorized intruders may prove an easier task than

sealing physical borders from unwanted immigration.\98\ Groups can establish online corporate entitie
or membership clubs that tightly control participation in, or even public knowledge of, their own affairs
Such groups can reach agreement on or modify these rules more rapidly via online communications.
Accordingly, the rule sets applicable to the online world may quickly evolve away from those applicabl
to more traditional spheres and develop greater variation among the sets.

How this process of differentiation and evolution will proceed is one of the more complex and fascinating questions about law in Cyberspace--and a subject beyond the scope of this Article. We should point out, however, an important normative dimension to the proliferation of these internal boundaries between distinct communities and distinct rule-sets and the process by which law will evolv in Cyberspace. Cyberspace may be an important forum for the development of new connections between idividuals and mechanisms of self-governance by which individuals attain an increasingly elusive sense of community; commenting on the erosion of national sovereignty in the modern world a the failure of the existing system of nation-states to cultivate a "civic voice," a moral connection betwe the individual and the community (or communities) in which she is embedded, Sandel has written:

"The hope for self-government today lies not in relocating sovereignty but in dispersing it. The most promising alternative to the sovereign state is not a cosmopolitan community based on the solidarity o humankind but *a multiplicity of communities and political bodies--some more extensive than nations and some less--among which sovereignty is diffused.* Only a politics that disperses sovereignty both upward [to transnational institutions] and downward can combine the power required to rival global market forces with the diffeentiation required of a public life that hopes to inspire the allegiance of its citizens. . . . If the nation cannot summon more than a minimal commonality, it is unlil that the global community can do better, at least on its own. A more promising basis for a democratic politics that reaches beyond nations is a revitalized civic life nourished in the more particular communities we inhabit. In the age of NAFTA the politics of neighborhood matters more, not less."\99

Furthermore, the ease with which individuals can move between different rule sets in Cyberspace has important implications for any contractarian political philosophy deriving a justification of the State's exercise of coercive power over its citizens from their consent to the exercise of that power. In the nonvirtual world, this consent has a strong fictional element:

State reliance on consent inferred from someone merely remaining in the state is particularly unrealist An individual's unwillingness to incur the extraordinary costs of leaving his or her birthplace should no be treated as a consensual undertaking to obey state authority.\100\

To be sure, citizens of France, dissatisfied with French law and preferring, say, Armenian rules, can try to persuade their compatriots and local decision-makers of the superiority of the Armenian rule-set.\101\ However, their "exit" option, in Albert Hirschman's terms, is limited by the need to physically relocate to Armenia to take advantage of that rule set.\102\

In contrast, in Cyberspace, any given user has a more accessible exit option, in terms of moving from one virtual environment's rule set to another's, thus providing a more legitimate "selection mechanism" by which differing rule sets will evolve over time.\103\

The ability of inhabitants of Cyberspace to cross borders at will between legally significant territories, many times in a single day, is unsettling. This power seems to undercut the validity of developing distin laws for online culture and commerce: How can these rules be "law" if participants can literally turn

them on and off with a switch? Frequent online travel might subject relatively mobile human beings to a far larger number of rule sets than they would encounter traveling through the physical world over the same period. Established authorities, contemplating the rise of a new law applicable to online activities might object that we cannot easily live in a world with too many different sources and types of law, particularly those made by private (non-governmental) parties, without breeding confusion and allowing anti-social actors to escape effective regulation.

But the speed with which we can cross legally meaningful borders or adopt and then shed legally significant roles should not reduce our willingness to recognize multiple rule sets. Rapid travel betwee spheres of being does not detract from the distinctiveness of the boundaries, as long as participants realize the rules are changing. Nor does it detract from the appropriateness of rules applying within any given place, any more than changing commercial or organizational roles in the physical world detracts from a person's ability to obey and distinguish rules as a member of many different institutional affiliations and to know which rules are appropriate for which roles.\104\ Nor does it lower the enforceability of any given rule set within its appropriate boundaries, as long as groups can control unauthorized boundary crossing of groups or messages.

Alternating between different legal identities many times during a day may confuse those for whom cyberspace remains an alien territory, but for those for whom cyberspace is a more natural habitat in which they spend increasing amounts of time it may become second nature. Legal systems must learn t accommodate a more mobile kind of legal person.\105\

V1. Conclusion

Global electronic communications have created new spaces in which distinct rule sets will evolve. We can reconcile the new law created in this space with current territorially-based legal systems by treatin it as a distinct doctrine, applicable to a clearly demarcated sphere, created primarily by legitimate, self-regulatory processes, and entitled to appropriate deference--but also subject to limitations when it oversteps its appropriate sphere.

The law of any given place must take into account the special characteristics of the space it regulates and the types of persons, places, and things found there. Just as a country's jurisprudence reflects its unique historical experience and culture, the law of Cyberspace will reflect its special character, which differs markedly from anything found in the physical world. For example, the law of the Net must deal with persons who "exist" in Cyberspace only in the form of an email address and whose purported identity may or may not accurately correspond to physical characteristics in the real world. In fact, an e-mail address might not even belong to a single person. Accordingly, if Cyberspace law is to recogniz the nature of its "subjects," it cannot rest on the same doctrines that give geographically based sovereigns jurisdiction over "whole," locatable, physical persons. The law of the Net must be prepared to deal with persons who manifest themselves only by means of a particular ID, user account, or domain name.

Moreover, if rights and duties attach to an account itself, rather than an underlying real world person, traditional concepts such as "equality," "discrimination," or even "rights and duties" may not work as we normally understand them. New angles on these ideas may develop. For example, when AOL users joined the Net in large numbers, other Cyberspace users often ridiculed them based on the ".aol" tag on their email addresses--a form of "domainism" that might be discouraged by new forms of Netiquette. If

a doctrine of Cyberspace law accords rights to users, we will need to decide whether those rights adhere only to particular types of online appearances, as distinct from attaching to particular individual in the real world.

Similarly, the types of "properties" that can become the subject of legal discussion in Cyberspace will differ from real world real estate or tangible objects. For example, in the real world the physical covers of a book delineate the boundaries of a "work" for purposes of copyright law;\106\ those limits may disappear entirely when the same materials are part of a large electronic database. Thus, we may have to change the "fair use" doctrine in copyright law that previously depended on calculating what portion of the physical work was copied.\107\ Similarly, a web page's "location" in Cyberspace may take on a value unrelated to the physical place where the disk holding that Web page resides, and efforts to regulate web pages by attempting to control physical objects may only cause the relevant bits to move from one place to another. On the other hand, the boundaries set by "URLs" (Uniform Resource Locators, the location of a document on the World Wide Web) may need special protection against confiscation or confusingly similar addresses. And, because these online "places" may contain offensiv material, we may need rules requiring (or allowing) groups to post certain signs or markings at these places' outer borders.

The boundaries that separate persons and things behave differently in the virtual world but are nonetheless legally significant. Messages posted under one e-mail name will not affect the reputation o another e-mail address, even if the same physical person authors both messages. Materials separated by a password will be accessible to different sets of users, even if those materials physically exist on th very same hard drive. A user's claim to a right to a particular online identity or to redress when that identity's reputation suffers harm, may be valid even if that identity does not correspond exactly to that of any single person in the real world.\108\

Clear boundaries make law possible, encouraging rapid differentiation between rule sets and defining the subjects of legal discussion. New abilities to travel or exchange information rapidly across old borders may change the legal frame of reference and require fundamental changes in legal institutions. Fundamental activities of lawmaking--accommodating conflicting claims, defining property rights, establishing rules to guide conduct, enforcing those rules, and resolving disputes--remain very much alive within the newly defined, intangible territory of Cyberspace. At the same time, the newly emergin law challenges the core idea of a current law-making authority--the territorial nation state, with substantial but legally restrained powers.

If the rules of Cyberspace thus emerge from consensually based rule sets, and the subjects of such laws remain free to move among many differing online spaces, then considering the actions of Cyberspace's system administrators as the exercise of a power akin to "sovereignty" may be inappropriate. Under a legal framework where the top level imposes physical order on those below it and depends for its continued effectiveness on the inability of its citizens to fight back or leave the territory, the legal and political doctrines we have evolved over the centuries are essential to constrain such power. In that situation, where exit is impossible, costly, or painful, then a right to a voice for the people is essential. But when the "persons" in question are not whole people, when their "property" is intangible and portable, and when all concerned may readily escape a jurisdiction they do not find empowering, the relationship between the "citizen" and the "state" changes radically. Law, defined as a thoughtful group

conversation about core values, will persist. But it will not, could not, and should not be the same law as that applicable to physical, geographically-defined territories.

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I. Free Speech in Cyberspace

Conceptual Background

PREPARED REMARKS

KEYNOTE ADDRESS AT THE FIRST CONFERENCE ON COMPUTERS, FREEDOM & PRIVACY

"The Constitution in Cyberspace:
Law and Liberty Beyond the Electronic Frontier"

by Laurence H. Tribe[É]
Tyler Professor of Constitutional Law, Harvard Law School.

Introduction

My topic is how to "map" the text and structure of our Constitution onto the texture and topology of "cyberspace". That's the term coined by cyberpunk novelist William Gibson, which many now use to describe the "place" -- a place without physical walls or even physical dimensions -- where ordinary telephone conversations "happen," where voice-mail and e-mail messages are stored and sent back and forth, and where computer-generated graphics are transmitted and transformed, all in the form of interactions, some real-time and some delayed, among countless users, and between users and the computer itself

Some use the "cyberspace" concept to designate fantasy worlds or "virtual realities" of the sort Gibson described in his novel *Neuromancer*, in which people can essentially turn their minds into computer peripherals capable of perceiving and exploring the data matrix. The whole idea of "virtual reality," of course, strikes a slightly odd note. As one of Lily Tomlin's most memorable characters once asked, "What's reality, anyway, but a collective hunch?" Work in this field tends to be done largely by people who share the famous observation that reality is overrated!

However that may be, "cyberspace" connotes to some users the sorts of technologies that people in Silicon Valley (like Jaron Lanier at VPL Research, for instance) work on when they try to develop "virtual racquetball" for the disabled, computer-aided design systems that allow architects to walk through "virtual buildings" and remodel them *before* they are built, "virtual conferencing" for business meetings, or maybe someday even "virtual day care centers" for latchkey children. The user snaps on a pair of goggles hooked up to a high-powered computer terminal, puts on a special set of gloves (and perhaps other gear) wired into the same computer system, and, looking a little bit like Darth Vader, pretty much steps into a computer-driven, drug-free, 3-dimensional, interactive, infinitely expandable hallucination complete with sight, sound and touch -- allowing the user literally to move through, and experience, information.

I'm using the term "cyberspace" much more broadly, as many have lately. I'm using it to encompass the full array of computer-mediated audio and/or video interactions that are already widely dispersed in modern societies -- from things as ubiquitous as the ordinary telephone, to things that are still coming on-line like computer bulletin boards and networks like Prodigy, or like

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the WELL ("Whole Earth 'Lectronic Link"), based here in San Francisco. My topic, broadly put, is the implications of that rapidly expanding array for our constitutional order. It is a constitutional order that tends to carve up the social, legal, and political universe along lines of "physical place" or "temporal proximity." The critical thing to note is that these very lines, in cyberspace, either get bent out of shape or fade out altogether. The question, then, becomes: when the lines along which our Constitution is drawn warp or vanish, what happens to the Constitution itself?

Setting the Stage

To set the stage with a perhaps unfamiliar example, consider a decision handed down nine months ago, *Maryland v. Craig*, where the U.S. Supreme Court upheld the power of a state to put an alleged child abuser on trial with the defendant's accuser testifying not in the defendant's presence but by one-way, closed-circuit television. The Sixth Amendment, which of course antedated television by a century and a half, says: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Justice O'Connor wrote for a bare majority of five Justices that the state's procedures nonetheless struck a fair balance between costs to the accused and benefits to the victim and to society as a whole. Justice Scalia, joined by the three "liberals" then on the Court (Justices Brennan, Marshall and Stevens), dissented from that cost-benefit approach to interpreting the Sixth Amendment. He wrote:

> The Court has convincingly proved that the Maryland procedure serves a valid interest, and gives the defendant virtually everything the Confrontation Clause guarantees (everything, that is, except confrontation). I am persuaded, therefore, that the Maryland procedure is virtually constitutional. Since it is not, however, actually constitutional I [dissent].

Could it be that the high-tech, closed-circuit TV context, almost as familiar to the Court's youngest Justice as to his even younger law clerks, might've had some bearing on Justice Scalia's sly invocation of "virtual" constitutional reality? Even if Justice Scalia wasn't making a pun on "virtual reality," and I suspect he wasn't, his dissenting opinion about the Confrontation Clause requires *us* to "confront" the recurring puzzle of how constitutional provisions written two centuries ago should be construed and applied in ever-changing circumstances.

Should contemporary society's technology-driven cost-benefit fixation be allowed to water down the old-fashioned value of direct confrontation that the Constitution seemingly enshrined as basic? I would hope not. In that respect, I find myself in complete agreement with Justice Scalia.

But new technological possibilities for seeing your accuser clearly without having your accuser see you at all -- possibilities for sparing the accuser any discomfort in ways that the accuser couldn't be spared before one-way mirrors or closed-circuit TVs were developed -- *should* lead us at least to ask ourselves whether *two*-way confrontation, in which your accuser is supposed to be made uncomfortable, and thus less likely to lie, really *is* the core value of the Confrontation Clause. If so, "virtual" confrontation should be held constitutionally

insufficient. If not -- if the core value served by the Confrontation Clause is just the ability to *watch* your accuser say that you did it -- then "virtual" confrontation should suffice. New technologies should lead us to look more closely at just *what values* the Constitution seeks to preserve. New technologies should *not* lead us to react reflexively *either way* -- either by assuming that technologies the Framers didn't know about make their concerns and values obsolete, or by assuming that those new technologies couldn't possibly provide new ways out of old dilemmas and therefore should be ignored altogether.

The one-way mirror yields a fitting metaphor for the task we confront. As the Supreme Court said in a different context several years ago, "The mirror image presented [here] requires us to step through an analytical looking glass to resolve it." (*NCAA v. Tarkanian*, 109 S. Ct. at 462.) The world in which the Sixth Amendment's Confrontation Clause was written and ratified was a world in which "being confronted with" your accuser *necessarily* meant a simultaneous physical confrontation so that your accuser had to *perceive* you being accused by him. Closed-circuit television and one-way mirrors changed all that by *decoupling* those two dimensions of confrontation, marking a shift in the conditions of information-transfer that is in many ways typical of cyberspace.

What does that sort of shift mean for constitutional analysis? A common way to react is to treat the pattern as it existed *prior* to the new technology (the pattern in which doing "A" necessarily *included* doing "B") as essentially arbitrary or accidental. Taking this approach, once the technological change makes it possible to do "A" *without* "B" -- to see your accuser without having him or her see you, or to read someone's mail without her knowing it, to switch examples -- one concludes that the "old" Constitution's inclusion of "B" is irrelevant; one concludes that it is enough for the government to guarantee "A" alone. Sometimes that will be the case; but it's vital to understand that, sometimes, it won't be.

A characteristic feature of modernity is the subordination of purpose to accident -- an acute appreciation of just how contingent and coincidental the connections we are taught to make often are. We understand, as moderns, that many of the ways we carve up and organize the world reflect what our social history and cultural heritage, and perhaps our neurological wiring, bring to the world, and not some irreducible "way things are." A wonderful example comes from a 1966 essay by Jorge Louis Borges, "Other Inquisitions." There, the essayist describes the following taxonomy of the animal kingdom, which he purports to trace to an ancient Chinese encyclopedia entitled *The Celestial Emporium of Benevolent Knowledge*:

> On those remote pages it is written that animals are divided into:
> (a) those belonging to the Emperor
> (b) those that are embalmed
> (c) those that are trained
> (d) suckling pigs
> (e) mermaids
> (f) fabulous ones
> (g) stray dogs
> (h) those that are included in this classification

(i) those that tremble as if they were mad
(j) innumerable ones
(k) those drawn with a very fine camel's hair brush
(l) others
(m) those that have just broken a water pitcher
(n) those that, from a great distance, resemble flies

Contemporary writers from Michel Foucault, in *The Archaeology of Knowledge*, through George Lakoff, in *Women, Fire, and Dangerous Things*, use Borges' Chinese encyclopedia to illustrate a range of different propositions, but the *core* proposition is the supposed arbitrariness -- the political character, in a sense -- of all culturally imposed categories.

At one level, that proposition expresses a profound truth and may encourage humility by combating cultural imperialism. At another level, though, the proposition tells a dangerous lie: it suggests that we have descended into the nihilism that so obsessed Nietzsche and other thinkers -- a world where *everything* is relative, all lines are up for grabs, all principles and connections are just matters of purely subjective preference or, worse still, arbitrary convention. Whether we believe that killing animals for food is wrong, for example, becomes a question indistinguishable from whether we happen to enjoy eating beans, rice and tofu.

This is a particularly pernicious notion in a era when we pass more and more of our lives in cyberspace, a place where, almost by definition, our most familiar landmarks are rearranged or disappear altogether -- because there is a pervasive tendency, even (and perhaps especially) among the most enlightened, to forget that the human values and ideals to which we commit ourselves may indeed be universal and need not depend on how our particular cultures, or our latest technologies, carve up the universe we inhabit. It was my very wise colleague from Yale, the late Art Leff, who once observed that, even in a world without an agreed-upon God, we can still agree -- even if we can't "prove" mathematically -- that "napalming babies is wrong."

The Constitution's core values, I'm convinced, need not be transmogrified, or metamorphosed into oblivion, in the dim recesses of cyberspace. But to say that they *need* not be lost there is hardly to predict that they *will* not be. On the contrary, without further thought and awareness of the kind this conference might provide, the danger is clear and present that they *will* be.

The "event horizon" against which this transformation might occur is already plainly visible: Electronic trespassers like Kevin Mitnik don't stop with cracking pay phones, but break into NORAD -- the North American Defense Command computer in Colorado Springs -- not in a *WarGames* movie, but in real life.

Less challenging to national security but more ubiquitously threatening, computer crackers download everyman's credit history from institutions like TRW; start charging phone calls (and more) to everyman's number; set loose "worm" programs that shut down thousands of linked computers; and spread "computer viruses" through everyman's work or home PC.

It is not only the government that feels threatened by "computer crime"; both the owners and the users of private information services, computer bulletin boards, gateways, and networks feel equally vulnerable to this new breed of invisible trespasser. The response from the many who sense danger has been swift, and often brutal, as a few examples illustrate.

Last March, U.S. Secret Service agents staged a surprise raid on Steve Jackson Games, a small games manufacturer in Austin, Texas, and seized all paper and electronic drafts of its newest fantasy role-playing game, *GURPS[reg.t.m.] Cyberpunk*, calling the game a "handbook for computer crime."

By last Spring, up to one quarter of the U.S. Treasury Department's investigators had become involved in a project of eavesdropping on computer bulletin boards, apparently tracking notorious hackers like "Acid Phreak" and "Phiber Optik" through what one journalist dubbed "the dark canyons of cyberspace."

Last May, in the now famous (or infamous) "Operation Sun Devil," more than 150 secret service agents teamed up with state and local law enforcement agencies, and with security personnel from AT&T, American Express, U.S. Sprint, and a number of the regional Bell telephone companies, armed themselves with over two dozen search warrants and more than a few guns, and seized 42 computers and 23,000 floppy discs in 14 cities from New York to Texas. Their target: a loose-knit group of people in their teens and twenties, dubbed the "Legion of Doom."

I am not describing an Indiana Jones movie. I'm talking about America in the 1990s.

The Problem

The Constitution's architecture can too easily come to seem quaintly irrelevant, or at least impossible to take very seriously, in the world as reconstituted by the microchip. I propose today to canvass five axioms of our constitutional law -- five basic assumptions that I believe shape the way American constitutional scholars and judges view legal issues -- and to examine how they can adapt to the cyberspace age. My conclusion (and I will try not to give away too much of the punch line here) is that the Framers of our Constitution were very wise indeed. They bequeathed us a framework for all seasons, a truly astonishing document whose principles are suitable for all times and all technological landscapes.

Axiom 1: There is a Vital Difference *Between Government and Private Action*

The first axiom I will discuss is the proposition that the Constitution, with the sole exception of the Thirteenth Amendment prohibiting slavery, regulates action by the *government* rather than the conduct of *private* individuals and groups. In an article I wrote in the Harvard Law Review in November 1989 on "The Curvature of Constitutional Space," I discussed the Constitution's metaphor-morphosis from a Newtonian to an Einsteinian and Heisenbergian paradigm. It was common, early in our history, to see the Constitution as "Newtonian in design

with its carefully counterpoised forces and counterforces, its [geographical and institutional] checks and balances." (103 *Harv. L. Rev.* at 3.)

Indeed, in many ways contemporary constitutional law is still trapped within and stunted by that paradigm. But today at least some post-modern constitutionalists tend to think and talk in the language of relativity, quantum mechanics, and chaos theory. This may quite naturally suggest to some observers that the Constitution's basic strategy of decentralizing and diffusing power by constraining and fragmenting governmental authority in particular has been rendered obsolete.

The institutional separation of powers among the three federal branches of government, the geographical division of authority between the federal government and the fifty state governments, the recognition of national boundaries, and, above all, the sharp distinction between the public and private spheres, become easy to deride as relics of a simpler, pre-computer age. Thus Eli Noam, in the First Ithiel de Sola Pool Memorial Lecture, delivered last October at MIT, notes that computer networks and network associations acquire quasi-governmental powers as they necessarily take on such tasks as mediating their members' conflicting interests, establishing cost shares, creating their own rules of admission and access and expulsion, even establishing their own *de facto* taxing mechanisms. In Professor Noam's words, "networks become political entities," global nets that respect no state or local boundaries. Restrictions on the use of information in one country (to protect privacy, for example) tend to lead to export of that information to other countries, where it can be analyzed and then used on a selective basis in the country attempting to restrict it. "Data havens" reminiscent of the role played by the Swiss in banking may emerge, with few restrictions on the storage and manipulation of information.

A tempting conclusion is that, to protect the free speech and other rights of *users* in such private networks, judges must treat these networks not as associations that have rights of their own *against* the government but as virtual "governments" in themselves -- as entities against which individual rights must be defended in the Constitution's name. Such a conclusion would be misleadingly simplistic. There are circumstances, of course, when non-governmental bodies like privately owned "company towns" or even huge shopping malls should be subjected to legislative and administrative controls by democratically accountable entities, or even to judicial controls as though they were arms of the state -- but that may be as true (or as false) of multinational corporations or foundations, or transnational religious organizations, or even small-town communities, as it is of computer-mediated networks. It's a fallacy to suppose that, just because a computer bulletin board or network or gateway is *something like* a shopping mall, government has as much constitutional duty -- or even authority -- to guarantee open public access to such a network as it has to guarantee open public access to a privately owned shopping center like the one involved in the U.S. Supreme Court's famous *PruneYard Shopping Center* decision of 1980, arising from nearby San Jose.

The rules of law, both statutory and judge-made, through which each state *allocates* private powers and responsibilities themselves represent characteristic forms of government action. That's why a state's rules for imposing liability on private publishers, or for deciding which

private contracts to enforce and which ones to invalidate, are all subject to scrutiny for their consistency with the federal Constitution. But as a general proposition it is only what *governments* do, either through such rules or through the actions of public officials, that the United States Constitution constrains. And nothing about any new technology suddenly erases the Constitution's enduring value of restraining *government* above all else, and of protecting all private groups, large and small, from government.

It's true that certain technologies may become socially indispensable -- so that equal or at least minimal access to basic computer power, for example, might be as significant a constitutional goal as equal or at least minimal access to the franchise, or to dispute resolution through the judicial system, or to elementary and secondary education. But all this means (or should mean) is that the Constitution's constraints on government must at times take the form of imposing *affirmative duties* to assure access rather than merely enforcing *negative prohibitions* against designated sorts of invasion or intrusion.

Today, for example, the government is under an affirmative obligation to open up criminal trials to the press and the public, at least where there has not been a particularized finding that such openness would disrupt the proceedings. The government is also under an affirmative obligation to provide free legal assistance for indigent criminal defendants, to assure speedy trials, to underwrite the cost of counting ballots at election time, and to desegregate previously segregated school systems. But these occasional affirmative obligations don't, or shouldn't, mean that the Constitution's axiomatic division between the realm of public power and the realm of private life should be jettisoned.

Nor would the "indispensability" of information technologies provide a license for government to impose strict content, access, pricing, and other types of regulation. *Books* are indispensable to most of us, for example -- but it doesn't follow that government should therefore be able to regulate the content of what goes onto the shelves of *bookstores*. The right of a private bookstore owner to decide which books to stock and which to discard, which books to display openly and which to store in limited access areas, should remain inviolate. And note, incidentally, that this needn't make the bookstore owner a "publisher" who is liable for the words printed in the books on her shelves. It's a common fallacy to imagine that the moment a computer gateway or bulletin board begins to exercise powers of selection to control who may be on line, it must automatically assume the responsibilities of a newscaster, a broadcaster, or an author. For computer gateways and bulletin boards are really the "bookstores" of cyberspace; most of them organize and present information in a computer format, rather than generating more information content of their own.

Axiom 2: The Constitutional Boundaries of Private Property and Personality Depend on Variables Deeper Than *Social Utility and Technological Feasibility*

The second constitutional axiom, one closely related to the private-public distinction of the first axiom, is that a person's mind, body, and property belong *to that person* and not to the public as a whole. Some believe that cyberspace challenges that axiom because its entire premise lies in the existence of computers tied to electronic transmission networks that process

digital information. Because such information can be easily replicated in series of "1"s and "0"s, anything that anyone has come up with in virtual reality can be infinitely reproduced. I can log on to a computer library, copy a "virtual book" to my computer disk, and send a copy to your computer without creating a gap on anyone's bookshelf. The same is true of valuable computer programs, costing hundreds of dollars, creating serious piracy problems. This feature leads some, like Richard Stallman of the Free Software Foundation, to argue that in cyberspace everything should be free -- that information can't be owned. Others, of course, argue that copyright and patent protections of various kinds are needed in order for there to be incentives to create "cyberspace property" in the first place.

Needless to say, there are lively debates about what the optimal incentive package should be as a matter of legislative and social policy. But the only *constitutional* issue, at bottom, isn't the utilitarian or instrumental selection of an optimal policy. Social judgments about what ought to be subject to individual appropriation, in the sense used by John Locke and Robert Nozick, and what ought to remain in the open public domain, are first and foremost *political* decisions.

To be sure, there are some constitutional constraints on these political decisions. The Constitution does not permit anything and everything to be made into a *private commodity*. Votes, for example, theoretically cannot be bought and sold. Whether the Constitution itself should be read (or amended) so as to permit all basic medical care, shelter, nutrition, legal assistance and, indeed, computerized information services, to be treated as mere commodities, available only to the highest bidder, are all terribly hard questions -- as the Eastern Europeans are now discovering as they attempt to draft their own constitutions. But these are not questions that should ever be confused with issues of what is technologically possible, about what is realistically enforceable, or about what is socially desirable.

Similarly, the Constitution does not permit anything and everything to be *socialized* and made into a public good available to whoever needs or "deserves" it most. I would hope, for example, that the government could not use its powers of eminent domain to "take" live body parts like eyes or kidneys or brain tissue for those who need transplants and would be expected to lead particularly productive lives. In any event, I feel certain that whatever constitutional right each of us has to inhabit his or her own body and to hold onto his or her own thoughts and creations should not depend solely on cost-benefit calculations, or on the availability of technological methods for painlessly effecting transfers or for creating good artificial substitutes.

Axiom 3: *Government May Not Control Information Content*

A third constitutional axiom, like the first two, reflects a deep respect for the integrity of each individual and a healthy skepticism toward government. The axiom is that, although information and ideas have real effects in the social world, it's not up to government to pick and choose for us in terms of the *content* of that information or the *value* of those ideas.

This notion is sometimes mistakenly reduced to the naive child's ditty that "sticks and stones may break my bones, but words can never hurt me." Anybody who's ever been called

something awful by children in a schoolyard knows better than to believe any such thing. The real basis for First Amendment values isn't the false premise that information and ideas have no real impact, but the belief that information and ideas are *too important* to entrust to any government censor or overseer.

If we keep that in mind, and *only* if we keep that in mind, will we be able to see through the tempting argument that, in the Information Age, free speech is a luxury we can no longer afford. That argument becomes especially tempting in the context of cyberspace, where sequences of "0"s and "1"s may become virtual life forms. Computer "viruses" roam the information nets, attaching themselves to various programs and screwing up computer facilities. Creation of a computer virus involves writing a program; the program then replicates itself and mutates. The electronic code involved is very much like DNA. If information content is "speech," and if the First Amendment is to apply in cyberspace, then mustn't these viruses be "speech" -- and mustn't their writing and dissemination be constitutionally protected? To avoid that nightmarish outcome, mustn't we say that the First Amendment is *inapplicable* to cyberspace?

The answer is no. Speech is protected, but deliberately yelling "Boo!" at a cardiac patient may still be prosecuted as murder. Free speech is a constitutional right, but handing a bank teller a hold-up note that says, "Your money or your life," may still be punished as robbery. Stealing someone's diary may be punished as theft -- even if you intend to publish it in book form. And the Supreme Court, over the past fifteen years, has gradually brought advertising within the ambit of protected expression without preventing the government from protecting consumers from deceptive advertising. The lesson, in short, is that constitutional principles are subtle enough to bend to such concerns. They needn't be broken or tossed out.

Axiom 4: The Constitution is Founded on Normative Conceptions of Humanity That Advances *in Science and Technology Cannot "Disprove"*

A fourth constitutional axiom is that the human spirit is something beyond a physical information processor. That axiom, which regards human thought processes as not fully reducible to the operations of a computer program, however complex, must not be confused with the silly view that, because computer operations involve nothing more than the manipulation of "on" and "off" states of myriad microchips, it somehow follows that government control or outright seizure of computers and computer programs threatens no First Amendment rights because human thought processes are not directly involved. To say that would be like saying that government confiscation of a newspaper's printing press and tomorrow morning's copy has nothing to do with speech but involves only a taking of metal, paper, and ink. Particularly if the seizure or the regulation is triggered by the content of the information being processed or transmitted, the First Amendment is of course fully involved. Yet this recognition that information processing by computer entails something far beyond the mebe sequencing of mechanical or chemical steps still leaves a potential gap between what computers can do internally and in communication with one another -- and what goes on within and between human minds. It is that gap to which this fourth axiom is addressed; the very existence of any such gap is, as I'm sure you know, a matter of considerable controversy.

What if people like the mathematician and physicist Roger Penrose, author of *The Emperor's New Mind*, are wrong about human minds? In that provocative recent book, Penrose disagrees with those Artificial Intelligence, or AI, gurus who insist that it's only a matter of time until human thought and feeling can be perfectly simulated or even replicated by a series of purely physical operations -- that it's all just neurons firing and neurotransmitters flowing, all subject to perfect modeling in suitable computer systems. Would an adherent of that AI orthodoxy, someone whom Penrose fails to persuade, have to reject as irrelevant for cyberspace those constitutional protections that rest on the anti-AI premise that minds are *not* reducible to really fancy computers?

Consider, for example, the Fifth Amendment, which provides that "no person shall be . . . compelled in any criminal case to be a witness against himself." The Supreme Court has long held that suspects may be required, despite this protection, to provide evidence that is not "testimonial" in nature -- blood samples, for instance, or even exemplars of one's handwriting or voice. Last year, in a case called *Pennsylvania v. Muniz*, the Supreme Court held that answers to even simple questions like "When was your sixth birthday?" are testimonial because such a question, however straightforward, nevertheless calls for the product of mental activity and therefore uses the suspect's mind against him. But what if science could eventually describe thinking as a process no more complex than, say, riding a bike or digesting a meal? Might the progress of neurobiology and computer science eventually overthrow the premises of the *Muniz* decision?

I would hope not. For the Constitution's premises, properly understood, are *normative* rather than *descriptive*. The philosopher David Hume was right in teaching that no "ought" can ever be logically derived from an "is." If we should ever abandon the Constitution's protection for the distinctively and universally human, it won't be because robotics or genetic engineering or computer science have led us to deeper truths, but rather because they have seduced us into more profound confusions. Science and technology open options, create possibilities, suggest incompatibilities, generate threats. They do not alter what is "right" or what is "wrong." The fact that those notions are elusive and subject to endless debate need not make them totally contingent on contemporary technology.

Axiom 5: Constitutional Principles Should Not *Vary With Accidents of Technology*

In a sense, that's the fifth and final constitutional axiom I would urge upon this gathering: that the Constitution's norms, at their deepest level, must be invariant under merely *technological* transformations. Our constitutional law evolves through judicial interpretation, case by case, in a process of reasoning by analogy from precedent. At its best, that process is ideally suited to seeing beneath the surface and extracting deeper principles from prior decisions. At its worst, though, the same process can get bogged down in superficial aspects of preexisting examples, fixating upon unessential features while overlooking underlying principles and values.

When the Supreme Court in 1928 first confronted wiretapping and held in *Olmstead v. United States* that such wiretapping involved no "search" or "seizure" within the meaning of the

Fourth Amendment's prohibition of "unreasonable searches and seizures," the majority of the Court reasoned that the Fourth Amendment "itself shows that the search is to be of material things -- the person, the house, his papers or his effects," and said that "there was no searching" when a suspect's phone was tapped because the Constitution's language "cannot be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office." After all, said the Court, the intervening wires "are not part of his house or office any more than are the highways along which they are stretched." Even to a law student in the 1960s, as you might imagine, that "reasoning" seemed amazingly artificial. Yet the *Olmstead* doctrine still survived.

It would be illuminating at this point to compare the Supreme Court's initial reaction to new technology in *Olmstead* with its initial reaction to new technology in *Maryland v. Craig*, the 1990 closed-circuit television case with which we began this discussion. In *Craig*, a majority of the Justices assumed that, when the 18th- century Framers of the Confrontation Clause included a guarantee of two-way *physical* confrontation, they did so solely because it had not yet become technologically feasible for the accused to look his accuser in the eye without having the accuser simultaneously watch the accused. Given that this technological obstacle has been removed, the majority assumed, one-way confrontation is now sufficient. It is enough that the accused not be subject to criminal conviction on the basis of statements made outside his presence.

In *Olmstead*, a majority of the Justices assumed that, when the 18th-century authors of the Fourth Amendment used language that sounded "physical" in guaranteeing against invasions of a person's dwelling or possessions, they did so not solely because *physical* invasions were at that time the only serious threats to personal privacy, but for the separate and distinct reason that *intangible* invasions simply would not threaten any relevant dimension of Fourth Amendment privacy.

In a sense, *Olmstead* mindlessly read a new technology *out* of the Constitution, while *Craig* absent-mindedly read a new technology *into* the Constitution. But both decisions -- *Olmstead* and *Craig* -- had the structural effect of withholding the protections of the Bill of Rights from threats made possible by new information technologies. *Olmstead* did so by implausibly reading the Constitution's text as though it represented a deliberate decision not to extend protection to threats that 18th-century thinkers simply had not foreseen. *Craig* did so by somewhat more plausibly -- but still unthinkingly -- treating the Constitution's seemingly explicit coupling of two analytically distinct protections as reflecting a failure of technological foresight and imagination, rather than a deliberate value choice.

The *Craig* majority's approach appears to have been driven in part by an understandable sense of how a new information technology could directly protect a particularly sympathetic group, abused children, from a traumatic trial experience. The *Olmstead* majority's approach probably reflected both an exaggerated estimate of how difficult it would be to obtain wiretapping warrants even where fully justified, and an insufficient sense of how a new information technology could directly threaten all of us. Although both *Craig* and *Olmstead*

reveal an inadequate consciousness about how new technologies interact with old values, *Craig* at least seems defensible even if misguided, while *Olmstead* seems just plain wrong.

Around 23 years ago, as a then-recent law school graduate serving as law clerk to Supreme Court Justice Potter Stewart, I found myself working on a case involving the government's electronic surveillance of a suspected criminal -- in the form of a tiny device attached to the outside of a public telephone booth. Because the invasion of the suspect's privacy was accomplished without physical trespass into a "constitutionally protected area," the Federal Government argued, relying on *Olmstead*, that there had been no "search" or "seizure," and therefore that the Fourth Amendment "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," simply did not apply.

At first, there were only four votes to overrule *Olmstead* and to hold the Fourth Amendment applicable to wiretapping and electronic eavesdropping. I'm proud to say that, as a 26-year-old kid, I had at least a little bit to do with changing that number from four to seven -- and with the argument, formally adopted by a seven-Justice majority in December 1967, that the Fourth Amendment "protects people, not places." (389 U.S. at 351.) In that decision, *Katz v. United States*, the Supreme Court finally repudiated *Olmstead* and the many decisions that had relied upon it and reasoned that, given the role of electronic telecommunications in modern life, the First Amendment purposes of protecting *free speech* as well as the Fourth Amendment purposes of protecting *privacy* require treating as a "search" any invasion of a person's confidential telephone communications, with or without physical trespass.

Sadly, nine years later, in *Smith v. Maryland*, the Supreme Court retreated from the *Katz* principle by holding that no search occurs and therefore no warrant is needed when police, with the assistance of the telephone company, make use of a "pen register", a mechanical device placed on someone's phone line that records all numbers dialed from the phone and the times of dialing. The Supreme Court, over the dissents of Justices Stewart, Brennan, and Marshall, found no legitimate expectation of privacy in the numbers dialed, reasoning that the digits one dials are routinely recorded by the phone company for billing purposes. As Justice Stewart, the author of *Katz*, aptly pointed out, "that observation no more than describes the basic nature of telephone calls . . . . It is simply not enough to say, after *Katz*, that there is no legitimate expectation of privacy in the numbers dialed because the caller assumes the risk that the telephone company will expose them to the police." (442 U.S. at 746-747.) Today, the logic of *Smith* is being used to say that people have no expectation of privacy when they use their cordless telephones since they know or should knowgmn?^? that radio waves can be easily monitored!

It is easy to be pessimistic about the way in which the Supreme Court has reacted to technological change. In many respects, *Smith* is unfortunately more typical than *Katz* of the way the Court has behaved. For example, when movies were invented, and for several decades thereafter, the Court held that movie exhibitions were not entitled to First Amendment protection. When community access cable TV was born, the Court hindered municipal attempts to provide it at low cost by holding that rules requiring landlords to install small cable boxes on their

apartment buildings amounted to a compensable taking of property. And in *Red Lion v. FCC*, decided twenty-two years ago but still not repudiated today, the Court ratified government control of TV and radio broadcast content with the dubious logic that the scarcity of the electromagnetic spectrum justified not merely government policies to auction off, randomly allocate, or otherwise ration the spectrum according to neutral rules, but also much more intrusive and content-based government regulation in the form of the so-called "fairness doctrine."

Although the Supreme Court and the lower federal courts have taken a somewhat more enlightened approach in dealing with cable television, these decisions for the most part reveal a curious judicial blindness, as if the Constitution had to be reinvented with the birth of each new technology. Judges interpreting a late 18th century Bill of Rights tend to forget that, unless its *terms* are read in an evolving and dynamic way, its *values* will lose even the *static* protection they once enjoyed. Ironically, *fidelity* to original values requires *flexibility* of textual interpretation. It was Judge Robert Bork, not famous for his flexibility, who once urged this enlightened view upon then Judge (now Justice) Scalia, when the two of them sat as colleagues on the U.S. Court of Appeals for the D.C. Circuit.

Judicial error in this field tends to take the form of saying that, by using modern technology ranging from the telephone to the television to computers, we "assume the risk." But that typically begs the question. Justice Harlan, in a dissent penned two decades ago, wrote: "Since it is the task of the law to form and project, as well as mirror and reflect, we should not . . . merely recite . . . risks without examining the *desirability* of saddling them upon society." (*United States v. White*, 401 U.S. at 786). And, I would add, we should not merely recite risks without examining how imposing those risks comports with the Constitution's fundamental values of *freedom*, *privacy*, and *equality*.

Failing to examine just that issue is the basic error I believe federal courts and Congress have made:

* in regulating radio and TV broadcasting without adequate sensitivity to First Amendment values;

* in supposing that the selection and editing of video programs by cable operators might be less than a form of expression;

* in excluding telephone companies from cable and other information markets;

* in assuming that the processing of "O"s and "1"s by computers as they exchange data with one another is something less than "speech"; and

* in generally treating information processed electronically as though it were somehow less entitled to protection for that reason.

The lesson to be learned is that these choices and these mistakes are not dictated by the Constitution. They are decisions for us to make in interpreting that majestic charter, and in implementing the principles that the Constitution establishes.

Conclusion

If my own life as a lawyer and legal scholar could leave just one legacy, I'd like it to be the recognition that the Constitution *as a whole* "protects people, not places." If that is to come about, the Constitution as a whole must be read through a technologically transparent lens. That is, we must embrace, as a rule of construction or interpretation, a principle one might call the "cyberspace corollary." It would make a suitable Twenty-seventh Amendment to the Constitution, one befitting the 200th anniversary of the Bill of Rights. Whether adopted all at once as a constitutional amendment, or accepted gradually as a principle of interpretation that I believe should obtain even without any formal change in the Constitution's language, the corollary I would propose would do for *technology* in 1991 what I believe the Constitution's Ninth Amendment, adopted in 1791, was meant to do for *text*.

The Ninth Amendment says: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." That amendment provides added support for the long-debated, but now largely accepted, "right of privacy" that the Supreme Court recognized in such decisions as the famous birth control case of 1965, *Griswold v. Connecticut*. The Ninth Amendment's simple message is: The *text* used by the Constitution's authors and ratifiers does not exhaust the values our Constitution recognizes. Perhaps a Twenty-seventh Amendment could convey a parallel and equally simple message: The *technologies* familiar to the Constitution's authors and ratifiers similarly do not exhaust the *threats* against which the Constitution's core values must be protected.

The most recent amendment, the twenty-sixth, adopted in 1971, extended the vote to 18-year-olds. It would be fitting, in a world where youth has been enfranchised, for a twenty-seventh amendment to spell a kind of "childhood's end" for constitutional law. The Twenty-seventh Amendment, to be proposed for at least serious debate in 1991, would read simply:

> "This Constitution's protections for the freedoms of speech, press, petition, and assembly, and its protections against unreasonable searches and seizures and the deprivation of life, liberty, or property without due process of law, shall be construed as fully applicable without regard to the technological method or medium through which information content is generated, stored, altered, transmitted, or controlled."

[Note: The machine-readable original of this was provided by the author on a PC diskette in WordPerfect. It was reformatted to ASCII, appropriate for general network and computer access, by Jim Warren. Text that was underlined or boldface in the original copy was delimited by

asterisks, and a registered trademark symbol was replaced by "reg.t.m.". Other than that, the text was as provided by the author.]

The Public Private Distinction in Internet Governance I; Introduction to State Action

Allen S. Hammond, Private Networks, Public Speech: Constitutional Speech Dimensions of Access to Private Networks, 55 U. Pitt. L. Rev. 1085 (1994)

I. INTRODUCTION

The current multiple network environment in the United States is undergoing significant change as a result of the phenomena of network and media convergence and the provision of network services outside the heretofore traditional rubric of common carriage via the public switched network. The convergence phenomena can be seen in the merger of fiber optic, telephone and computer technologies into broad band telecommunications networks technology. Convergence is also evident in the disintegration of distinctions between video distribution and public switched networks as technology, government policy and user demand combine to introduce inter-industry competition into the nation's video distribution, inter-exchange and local exchange markets. n1 The movement from service provision via common carrier to private carriage can be seen in several developments as well. They include private and common carrier responses to the growing demand for specialized communication services. It is estimated that as much as a third of the nation's total yearly telecommunications investment is channelled into private networks, virtual private networks and related hybrid services.

Reliance on private investment in the construction and servicing of the public switched network infrastructure is also the chosen vehicle for building the broadband electronic super-highway, which many believe will be the logical evolution of the public switched network and its more private analogues. n2

The Clinton administration's reliance on private sector investment and privatization of network infrastructure is a pragmatic policy developed in a time of decreasing public revenues. Sole reliance on pro competition policies, however, will not adequately protect individual and group speech and related activities fostered by broadband intelligent networks or existing telecommunications networks. In the process of managing market entry and firm competition, current U.S. competition policies run the risk of ceding creation and control of speech activities to private firms. This is particularly true to the extent the First Amendment is read as a negative bar to government action rather than an affirmative protection for speech activities.

Pro-competitive privatization policies do not directly address the need for preserving and expanding electronic speech activities as a valid goal, and thus there is a significant risk of losing opportunities for electronic speech and its related activities. Consequently the definition, preservation and expansion of electronic speech and its related activities must be elevated to a priority policy goal and incorporated within the broader policy framework of the government's NII policy.

Many states have made the same decision in their pursuit of similar pro-competitive telecommunications policies. For instance, the state of New York has recently published a document developed by the Governor's Telecommunications Exchange. The document, entitled "Connecting to the Future," identifies numerous policies which it is suggested that the state pursue in acquiring the economic benefits of an advanced telecommunications infrastructure. Among the key recommendations is reliance on a competitive market to ensure greater consumer choice and higher quality service. Unlike the federal government's NII report, however

the New York report acknowledges that the state retains an obligation to ensure a free flow of information and ideas. CONNECTING TO THE FUTURE: GREATER ACCESS, SERVICES, AND COMPETITION IN TELECOMMUNICATIONS, REP. OF THE N.Y. TELECOMMUNICATIONS EXCHANGE, Dec. 1993, at xii, 18-21, 28-29.
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As these changes occur, one of the critical questions for First Amendment theorists and scholars concerned with mass media and telecommunications is what access and speech rights will network owners and users have after the convergence and privatization of the mass media and telecommunications networks? n3

As the convergence phenomenon intersects with the growing reliance on private as opposed to public common carriage provision of network services, there are potential dangers to access and broad-based speech opportunities. Privatizing the ownership of the technologies and networks can lead to the concentration of control over content in the hands of private network owners. As a result of the historic tendency to equate speech rights with ownership of the means of transmission, privatizing the merging of technology, network function and information streams could effectuate a transfer of the current shared control over access and speech from the current public/private constitutional arrangement to private/contractual arrangements. n4 Such a result could be detrimental to the potential speech and access opportunities of existing and future network users of video, voice and data network information services. n5 Private owners may not be motivated by public interest considerations of access and inclusion. Instead, their major motivation to provide access and speech to their employees is utilitarian, and their major motivation to serve a particular individual or group of customers depends (in the most ideal sense) upon the desirability of that individual or market as a customer base and their ability to pay. These decisions are private, and thus there is arguably less opportunity to rest the justification for access and speech rights upon constitutional grounds given the alleged absence of state action. n6

n6 Several scholars have criticized the current state/private dichotomy established by the Supreme Court in light of the continuing trend toward privatization in American life. See Rodney A. Smolla, The Bill of Rights At 200 Years: Bicentennial Perspective: Preserving the Bill of Rights in the Modern Administrative-Industrial State, 31 WM. & MARY L. REV. 321, 358-359 (1990) (arguing that since restraints on human thought and action are the same whether applied by public or private entities, protection of constitutional freedoms should be maintained in the private as well as the public sector); Clyde W. Summers, The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons from Labor Law, U. ILL. L. REV. 689, 702 (1989) (arguing that as more public functions are performed by private entities there is a critical need to protect constitutional rights heretofore protected from government control in the public sphere from private control in the private sphere).

Generally, absent a showing of an independent nexus of involvement by the state, however, neither the chartering, funding, licensing, regulating or tax exemption of a corporation by the government constitutes state action. See Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (regulation); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (licensing); Trageser v. Libbie Rehabilitation Ctr., 590 F.2d 87 (4th Cir. 1978), cert. denied, 442 U.S. 947 (1979) (funding); Aasum v. Good Samaritan Hosp., 542 F.2d 792 (9th Cir. 1976); Cohen v. Illinois Inst. of Technology, 524 F.2d 818 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976); Weis v.

Syracuse University, 552 F. Supp. 675, 522 F.2d 397 (2d Cir. 1975) (N.D.N.Y. 1982); Naranjo v. Alverno College, 487 F. Supp. 635 (E.D. Wis. 1980); Manning v. Greensville Memorial Hosp., 470 F. Supp. 662 (E.D. Va. 1979); Stewart v. New York Univ., 430 F. Supp. 1305 (S.D.N.Y. 1976); and Sament v. Hahnemann Medical College and Hosp. of Phila., 413 F. Supp. 434 (E.D. Pa. 1976), aff'd mem., 547 F.2d 1164 (3d Cir. 1977) (charter).

Where the private entity exercises powers traditionally reserved to the state, state action may be found. See Evans v. Newton, 382 U.S. 296 (1966) (municipal park); Marsh v. Alabama 326 U.S. 501 (1946) (company town); and Nixon v. Condon, 286 U.S. 73 (1932) (election).

Government regulation of broadcasting has not been deemed sufficient justification for finding that the editorial decisions of broadcasters constitute state action. See CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973). Decisions by regulated telephone companies to deny billing services to information providers of government regulated indecent communication has not been deemed to constitute state action. The weight of precedent would tend to support a conclusion that activities of regulated entities such as cable operators and telephone companies which would be constitutionally proscribed if conducted by the government are constitutionally permissible. Recently, however, statutorily required efforts by cable operators to limit or ban indecent programming on leased and/or public access channels have been deemed to constitute state action. See infra note 106.

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Under such circumstances it is reasonable to ask: Will privatizing the post-convergence, multi-functional, multi-media networks result in speech rights only for network owners and those they elect to employ or to serve under contract? Who will serve people who own no network? In an era of privatized carriage in the provision of network services, what ability will the government have to assure access and speech rights for the non-facilities-based public?

This article defines private networks and closed user groups and examines the current practices by which they limit the access and speech activities of potential and actual customers and subscribers as well as employees on their networks. It then identifies and addresses some of the potential constitutional questions raised by such practices. The article concludes that current government efforts to rely on network privatization to assure the development of network infrastructure will continue. Even as this trend continues over time, however, the government retains ways in which it may act to ensure access and speech rights for potential private network users, whether they are subscribers or employees, while acknowledging the access and speech rights of network providers.

The application and enforcement of libel, indecency and obscenity laws can serve to encourage some network owners to relinquish editorial control over content in order to avoid liability. This assumes that the government relinquishes its strategy of imposing responsibility and liability on both the network owner and the subscriber. Ultimately, absent the assertion of editorial control by the network provider, responsibility and liability for speech should reside with the speaker.

Similarly, the removal of government-sanctioned limitations on carrier tort liability would encourage network owners to eschew private carriage for the protection that public common carriage affords. Tort liability under state law would attach whenever the private carrier negligently handles subscriber information. Private carrier and closed user group attempts to

exempt themselves from such liability via exculpatory contract clauses or tariff language would be deemed unconscionable and unenforceable as a matter of law where it could be established that the subscriber does not possess equal bargaining power. Only carriers providing service to the general public or substantial interconnection with public networks should enjoy the protection from tort liability. Like the imposition of libel and criminal liability, the application of tort liability would also serve as an incentive for private networks to eschew control over content or, at the very least, provide access via interconnection between other networks.

Marsh v. Alabama
326 U.S. 501 (1946)

December 6, 1945, Argued
January 7, 1946, Decided

PRIOR HISTORY: APPEAL FROM THE COURT OF APPEALS OF ALABAMA.

APPEAL from the affirmance [***2] of a conviction for violation of a state statute challenged as invalid under the Federal Constitution. The State Supreme Court denied certiorari, 246 Ala. 539, 21 So. 2d 564.

DISPOSITION: 21 So. 2d 558, reversed.

JUDGES: Stone, Black, Reed, Frankfurter, Douglas, Murphy, Rutledge, Burton; Jackson took no part in the consideration or decision of this case.

OPINIONBY: BLACK

OPINION: [*502] [**277] MR. JUSTICE BLACK delivered the opinion of the Court.

In this case we are asked to decide whether a State, consistently with the First and Fourteenth Amendments, can impose criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town's management. The town, a suburb of Mobile, Alabama, known as Chickasaw, is owned by the Gulf Shipbuilding Corporation. Except for that it has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of [***3] sewers, a sewage disposal plant and a "business block" on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block and [*503] the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area. The town and the surrounding neighborhood, which can not be distinguished from the Gulf property by anyone not familiar with the property lines, are thickly settled, and according to all indications the residents use the business block as their regular shopping center. To do so, they now, as they have for many years, make use of a company-owned paved street and sidewalk located alongside the store fronts in order to enter and leave the stores and the post office. Intersecting company-owned roads at each end of the business block lead into a four-lane public highway which runs parallel to the business block at a distance of thirty feet. There is nothing to stop highway traffic from coming onto the business block and upon arrival a traveler [***4] may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.

Appellant, a Jehovah's Witness, . . . was warned that she could not distribute the literature without a permit. . . . When she was asked to leave the sidewalk and Chickasaw she declined. The deputy sheriff arrested her and she was charged in the state court with [trespass]. . . .

...

... Under our decision in Lovell v. Griffin, [***6] 303 U.S. 444 and others which have followed that case, n1 neither a State nor a municipality can completely [**278] bar the distribution of literature . . . . Our question then narrows down to this: Can those people who live in or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town?

...

... Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Cf. Republic Aviation Corp. v. Labor Board, 324 U.S. 793, 798, 802, n. 8. Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation. n3

...

... Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free.

...

When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. . . . In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute. Reversed and remanded.

U.S. Supreme Court

SHELLEY V. KRAEMER , 334 U.S. 1 (1948) 334 U.S. 1

SHELLEY et ux.

v.

KRAEMER et ux.

McGHEE et ux.

v.

SIPES et al.

Nos. 72, 87.

Argued Jan. 15, 16, 1948.

Decided May 3, 1948.

[Shelley v. Kraemer 334 U.S. 1 (1948)] [334 U.S. 1 , 2]

Messrs. George L. Vaughn and Herman Willer, both of St. Louis, Mo., for petitioners Shelley. [334 U.S. 1 , 2] Messrs. Thurgood Marshall, of New York City, Loren Miller, for petitioners McGhee. [334 U.S. 1 , 3] Mr. Gerald L. Seegers, of St. Louis, Mo., for respondents Kraemer.

Messrs. Henry Gilligan and James A. Crooks, both of Washington, D.C. for respondents Sipes and others.

Mr. Philip B. Perlman, Sol. Gen., of Washington, D.C., for the United States, as amicus curiae, by special leave of Court. [334 U.S. 1 , 4]

Mr. Cheif Justice VINSON delivered the opinion of the Court.

These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the Basic constitutional issues of obvious importance have been raised.

The first of these cases comes to this Court on certiorari to the Supreme Court of Missouri. On February 16, 1911, thirty out of a total of thirty-nine owners of property fronting both sides of Labadie Avenue between Taylor Avenue and Cora Avenue in the city of St. Louis, signed an agreement, which was subsequently recorded, providing in part:

'* * * the said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date, so that it shall be a condition all the time and whether recited and referred to as (sic) not in subsequent conveyances and shall attach to the land, as a condition precedent to the sale of the same, that hereafter no part of said property or any [334 U.S. 1 , 5] portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race.'

The entire district described in the agreement included fifty-seven parcels of lamd. The thirty owners who signed the agreement held title to forty-seven parcels, including the particular parcel involved in this case. At the time the agreement was signed, five of the parcels in the district were owned by Negroes. One of those had been occupied by Negro families since 1882, nearly thirty years before the restrictive agreement was executed. The trial court found that owners of seven out of nine homes on the south side of Labadie Avenue, within the restrit ed district and 'in the immediate vicinity' of the premises in question, had failed to sign the restrictive agreement in 1911. At the time this action was brought, four of the premises were occupied by Negroes, and had been so occupied for periods ranging from twenty-three to sixty-three years. A fifth parcel had been occupied by Negroes until a year before this suit was instituted.

On August 11, 1945, pursuant to a contract of sale, petitioners Shelley, who are Negroes, for valuable consideration received from one Fitzgerald a warranty deed to the parcel in question. 1 The trial court found that petitioners had no actual knowledge of the restrictive agreement at the time of the purchase. [334 U.S. 1 , 6] On October 9, 1945, respondents, as owners of other property subject to the terms of the restrictive covenant, brought suit in Circuit Court of the city of St. Louis prarying that petitioners Shelley be restrained from taking possession of the property and that judgment be entered divesting title out of petitioners Shelley and revesting title in the immediate grantor or in such other person as the court should direct. The trial court denied the requested relief on the ground that the restrictive agreement, upon which respondents based their action, had never become final and complete because it was the intention of the parties to that agreement that it was not to become effective until signed by all property owners in the district, and signatures of all the owners had never been obtained.

The Supreme Court of Missouri sitting en banc reversed and directed the trial court to grant the relief for which respondents had prayed. That court held the agreement effective and concluded that enforcement of its provisions violated no rights guaranteed to petitioners by the Federal Constitution. 2 At the time the court rendered its decision, petitioners were occupying the property in question.

The second of the cases under consideration comes to this Court from the Supreme Court of Michigan. The circumstances presented do not differ materially from the Missouri case. In June, 1934, one Ferguson and his wife, who then owned the property located in the city of Detroit which is involved in this case, executed a contract providing in part:

'This property shall not be used or occupied by any person or persons except those of the Caucasian race. [334 U.S. 1 , 7] 'It is further agreed that this restriction shall not be effective unless at least eighty percent of the property fronting on both sides of the street in the block where our land is located is subjected to this or a similar restriction.'

The agreement provided that the restrictions were to remain in effect until January 1, 1960. The contract was subsequently recorded; and similar agreements were executed with respect to eighty percent of the lots in the block in which the property in question is situated.

By deed dated November 30, 1944, petitioners, who were found by the trial court to be Negroes, acquired title to the property and thereupon entered into its occupancy. On January 30, 1945, respondents, as owners of property subject to the terms of the restrictive agreement, brought suit against petitioners in the Circuit Court of Wayne County. After a hearing, the court entered a decree directing petitioners to move from the property within ninety days. Petitioners were further enjoined and restrained from using or occupying the premises in the future. On appeal, the Supreme Court of Michigan affirmed, deciding adversely to petitioners' contentions that they had been denied rights protected by the Fourteenth Amendment. 3

Petitioners have placed primary reliance on their contentions, first raised in the state courts, that judicial enforcement of the restrictive agreements in these cases has violated rights guaranteed to petitioners by the Fourteenth Amendment of the Federal Constitution and Acts of Congress passed pursuant to that Amendment. 4 Spe- [334 U.S. 1 , 8] cifically, petitioners urge that they have been denied the equal protection of the laws, deprived of property without due process of law, and have been denied privileges and immunities of citizens of the United States. We pass to a consideration of those issues.

I.

Whether the equal protection clause of the Fourteenth Amendment inhibits judicial enforcement by state courts of restrictive covenants based on race or color is a question which this Court has not heretofore been called upon to consider. Only two cases have been decided by this Court which in any way have involved the enforcement of such agreements. The first of these was the

case of Corrigan v. Buckley, 1926, 271 U.S. 323 . There, suit was brought in the courts of the District of Columbia to enjoin a threatened violation of certain restrictive covenants relating to lands situated in the city of Washington. Relief was granted, and the case was brought here on appeal. It is apparent that that case, which had originated in the federal courts and involved the enforcement of covenants on land located in the District of Columbia, could present no issues under the Fourteenth Amendment; for that Amendment by its terms applies only to the States. Nor was the question of the validity of court enforcement of the restrictive covenants under the Fifth Amendment properly before the Court, as the opinion of this Court specifically recognizes. 5 The only constitutional issue which the appellants had raised in the lower courts, and hence the only constitutional issue [334 U.S. 1 , 9] before this Court on appeal, was the validity of the covenant agreements as such. This Court concluded that since the inhibitions of the constitutional provisions invoked, apply only to governmental action, as contrasted to action of private individuals, there was no showing that the covenants, which were simply agreements between private property owners, were invalid. Accordingly, the appeal was dismissed for want of a substantial question. Nothing in the opinion of this Court, therefore, may properly be regarded as an adjudication on the merits of the constitutional issues presented by these cases, which raise the question of the validity, not of the private agreements as such, but of the judicial enforcement of those agreements.

The second of the cases involving racial restrictive covenants was Hansberry v. Lee, 1940, 311 U.S. 32 , 132 A.L.R. 741. In that case, petitioners, white property owners, were enjoined by the state courts from violating the terms of a restrictive agreement. The state Supreme Court had held petitioners bound by an earlier judicial determination, in litigation in which petitioners were not parties, upholding the validity of the restrictive agreement, although, in fact, the agreement had not been signed by the number of owners necessary to make it effective under state law. This Court reversed the judgment of the state Supreme Court upon the ground that petitioners had been denied due process f law in being held estopped to challenge the validity of the agreement on the theory, accepted by the state court, that the earlier litigation, in which petitioners did not participate, was in the nature of a class suit. In arriving at its result, this Court did not reach the issues presented by the cases now under consideration.

It is well, at the outset, to scrutinize the terms of the restrictive agreemens involved in these cases. In the Missouri case, the covenant declares that no part of the [334 U.S. 1 , 10] affected property shall be (355 Mo. 814, 198 S.W.2d 681) 'occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property * * * against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race.' Not only does the restricton seek to proscribe use and occupancy of the affected properties by members of the excluded class, but as construed by the Missouri courts, the agreement requires that title of any person who uses his property in violation of the restriction shall be divested. The restriction of the covenant in the Michigan case seeks to bar occupancy by persons of the excluded class. It provides that (316 Mich. 614, 25 N.W.2d 642) 'This property shall not be used or occupied by any person or persons except those of the Caucasian race.'

It should be observed that these covenants do not seek to proscribe any particular use of the affected properties. Use of the properties for residential occupancy, as such, is not forbidden. The restrictions of these agreements, rather, are directed toward a designated class of persons and seek to determine who may and who may not own or make use of the properties for residential purposes. The excluded class is defined wholly in terms of race or color.; 'simply that and nothing more.'6

It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. 7 Thus, [334 U.S. 1 , 11] s 1978 of the Revised Statutes, derived from 1 of the Civil Rights Act of 1866 which was enacted by Congress while the Fourteenth Amendment was also under consideration,8 provides:

'All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.'9

This Court has given specific recognition to the same principle. Buchanan v. Warley, 1917, 245 U.S. 60 , L.R.A. 1918C, 210, Ann.Cas.1918A, 1201.

It is likewise clear that restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance. We do not understand respondents to urge the contrary. In the case of Buchanan v. Warley, supa, a unanimous Court declared unconstitutional the provisions of a city ordinance which denied to colr ed persons the right to occupy houses in blocks in which the greater number of houses were occupied by white persons, and imposed similar restrictions on white persons with respect to blocks in which the greater number of houses were occupied by colored persons. During the course of the opinion in that case, this Court stated: 'The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire [334 U.S. 1 , 12] property without state legislation discriminating against him solely because of color.'10

In Harmon v. Tyler, 1927, 273 U.S. 668 , a unanimous court, on the authority of Buchanan v. Warley, supra, declared invalid an ordinance which forbade any Negro to establish a home on any property in a white community or any white person to establish a home in a Negro community, 'except on the written consent of a majority of the persons of the opposite race inhabiting such community or portion of the City to be affected.'

The precise question before this Court in both the Buchanan and Harmon cases, involved the rights of white sellers to dispose of their properties free from restrictions as to potential purchasers based on considerations of race or color. But that such legislation is also offensive to the rights of those desiring to acquire and occupy property and barred on grounds of race or color, is clear, not only from the language of the opinion in Buchanan v. Warley, supra, but from this Court's disposition of the case of City of Richmond v. Deans, 1930, 281 U.S. 704 . There, a Negro, barred from the occupancy of certain property by the terms of an ordinance similar to that in the Buchanan case, sought injunctive relief in the federal courts to enjoin the enforcement of the ordinance on the grounds that its provisions violated the terms of the Fourteenth Amendment. Such relief was granted, and this Court affirmed, finding the citation of Buchanan v. Warley, supra, and Harmon v. Tyler, supra, sufficient to support its judgment. 11

But the present cases, unlike those just discussed, do not involve action by state legislatures or city councils. [334 U.S. 1 , 13] Here the particular patterns of discrimination and the areas in which the restrictions are to operate, are determined, in tne first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so defined. The crucial issue with which we are here confronted is whether this distinction removes these cases from the operation of the prohibitory provisions of the Fourteenth Amendment.

Since the decision of this Court in the Civil Rights Cases, 1883, 109 U.S. 3 , the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of

the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful. 12

We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to pt itioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated. Cf. Corrigan v. Buckley, supra.

But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive [334 U.S. 1 , 14] terms of the agreements. The respondents urge that jjdicial enforcement of private agreements does not amount to state action; or, in any event, the participation of the State is so attenuated in character as not to amount to state action within the meaning of the Fourteenth Amendment. Finally, it is suggested, even if the States in these cases may be deemed to have acted in the constitutional sense, their action did not deprive petitioners of rights guaranteed by the Fourteenth Amendment. We move to a consideration of these matters.

II.

That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court. That principle was given expression in the earliest cases involving the construction of the terms of the Fourteenth Amendment. Thus, in Commonwealth of Virginia v. Rives, 1880, 100 U.S. 313, 318 , this Court stated: 'It is doubtless true that a State may act through different agencies,-either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another.' In Ex parte Commonwealth of Virginia, 1880, 100 U.S. 339, 347 , the Court observed: 'A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way.' In the Civil Rights Cases, 1883, 109 U.S. 3, 11 , 17, 21, this Court pointed out that the Amendment makes void 'state action of every kind' which is inconsistent with the guaranties therein contained, and extends to manifestations of 'state authority in the shape of laws, customs, or judicial or executive proceedings.' Language to like effect is em- [334 U.S. 1 , 15] ployed no less than eighteen times during the course of that opinion. 13

Similar expressions, giving specific recognition to the fact that judicial action is to be regarded as action on the State for the purposes of the Fourteenth Amendment, are to be found in numerous cases which have been more recently decided. In Twining v. New Jersey, 1908, 211 U.S. 78, 90 , 91, 16, the Court said: 'The judicial act of the highest court of the state, in authoritatively construing and enforcing its laws, is the act of the state.' In Brinkerhoff-Faris Trust & Savings Co. v. Hill, 1930, 281 U.S. 673, 680 , 454, the Court, through Mr. Justice Brandeis, stated: 'The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government.' Further examples of such declarations in the opinions of this Court are not lacking. 14

One of the earliest applications of the prohibitions contained in the Fourteenth Amendment to action of state [334 U.S. 1 , 16] judicial officials occurred in cases in which Negroes had been excluded from jury service in criminal prosecutions by reason of their race or color. These cases demonstrate, also, the early recognition by this Court that state action in violation of the Amendment's provisions is equally repugnant to the constitutional commands whether directed by state statute or taken by a judicial official in the absence of statute. Thus, in Strauder v. West Virginia, 1880, 100 U.S. 303 , this Court declared invalid a state statute restricting jury service to

white persons as amounting to a denial of the equal protection of the laws to the colored defendant in that case. In the notice and opportunity to defend, has, Ex parte Virginia, supra, held that a similar discrimination imposed by the action of a state judge denied rights protected by the Amendment, despite the fact that the language of the state statute relating to jury service contained no such restrictions.

The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defen, has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment. Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra. Cf. Pennoyer v. Neff, 1878, 95 U.S. 714 .15

In numerous cases, this Court has reversed criminal convictions in state courts for failure of those courts to provide the essential ingredients of a fair hearing. Thus it has been held that convictions obtained in state courts under the domination of a mob are void. Moore v. Dempsey, 1923, 261 U.S. 86 . And see Frank v. Mangum, 1915, 237 U.S. 309 . Convictions obtained by [334 U.S. 1 , 17] coerced confessions,16 by the use of perjured testimony known by the prosecution to be such,17 or without the effective assistance of counsel, 18 have also been held to be exertions of state authority in conflict with the fundamental rights protected by the Fourteenth Amendment.

But the examples of state judicial action which have been held by this Court to violate the Amendment's commands are not restricted to situations in which the judicial proceedings were found in some manner to be procedurally unfair. It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process. 19 Thus, in American Federation of Labor v. Swing, 1941, 312 U.S. 321 , enforcement by state courts of the common-law policy of the State, which resulted in the restraining of peaceful picketing, was held to be state action of the sort prohibited by the Amendment's guaranties of freedom of discussion. 20 In Cantwell v. Connecticut, 1940, 310 U.S. 296 , 128 A.L.R. 1352, [334 U.S. 1 , 18] a conviction in a state court of the common-law crime of breach of the peace was, under the circumstances of the case, found to be a violation of the Amendment's commonds relating to freedom of religion. In Bridges v. California, 1941, 314 U.S. 252 , 159 A.L.R. 1346, enforcement of the state's common-law rule relating to contempts by publication was held to be state action inconsistent with the prohibitions of the Fourteenth Amendment. 21 And cf. Chicago, B. & Q.R. Co. v. Chicago, 1897, 166 U.S. 226 .

The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government.

III.

Against this background of judicial construction, extending over a period of some three-quarters of a century, we are called upon to consider whether enforcement by state courts of the restrictive agreements in these cases may be deemed to be the acts of those States; and, if so, whether that action has denied these petitioners the equal protection of the laws which the Amendment was intended to insure. [334 U.S. 1 , 19] We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to

establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as theys ee fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

The enforcement of the restrictive agreements by the state courts courts in these cases was directed pursuant to the common-law policy of the States as formulated by those courts in earlier decisions. 22 In the Missouri case, enforcement of the covenant was directed in the first instance by the highest court of the State after the trial court had determined the agreement to be invalid for [334 U.S. 1 , 20] want of the requisite number of signatures. In the Michigan case, the order of enforcement by the trial court was affirmed by the highest state court. 23 The judicial action in each case bears the clear and unmistakable imprimatur of the State. We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. 24 Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.

We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of theFourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or [334 U.S. 1 , 21] color. 25 The Fourteenth Amendment declares 'that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color.'26 Strauder v. West Virginia, supra, 100 U.S. at 307. Only recently this Court has had occasion to declare that a state law which denied equal enjoyment of property rights to a designated class of citizens of specified race and ancestry, was not a legitimate exercise of the state's police power but violated the guaranty of the equal protectin of the laws. Oyama v. California, 1948, 332 U.S. 633 . Nor may the discriminations imposed by the state courts in these cases be justified as proper exertions of state police power. 27 Cf. Buchanan v. Warley, supra.

Respondents urge, however, that since the state courts stand ready to enforce restrictive covenants excluding white persons from the ownership or occupancy of property covered by such agreements, enforcement of covenants excluding colored persons may not be deemed a

denial of equal protection of the laws to the colored persons who are thereby affected. 28 This contention does [334 U.S. 1 , 22] not bear scrutiny. The parties have directed our attention to no case in which a court, state or federal, has been called upon to enforce a covenant excluding members of the white majority from ownership or occupancy of real property on grounds of race or color. But there are more fundamental considerations. The rights ceated by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. 29 It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

Nor do we find merit in the suggestion that property owners who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment. Cf. Marsh v. Alabama, 1946, 326 U.S. 501 .

The problem of defining the scope of the restrictions which the Federal Constitution imposes upon exertions of power by the States has given rise to many of the most persistent and fundamental issues which this Court has been called upon to consider. That problem was foremost in the minds of the framers of the Constitution, [334 U.S. 1 , 23] and since that early day, has arisen in a multitude of forms. The task of determining whether the action of a State offends constitutional provisions is one which may not be undertaken lightly. Where, however, it is clear that the action of the State violt es the terms of the fundamental charter, it is the obligation of this Court so to declare.

The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind. 30

Upon full consideration, we have concluded that in these cases the States have acted to deny petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment. Having so decided, we find it unnecessary to consider whether petitioners have also been deprived of property without due process of law or denied privileges and immunities of citizens of the United States.

For the reasons stated, the judgment of the Supreme Court of Missuri and the judgment of the Supreme Court of Michigan must be reversed.

Reversed.

Mr. Justice REED, Mr. Justice JACKSON, and Mr. Justice RUTLEDGE took no part in the consideration or decision of these cases.

Footnotes

[Footnote 1] The trial court found that title to the property which petitioners Shelley sought to purchase was held by one Bishop, a real estate dealer, who placed the property in the name of Josephine Fitzgerald. Bishop, who acted as agent for petitioners in the purchase, concealed the fact of his ownership.

[Footnote 2] Kraemer v. Shelley, 1946, 355 Mo. 814, 198 S.W.2d 679.

[Footnote 3] Sipes v. McGhee, 1947, 316 Mich 614, 25 N.W.2d 638.
[Footnote 4] The first section of the Fourteenth Amendment provides: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'
[Footnote 5] Corrigan v. Buckley, 1926, 271 U.S. 323, 330 , 331, 523, 524.
[Footnote 6] Buchanan v. Warley, 1917, 245 U.S. 60, 73 , 18, L.R.A.1918C, 210, Ann.Cas.1918A, 1201.
7. Slaughter-House Cases, 1873, 16 Wall. 36, 70, 81. See Flack, The Adoption of the Fourteenth Amendment.
[Footnote 8] In Oyama v. California, 1948, 332 U.S. 633, 640 , 272, the section of the Civil Rights Act herein considered is described as the federal statute, 'enacted before the Fourteenth Amendment but vindicated by it.' The Civil Rights Act of 1866 was reenacted in 18 of the Act of May 31, 1870, subsequent to the adoption of the Fourteenth Amendment. 16 Stat. 144.
[Footnote 9] 14 Stat. 27, 8 U.S.C. 42, 8 U.S.C.A. 42.
[Footnote 10] Buchanan v. Warley, 1917, 245 U.S. 60, 79 , L.R.A. 1918C, 210, Ann.Cas.1918A, 1201.
[Footnote 11] Courts of Georgia, Maryland, North Carolina, Oklahoma, Texas, and Virginia have also declared similar statutes invalid discussed, do not involve action by state Amendment. Glover v. Atlanta, 1918, 148 Ga. 285, 96 S.E. 562; Jackson v. State, 1918, 132 Md. 311, 103 A. 910; Clinard v. Winston-Salem, 1940, 217 N.C. 119, 6 S.E.2d 867, 126 A.L.R. 634; Allen v. Oklahoma City, 1936, 175 Okl. 421, 52 P.2d 1054; Liberty Annex Corp. v. Dallas, Tex.Civ.App. 1927, 289 S.W. 1067; Irvine v. Clifton Forge, 1918, 124 Va. 781, 97 S.E. 310.
[Footnote 12] And see United States v. Harris, 1883, 106 U.S. 629 ; United States v. Cruikshank, 1876, 92 U.S. 542 .
[Footnote 13] Among the phrases appearing in the opinion are the following: 'the operation of state laws, and the action of state officers, executive or judicial'; 'state laws and state proceedings'; 'state law * * * or some state action through its officers or agents'; 'state laws and acts done under state authority'; 'state laws or state action of some kind'; 'such laws as the states may adopt or enforce'; 'such acts and proceedings as the states may commit or take'; 'state legislation or action'; 'state law or state authority.'
[Footnote 14] Neal v. Delaware, 1881, 103 U.S. 370, 397 ; Scott v. McNeal, 1894, 154 U.S. 34, 45 , 1112; Chicao , B. & Q.R. Co. v. Chicago, 1897, 166 U.S. 226, 233 Ä235, 583, 584; Hovey v. Elliott, 1897, 167 U.S. 409, 417 , 418, 844; Carter v. Texas, 1900, 177 U.S. 442, 447 , 689; Martin v. Texas, 1906, 200 U.S. 316, 319 ; Raymond v. Chicago Union Traction Co., 1907, 207 U.S. 20, 35 , 36, 12, 12 Ann.Cas. 757; Home Telephone and Telegraph Co. v. Los Angeles, 1913, 227 U.S. 278, 286 , 287, 314; Prudential Ins. Co. v. Cheek, 1922, 259 U.S. 530, 548 , 524, 27 A.L.R. 27; American Ry. Exp. Co. v. Kentucky, 1927, 273 U.S. 269, 274 , 355; Mooney v. Holohan, 1935, 294 U.S. 103, 112 , 113, 341, 342, 98 A.L.R. 406; Hansberry v. Lee, 1940, 311 U.S. 32, 41 , 61 S. Ct. 115, 117, 132 A.L.R. 741.
[Footnote 15] And see Standard Oil Co. v. Missouri, 1912, 224 U.S. 270, 281 , 282, 409, Ann.Cas.1913D, 936; Hansberry v. Lee, 1940, 311 U.S. 32 , 132 A.L.R. 741.
[Footnote 16] Brown v. Mississippi, 1936, 297 U.S. 278 ; Chambers v. Florida, 1940, 309 U.S. 227 ; Ashcraft v. Tennessee, 1944, 322 U.S. 143 ; Lee v. Mississippi, 1948, 332 U.S. 742 .
[Footnote 17] See Mooney v. Holohan, 1935, 294 U.S. 103, 98 A.L.R. 406; Pyle v. Kansas, 1942, 317 U.S. 213 .

[Footnote 18] Powell v. Alabama, 1932, 287 U.S. 45, 84 A.L.R. 527; Williams v. Kaiser, 1945, 323 U.S. 471 ; Tomkins v. Missouri, 1945, 323 U.S. 485 ; DeMeerleer v. Michigan, 1947 329 U.S. 663 .
[Footnote 19] In applying the rule of Erie R. Co. v. Tompkins, 1938, 304 U.S. 64 , 144 A.L.R. 1487, it is clear that the common- law rules enunciated by state courts in judicial opinions are to be regarded as a part of the law of the State.
[Footnote 20] And see Bakery Drivers Local v. Wohl, 1942, 315 U.S. 769 ; Cafeteria Employees Union v. Angelos, 1943, 320 U.S. 293 .
[Footnote 21] And see Pennekamp v. Florida, 1946, 328 U.S. 331 ; Craig v. Harney, 1947, 331 U.S. 367 .
[Footnote 22] See Swain v. Maxwell, 1946, 355 Mo. 448, 196 S.W.2d 780; Koehler v. Rowland, 1918, 275 Mo. 573, 205 S.W. 217, 9 A.L.R. 107. See also Parmalee v. Morris, 1922, 218 Mich. 625, 188 N.W. 330, 38 A.L.R. 1180. Cf. Porter v. Barrett, 1925, 233 Mich. 373, 206 N.W. 532, 42 A.L.R. 1267.
[Footnote 23] Cf. Home Telephone and Telegraph Co. v. Los Angeles, 1913, 227 U.S. 278 ; Raymond v. Chicago Union Traction Co., 1907, 207 U.S. 20, 12 Ann.Cas. 757.
[Footnote 24] Bridges v. California, 1941, 314 U.S. 252 , 159 A.L.R. 1346; American Federation of Labor v. Swing, 1941, 312 U.S. 321 .
[Footnote 25] See Yick Wo v. Hopkins, 1886, 118 U.S. 356 ; Strauder v. West Virginia, 1880, 100 U.S. 303 ; Truax v. Raich, 1915, 239 U.S. 33 , L.R.A.1916D, 545, Ann. Cas.1917B, 283.
[Footnote 26] Restrictive agreements of the sort involved in these case have been used to exclude other than Negroes from the ownership or occupancy of real property. We are informed that such agreements have been directed against Indians, Jews, Chinese, Japanese, Mexicans, Hawaiians, Puerto Ricans, and Filipinos, among others.
[Footnote 27] See Bridges v. California, 1941, 314 U.S. 252, 261 , 193, 159 A.L.R. 1346; Cantwell v. Connecticut, 1940, 310 U.S. 296 , 307, 308, 905, 128 A.L.R. 1352.
[Footnote 28] It should be observed that the restrictions relating to residential occupancy contained in ordinances involved in the Buchanan, Harmon and Deans cases, cited supra, and declared by this Court to be inconsistent with the requirements of the Fourteenth Amendment, applied equally to white persons and Negroes.
[Footnote 29] McCabe v. Atchison, Topeka & Santa Fe R. Co., 1914, 235 U.S. 151, 161 Ä162, 71; Missouri ex rel. Gaines v. Canada, 1938, 305 U.S. 337 ; Oyama v. California, 1948, 332 U.S. 633 .
[Footnote 30] Slaughter-House Cases, 1873, 16 Wall 36, 81; Strauder v. West Virginia, 1880, 100 U.S. 303 . See Flack, The Adoption of the Fourteenth Amendment.

U.S. Supreme Court

FLAGG BROS., INC. v. BROOKS, 436 U.S. 149 (1978) 436 U.S. 149

FLAGG BROS., INC., ET AL. v. BROOKS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 77-25.

Argued January 18, 1978
Decided May 15, 1978 *

[Footnote *] Together with No. 77-37, Lefkowitz, Attorney General of New York v. Brooks et al.; and No. 77-42, American Warehousemen's Assn. et al. v. Brooks et al., also on certiorari to the same court.

After respondent Brooks and her family had been evicted from their apartment and their belongings had been stored by petitioner storage company, Brooks was threatened with sale of her belongings pursuant to New York Uniform Commercial Code 7-210 unless she paid her storage account. She thereupon brought this class action under 42 U.S.C. 1983, seeking damages and injunctive relief and a declaration that the sale pursuant to 7-210 (which provides a procedure whereby a warehouseman conforming to the provisions of the statute may convert his lien into good title) would violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Subsequent interventions by respondent Jones as plaintiff and petitioners warehouse associations and the New York State Attorney General as defendants were permitted. The District Court dismissed the complaint for failure to state a claim for relief under 1983, which provides, inter alia, that every person who under color of any state statute subjects any citizen to the deprivation of any rights secured by the Constitution and federal laws shall be liable to the injured party. The Court of Appeals reversed, holding that state action might be found in the exercise by a private party of "some power delegated to it by the State which is traditionally associated with sovereignty," and that "by enacting 7-210 New York not only delegated to the warehouseman a portion of its sovereign monopoly power over binding conflict resolution . . . but also let him, by selling stored goods, execute a lien and thus perform a function which has traditionally been that of the sheriff." Held: A warehouseman's proposed sale of goods entrusted to him for storage, as permitted by 7-210, is not "state action," and since the allegations of the complaint failed to establish that any violation of respondents' Fourteenth Amendment rights was committed by either the storage company or the State of New York, [436 U.S. 149, 150] the District Court properly concluded that no claim for relief was stated by respondents under 42 U.S.C. 1983. Pp. 155-166.

(a) Respondents' failure to allege the participation of any public officials in the proposed sale plainly distinguishes this litigation from decisions such as North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 ; Fuentes v. Shevin, 407 U.S. 67 ; and Sniadach v. Family Finance Corp., 395 U.S. 337 , which imposed procedural restrictions on creditors' remedies. P. 157.

(b) The challenged statute does not delegate to the storage company an exclusive prerogative of the sovereign. Other remedies for the settlement of disputes between debtors and creditors (which is not traditionally a public function) remain available to the parties. Terry v. Adams, 345 U.S. 461 ; Smith v. Allwright, 321 U.S. 649 ; Nixon v. Condon, 286 U.S. 73 ; and Marsh v. Alabama, 326 U.S. 501 , distinguished. Pp. 157-163.

(c) Though respondents contend that the State authorized and encouraged the storage company's action by enacting 7-210, a State's mere acquiescence in a private action does not

convert such action into that of the State. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 . Pp. 164-166.
553 F.2d 764, reversed.
REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and POWELL, JJ., joined. MARSHALL, J., filed a dissenting opinion, post, p. 166. STEVENS, J., filed a dissenting opinion, in which WHITE and MARSHALL, JJ., joined, post, p. 168. BRENNAN, J., took no part in the consideration or decision of the cases.
Alvin Altman argued the cause and filed briefs for petitioners in No. 77-25. A. Seth Greenwald, Assistant Attorney General of New York, argued the cause for petitioner in No. 77-37. With him on the briefs were Louis J. Lefkowitz, Attorney General, pro se, and Samuel A. Hirshowitz, First Assistant Attorney General. William H. Towle filed a brief for petitioners in No. 77-42. Arnold H. Shaw filed a brief for the Warehousemen's Association of New York and New Jersey, Inc., et al., respondents under this Court's Rule 21 (4), in support of petitioners.
Martin A. Schwartz argued the cause for respondents Brooks [436 U.S. 149, 151] et al. in all cases. With him on the brief was Lawrence S. Kahn.Fn
Fn [436 U.S. 149, 151] Briefs of amici curiae urging affirmance were filed by W. Bernard Richland and L. Kevin Sheridan for the city of New York; by John E. Kirklin and Kalman Finkel for the Legal Aid Society of New York City; by John C. Esposito for the New York State Consumer Protection Board; and by Robert S. Catz for the Urban Law Institute in No. 77-42.
MR. JUSTICE REHNQUIST delivered the opinion of the Court.
The question presented by this litigation is whether a warehouseman's proposed sale of goods entrusted to him for storage, as permitted by New York Uniform Commercial Code 7-210 (McKinney 1964), 1 is an action properly attributable [436 U.S. 149, 152] to the State of New York. The District Court found that the warehouseman's conduct was not that of the State, and dismissed this suit for want of jurisdiction under 28 U.S.C. 1343 [436 U.S. 149, 153] (3). 404 F. Supp. 1059 (SDNY 1975). The Court of Appeals for the Second Circuit, in reversing the judgment of the District Court, found sufficient state involvement with the proposed sale to invoke the provisions of the Due Process Clause of the Fourteenth Amendment. 553 F.2d 764 (1977). We agree with the District Court, and we therefore reverse.
I
According to her complaint, the allegations of which we must accept as true, respondent Shirley Brooks and her family were evicted from their apartment in Mount Vernon, N. Y., on June 13, 1973. The city marshal arranged for Brooks' possessions to be stored by petitioner Flagg Brothers, Inc., in its warehouse. Brooks was informed of the cost of moving and storage, and she instructed the workmen to proceed, although she found the price too high. On August 25, 1973, after a series of disputes over the validity of the charges being claimed by petitioner Flagg Brothers, Brooks received a letter demanding that her account be brought up to date within 10 days "or your furniture will be sold." App. 13a. A series of subsequent letters from respondent and her attorneys produced no satisfaction.
Brooks thereupon initiated this class action in the District Court under 42 U.S.C. 1983, seeking damages, an injunction against the threatened sale of her belongings, and the declaration that such a sale pursuant to 7-210 would violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment. She was later joined in her action by Gloria Jones, another resident of Mount Vernon whose goods had been stored by Flagg Brothers following her eviction. [436 U.S. 149, 154] The American Warehousemen's Association and the International Association of Refrigerated Warehouses, Inc., moved to intervene as defendants, as did the Attorney General of New York and others seeking to defend the constitutionality of the challenged statute. 2 On July 7, 1975, the District Court, relying primarily on our decision in Jackson v. Metropolitan

Edison Co., 419 U.S. 345 (1974), dismissed the complaint for failure to state a claim for relief under 1983.
A divided panel of the Court of Appeals reversed. 3 The majority noted that Jackson had suggested that state action might be found in the exercise by a private party of "`some [436 U.S. 149, 155] power delegated to it by the State which is traditionally associated with sovereignty.'" 553 F.2d, at 770, quoting 419 U.S., at 353 . The majority found:
"[B]y enacting 7-210, New York not only delegated to the warehouseman a portion of its sovereign monopoly power over binding conflict resolution [citations omitted], but also let him, by selling stored goods, execute a lien and thus perform a function which has traditionally been that of the sheriff." 553 F.2d, at 771.
The court, although recognizing that the Court of Appeals for the Ninth Circuit had reached a contrary conclusion in dealing with an identical California statute in Melara v. Kennedy, 541 F.2d 802 (1976), concluded that this delegation of power constituted sufficient state action to support federal jurisdiction under 28 U.S.C. 1343 (3). The dissenting judge found the reasoning of Melara persuasive.
We granted certiorari, 434 U.S. 817 , to resolve the conflict over this provision of the Uniform Commercial Code, in effect in 49 States and the District of Columbia, and to address the important question it presents concerning the meaning of "state action" as that term is associated with the Fourteenth Amendment. 4

II

A claim upon which relief may be granted to respondents against Flagg Brothers under 1983 must embody at least two elements. Respondents are first bound to show that they have been deprived of a right "secured by the Constitution and the laws" of the United States. They must secondly show that Flagg Brothers deprived them of this right acting "under color of any statute" of the State of New York. It is clear that these two elements denote two separate areas of [436 U.S. 149, 156] inquiry. Adickes v. S. H. Kress & Co., 398 U.S. 144, 150 (1970).
Respondents allege in their complaints that "the threatened sale of the goods pursuant to New York Uniform Commercial Code 7-210" is an action under color of state law. App. 14a, 47a. We have previously noted, with respect to a private individual, that "[w]hatever else may also be necessary to show that a person has acted `under color of [a] statute' for purposes of 1983, . . . we think it essential that he act with the knowledge of and pursuant to that statute." Adickes, supra, at 162 n. 23. Certainly, the complaints can be fairly read to allege such knowledge on the part of Flagg Brothers. However, we need not determine whether any further showing is necessary, since it is apparent that neither respondent has alleged facts which constitute a deprivation of any right "secured by the Constitution and laws" of the United States.
A moment's reflection will clarify the essential distinction between the two elements of a 1983 action. Some rights established either by the Constitution or by federal law are protected from both governmental and private deprivation. See, e. g., Jones v. Alfred H. Mayer Co., 392 U.S. 409, 422 -424 (1968) (discussing 42 U.S.C. 1982). Although a private person may cause a deprivation of such a right, he may be subjected to liability under 1983 only when he does so under color of law. Cf. 392 U.S., at 424 -425, and n. 33. However, most rights secured by the Constitution are protected only against infringement by governments. See, e. g., Jackson, 419 U.S., at 349 ; Civil Rights Cases, 109 U.S. 3, 17 -18 (1883). Here, respondents allege that Flagg Brothers has deprived them of their right, secured by the Fourteenth Amendment, to be free from state deprivations of property without due process of law. Thus, they must establish not only that Flagg Brothers acted under color of the challenged statute, but also that its actions are properly attributable to the State of New York. [436 U.S. 149, 157]

It must be noted that respondents have named no public officials as defendants in this action. The city marshal, who supervised their evictions, was dismissed from the case by the consent of all the parties. 5 This total absence of overt official involvement plainly distinguishes this case from earlier decisions imposing procedural restrictions on creditors' remedies such as North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). In those cases, the Court was careful to point out that the dictates of the Due Process Clause "attac[h] only to the deprivation of an interest encompassed within the Fourteenth Amendment's protection." Fuentes, supra, at 84. While as a factual matter any person with sufficient physical power may deprive a person of his property, only a State or a private person whose action "may be fairly treated as that of the State itself," Jackson, supra, at 351, may deprive him of "an interest encompassed within the Fourteenth Amendment's protection," Fuentes, supra, at 84. Thus, the only issue presented by this case is whether Flagg Brothers' action may fairly be attributed to the State of New York. We conclude that it may not.

III

Respondents' primary contention is that New York has delegated to Flagg Brothers a power "traditionally exclusively reserved to the State." Jackson, supra, at 352. They argue that the resolution of private disputes is a traditional function of civil government, and that the State in 7-210 has delegated this function to Flagg Brothers. Respondents, [436 U.S. 149, 158] however, have read too much into the language of our previous cases. While many functions have been traditionally performed by governments, very few have been "exclusively reserved to the State." One such area has been elections. While the Constitution protects private rights of association and advocacy with regard to the election of public officials, our cases make it clear that the conduct of the elections themselves is an exclusively public function. This principle was established by a series of cases challenging the exclusion of blacks from participation in primary elections in Texas. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932). Although the rationale of these cases may be subject to some dispute, 6 their scope is carefully defined. The doctrine does not reach to all forms of private political activity, but encompasses only state-regulated elections or elections conducted by organizations which in practice produce "the uncontested choice of public officials." Terry, supra, at 484 (Clark, J., concurring). As Mr. Justice Black described the situation in Terry, supra, at 469: "The only election that has counted in this Texas county for more than fifty years has been that held by the Jaybirds from which Negroes were excluded." 7

A second line of cases under the public-function doctrine originated with Marsh v. Alabama, 326 U.S. 501 (1946). Just as the Texas Democratic Party in Smith and the Jaybird Democratic Association in Terry effectively performed the entire public function of selecting public officials, so too the [436 U.S. 149, 159] Gulf Shipbuilding Corp. performed all the necessary municipal functions in the town of Chickasaw, Ala., which it owned. Under those circumstances, the Court concluded it was bound to recognize the right of a group of Jehovah's Witnesses to distribute religious literature on its streets. The Court expanded this municipal-function theory in Food Employees v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968), to encompass the activities of a private shopping center. It did so over the vigorous dissent of Mr. Justice Black, the author of Marsh. As he described the basis of the Marsh decision:

"The question is, Under what circumstances can private property be treated as though it were public? The answer that Marsh gives is when that property has taken on all the attributes of a town, i. e., `residential buildings, streets, a system of sewers, a sewage disposal plant and a "business block" on which business places are situated.' 326 U.S., at 502 ." 391 U.S., at 332 (dissenting opinion).

This Court ultimately adopted Mr. Justice Black's interpretation of the limited reach of Marsh in Hudgens v. NLRB, 424 U.S. 507 (1976), in which it announced the overruling of Logan Valley. These two branches of the public-function doctrine have in common the feature of exclusivity. 8 Although the elections held by the Democratic Party and its affiliates were the only meaningful elections in Texas, and the streets owned by the [436 U.S. 149, 160] Gulf Shipbuilding Corp. were the only streets in Chickasaw, the proposed sale by Flagg Brothers under 7-210 is not the only means of resolving this purely private dispute. Respondent Brooks has never alleged that state law barred her from seeking a waiver of Flagg Brothers' right to sell her goods at the time she authorized their storage. Presumably, respondent Jones, who alleges that she never authorized the storage of her goods, could have sought to replevy her goods at any time under state law. See N. Y. Civ. Prac. Law 7101 et seq. (McKinney 1963). The challenged statute itself provides a damages remedy against the warehouseman for violations of its provisions. N. Y. U. C. C. 7-210 (9) (McKinney 1964). This system of rights and remedies, recognizing the traditional place of private arrangements in ordering relationships in the commercial world, 9 can hardly be said to have delegated to Flagg Brothers an exclusive prerogative of the sovereign. 10 [436 U.S. 149, 161]

Whatever the particular remedies available under New York law, we do not consider a more detailed description of them necessary to our conclusion that the settlement of disputes between debtors and creditors is not traditionally an exclusive public function. 11 Cf. United States v. Kras, [436 U.S. 149, 162] 409 U.S. 434, 445 -446 (1973). Creditors and debtors have had available to them historically a far wider number of choices than has one who would be an elected public official, or a member of Jehovah's Witnesses who wished to distribute literature in Chickasaw, Ala., at the time Marsh was decided. Our analysis requires no parsing of the difference between various commercial liens and other remedies to support the conclusion that this entire field of activity is outside the scope of Terry and Marsh. 12 This is true whether these commercial rights and remedies are created by statute or decisional law. To rely upon the historical antecedents of a [436 U.S. 149, 163] particular practice would result in the constitutional condemnation in one State of a remedy found perfectly permissible in another. Compare Cox Bakeries v. Timm Moving & Storage, 554 F.2d 356, 358-359 (CA8 1977), with Melara, 541 F.2d, at 805-806, and n. 7. Cf. Bell v. Maryland, 378 U.S. 226, 334 -335 (1964) (Black, J., dissenting). 13

Thus, even if we were inclined to extend the sovereign-function doctrine outside of its present carefully confined bounds, the field of private commercial transactions would be a particularly inappropriate area into which to expand it. We conclude that our sovereign-function cases do not support a finding of state action here.

Our holding today impairs in no way the precedential value of such cases as Norwood v. Harrison, 413 U.S. 455 (1973), or Gilmore v. City of Montgomery, 417 U.S. 556 (1974), which arose in the context of state and municipal programs which benefited private schools engaging in racially discriminatory admissions practices following judicial decrees desegregating public school systems. And we would be remiss if we did not note that there are a number of state and municipal functions not covered by our election cases or governed by the reasoning of Marsh which have been administered with a greater degree of exclusivity by States and municipalities than has the function of so-called "dispute resolution." Among these are such functions as education, fire and police protection, and tax collection. 14 We express no view as to the extent, [436 U.S. 149, 164] if any, to which a city or State might be free to delegate to private parties the performance of such functions and thereby avoid the strictures of the Fourteenth Amendment. The mere recitation of these possible permutations and combinations of factual situations suffices to caution us that their resolution should abide the necessity of deciding them.

IV

Respondents further urge that Flagg Brothers' proposed action is properly attributable to the State because the State has authorized and encouraged it in enacting 7-210. Our cases state "that a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act." Adickes, 398 U.S., at 170 . This Court, however, has never held that a State's mere acquiescence in a private action converts that action into that of the State. The Court rejected a similar argument in Jackson, 419 U.S., at 357 :

"Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into `state action.'" (Emphasis added.)

The clearest demonstration of this distinction appears in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), which held that the Commonwealth of Pennsylvania, although not responsible for racial discrimination voluntarily practiced by a private club, could not by law require the club to comply with its own discriminatory rules. These cases clearly rejected the notion that our prior cases permitted the imposition of Fourteenth Amendment restraints on private action by the simple device of characterizing the State's inaction as "authorization" [436 U.S. 149, 165] or "encouragement." See id., at 190 (BRENNAN, J., dissenting).

It is quite immaterial that the State has embodied its decision not to act in statutory form. If New York had no commercial statutes at all, its courts would still be faced with the decision whether to prohibit or to permit the sort of sale threatened here the first time an aggrieved bailor came before them for relief. A judicial decision to deny relief would be no less an "authorization" or "encouragement" of that sale than the legislature's decision embodied in this statute. It was recognized in the earliest interpretations of the Fourteenth Amendment "that a State may act through different agencies, - either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State" infringing rights protected thereby. Virginia v. Rives, 100 U.S. 313, 318 (1880). If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner.

Not only is this notion completely contrary to that "essential dichotomy," Jackson, supra, at 349, between public and private acts, but it has been previously rejected by this Court. In Evans v. Abney, 396 U.S. 435, 458 (1970), our Brother BRENNAN in dissent contended that a Georgia statutory provision authorizing the establishment of trusts for racially restricted parks conferred a "special power" on testators taking advantage of the provision. The Court nevertheless concluded that the State of Georgia was in no way responsible for the purely private choice involved in that case. By the same token, the State of New York is in no way responsible for Flagg Brothers' decision, a decision which the State in 7-210 permits but does not compel, to threaten to sell these respondents' belongings. [436 U.S. 149, 166]

Here, the State of New York has not compelled the sale of a bailor's goods, but has merely announced the circumstances under which its courts will not interfere with a private sale. Indeed, the crux of respondents' complaint is not that the State has acted, but that it has refused to act. This statutory refusal to act is no different in principle from an ordinary statute of limitations whereby the State declines to provide a remedy for private deprivations of property after the passage of a given period of time.

We conclude that the allegations of these complaints do not establish a violation of these respondents' Fourteenth Amendment rights by either petitioner Flagg Brothers or the State of New York. The District Court properly concluded that their complaints failed to state a claim for relief under 42 U.S.C. 1983. The judgment of the Court of Appeals holding otherwise is

Reversed.

MR. JUSTICE BRENNAN took no part in the consideration or decision of these cases.

Footnotes

[Footnote 1] The challenged statute reads in full:

" 7 - 210. Enforcement of Warehouseman's Lien

"(1) Except as provided in subsection (2), a warehouseman's lien may be enforced by public or private sale of the goods in bloc or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the warehouseman is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the warehouseman either sells the goods in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale, or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold, he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.

"(2) A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows:

"(a) All persons known to claim an interest in the goods must be notified.

"(b) The notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified.

"(c) The notification must include an itemized statement of the claim, a [436 U.S. 149, 152] description of the goods subject to the lien, a demand for payment within a specified time not less than ten days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.

"(d) The sale must conform to the terms of the notification.

"(e) The sale must be held at the nearest suitable place to that where the goods are held or stored.

"(f) After the expiration of the time given in the notification, an advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include a description of the goods, the name of the person on whose account they are being held, and the time and place of the sale. The sale must take place at least fifteen days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least ten days before the sale in not less than six conspicuous places in the neighborhood of the proposed sale.

"(3) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the warehouseman subject to the terms of the receipt and this Article.

"(4) The warehouseman may buy at any public sale pursuant to this section.

"(5) A purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods free of any rights of persons against whom the lien was valid, despite noncompliance by the warehouseman with the requirements of this section.

"(6) The warehouseman may satisfy his lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.
"(7) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor.
"(8) Where a lien is on goods stored by a merchant in the course of his [436 U.S. 149, 153] business the lien may be enforced in accordance with either subsection (1) or (2).
"(9) The warehouseman is liable for damages caused by failure to comply with the requirements for sale under this section and in case of willful violation is liable for conversion."
[Footnote 2] In his order granting the motions to intervene, Judge Gurfein noted that respondent Brooks' goods had been returned to her, but he found that her action had been saved from mootness by her claim for damages. 63 F. R. D. 409, 412 (SDNY 1974). We have no occasion to consider the correctness of that decision, since we have concluded, n. 3, infra, that the claim of respondent Jones remains alive.
[Footnote 3] Jones died prior to the court's decision. However, the court concluded that, under 42 U.S.C. 1983, her claim survived for the benefit of her estate, since a comparable claim would survive under applicable New York law. 553 F.2d, at 768 n. 7. For simplicity, Jones will be referred to as a respondent herein.
The court also noted that Jones had recovered most of her possessions after the District Court's dismissal of her action. Unlike Brooks, she paid the charges demanded by Flagg Brothers, but did so "only because of alleged threats of sale and the twenty-month detention of the goods." Ibid.
At this point in the litigation, it is clear that Flagg Brothers has not sold and will not sell the belongings of either respondent. Although injunctive relief against such sale is therefore no longer available, we must reach the merits of the claim if either respondent can demonstrate that she has suffered monetary damage by reason of the workings of 7-210. See, e. g., Liner v. Jafco, Inc., 375 U.S. 301, 305 -306 (1964). The affidavit submitted with Jones' complaint alleges that Flagg Brothers charged her an auctioneer's fee, pursuant to 7-210 (3), which she has now paid. If she is correct that the warehouseman's invocation of the statute constitutes a violation by the State itself of the Fourteenth Amendment, she would surely be entitled to recover that fee. We express no opinion as to whether she could prove other damages causally related to the threatened use of the sale provisions.
[Footnote 4] Even if there is "state action," the ultimate inquiry in a Fourteenth Amendment case is, of course, whether that action constitutes a denial or deprivation by the State of rights that the Amendment protects.
[Footnote 5] Of course, where the defendant is a public official, the two elements of a 1983 action merge. "The involvement of a state official . . . plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment . . . rights, whether or not the actions of the police were officially authorized, or lawful." Adickes v. S. H. Kress & Co., 398 U.S. 144, 152 (1970) (citations omitted).
[Footnote 6] Indeed, the majority in Terry produced three separate opinions, none of which commanded a majority of the Court.
[Footnote 7] In construing the public-function doctrine in the election context, the Court has given special consideration to the fact that Congress, in 42 U.S.C. 1971 (a)(1), has made special provision to protect equal access to the ballot. Terry, 345 U.S., at 468 (opinion of Black, J.); Smith, 321 U.S., at 651 . No such congressional pronouncement speaks to the ordinary commercial transaction presented here.

[Footnote 8] Respondents also contend that Evans v. Newton, 382 U.S. 296 (1966), establishes that the operation of a park for recreational purposes is an exclusively public function. We doubt that Newton intended to establish any such broad doctrine in the teeth of the experience of several American entrepreneurs who amassed great fortunes by operating parks for recreational purposes. We think Newton rests on a finding of ordinary state action under extraordinary circumstances. The Court's opinion emphasizes that the record showed "no change in the municipal maintenance and concern over this facility," id., at 301, after the transfer of title to private trustees. That transfer had not been shown to have eliminated the actual involvement of the city in the daily maintenance and care of the park.

[Footnote 9] Unlike the parade of horribles suggested by our Brother STEVENS in dissent, post, at 170, this case does not involve state authorization of private breach of the peace.

[Footnote 10] It is undoubtedly true, as our Brother STEVENS says in dissent, post, at 169, that "respondents have a property interest in the possessions that the warehouseman proposes to sell." But that property interest is not a monolithic, abstract concept hovering in the legal stratosphere. It is a bundle of rights in personalty, the metes and bounds of which are determined by the decisional and statutory law of the State of New York. The validity of the property interest in these possessions which respondents previously acquired from some other private person depends on New York law, and the manner in which that same property interest in these same possessions may be lost or transferred to still another private person likewise depends on New York law. It would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to "state action" even though no state process or state officials were ever involved in enforcing that body of law.

This situation is clearly distinguishable from cases such as North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Fuentes v. [436 U.S. 149, 161] Shevin, 407 U.S. 67 (1972); and Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). In each of those cases a government official participated in the physical deprivation of what had concededly been the constitutional plaintiff's property under state law before the deprivation occurred. The constitutional protection attaches not because, as in North Georgia Finishing, a clerk issued a ministerial writ our of the court, but because as a result of that writ the property of the debtor was seized and impounded by the affirmative command of the law of Georgia. The creditor in North Georgia Finishing had not simply sought to pursue the collection of his debt by private means permissible under Georgia law; he had invoked the authority of the Georgia court, which in turn had ordered the garnishee not to pay over money which previously had been the property of the debtor. See Virginia v. Rives, 100 U.S. 313, 318 (1880); Shelley v. Kraemer, 334 U.S. 1 (1948). The "consent" inquiry in Fuentes occurred only after the Court had concluded that state action for purposes of the Fourteenth Amendment was supplied by the participation in the seizure on the part of the sheriff. The consent inquiry was directed to whether there had been a waiver of the constitutional right to due process which had been triggered by state deprivation of property. But our Brother STEVENS puts the cart before the horse; he concludes that the respondents' lack of consent to the deprivations triggers affirmative constitutional protections which the State is bound to provide. Thus what was a mere coda to the constitutional analysis in Fuentes becomes the major theme of the dissent.

[Footnote 11] It may well be, as my Brother STEVENS' dissent contends, that "[t]he power to order legally binding surrenders of property and the constitutional restrictions on that power are necessary correlatives in our system." Post, at 178-179. But here New York, unlike Florida in Fuentes, Georgia in North Georgia Finishing, and Wisconsin in Sniadach, has not ordered

respondents to surrender any property whatever. It has merely enacted a statute which provides that a warehouseman conforming to the provisions of the statute may convert his traditional lien into good title. There is no reason whatever to believe that either Flagg Brothers or respondents could not, if they wished, seek resort to the New York courts in order to either compel or prevent the "surrenders of property" to which that dissent refers, and that [436 U.S. 149, 162] the compliance of Flagg Brothers with applicable New York property law would be reviewed after customary notice and hearing in such a proceeding.

The fact that such a judicial review of a self-help remedy is seldom encountered bears witness to the important part that such remedies have played in our system of property rights. This is particularly true of the warehouseman's lien, which is the source of this provision in the Uniform Commercial Code which is the law in 49 States and the District of Columbia. The lien in this case, particularly because it is burdened by procedural constraints and provides for a compensatory remedy and judicial relief against abuse, is not atypical of creditors' liens historically, whether created by statute or legislatively enacted. The conduct of private actors in relying on the rights established under these liens to resort to self-help remedies does not permit their conduct to be ascribed to the State. Cf. Steele v. Louisville & Nashville R. Co., 323 U.S. 192 (1944); Railway Employees' Dept. v. Hanson, 351 U.S. 225 (1956).

[Footnote 12] This is not to say that dispute resolution between creditors and debtors involves a category of human affairs that is never subject to constitutional constraints. We merely address the public-function doctrine as respondents would apply it to this case.

Self-help of the type involved in this case is not significantly different from creditor remedies generally, whether created by common law or enacted by legislatures. New York's statute has done nothing more than authorize (and indeed limit) - without participation by any public official - what Flagg Brothers would tend to do, even in the absence of such authorization, i. e., dispose of respondents' property in order to free up its valuable storage space. The proposed sale pursuant to the lien in this case is not a significant departure from traditional private arrangements.

[Footnote 13] See also Davis v. Richmond, 512 F.2d 201, 203 (CA1 1975):

"[W]e are disinclined to decide the issue of state involvement on the basis of whether a particular class of creditor did or did not enjoy the same freedom to act in Elizabethan or Georgian England."

[Footnote 14] Contrary to MR. JUSTICE STEVENS' suggestion, post, at 172 n. 8, this Court has never considered the private exercise of traditional police functions. In Griffin v. Maryland, 378 U.S. 130 (1964), the State contended that the deputy sheriff in question had acted only as a private security employee, but this Court specifically found that he "purported to exercise the authority of a deputy sheriff." Id., at 135. Griffin thus sheds [436 U.S. 149, 164] no light on the constitutional status of private police forces, and we express no opinion here.

MR. JUSTICE MARSHALL, dissenting.

Although I join my Brother STEVENS' dissenting opinion, I write separately to emphasize certain aspects of the majority opinion that I find particularly disturbing.

I cannot remain silent as the Court demonstrates, not for the first time, an attitude of callous indifference to the realities of life for the poor. See, e. g., Beal v. Doe, 432 U.S. 438, 455 -457 (1977) (MARSHALL, J., dissenting); United States v. Kras, 409 U.S. 434, 458 -460 (1973) (MARSHALL, J., dissenting). It blandly asserts that "respondent Jones . . . could have sought to replevy her goods at any time under state law." Ante, at 160. In order to obtain replevin in New York, however, respondent Jones would first have had to present to a sheriff an "undertaking" from a surety by which the latter would be bound to pay "not less than twice the value" of the goods involved and perhaps substantially more, depending in [436 U.S. 149, 167] part on the size

of the potential judgment against the debtor. N. Y. Civ. Prac. Law 7102 (e) (McKinney Supp. 1977). Sureties do not provide such bonds without receiving both a substantial payment in advance and some assurance of the debtor's ability to pay any judgment awarded. Respondent Jones, according to her complaint, took home $87 per week from her job, had been evicted from her apartment, and faced a potential liability to the warehouseman of at least $335, an amount she could not afford. App. 44a-46a. The Court's assumption that respondent would have been able to obtain a bond, and thus secure return of her household goods, must under the circumstances be regarded as highly questionable. * While the Court is technically correct that respondent "could have sought" replevin, it is also true that, given adequate funds, respondent could have paid her rent and remained in her apartment, thereby avoiding eviction and the seizure of her household goods by the warehouseman. But we cannot close our eyes to the realities that led to this litigation. Just as respondent lacked the funds to prevent eviction, it seems clear that, once her goods were seized, she had no practical choice but to leave them with the warehouseman, where they were subject to forced sale for nonpayment of storage charges.

I am also troubled by the Court's cavalier treatment of the place of historical factors in the "state action" inquiry. While we are, of course, not bound by what occurred centuries ago in England, see ante, at 163 n. 13, the test adopted by the Court itself requires us to decide what functions have been "traditionally exclusively reserved to the State," Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974) (emphasis added). Such an issue plainly cannot be resolved in a historical vacuum. New York's highest court has stated that "[i]n [436 U.S. 149, 168] [New York] the execution of a lien . . . traditionally has been the function of the Sheriff." Blye v. Globe-Wernicke Realty Co., 33 N. Y. 2d 15, 20, 300 N. E. 2d 710, 713-714 (1973). Numerous other courts, in New York and elsewhere, have reached a similar conclusion. See, e. g., Sharrock v. Dell Buick-Cadillac, Inc., 56 App. Div. 2d 446, 455, 393 N. Y. S. 2d 166, 171 (1977) ("[T]he garageman in executing his lien . . . is performing the traditional function of the Sheriff and is clothed with the authority of State law"); Parks v. "Mr. Ford," 556 F.2d 132, 141 (CA3 1977) (en banc) ("Pennsylvania has quite literally delegated to private individuals. [forced-sale] powers `traditionally exclusively reserved' to sheriffs and constables"); Cox Bakeries, Inc. v. Timm Moving & Storage, Inc., 554 F.2d 356, 358 (CA8 1977) (Clark, J.) (by giving a warehouseman forced-sale powers, "the state has delegated the traditional roles of judge, jury and sheriff"); Hall v. Garson, 430 F.2d 430, 439 (CA5 1970) ("The execution of a lien . . . has in Texas traditionally been the function of the Sheriff or constable").

By ignoring this history, the Court approaches the question before us as if it can be decided without reference to the role that the State has always played in lien execution by forced sale. In so doing, the Court treats the State as if it were, to use the Court's words, "a monolithic, abstract concept hovering in the legal stratosphere." Ante, at 160 n. 10. The state-action doctrine, as developed in our past cases, requires that we come down to earth and decide the issue here with careful attention to the State's traditional role.

I dissent.

[Footnote *] New York's replevin statutes have been challenged by poor persons on the ground that they violated equal protection because the poor could not obtain the required "undertaking." See Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (NDNY 1970) (three-judge court); Tamburro v. Trama, 59 Misc. 2d 488, 299 N. Y. S. 2d 528 (1969).

MR. JUSTICE STEVENS, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, dissenting.

Respondents contend that petitioner Flagg Brothers' proposed sale of their property to third parties will violate the Due Process Clause of the Fourteenth Amendment. Assuming, [436 U.S.

149, 169] arguendo, that the procedure to be followed would be inadequate if the sale were conducted by state officials, the Court holds that respondents have no federal protection because the case involves nothing more than a private deprivation of their property without due process of law. In my judgment the Court's holding is fundamentally inconsistent with, if not foreclosed by, our prior decisions which have imposed procedural restrictions on the State's authorization of certain creditors' remedies. See North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 ; Fuentes v. Shevin, 407 U.S. 67 ; Sniadach v. Family Finance Corp., 395 U.S. 337 .

There is no question in this case but that respondents have a property interest in the possessions that the warehouseman proposes to sell. 1 It is also clear that, whatever power of sale the warehouseman has, it does not derive from the consent of the respondents. 2 The claimed power derives solely from the State, and specifically from 7-210 of the New York Uniform Commercial Code. The question is whether a state statute which authorizes a private party to deprive a person of his property without his consent must meet the requirements of the Due Process Clause of the Fourteenth Amendment. This question must be answered in the affirmative unless the State has virtually unlimited power to transfer interests in private property without any procedural protections. 3 [436 U.S. 149, 170]

In determining that New York's statute cannot be scrutinized under the Due Process Clause, the Court reasons that the warehouseman's proposed sale is solely private action because the state statute "permits but does not compel" the sale, ante, at 165 (emphasis added), and because the warehouseman has not been delegated a power "exclusively reserved to the State," ante, at 158 (emphasis added). Under this approach a State could enact laws authorizing private citizens to use self-help in countless situations without any possibility of federal challenge. A state statute could authorize the warehouseman to retain all proceeds of the lien sale, even if they far exceeded the amount of the alleged debt; it could authorize finance companies to enter private homes to repossess merchandise; or indeed, it could authorize "any person with sufficient physical power," ante, at 157, to acquire and sell the property of his weaker neighbor. An attempt to challenge the validity of any such outrageous statute would be defeated by the reasoning the Court used today: The Court's rationale would characterize action pursuant to such a statute as purely private action, which the State permits but does not compel, in an area not exclusively reserved to the State.

As these examples suggest, the distinctions between "permission" and "compulsion" on the one hand, and "exclusive" and "nonexclusive," on the other, cannot be determinative factors in state-action analysis. There is no great chasm between "permission" and "compulsion" requiring particular state action to fall within one or the other definitional camp. Even Moose Lodge No. 107 v. Irvis, 407 U.S. 163 , upon which the Court relies for its distinction between "permission" and [436 U.S. 149, 171] "compulsion," recognizes that there are many intervening levels of state involvement in private conduct that may support a finding of state action. 4 In this case, the State of New York, by enacting 7-210 of the Uniform Commercial Code, has acted in the most effective and unambiguous way a State can act. This section specifically authorizes petitioner Flagg Brothers to sell respondents' possessions; it details the procedures that petitioner must follow; and it grants petitioner the power to convey good title to goods that are now owned by respondents to a third party. 5

While Members of this Court have suggested that statutory authorization alone may be sufficient to establish state action, 6 it is not necessary to rely on those suggestions in this case because New York has authorized the warehouseman to perform what is clearly a state function. The test of what is a state function for purposes of the Due Process Clause has been variously phrased. Most frequently the issue is presented in terms of whether the State has delegated a function

traditionally and historically associated with sovereignty. See, e. g., Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 ; Evans v. Newton, 382 U.S. 296, 299 . In this Court, petitioners have attempted to argue that the nonconsensual transfer [436 U.S. 149, 172] of property rights is not a traditional function of the sovereign. The overwhelming historical evidence is to the contrary, however, 7 and the Court wisely does not adopt this position. Instead, the Court reasons that state action cannot be found because the State has not delegated to the warehouseman an exclusive sovereign function. 8 This distinction, however, [436 U.S. 149, 173] is not consistent with our prior decisions on state action; 9 is not even adhered to by the Court in this case; 10 and, most importantly, is inconsistent with the line of cases beginning with Sniadach v. Family Finance Corp., 395 U.S. 337 .

Since Sniadach this Court has scrutinized various state statutes regulating the debtor-creditor relationship for compliance with the Due Process Clause. See also North Georgia Finishing, Inc., v. Di-Chem, Inc., 419 U.S. 601 ; Mitchell v. W. T. Grant Co., 416 U.S. 600 ; Fuentes v. Shevin, 407 U.S. 67 . In each of these cases a finding of state action was a prerequisite to the Court's decision. The Court today seeks to explain these finding on the ground that in each case there was some element of "overt official involvement." Ante, at 157. Given the facts of those cases, this explanation is baffling. In North Georgia Finishing, for instance, the official involvement of the State of Georgia consisted of a court clerk who issued a writ of garnishment based solely on the affidavit of the creditor. 419 U.S., at 607 . The clerk's actions were purely ministerial, and, until today, this Court had never held that purely ministerial [436 U.S. 149, 174] acts of "minor governmental functionaries" were sufficient to establish state action. 11 The suggestion that this was the basis for due process review in Sniadach, Shevin, and North Georgia Finishing marks a major and, in my judgment, unwise expansion of the state-action doctrine. The number of private actions in which a governmental functionary plays some ministerial role is legion; 12 to base due process review on the fortuity of such governmental intervention would demean the majestic purposes of the Due Process Clause.

Instead, cases such as North Georgia Finishing must be viewed as reflecting this Court's recognition of the significance of the State's role in defining and controlling the debtor-creditor relationship. The Court's language to this effect in the various debtor-creditor cases has been unequivocal. In Fuentes v. Shevin the Court stressed that the statutes in question "abdicate[d] effective state control over state power." 407 U.S., at 93 . And it is clear that what was of concern in Shevin was the private use of state power to achieve a nonconsensual resolution of a commercial dispute. The state statutes placed the state power to repossess property in the hands of an interested private party, just as the state statute in this case places the state power to conduct judicially binding sales in satisfaction of a lien in the hands of the warehouseman. "Private parties, serving their own private advantage, [436 U.S. 149, 175] may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters." Ibid.

This same point was made, equally emphatically, in Mitchell v. W. T. Grant Co., supra, at 614-616, and North Georgia Finishing, supra, at 607. Yet the very defect that made the statutes in Shevin and North Georgia Finishing unconstitutional - lack of state control - is, under today's decision, the factor that precludes constitutional review of the state statute. The Due Process Clause cannot command such incongruous results. If it is unconstitutional for a State to allow a private party to exercise a traditional state power because the state supervision of that power is purely mechanical, the State surely cannot immunize its actions from constitutional scrutiny by removing even the mechanical supervision.

Not only has the State removed its nominal supervision in this case, 13 it has also authorized a private party to exercise a governmental power that is at least as significant as the power exercised in Shevin or North Georgia Finishing. In Shevin, the Florida statute allowed the debtor's property to be seized and held pending the outcome of the creditor's action for repossession. The property would not be finally disposed of until there was an adjudication of the underlying claim. Similarly, in North Georgia Finishing, the state statute provided for a garnishment procedure which deprived the debtor of the use of property in the garnishee's hands pending the outcome of litigation. The warehouseman's power under 7-210 is far broader, as the Court of Appeals pointed out: [436 U.S. 149, 176] "After giving the bailor specified notice, . . . the warehouseman is entitled to sell the stored goods in satisfaction of whatever he determines the storage charges to be. The warehouseman, unquestionably an interested party, is thus authorized by law to resolve any disputes over storage charges finally and unilaterally." 553 F.2d 764, 771.

Whether termed "traditional," "exclusive," or "significant," the state power to order binding, nonconsensual resolution of a conflict between debtor and creditor is exactly the sort of power with which the Due Process Clause is concerned. And the State's delegation of that power to a private party is, accordingly, subject to due process scrutiny. This, at the very least, is the teaching of Sniadach, Shevin, and North Georgia Finishing.

It is important to emphasize that, contrary to the Court's apparent fears, this conclusion does not even remotely suggest that "all private deprivations of property [will] be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner." Ante, at 165. The focus is not on the private deprivation but on the state authorization. "[W]hat is always vital to remember is that it is the state's conduct, whether action or inaction, not the private conduct, that gives rise to constitutional attack." Friendly, The Dartmouth College Case and The Public-Private Penumbra, 12 Texas Quarterly, No. 2, p. 17 (1969) (Supp.) (emphasis in original). The State's conduct in this case takes the concrete form of a statutory enactment, and it is that statute that may be challenged.

My analysis in this case thus assumes that petitioner Flagg Brothers' proposed sale will conform to the procedure specified by the state legislature and that respondents' challenge therefore will be to the constitutionality of that process. It is only what the State itself has enacted that they may ask the federal court to review in a 1983 case. If there should be a deviation from the state statute - such as a failure to give the [436 U.S. 149, 177] notice required by the state law - the defect could be remedied by a state court and there would be no occasion for 1983 relief. This point has been well established ever since this Court's first explanations of the state-action doctrine in the Civil Rights Cases, 109 U.S. 3, 17 :

"[C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; . . . but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress." 14

On the other hand, if there is compliance with the New York statute, the state legislative action which enabled the deprivation to take place must be subject to constitutional challenge in a federal court. 15 Under this approach, the federal courts do not have jurisdiction to review every foreclosure proceeding in which the debtor claims that there has been a procedural defect constituting a denial of due process of law. Rather, the federal district court's jurisdiction under [436 U.S. 149, 178] 1983 is limited to challenges to the constitutionality of the state procedure itself - challenges of the kind considered in North Georgia Finishing and Shevin.

Finally, it is obviously true that the overwhelming majority of disputes in our society are resolved in the private sphere. But it is no longer possible, if it ever was, to believe that a sharp line can be drawn between private and public actions. 16 The Court today holds that our examination of state delegations of power should be limited to those rare instances where the State has ceded one of its "exclusive" powers. As indicated, I believe that this limitation is neither logical nor practical. More troubling, this description of what is state action does not even attempt to reflect the concerns of the Due Process Clause, for the state-action doctrine is, after all, merely one aspect of this broad constitutional protection.

In the broadest sense, we expect government "to provide a reasonable and fair framework of rules which facilitate commercial transactions . . . ." Mitchell v. W. T. Grant Co., 416 U.S., at 624 (POWELL, J., concurring). This "framework of rules" is premised on the assumption that the State will control nonconsensual deprivations of property and that the State's control will, in turn, be subject to the restrictions of the Due Process Clause. 17 The power to order legally binding [436 U.S. 149, 179] surrenders of property and the constitutional restrictions on that power are necessary correlatives in our system. In effect, today's decision allows the State to divorce these two elements by the simple expedient of transferring the implementation of its policy to private parties. Because the Fourteenth Amendment does not countenance such a division of power and responsibility, I respectfully dissent.

[Footnote 1] Of course the warehouseman may also have a property interest and the ultimate resolution of the due process issue will require a balancing of these interests. See Mitchell v. W. T. Grant Co., 416 U.S. 600, 604 .

[Footnote 2] Although the petitioners have at various stages of this case contended that there was an "implied contract" between the warehouseman and respondents providing for the sale of respondents' possessions in satisfaction of a lien, the Court of Appeals rejected this claim, 553 F.2d 764, 767 n. 3, and petitioners conceded in this Court that, taking respondents' allegations as fact, as we must, there is no contractual issue in this case. Tr. of Oral Arg. 11.

[Footnote 3] It could be argued that since the State has the power to create property interests, it should also have the power to determine what [436 U.S. 149, 170] procedures should attend the deprivation of those interests. See Arnett v. Kennedy, 416 U.S. 134, 153 -154 (REHNQUIST, J.). Although a majority of this Court has never adopted that position, today's opinion revives the theory in a somewhat different setting by holding that the State can shield its legislation affecting property interests from due process scrutiny by delegating authority to private parties.

[Footnote 4] In Moose Lodge the Court found state action on the basis of the Liquor Control Board's regulation which required that "[e]very club licensee shall adhere to all of the provisions of its Constitution and By-Laws." As the Court recognized, this regulation was neutral on its face, see 407 U.S., at 178 , and did not compel the Lodge to adopt a discriminatory membership rule.

[Footnote 5] In fact, 7-210 (5) (1964) provides:

"A purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods free of any rights of persons against whom the lien was valid, despite noncompliance by the warehouseman with the requirements of this section."

[Footnote 6] See, e. g., Burton v. Wilmington Parking Authority, 365 U.S. 715, 726 (STEWART, J., concurring); id., at 727 (Frankfurter, J., dissenting); and id., at 729 (Harlan, J., dissenting).

[Footnote 7] The New York State courts have recognized that the execution of a lien is a traditional function of the State. See Blye v. Globe-Wernicke Realty Co., 33 N. Y. 2d 15, 20, 300 N. E. 2d 710, 713-714 (1973). See also 3 W. Blackstone, Commentaries 7-11, pp. *3-6, which notes that the right of self-help at common law was severely limited.

I fully agree with the Court that the decision of whether or not a statute is subject to due process scrutiny should not depend on "`whether a particular class of creditor did or did not enjoy the

same freedom to act in Elizabethan or Georgian England.'" Ante, at 163 n. 13 (citation omitted). Nonetheless some reference to history and well-settled practice is necessary to determine whether a particular action is a "traditional state function." See Jackson v. Metropolitan Edison Co., 419 U.S. 345 . Indeed, in Jackson the Court specifically referred to Pennsylvania decisions, rendered in 1879 and 1898, which had rejected the contention that the furnishing of utility services was a state function. Id., at 353.

[Footnote 8] See ante, at 157-158. As I understand the Court's notion of "exclusivity," the sovereign function here is not exclusive because there may be other state remedies, under different statutes or common-law theories, available to respondents. Ante, at 159-160. Even if I were to accept the notion that sovereign functions must be "exclusive," the Court's description of exclusivity is incomprehensible. The question is whether a particular action is a uniquely sovereign function, not whether state law forecloses any possibility of recovering for damages for such activity. For instance, it is clear that the maintenance of a police force is a unique sovereign function, and the delegation of police power to a private party will entail state action. See Griffin v. Maryland, 378 U.S. 130 . Under the Court's analysis, however, there would be no state action if the State provided a remedy, such as an action for wrongful imprisonment, for the individual injured by the "private" policeman. This analysis is not based on "exclusivity," but on some vague, and highly inappropriate, notion that respondents should not complain about this state statute if the State offers them a glimmer of hope of redeeming their possessions, or at least the value of the goods, through some other state action. Of course, the availability [436 U.S. 149, 173] of other state remedies may be relevant in determining whether the statute provides sufficient procedural protections under the Due Process Clause, but it is not relevant to the state-action issue.

[Footnote 9] The Court, for instance, attempts to distinguish Evans v. Newton, 382 U.S. 296 . Newton concededly involved a function which is not exclusively sovereign - the operation of a park, but the Court claims that Newton actually rested on a determination that the city was still involved in the "daily maintenance and care of the park." Ante, at 159 n. 8. This stark attempt to rewrite the rationale of the Newton opinion is fully answered by MR. JUSTICE WHITE'S opinion in that case. MR. JUSTICE WHITE observed:

"It is . . . evident that the record does not show continued involvement of the city in the operation of the park - the record is silent on this point." 382 U.S., at 304 .

[Footnote 10] As the Court is forced to recognize, its notion of exclusivity simply cannot be squared with the wide range of functions that are typically considered sovereign functions, such as "education, fire and police protection, and tax collection." Ante, at 163.

[Footnote 11] See, e. g., Parks v. "Mr. Ford," 556 F.2d 132, 148 (CA3 1977) (en banc) (Adams, J., concurring); Gibbs v. Titelman, 502 F.2d 1107, 1113 n. 17 (CA3 1974), cert. denied sub nom. Gibbs v. Garver, 419 U.S. 1039 ; Shirley v. State Nat. Bank of Connecticut, 493 F.2d 739, 743 n. 5 (CA2 1974).

[Footnote 12] For instance, state officials often perform ministerial acts in the transferring of ownership in motor vehicles or real estate. See Burke & Reber, State Action, Congressional Power and Creditors' Rights: An Essay on The Fourth Amendment, 47 S. Cal. L. Rev. 1, 19-23 (1973). It is difficult to believe that the Court would hold that all car sales are invested with state action. See Parks v. "Mr. Ford," supra, at 141.

[Footnote 13] Of course, the State does "supervise" the warehouseman's actions in the sense that it prescribes the procedures that warehousemen must follow to complete a legally binding sale.

[Footnote 14] Furthermore, if the warehouseman has deviated from the statutory requirements, the statute would not provide him with the kind of support that would justify the conclusion that he

acted "under color of law." With respect to this requirement of 1983, while I agree with the majority that the concepts of "under color of law" and "state action" may be separately analyzed, see Lucas v. Wisconsin Electric Co., 466 F.2d 638, 654-655 (CA7 1972), normally as a practical matter they embody the same test of state involvement. See United States v. Price, 383 U.S. 787, 794 n. 7.

[Footnote 15] Indeed, under the Court's analysis as I understand it, the state statute in this case would not be subject to due process scrutiny in a state court.

[Footnote 16] See, e. g., Thompson, Piercing the Veil of State Action: The Revisionist Theory and A Mythical Application To Self-Help Repossession, 1977 Wis. L. Rev. 1; Glennon & Nowak, A Functional Analysis of the Fourteenth Amendment "State Action" Requirement, 1976 S. Ct. Rev. 221; Black, Foreword: "State Action," Equal Protection, and California's Proposition 14, 81 Harv. L. Rev. 69 (1967); Williams, The Twilight of State Action, 41 Texas L. Rev. 347 (1963); Van Alstyne & Karst, State Action, 14 Stan. L. Rev. 3 (1961).

[Footnote 17] Mr. Justice Harlan explained this principle as follows:

"American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly [436 U.S. 149, 179] process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle." Boddie v. Connecticut, 401 U.S. 371, 375 . [436 U.S. 149, 180]

Jackson v. Metropolitan Edison, Co.
419 U.S. 345 (1974)

October 15, 1974, Argued
December 23, 1974, Decided

OPINION: [*346] [**451] MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Metropolitan Edison Co. is a privately owned and operated Pennsylvania corporation which holds a certificate of public convenience issued by the Pennsylvania Public Utility Commission empowering it to deliver electricity to a service area which includes the city of York, Pa. As a condition of holding its certificate, it is subject to extensive regulation by the Commission. Under a provision of its general tariff filed with the Commission, it has the right to discontinue service to any customer on reasonable notice of nonpayment of bills.

...

Petitioner then filed suit against Metropolitan in the United States District Court for the Middle District of Pennsylvania under the Civil Rights Act of 1871, 42 U. S. C. § 1983, seeking damages for the termination and an injunction requiring Metropolitan to continue providing power to her residence until she had been afforded notice, a hearing, and an opportunity to pay any amounts found due. She urged that under state law she had an [*348] entitlement to reasonably continuous electrical service to her home n2 and that Metropolitan's termination of her service for alleged nonpayment, action allowed by a provision of its general tariff filed with the Commission, constituted "state action" depriving her of property in violation of the Fourteenth Amendment's guarantee of due process of law.

...

[*349] The District Court granted Metropolitan's motion to dismiss petitioner's complaint on the ground that the termination did not constitute state action and hence was not subject to judicial scrutiny under the Fourteenth Amendment. n4 On appeal, the United States Court of Appeals for the Third Circuit affirmed, also finding an absence of state action. n5 We granted certiorari to review this judgment.

...

Here the action complained of was taken by a utility company which is privately owned and operated, but which in many particulars of its business is subject to extensive state regulation. The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. n7 407 U.S., at 176-177. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so. Public Utilities Comm'n v. Pollak, 343 U.S. 451, 462 (1952). It may well be that [*351] acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be "state" acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. Moose Lodge No. 107, supra, at 176. The true nature of the State's involvement may not be immediately obvious, [***9] and detailed inquiry may be

required in order to determine whether [**454] the test is met. Burton v. Wilmington Parking Authority, supra..
...

Petitioner first argues that "state action" is present because of the monopoly status allegedly conferred upon Metropolitan by the State of Pennsylvania. As a factual matter, it may well be doubted that the State ever granted or guaranteed Metropolitan a monopoly. n8 But assuming that it had, this fact is not determinative in considering [*352] whether Metropolitan's termination of service to petitioner was "state action" for purposes of the Fourteenth Amendment. In Pollak, supra, where the Court dealt with the activities of the District of Columbia Transit Co., a congressionally established monopoly, we expressly disclaimed reliance on the monopoly status of the transit authority. 343 U.S., at 462. Similarly, although certain monopoly aspects were presented in Moose Lodge No. 107, supra, we found that the Lodge's action [***11] was not subject to the provisions of the Fourteenth Amendment. In each of those cases, there was insufficient relationship between the challenged actions of the entities involved and their monopoly status. There is no indication of any greater connection here.

Petitioner next urges that state action is present because respondent provides an essential public service required to be supplied on a reasonably continuous basis by Pa. Stat. Ann., Tit. 66, § 1171 (1959), and hence performs a "public function." We have, of course, found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State. See, e. g., Nixon v. Condon, 286 U.S. 73 (1932) (election); Terry v. Adams, 345 U.S. 461 (1953) (election); Marsh v. Alabama, 326 U.S. 501 (1946) (company town); Evans v. Newton, 382 U.S. 296 (1966) (municipal park). If [*353] we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one. But while the Pennsylvania statute imposes an obligation to furnish service on regulated utilities, it imposes no such obligation on the State. The Pennsylvania courts have rejected the contention that the furnishing of utility services is either a state function or a [***13] municipal duty. Girard Life Insurance Co. v. City of [**455] Philadelphia, 88 Pa. 393 (1879); Baily v. Philadelphia, 184 Pa. 594, 39 A. 494 (1898).

Perhaps in recognition of the fact that the supplying of utility service is not traditionally the exclusive prerogative of the State, petitioner invites the expansion of the doctrine of this limited line of cases into a broad principle that all businesses "affected with the public interest" are state actors in all their actions.

We decline the invitation for reasons stated long ago in Nebbia v. New York, 291 U.S. 502 (1934), in the course of rejecting a substantive due process attack on state legislation:

"It is clear that there is no closed class or category of businesses affected with a public interest . . . . The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions 'affected with a public interest,' and 'clothed with a public use,' have been brought forward [***14] as the criteria . . . it has been admitted that they are not susceptible of definition and form an unsatisfactory test . . . ." Id., at 536.
See, e. g., Tyson & Brother v. Banton, 273 U.S. 418, 451 (1927) (Stone, J., dissenting).

[*354] Doctors, optometrists, lawyers, Metropolitan, and Nebbia's upstate New York grocery selling a quart of milk are all in regulated businesses, providing arguably essential goods and services, "affected with a public interest." We do not believe that such a status converts their every action, absent more, into that of the State.

We also reject the notion that Metropolitan's termination is state action because the State "has specifically authorized and approved" the termination practice. In the instant case, Metropolitan filed with the Public Utility Commission a general tariff -- a provision of which states Metropolitan's right to terminate service for nonpayment. n10 This provision has appeared in Metropolitan's previously filed tariffs for many years and has never been the subject of a hearing or other scrutiny by the Commission. n11 Although the Commission did hold [*355] hearings on portions of Metropolitan's general tariff relating to a general rate increase, it never even considered the reinsertion of this provision in the newly filed general tariff.

...

The case most heavily relied on by petitioner is Public Utilities Comm'n v. Pollak, supra. There the Court dealt with the contention that Capital Transit's installation of a piped music system on its buses violated the First Amendment rights of the bus riders. It is not entirely clear whether the Court alternatively held that Capital Transit's action was action of the "State" for First Amendment purposes, or whether it merely assumed, arguendo, that it was and went on to resolve the First Amendment question adversely to the bus riders. n16 In either event, the nature of the state involvement there was quite different than it is here. The District of Columbia Public Utilities Commission, on its own motion, commenced an investigation of the effects of the piped music, and after a full hearing concluded not only that Capital Transit's practices were "not inconsistent with public convenience, comfort, and safety," 81 P. U. R. (N. S.) 122, 126 (1950), but also that the [*357] practice "in fact, through the creation of better will among passengers, . . . tends to improve the conditions under which the public ride." [***19] Ibid. Here, on the other hand, there was no such imprimatur placed on the practice of Metropolitan about which petitioner complains. The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering [**457] it, does not transmute a practice initiated by the utility and approved by the commission into "state action." At most, the Commission's failure to overturn this practice amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired. Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, n17 does not make its action in doing so "state action" for purposes of the Fourteenth Amendment.

...

MR. JUSTICE MARSHALL, dissenting.

...

Our state-action cases have repeatedly relied on several factors clearly presented by this case: a state-sanctioned monopoly; an extensive pattern of cooperation between the [***35] "private" entity and the State; and a service uniquely public in nature. Today the Court takes a major step in repudiating this line of authority....

...

... Even when the Court has not found state action based solely on the State's conferral of a monopoly, it has suggested that the monopoly factor weighs heavily in determining whether constitutional obligations can be imposed on formally private entities. . . .

The majority distinguishes this line of cases with a cryptic assertion that public utility companies are "natural monopolies." . . . Initially, it is far from obvious that an electric company would not be subject to competition if the market were unimpeded by governmental restrictions. Certainly the "start-up" costs of initiating electric service are substantial, but the rewards available in a relatively inelastic market might well be sufficient under the right circumstances to attract competitive investment. Instead, the State has chosen to forbid the high profit margins that might invite private competition or increase pressure for state ownership and operation of electric power facilities.

... Encompassed within this policy is the State's determination not to permit governmental competition with the selected private company, but to cooperate with and regulate the company in a multitude of ways to ensure that the company's service will be the functional equivalent of service provided by the State.
...

... I question the wisdom of giving such short shrift to the extensive interaction between the company and the State, and focusing solely on the extent of state support for the particular activity under challenge. In cases where the State's only significant involvement is through financial support or limited regulation of the private entity, it may be well to inquire whether the [*370] State's involvement suggests state approval of the objectionable conduct. See Powe v. Miles, 407 F.2d 73, 81 (CA2 1968); Grossner v. Trustees of Columbia University, 287 F.Supp. 535, 547-548 (SDNY 1968). But where the State has so thoroughly insinuated itself into the operations of the enterprise, it should not be fatal if the State has not affirmatively sanctioned the particular practice in question.

Finally, it seems to me in any event that the State has given its approval to Metropolitan Edison's termination procedures. The State Utility Commission approved a tariff provision under which the company reserved the right to discontinue its service on reasonable notice for nonpayment of bills.

... That it was not seriously questioned before approval does not mean that it was not approved. It suggests, instead, that the Commission was satisfied to permit the company to proceed in the termination area as it had done in the past.

...

... I agree with the majority that it requires more than a finding that a particular business is "affected with the public interest" before constitutional burdens can be imposed on that business. [***44] But when the activity in question is of such public importance that the State invariably either provides the service itself or permits private companies to act as state surrogates in providing it, much more is involved than just a matter of public interest. In those cases, the State has determined that if private companies wish to enter the field, they will have to surrender many of the prerogatives normally associated with private enterprise and behave in many ways like a governmental body. And when the State's regulatory scheme has gone that far, it seems entirely consistent to impose on the public utility the constitutional burdens normally reserved for the State.

Private parties performing functions affecting the public interest can often make a persuasive claim to be free of the constitutional requirements applicable to governmental institutions because of the value of preserving a private sector in which the opportunity for individual choice is maximized. See Evans v. Newton, supra, at 298; H. Friendly, The Dartmouth College Case and the Public-Private Penumbra (1969). Maintaining the private status of parochial schools, cited by the majority, advances [***45] just this value. In the due process area, a similar value of diversity may often be furthered by allowing various private institutions the flexibility to select procedures that fit their particular needs. See Wahba v. New York University, 492 F.2d 96, 102 (CA2), cert. denied, post, p. 874. But it is hard to imagine any such interests that are furthered by protecting privately owned public utility companies from meeting the constitutional standards that would apply if the companies were state owned. The values of pluralism and diversity are [*373] simply not relevant when the private company is the only electric company in town.

...

What is perhaps most troubling [***47] about the Court's opinion is that it would appear to apply to a broad range of claimed constitutional violations by the company. The Court has not adopted the notion, accepted elsewhere, that different standards should apply to state-action [*374] analysis when different constitutional claims are presented. See Adickes v. S. H. Kress & Co., 398 U.S. 144, 190-191 (1970) (BRENNAN, J., concurring and dissenting); Grafton v. Brooklyn Law School, 478 F.2d 1137, 1142 (CA2 1973). Thus, the majority's analysis would seemingly apply as well to a company that refused to extend service to Negroes, welfare recipients, or any other group that the company preferred, for its own reasons, not to serve. I cannot believe that this Court would hold that the State's involvement with the utility company was not sufficient to impose upon the company an obligation to meet the constitutional mandate of nondiscrimination. Yet nothing in the analysis of the majority opinion suggests otherwise.

I dissent.

Cyber Promotions, Inc. v. America Online, Inc., 948 F. Supp. 436 (E.D. Pa. 1996).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

America Online Inc. v.Cyber Promotions Inc.
C.A. NO. 96-5213

November 4, 1996

MEMORANDUM OPINION AND ORDER

Opinion: Weiner, J.

These cases present the novel issue of whether, under the First Amendment to the United States Constitution, one private company has the unfettered right to send unsolicited e-mail advertisements to subscribers of another private online company over the Internet and whether the private online company has the right to block the e-mail advertisements from reaching its members. The question is important because while the Internet provides the opportunity to disseminate vast amounts of information, the Internet does not, at least at the present time, have any means to police the dissemination of that information. We therefore find that, in the absence of State action, the private online service has the right to prevent unsolicited e-mail solicitations from reaching its subscribers over the Internet.

The cases have their genesis in a letter dated January 26, 1996, in which American Online, Inc. ("AOL") advised Cyber Promotions, Inc. ("Cyber") that AOL was upset with Cyber's dissemination of unsolicited e-mail to AOL members over the Internet. AOL subsequently sent a number of "e-mail bombs" [1] to Cyber's Internet service providers ("ISP").

On March 26, 1996, Cyber filed Civil Action No. 96-2486 in this Court against AOL in response to AOL's "e-mail bombing" of Cyber's ISPs. The Complaint alleges that as a result of AOL's "e-mail bombing", two of Cyber's ISPs terminated their relationship with Cyber and a third ISP refused to enter into a contract with Cyber. The Complaint asserts a claim for violation of the Computer Fraud and Abuse Act, 18 U.S.C. Section 1030, as well as state law claims for intentional interference with contractual relations, tortious interference with prospective contractual relations and unfair competition. The Complaint seeks certain injunctive relief and damages.

On April 8, 1996, AOL filed a ten-count Complaint against Cyber in the United States District Court for the Eastern District of Virginia, alleging service and trade name infringement, service mark and trade name dilution, false designation of origin, false advertising, unfair competition, violations of the Virginia Consumer Protection Act, the Electronic Communications Privacy Act, the Computer Fraud and Abuse Act and the Virginia Computer Crimes Act. AOL seeks various injunctive relief and damages.

On May 8, 1996, Cyber filed a First Amended Complaint in Civil Action No. 96-2486 in which it asserted the same four claims it asserted in its original Complaint and added a declaratory judgment claim (Count V). Cyber seeks, *inter alia*, a "declaration that [it] has the right to send to AOL members via the Internet unsolicited e-mail advertisements." Amended Complaint at p. 21. Cyber also asks the Court to "permanently enjoin[] AOL ... from ... directly or indirectly preventing AOL members from receiving [Cyber's] e-mail messages." *Id*.

On June 17, 1996, AOL filed a First Amended Complaint in the Virginia action in which it added claims for misappropriation, conversion, and unjust enrichment.

By Order dated July 24, 1996, the judge in the Eastern District of Virginia to whom AOL's action was assigned, transferred that action to this Court, finding that it arises from "the same nucleus

of operative facts" as Cyber's action and that therefore "the two cases should be consolidated for trial." Upon transfer to this Court, AOL's action was assigned Civil Action No. 96-5213. The parties have agreed that the First Amended Complaint in that action will be treated as setting forth AOL's counterclaims in Civil Action No. 96-2486.

AOL has vehemently argued throughout the brief history of these suits that Cyber has no right to send literally millions of e-mail messages each day to AOL's Internet servers free of charge and resulting in the overload of the e-mail servers. Indeed, the court has received a plethora of letters from disgruntled AOL members who object to having to receive Cyber's unsolicited e-mail whenever they sign on to AOL despite repeated attempts to be removed from Cyber's lists. Cyber, on the other hand, has contended that without the right to send unsolicited e-mail to AOL members, it will go out of business.

Recognizing that Cyber's contention that it has the right to send unsolicited e-mail to AOL members over the Internet implicates the First Amendment and therefore is a threshold issue, the Court directed the parties to brief the following issue: Whether Cyber has a right under the First Amendment of the United States Constitution to send unsolicited e-mail to AOL members via the Internet and concomitantly whether AOL has the right under the First Amendment to block the e-mail sent by Cyber from reaching AOL members over the Internet. In response, AOL has filed a document entitled "Motion for Partial Summary Judgment of America Online, Inc. on First Amendment issues." Specifically, AOL seeks summary judgment on Cyber's declaratory judgment claim asserted in Count V of Cyber's First Amended Complaint. Cyber has filed a document entitled "Plaintiff's Memorandum in Support of its First Amendment Right to Send Internet E-Mail to Defendant's Members."

The Court also directed the parties to enter into a Stipulation of Facts solely for the purpose of resolving the First Amendment issue. Pursuant to the Court's directive, the parties have stipulated to the following facts:

1. Cyber is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, having a place of business at 1255 Passmore Street, 1st Floor, Philadelphia, Pennsylvania 19111.

2. AOL is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 22000 AOL Way, Dulles, Virginia 20166.

3. AOL was and is a private online company that has invested substantial sums of its own money in equipment, name, software and reputation. AOL is not owned in whole or in part by the government.

4. AOL is owned by shareholders, and its stock trades on the New York Stock Exchange.

6. AOL's members or subscribers pay prescribed fees for use of AOL resources, access to AOL and access and use of AOL's e-mail system and its connection to the Internet.

7. AOL's e-mail system operates through dedicated computers known as servers, which consist of computer hardware and software purchased, maintained and owned by AOL. AOL's computer servers have a finite, though expandable, capacity to handle e-mail. All Internet e-mail from non-AOL members to AOL customers or members and from AOL customers or members to non-AOL members requires the use of AOL's computer hardware and software in combination with the hardware and software of the Internet and the hardware and software of the non-AOL members.

9. There has been no government involvement in AOL's business decision to institute or reinstitute a block directed to Internet e-mail sent by Cyber to AOL members or subscribers.

10. Although the Internet is accessible to all persons with just a computer, a modem and a service provider, the constituent parts of the Internet (namely the computer hardware and software, servers, service providers and related items) are owned and managed by private

entities and persons, corporations, educational institutions and government entities, who cooperate to allow their constituent parts to be interconnected by a vast network of phone lines.
11. In order for non-AOL members to send Internet e-mail to AOL members, non-AOL members must utilize a combination of their own hardware and software, the Internet and AOL's network.
12. To obtain its initial access to the Internet, AOL obtained an Internet address and domain name from IANA, a clearing house that routinely and ministerially assigns Internet addresses and domain names.
13. Cyber, an advertising agency incorporated in 1996, provides advertising services for companies and individuals wishing to advertise their products and services via e-mail.
14. Cyber sends its e-mail via the Internet to members of AOL, members of other commercial online services and other individuals with an Internet e-mail address.
15. AOL provides its subscribing members with one or more e-mail addresses so that members can exchange e-mail with one another and exchange e-mail (both sending and receiving) over the Internet with non-AOL members.
16. AOL has attached to its Memorandum of Law in Support of its Motion for Partial Summary Judgment on First Amendment Issues three sets of examples of e-mail messages sent by Cyber to AOL members. The first set (Tab 1) consists of a multi-page set of advertisements; the second set (Tab 2) consists of an exclusive or single-advertiser e-mail; and the third set (Tab 3) consists of a document called by Cyber an "e-mag." Under each tab are two examples, the first selected by AOL and the second selected by Cyber. The Court has reviewed all of the examples and notes that many of the ads include get-rich-quick ads, weight loss ads, health aid promises and even phone sex services.
17. To attract membership, AOL offers a variety of services, options, resources and support, including content-based services, access to stock quotes, children's entertainment, news, and the ability to send and receive Internet e-mail to and from non-AOL members.

In addition to the parties's Stipulation of Facts, it is necessary for resolution of the issue before us to relate some of the factual findings about the Internet itself made earlier this year by our court in *American Civil Liberties Union v. Reno*, 929 F.Supp. 824 (E.D. Pa. 1996). They are as follows:

> 18. "The Internet is ... a unique and wholly new medium of worldwide human communication." *Id*. at 844.

19. The Internet is "a giant network which interconnects innumerable smaller groups of linked computer networks." *Id*. at 830. In short, it is "a global Web of linked networks and computers ... " *Id*. at 831.
20. "The Internet is an international system." *Id*. It is "a decentralized, global medium of communications -- or 'cyberspace' -- that links people, institutions, corporations, and governments around the world. This communications medium allows any of the literally tens of millions of people with access to the Internet to exchange information." *Id*.
21. "No single entity -- academic, corporate, governmental, or non-profit -- administers the Internet. It exists and functions as a result of the fact that hundreds of thousands of separate operators of computers and computer networks independently decided to use common data transfer protocol to exchange communica tions and information with other computers (which in turn exchange communications and information with still other computers)." *Id*. at 832.
22. Computer users have a wide variety of avenues by which to access the Internet. *Id*. One such avenue is "through one of the major national commercial 'online services' such as [AOL] ... *Id*. at 833. These online services offer nationwide computer networks (so that subscribers can dial-in to a local telephone number), and the services provide extensive and well organized

content within their own proprietary computer networks. In addition to allowing access to the extensive content available *within* each online service, the services also allow subscribers to link to the much larger resources of the Internet." *Id*. (emphasis in original). "The major commercial online services have almost twelve million individual subscribers across the United States." *Id*. Approximately six million individuals are subscribers of AOL.
23. There are a number of different ways to communicate over the Internet. One such way "is via electronic mail, or 'e-mail', comparable in principle to sending a first class letter. One can address and transmit a message to one or more other people." *Id*. at 834.
24. "[T]he content on the Internet is as diverse as human thought." *Id*. at 842.
25. "Communications over the Internet do not 'invade' an individuals's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'" *Id*. at 844.
26. Unlike a radio or television, "the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial." *Id*. at 845.
STANDARD OF REVIEW
Under Federal Rule of Civil Procedure 56(c), summary judgment may be granted when, "after considering the record evidence in the light most favorable to the non-moving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Turner v. Schering-Plough Corp*., 901 F.2d 335, 340-41 (3d Cir. 1990). For a dispute to be "genuine," the evidence must be such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986); *Williams v. Borough of Chester*, 891 F.2d, 458, 460 (3d Cir. 1989). To establish a genuine issue of material fact, the non-moving party must introduce evidence beyond the mere pleadings to create an issue of material fact on "an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). The burden of demonstrating the absence of genuine issues of material fact is initially on the moving party regardless of which party would have the burden of persuasion at trial. *First Nat'l Bank of Pennsylvania v. Lincoln Nat'l Life Ins*., 824 F.2d 177, 180 (3d Cir. 1987). Following such a showing, the non-moving party must present evidence through affidavits or depositions and admissions on file which comprise of a showing sufficient to establish the existence of every element essential to that party's case. *Celotex*, 477 U.S. at 323. If that evidence is, however, "'merely colorable' or is 'not significantly probative,' summary judgment may be granted." *Equimark Commercial Finance Co. v. C.I.T. Financial Corp*. 812 F.2d 141, 144 (3d Cir. 1987) (quoting, in part, *Anderson*, 477 U.S. at 249-50).
In view of the parties' Stipulation of Facts and the prior factual findings of this Court in *ACLU v. Reno, supra*., the Court finds there are no genuine issues of material fact as to the First Amendment issue and that that issue is suitable for summary disposition.
In its Motion for Partial Summary Judgment, AOL contends that Cyber has no First Amendment right to send unsolicited e-mail to AOL members over the Internet because AOL is not a state actor, AOL's e-mail servers are not public fora in which Cyber has a right to speak, Cyber's right to use AOL's, service free of charge, does not substantially outweigh AOL's right to speak or not to speak, and that AOL's restrictions on mass e-mail solicitations are tailored to serve a substantial interest. Motion for Partial Summary Judgment at 6. Because we find AOL is not a state actor and none of its activities constitute state action, we need not consider AOL's remaining First Amendment contentions.
The First Amendment to the United States Constitution states that "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." The United States Supreme Court has recognized that "the constitutional guarantee of free speech is a guarantee only against abridgement by government,

federal or state." *Hudgens v.NLRB*, 424 U.S. 507, 513 (1976). Only recently, the Supreme Court has stated that "the guarantees of free speech ... guard only against encroachment by the government and 'erec[t] no shield against merely private conduct.'" *Hurley v. Irish-American Gay Group of Boston*, 115 S.Ct. 2338, 2344 (1995) (citation omitted).

In the case *sub judice*, the parties have stipulated that AOL is a *private* online company that is not owned in whole or part by the government. Stipulation of Facts at para. 3. (emphasis added). The parties have further stipulated that "AOL is not a government entity or political subdivision." *Id*. at para. 5. They have also stipulated that there has been no government involvement in AOL's business decision to institute or reinstitute a block directed to Internet e-mail sent by Cyber to AOL members or subscribers. *Id*. at para. 9.

Despite these stipulations, Cyber argues that AOL's conduct has the character of state action. As a general matter, private action can only be considered state action when "there is a sufficiently close nexus between the State and the challenged action of [the private entity] so that the action of the latter may be fairly treated as that of the State itself." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Recently, our Court of Appeals observed that the Supreme Court appears to utilize three distinct tests in determining whether there has been state action. *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1142 (3d Cir. 1995). First, we must consider whether "'the private entity has exercised powers that are traditionally the *exclusive* prerogative of the state.'" *Id*. (*quoting Blum v. Yaretsky*, 457 U.S. at 1004-05. (emphasis in *Mark*)). This test is known as the exclusive public function test. If the private entity does not exercise such powers, we must consider whether "'the private entity has acted with the help of or in concert with state officials.'" *Mark*, 51 F.3d at 1142 (*quoting McKeesport Hospital v. Accreditation Council for Graduate Medical Ed.*, 24 F.3d 519, 524 (3d Cir. 1994)). The final test is whether "'[t]he State has so far insinuated itself into a position of interdependence with ... [the acting party] that it must be recognized as a joint participant in the challenged activity.'" *Mark*, 51 F.3d at 1142 (*quoting Krynicky v. University of Pittsburgh*, 742 F.2d 94, 98 (3d Cir. 1984)).

With regard to the first test, AOL exercises absolutely no powers which are in any way the prerogative, let alone the *exclusive* prerogative, of the State. In *ACLU, supra*, this Court previously found that no single entity, including the State, administers the Internet. *ACLU*, 929 F.Supp. at 832. Rather, the Court found that the Internet is a "global Web of linked networks and computers" which exists and functions as the result of the desire of hundreds of thousands of computer operators and networks to use common data transfer data protocol to exchange communications and information. *Id*. In addition, "the constituent parts of the Internet ... are owned and managed by private entities and persons, corporations, educational institutions and government entities, who cooperate to allow their constituent parts to be interconnected by a vast network of phone lines." Stipulation of Facts at para. 10. As a result, tens of millions of people with access to the Internet can exchange information. AOL is merely one of many private online companies which allow its members access to the Internet through its e-mail system where they can exchange information with the general public. The State has absolutely no interest in, and does not regulate, this exchange of information between people, institutions, corporations and governments around the world.

Cyber argues, however, that "by providing Internet e-mail and acting as the sole conduit to its members' Internet e-mail boxes, AOL has opened up that part of its network and as such, has sufficiently devoted this domain for public use. This dedication of AOL's Internet e-mail accessway performs a public function in that it is open to the public, free of charge to any user, where public discourse, conversations and commercial transactions can and do take place." Cyber's Memorandum in Support of its First Amendment Right to Send Internet E-Mail to Defendant's Members at 13. Cyber therefore contends that AOL's Internet e-mail accessway is

similar to the company town in *Marsh v. Alabama*, 326 U.S. 501 (1946), which the Supreme Court found performed a public function and therefore was a state actor.
In *Marsh*, a Jehovah's Witness was convicted of criminal trespass for distributing literature without a license on a sidewalk in a town owned by a private company. The Supreme Court found that since the private company owned the streets, sidewalks, and business block, paid the sheriff, privately owned and managed the sewage system, and owned the building where the United States post office was located, the company, in effect, operated as the municipal government of the town. *Marsh*, 326 U.S. at 502-03. "[T]he owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State." *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972). The Court observed that "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Marsh*, 326 U.S. at 506. As a result, the Court found state action in "the State['s] ... attempt[] to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town ... " *Marsh*, 326 U.S. at 509. Our Court of Appeals has noted that "*Marsh* has been construed narrowly." *Cable Investments, Inc. v. Woolley*, 867 F.2d 151, 162 (3d Cir. 1989).[2]
By providing its members with access to the Internet through its e-mail system so that its members can exchange information with those members of the public who are also connected to the Internet, AOL is not exercising *any* of the municipal powers or public services traditionally exercised by the State as did the private company in *Marsh*. Although AOL has technically opened its e-mail system to the public by connecting with the Internet, AOL has not opened its property to the public by performing any municipal power or essential public service and, therefore, does not stand in the shoes of the State. *Marsh* is simply inapposite to the facts of the case *sub judice*.
Cyber also argues that AOL's Internet e-mail connection constitutes an exclusive public function because there are no alternative avenues of communication for Cyber to send its e-mail to AOL members. As support for this proposition, Cyber directs our attention to the decisions of the Supreme Court in *United States Postal Service v. Greenburgh Civic Assn's*, 453 U.S. 114 (1981); *Lloyd Corp v. Tanner*, 407 U.S. 551 (1972) and *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968). Of these decisions, only the *Lloyd* decision is helpful to Cyber.
In *Greenburgh*, a civic association challenged a federal statue which prohibited the deposit of unstamped "mailable matter" in a letterbox approved by the United States Postal Service. The civic association contended that the First Amendment guaranteed them the right to deposit, without postage, their notices, circulars, flyers in such letterboxes. The Supreme Court upheld the constitutionality of the statute, finding that neither the enactment nor the enforcement of the statute was geared in any way to the content of the message sought to be placed in the letterbox. The Court also noted that the statute did not prevent individuals from going door-to-door to distribute their message or restrict the civic organization's right to use the mails. *Greenburgh*, however, did not involve the issue of whether there was state action. It therefore is inapplicable to the issue of whether AOL's conduct constitutes state action.
In *Logan Valley*, a case involving peaceful picketing directed solely at one establishment within a shopping center, the Court reviewed the *Marsh* decision in detail, emphasized the similarities between a shopping center and a company town and concluded that a shopping center is the "functional equivalent" of the business district in *Marsh*. As a result, the Court held that the picketers had a First Amendment right to picket within a shopping center. *Logan Valley*, however, was subsequently overruled by *Lloyd, supra*. *Hudgens v. National Labor Relations*

Board, 424 U.S. 507 (1976). ("[W]e make clear now, if it was not clear before, that the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case.")
In *Lloyd*, a group of individuals sought to distribute handbills in the interior of a privately owned shopping center. The content of the handbills was not directed at any one establishment in the shopping center but instead was directed at the Vietnam War. The Court noted that, unlike the situation in *Logan Valley* where the protestors had no other alternative to convey their message at the single establishment in the shopping center, the protesters in *Lloyd* could distribute their message about the Vietnam war on any public street, sidewalk or park outside the mall. The Court therefore found that "[i]t would be an unwarranted infringement of property rights to require [the protesters] to yield to the exercise of First Amendment under circumstances where adequate alternative avenues of communication exist." *Lloyd*, 407 U.S. at 567. The *Lloyd* Court went on to reject the individuals' functional equivalency argument, finding that the private shopping center neither assumed the full spectrum of municipal powers nor stood in the shoes of the state, as did the private company in *Marsh*. The Court held that, "[t]he First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state* action, not on action by the owner of private property used nondiscriminatorily for private purposes only." *Lloyd*, 407 U.S. at 567 (emphasis in original).
Cyber has numerous alternative avenues of sending its advertising to AOL members. An example of another avenue Cyber has of sending its advertising to AOL members over the Internet is the World Wide Web which would allow access by Internet users, including AOL customers, who *want* to receive Cyber's e-mail. Examples of non-Internet avenues include the United States mail, telemarketing, television, cable, newspapers, magazines and even passing out leaflets. Of course, AOL's decision to block Cyber's e-mail from reaching AOL's members does not prevent Cyber from sending its e-mail advertisements to the members of competing commercial online services, including CompuServe, the Microsoft Network and Prodigy.
Having found that AOL is not a state actor under the exclusive public function test, we evaluate whether AOL is a state actor under the remaining two tests, i.e. whether AOL is acting with the help of or in concert with state officials and whether the State has put itself in a position of interdependence with AOL such that it must be considered a participant in AOL's conduct. These tests actually overlap one another.
In its Memorandum, Cyber does not specifically argue that AOL is acting in concert with state officials. Indeed, the two major cases from the Supreme Court which have found state action under this test are clearly distinguishable from the case *sub judice. See, Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) (finding a conspiracy between a private actor and a state official to engage in unlawful discrimination constituted action under color of law for purposes of 42 U.S.C. Section 1983); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) (finding private creditor's pre-judgment attachment petition upon which clerk of state court issued a writ of attachment and sheriff executed the writ on property of private debtor was state action under Section 1983). Rather, Cyber relies on the "joint participation" doctrine and contends that "AOL's use of the Court to obtain injunctive relief and/or damages [which it seeks in its prayer for relief in its counterclaim] and its assertions of federal and state statutory law, which if applicable to Cyber's activities, would violate Cyber's First Amendment rights." Cyber's Memorandum at 15.
In *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) the Supreme Court refined the joint participation test by announcing that courts must ask "first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority; and second, whether the private party charged with the deprivation could be described in all fairness as a state actor." *Edmonson*, 500 U.S. at 620. Under the first prong, the inquiry is

"under what authority did the private person engage in the allegedly unlawful acts." *Mark*, 51 F.3d at 1144.

In the case *sub judice*, the parties have stipulated that "[t]here has been no government involvement in AOL's business decisions with respect to e-mail sent by Cyber nor in any AOL decision to institute or reinstitute a block directed to Internet e-mail sent by Cyber to AOL members or subscribers." Stipulation of Facts at para. 9. As a result, Cyber is unable to satisfy even the first prong of the joint participation test.

In addition, our Court of Appeals has stated that "[m]erely instituting a routine civil suit does not transform a litigant's actions into those taken under color of state law." *Tunstall v. Office of Judicial Support*, 820 F.2d 631, 634 (3d Cir. 1987). The *Tunstall* Court concluded that the filing of a quiet title action in state court by a purchaser of land to complete the seizure of plaintiff's property did not involve state action since the suit "did not attempt any seizure of property with the cooperation of state officials as in the *Lugar* line of cases." *Id*. In addition, the United States Court of Appeals for the Eleventh Circuit has found that a regulated utility did not act under color of state law when it obtained a temporary restraining order from a state court. *Cobb v. Georgia Power Co.*, 757 F.2d 1248 (11th Cir. 1985). The United States Court of Appeals for the Second Circuit has held that the mere filing of a state law contempt proceeding does not constitute joint participation so as to satisfy the color of state law requirement under 42 U.S.C. Section 1983. *Dahlberg v. Becker*, 748 F.2d 85 (2d Cir. 1984).

Perhaps recognizing the futility of its argument, Cyber contends in its Reply Memorandum that "[i]t is not Cyber's position that the mere filing of an action provides a party with the requisite state action to assert a First Amendment violation. Rather it is the Court's participation with the litigant in issuing or enforcing an order which impinges on another's First Amendment rights. *Grandbouche v. Clancey*, 825 F.2d 1463, 1466 (10th Cir. 1987)." Reply Memorandum at 7. In *Grandbouche*, the United States Court of Appeals for the Tenth Circuit stated that the first Amendment "may be applicable in the context of discovery orders, even if all of the litigants are private entities." The Court found government action present as a result of a magistrate's order compelling discovery and the trial court's enforcement of that order.

We are troubled by the *Grandbouche* decision because it has the effect of creating government action every time a magistrate simply signs, and a trial judge enforces, a discovery order. Therefore, even if this Court had enforced a discovery order (which we have not), we would not follow the *Grandbouche* decision.

In sum, we find that since AOL is not a state actor and there has been no state action by AOL's activities under any of the three tests for state action enunciated by our Court of Appeals in *Mark*, Cyber has no right under the First Amendment to the United States Constitution to send unsolicited e-mail to AOL's members. It follows that AOL, as a private company, may block any attempts by Cyber to do so.

Cyber also contends that its practice of sending e-mail advertisements to AOL's servers is also protected "under state constitutional law, which in many instances, affords even broader protection than federal First Amendment guarantees which this Court can enforce." Cyber's Memorandum at 17. Specifically, Cyber refers to the state constitutions of Pennsylvania and Virginia.[3] Although this argument is beyond the scope of the issue the Court directed the parties to brief, we will nevertheless consider it at this time.

The theory that a state constitution's free speech provisions may afford broader rights than similar provisions of the United States Constitution was first recognized by the Supreme Court in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). The *PruneYard* Court held that, while the First Amendment did not grant the defendants the right to solicit in a privately owned shopping center, state (California) law might grant that right. The Supreme Court of

Pennsylvania has itself recognized that "Pennsylvania may afford greater protection to individual rights under its Constitution" than the Constitution of the United States. *Western Pennsylvania Socialist Workers 1982 Campaign v. Conn. Gen. Life Ins. Co.*, 515 A.2d 1331, 1333-34 (1986) (plurality opinion); *Commonwealth v. Tate*, 432 A.2d 1382 (1981).

Article 1, Section 7 of the Pennsylvania Constitution provides:

> The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any <NOBR>subject ...</NOBR>

In *Tate*, the only case on which Cyber relies, the Supreme Court of Pennsylvania overturned convictions for defiant trespass stemming from a group of protester's refusal to desist from distributing politically oriented materials in a peaceful manner on the campus of a privately owned college. The court found that the college had created a public forum by opening the campus to the public to hear the director of the FBI to speak in a campus building. Because the college had become a public forum and because the defiant trespass statute had provided a defense to a charge of defiant trespass in those circumstances [4], the *Tate* Court held that the protesters had a right to speak freely without fear of criminal conviction under Article I, Section 7 of the Pennsylvania Constitution.

Tate was subsequently clarified by the Supreme Court of Pennsylvania in *Western Pennsylvania Socialist Workers, supra*. In that case, a political committee, its chairman, a gubernatorial candidate and a campaign worker claimed they had the right under, *inter alia*, Article 1, Section 7 of the Pennsylvania Constitution to collect signatures for the gubernatorial candidate's campaign at privately owned shopping malls, including one owned by Connecticut General Life Insurance Co. Connecticut General had a policy which uniformly prohibited all political activities including solicitation at its mall. The Court distinguished *Tate*, by observing that "[b]y adhering to a strict no political solicitation policy, [Connecticut General] has uniformly and generally prevented the mall from becoming a public forum." *Western Pennsylvania*, 515 A.2d at 1337. Rather, the Court noted that Connecticut General had only invited the public into the mall for commercial purposes. Since Connecticut General had not invited the public into the mall for political purposes, the Court held that Article 1, Section 7, was inapplicable.

The *Western Pennsylvania* Court also rejected attempts to analogize the mall to the company town in *Marsh v. Alabama, supra* by stating:

> A shopping mall is not equivalent to a town. Though it duplicates the commercial function traditionally associated with a town's business district or marketplace, the similarity ends there. People do not live in shopping malls. Malls do not provide essential public services such as water, sewers, roads, sanitation or vital records, nor are they responsi ble for education, recreation or transportation. Thus, the *Marsh* analysis is not applicable to the instant case.

Western Pennsylvania, 515 A.2d at 1338.

The case *sub judice* is more similar to *Western Pennsylvania* than it is to *Tate*. AOL's e-mail servers are certainly not a traditional public forum such as a street, park or even the college in *Tate*. Instead, AOL's e-mail servers are privately owned and are only available to the subscribers of AOL who pay a fee for their usage. Moreover, unlike *Tate*, AOL has not presented its e-mail servers to the public at large for disseminating political messages at a certain event. Indeed, AOL has never presented its e-mail servers to the public at large for dissemination of messages in general as AOL's servers have a finite capacity. Stipulation of Facts at para. 7. As noted above, AOL's e-mail system simply provides a means for its members to communicate with those members of the public who are connected with the Internet.

Cyber also does not have the right under the Constitution of Virginia to send unsolicited e-mail over the Internet to AOL members. Article I, Section 12 of the Virginia Constitution provides:

> That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.

There are no decisions which interpret this provision in a manner which would be helpful to Cyber. The decisions Cyber cites, *National Capital Naturists, Inc. v. Board of Supervisors*, 878 F.2d 128, 133 (4th Cir. 1989); *Leachman v. Rector & Visitors of the Univ. of Virginia*, 691 F.Supp. 961, 964 n.5 (W.D.Va. 1988), *aff'd*, 915 F.2d 1564 (4th Cir. 1990); *Robert v. Norfolk*, 188 Va. 413, 49 S.E.2d 697, 700 (1948) all merely recognize the principle enunciated by the Supreme Court in *PruneYard* that states have the "sovereign right" to give their constitutions an expansive interpretation.

Although we have found that Cyber has no right under the First Amendment of the United States Constitution or under the Constitutions of Pennsylvania or Virginia to send unsolicited e-mail to members of AOL, we will not, at this time, enter judgment on Count V of Cyber's First Amended Complaint for declaratory relief. This is because Cyber contends in its Reply brief that "many more issues ... have to be addressed since there are numerous reasons beyond the First Amendment which will permit Cyber to send e-mail to AOL members." Cyber's Reply Memorandum at 1. Therefore, we will simply declare that Cyber has no right under the First Amendment to the United States Constitution or under the Constitu tions of Pennsylvania or Virginia to send unsolicited e-mail over the Internet to members of AOL. We will allow Cyber ten days from the date of this Memorandum Opinion and Order to submit a list of the theories other than the First Amendment it believes entitles it to send unsolicited e-mail to members of AOL. An Order to that effect follows.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CYBER PROMOTIONS, INC. v. AMERICAN ONLINE, INC.
C.A. NO. 96-2486
AMERICAN ONLINE, INC. v. CYBER PROMOTIONS, INC.
C.A. NO. 96-5213

ORDER

The motion of American Online, Inc. for partial summary judgment on First Amendment issues is GRANTED in part and DENIED in part.

The Court declares that Cyber Promotions, Inc. does not have a right under the First Amendment to the United States Constitution or under the Constitutions of Pennsylvania and Virginia to send unsolicited e-mail advertisements over the Internet to members of American Online, Inc. and, as a result, American Online, Inc. may block any attempts by Cyber Promotions, Inc. to do so.

Cyber Promotions, Inc. shall, within ten days of the date of this Order, submit to the Court a list of the theories other than the First Amendment which it believes entitles it to send unsolicited e-mail to members of American Online, Inc.

Either party may request that we issue an Order certifying our decision for an immediate interlocutory appeal to the United States Court of Appeals for the Third Circuit.

IT IS SO ORDERED.

FOOTNOTES

FN1. In past submissions, Cyber has stated that AOL's "e-mail bombs" occurred when AOL gathered all unsolicited e-mail sent by Cyber to undeliverable AOL addresses, altered the return path of such e-mail, and then sent the altered e-mail in a bulk transmission to Cyber's ISPs in order to disable the ISPs.

FN2. Indeed, our Court of Appeals has observed that the exclusive public function test itself "rarely could be satisfied." *Mark*, 51 F.3d at 1142. "Thus, in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), the Court held that a private utility company, extensively regulated by the state, and apparently holding at least a partial monopoly in its territory, did not act under color of state law, in part because the state where the utility was engaged in business had 'rejected the contention that the furnishing of utility services is either a state function or a municipal duty.' (citation omitted). Similarly, in *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), the Court held that a private entity engaged in the education of maladjusted high school students did not perform an exclusively public function because '[the state's] legislative policy choice [to fund the public school] in no way makes these services the exclusive province of the State.' (citation omitted); *see also Black v. Indiana Area Sch. Dist.*, 985 F.2d 707, 710-11 (3d Cir. 1993) (private contractor providing state school bus program at state expense not performing exclusive state function)." *Mark, id*.

FN3. Cyber contends it is entitled to the protection of the Pennsylvania Constitution because Cyber's e-mail originates from Pennsylvania and that it is entitled to the protection of the Virginia Constitution because AOL's blocking actions occur in Virginia.

FN4. Pa.Cons.Stat.Ann. tit. 18 Section 3503(c)(2) provides:

> It is a defense to prosecution under this section that: the premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining on the premises.

The Public/Private Distinction In Internet Governance II: Private Non-Delegation Doctrine & ICANN

WRONG TURN IN CYBERSPACE: USING ICANN TO ROUTE AROUND THE APA AND THE CONSTITUTION

A. MICHAEL FROOMKIN[†]

ABSTRACT

The Internet relies on an underlying centralized hierarchy built into the domain name system (DNS) to control the routing for the vast majority of Internet traffic. At its heart is a single data file, known as the "root." Control of the root provides singular power in cyberspace.

This Article first describes how the United States government found itself in control of the root. It then describes how, in an attempt[*pg 18] to meet concerns that the United States could so dominate an Internet chokepoint, the U.S. Department of Commerce (DoC) summoned into being the Internet Corporation for Assigned Names and Numbers (ICANN), a formally private nonprofit California corporation. DoC then signed contracts with ICANN in order to clothe it with most of the U.S. government's power over the DNS, and convinced other parties to recognize ICANN's authority. ICANN then took regulatory actions that the U.S. Department of Commerce was unable or unwilling to make itself, including the imposition on all registrants of Internet addresses of an idiosyncratic set of arbitration rules and procedures that benefit third-party trademark holders.

Professor Froomkin then argues that the use of ICANN to regulate in the stead of an executive agency violates fundamental values and policies designed to ensure democratic control over the use of government power, and sets a precedent that risks being expanded into other regulatory activities. He argues that DoC's use of ICANN to make rules either violates the APA's requirement for notice and comment in rulemaking and judicial review, or it violates the Constitution's nondelegation doctrine. Professor Froomkin reviews possible alternatives to ICANN, and ultimately proposes a decentralized structure in which the namespace of the DNS is spread out over a transnational group of "policy partners" with DoC.

[*pg 19]

[*pg 20]

The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid.

LOUIS L. JAFFE[1]

INTRODUCTION

The United States government is managing a critical portion of the Internet's infrastructure in violation the Administrative Procedures Act (APA) and the Constitution. For almost two years, the Internet Corporation for Assigned Names and Numbers (ICANN) has been making domain name policy under contract with the Department of Commerce (DoC).[2] ICANN is formally a private nonprofit California corporation created, in response to a summoning by U.S. government officials, to take regulatory actions that DoC was unable or unwilling to take directly. If the U.S. government is laundering its policymaking through ICANN, it violates the APA; if ICANN is, in fact, independent, then the federal government's decision to have ICANN manage a resource of such importance and to allow -- indeed, require -- it to enforce regulatory conditions on users of that resource violates the nondelegation doctrine of the U.S. Constitution. In either case, the relationship violates basic norms of due process and public policy designed to ensure that federal power is exercised responsibly.

Despite being famously decentralized and un-hierarchical,[3] the Internet relies on an underlying centralized hierarchy built into the domain name system (DNS). Domain names (such as "www.law.miami.edu") are the unique identifiers that people depend on to route e-mail, find web pages, and connect to other Internet resources.[4] The need to enforce uniqueness, that is, to prevent two people from attempting to use the exact same domain name, creates a need for some sort of body to monitor or allocate naming. However, [*pg 21] control over the DNS confers substantial power over the Internet. Whoever controls the DNS decides what new families of "top-level" domain names can exist (e.g., new suffixes like .xxx or .union) and how names and essential routing numbers will be assigned tc websites and other Internet resources.[5] The power to create is also the power to destroy, and the power to destroy carries in its train the power to attach conditions to the use of a domain name.[6] Currently, this power is used to require domain name registrants to publish their addresses and telephone numbers on a worldwide readable list and to agree that any trademark holder in the world aggrieved by their registration can demand arbitration regarding ownership of the name under an eccentric set of rules and standards. In theory, the power conferred by control of the DNS could be used to enforce many kinds of regulation of the Internet; it could, for example, be used to impose content controls on the World Wide Web (WWW), although there are no signs that anyone intends this at present.

Without meaning to at first, the United States government found itself controlling this unique Internet chokepoint.[7] When the Internet was small, the DNS was run by a combination of volunteers, the Na- [*pg 22] tional Science Foundation (NSF), and U.S. government civilian and military contractors and grant recipients.[8] As the paymaster for these contractors, the U.S. government became the de facto ruler of the DNS, although it barely exercised -- and for a long time may not in any real sense have been aware of -- its power. The Internet's exponential growth placed strains on the somewhat ad hoc system for managing the DNS, and what had been primarily technical issues became political, legal, anc economic problems that attracted high-level official attention.[9] In particular, as attractive domain name in .com began to become scarce,[10] disputes over attractive names became increasingly common,[11] and pressure mounted for the creation of new "top-level" domain suffixes such as .shop or .web. Although

technically trivial to implement,[12] the proposals ran into intense counter- [*pg 23] pressure from intellectual property rights holders who already faced mounting problems with cybersquatters -- speculators who registered domain names corresponding to trademarks and held them for profit.[13] Meanwhile, foreign governments, notably the European Union, began to express understandable concern about the United States' control of a critical element of a global communication and commercial resource on which they foresaw their economies and societies becoming ever-more dependent.[14]

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As the DNS issue, and especially the relationship between domain names and trademarks, grew in importance, the conflicting pressures on the federal government for action grew as well. In June 1998, DoC and an interagency task force headed by Presidential Senior Adviser Ira Magaziner responded with the Statement of Policy on the Privatization of Internet Domain Name System, known as the DNS White Paper.[15] Abandoning earlier hopes of issuing a substantive rule, which requires statutory authorization and is subject to judicial review, the policy statement instead set out goals that the administration thought could be achieved without rulemaking. Embracing the rhetoric of privatization, the DNS White Paper called for the creation of a private nonprofit corporation to take over the DNS and institute various reforms.[16] Shortly thereafter, an international group incorporated ICANN as a private nonprofit California corporation, and, after some negotiation, DoC lent ICANN much of its authority over management of the DNS.

In its first two years of life, ICANN has made a number of decisions with potentially long-term effects Of necessity, much of ICANN's energy has been devoted to the process of setting up its own, somewhat ornate, internal structures[17] and procedures. The formal structures in place at this writing giv overwhelming weight to corporate voices, tempered only by the power of the board to reject their suggestions. The board remains composed of the nine original unelected directors, supplemented by nine selected by so-called constituency groups, who in turn are selected by ICANN. Internet users and individual domain name registrants remain unrepresented at the board level, although ICANN is in the process of organizing a limited representation for the public.[18]

Almost as soon as it was in place, the ICANN board undertook major decisions, beginning with the agenda set out in the White Paper. ICANN pushed Network Solutions, Inc. (NSI), the monopoly registry and dominant registrar, to allow more competition among [*pg 25] registrars.[19] ICANN also instituted mandatory arbitration of trademark claims. ICANN's "Uniform Dispute Resolution Policy" (UDRP) requires every registrant in .com, .org, or .net to agree to arbitration before ICANN-selected arbitration providers if any trademark owners anywhere in the world feel aggrieved by their registration of a term similar to that trademark.[20]

As a result of this policy, registrants are now subject to an idiosyncratic set of arbitration rules and procedures that benefit third-party trademark holders at the expense of registrants and do not necessarily conform to U.S. trademark law.[21] ICANN also chose to keep in place and step up enforcement of some policies that it inherited, notably NSI's anti-privacy rule requiring that every

registrant of a domain name agree to have his name, address, e-mail, and telephone number placed in a database readable by any Internet user in the world.[22]

Since ostensibly handing the policy baton to ICANN, DoC has treated these key decisions regarding the DNS as if they were either matters of policy outside the rulemaking strictures of the Administrative Procedure Act, as if they were matters of contract, or as if ICANN were an arms-length private body exercising autonomous choices that could take effect spontaneously, without DoC's participation or responsibility.[23] DoC has, thus, made, or acquiesced in ICANN's making, some of the most important decisions relating to the near-term future of the Internet via research contracts rather than agency adjudication or rulemaking, thus evading notice, comment, due process, and judicial review. Government outsourcing and privatization often is premised on the theory that private enterprise can [*pg 26] provide some goods and services more efficiently than the public sector.[24] DoC's reliance on ICANN is different from the classic model of privatization, because rather than privatizing a revenue-generating function, the government is "privatizing" a policy-generating function. Furthermore, the "privatization" is subject to sufficient strings to make ICANN's actions fairly chargeable to the government. Although the ICANN-DoC contracts speak of cooperation and research, some of the most significant outputs from ICANN are government regulation in all but name. It is time to call them what they are.

However one chooses to characterize the U.S. government's interest in the root file or the DNS as a whole, there is little debate that (1) DoC derives at least part of whatever authority it has from its abilit to instruct a U.S. government contractor, NSI, regarding the content of the root file,[25] and (2) whatever authority ICANN holds at present emanates from, and remains subject to, DoC's ultimate authority.[26] The U.S. government's continuing control of the DNS has legal consequences that have not been well understood by participants in what have come to be called the "DNS wars,"[27] and were ignored in a recent General Accounting Office (GAO) study that examined DoC's role in ICANN's creation.[28] Chief among these legal [*pg 27] consequences is that to the extent that DoC relies on ICANN to regulate in its stead -- and this reliance appears to be quite substantial -- DoC's relationship with ICANN violates fundamental U.S. policies that are designed to ensure democratic control over the use of government power. DoC's relationship with ICANN is, therefore, illegal.

Depending on the precise nature of the DoC-ICANN relationship, not all of which is public, DoC's use of ICANN to run the DNS violates the APA and/or the U.S. Constitution. On the one hand, DoC may retain substantial control, either directly or by review, over ICANN's policy decisions. In that case, DoC's use of ICANN to make rules violates the APA. On the other hand, if DoC has ceded temporary policy control to ICANN, that violates the Constitution's nondelegation doctrine.

There is substantial evidence, discussed below, that DoC has directly instructed ICANN on policy matters. Furthermore, as ICANN is utterly dependent on DoC for ICANN's continuing authority, funding, and, indeed, its reason for being, it would be reasonable to conclude that the corporation is currently so captive that all of ICANN's decisions can fairly be charged to the government. If so, the DNS has not, in fact, been privatized at all, even temporarily. At least in cases where ICANN does

what DoC tells it to do, and arguably in all cases, DoC's use of a private corporation to implement policy decisions represents an end run around the APA and the Constitution. To the extent that DoC launders its policy choices through a cat's paw, the public's right to notice and meaningful comment; to accountable decisionmaking; to due process; and to protection against arbitrary and capricious policy choices, self-dealing, or ex parte proceedings are all attenuated or eliminated; so, too, is the prospect o any meaningful judicial review. The result is precisely the type of illegitimate agency decisionmaking t modern administrative law claims to be most anxious to prevent.[29]

If, on the other hand, ICANN is making its policy decisions independently of DoC, as ICANN's partisans tend to argue, then even a partial transfer of DoC's policymaking authority over the DNS violates an even more fundamental public policy against the arbitrary [*pg 28] exercise of public power, the constitutional doctrine prohibiting the delegation of public power to private groups.[30] Most famous expounded in two pre-New Deal cases, Carter v. Carter Coal Co.[31] and A.L.A. Schechter Poultry Corp. v. United States,[32] the private nondelegation doctrine focuses on the dangers of arbitrariness, lack of due process, and self-dealing when private parties are given the use of public power without the shackles of administrative procedure.[33] The doctrine stems from a long tradition of seeking to ensure that public power is exercised in a manner that makes it both formally and, insofar as possible, actually accountable to elected officials, and through them -- we hope -- to the electorate. This concern for proper sources and exercise of public authority promotes both the rule of law and accountability.[34]

The ICANN issue is unique in a number of ways. Modern federal cases implicating the nondelegation doctrine are quite rare; the Supreme Court does not seem to have considered the issue in the context o a delegation to a private group since the New Deal, and the lower court cases are few and often very technical. In any event, nondelegation cases usually involve a contested statute.[35] The issue then is whether Congress's attempt to vest power in an agency or a private body is constitutional. In the case of ICANN, there is no statute. Congress at no time determined that the DNS should be privatized, or, indeed, legislated anything about national DNS policy. Instead, DoC itself chose to delegate the DNS functions to ICANN, relying on its general authority to enter into contracts. ICANN is also a very unusual corporation. There are many government contractors, both profit-making and nonprofit. But it is unusual for a nonprofit corpo- [*pg 29] ration to be created for the express purpose of taking over a government regulatory function.

There is a danger, however, that ICANN may not be unique for long. One administration spokesperson has already suggested that ICANN should be a model for regulation of other Internet-related issues such as accreditation standards for distance learning and e-commerce over business-to-business "closed" networks.[36] The specter of a series of ICANN clones in the United States or in cyberspace should give one pause, because ICANN is a very bad model, one that undermines the procedural values that motivate both the APA and the Due Process Clause of the Constitution.[37]

DoC's reliance on ICANN has (1) reduced public participation in decisionmaking over public issues, (2) vested key decisionmaking power in an essentially unaccountable private body that many feel has already abused its authority in at least small ways and is indisputably capable of abusing it in big ways,

and (3) nearly (but, as argued below, not quite) eliminated the possibilities for judicial review of critica decisions regarding the DNS. So far, ICANN appears to be accountable to no one except DoC itself, a department with a strong vested interest in declaring its DNS "privatization" policy to be a success.

Democratic theory suggests that the absence of accountability tends to breed arbitrariness and self-dealing.[38] In addition to avoiding governmental accountability mechanisms, ICANN lacks much of the accountability normally found in corporations and in nonprofits. Or- [*pg 30] dinary corporations have shareholders and competitors. ICANN does not because it is nonprofit and has a unique relationship with the Department of Commerce. Many nonprofit organizations have members who can challenge corporate misbehavior. ICANN has taken steps to ensure that its "members" are denied such legal redress under California law.[39] All but the wealthiest nonprofits are constrained by needing to raise funds; ICANN faced such constraints in its early days, but it has now leveraged its control over the legacy root into promises of contributions from the registrars that have agreed to accept ICANN's authority over them in exchange for the ability to sell registrations in .com, .org and .net, and from NSI the dominant registrar and monopoly .com/.org/.net registry,[40] which agreed to pay $2.25 million to ICANN this year as part of agreements hammered out with DoC and ICANN.[41] The result is a body that, to date, has been subject to minimal accountability. Only DoC (and, in one special set of cases, NSI or registrars[42]) currently has the power to hold ICANN account- [*pg 31] able. NSI currently has no incentive to use its limited power, and DoC has nothing to complain of so long as ICANN is executing the instructions set out in the White Paper. The accountability gap will get worse if DoC give full control of the DNS to ICANN.[43] But it should be [*pg 32] noted that opinions may differ as to whether DoC could legally give away its interest in DNS to ICANN without an act of Congress. It is likewise unclear what precisely "giving away control" would consist of beyond DoC's interest in its contracts with the maintainer of the root, since the most important part of anyone's "control" over the root is publishing data that other parties, many of whom are independent of the government, choose to rely on.[44]

Part I of this Article describes the domain name system and its central role in the smooth functioning o the Internet as we know it today. The DNS is a hierarchical system in an otherwise relatively decentralized Internet. Section A explains what a domain name is, what domain names do, and how domain names are assigned and acquired. Section B explains the technical source of control over the DNS and why this control over the DNS system is so important.

Part II of the Article lays out the convoluted legal and contractual history of the DNS in order to establish the foundation for the legal argument in the third part. Part II thus describes the growing formalization of DNS regulation and the increasingly conscious intervention of the U.S. government in DNS policymaking. What began as small operation, below the policy radar, affecting only a small number of computers, grew in importance as the Internet grew and as the number of attractive names remaining to be registered in .com shrank. Existing arrangements came under increasing strain as conflicts over names, especially between trademark holders and registrants, grew. Where there had been uncertainty for many years as to precisely where authority over the root might reside, by 1998 the U.S. government had defeated an attempt to redirect the root and amended its contract with NSI to

make the government's supremacy clear. Power, however, brought responsibility and increased controversy. The debate over the addition of new top-level domains to the root brought matters to a head and triggered active intervention by DoC and an interagency group headed by Presidential Senior Adviser [*pg 33] Ira Magaziner. Their policy review culminated in the White Paper, which called for an entity like ICANN to take over the management of the DNS.

Part III of this Article offers a legal analysis concentrating on the federal government's role in DNS policymaking. How ICANN perceives itself is of only minor relevance to the legality of DoC's reliance on it. The central questions concern: (1) the nature of ICANN's actions and (2) the nature of DoC's response to ICANN's actions. ICANN does something that is either is "standard setting" or is something more, such as "policymaking" or "rulemaking." Determining whether ICANN does "policy" requires a fairly detailed excursion into ICANN's and the DNS's history and contributes mightily to the length of this Article. But this is a critical issue, because if ICANN is engaged in mere standard setting, then there is no APA or constitutional issue; however, if ICANN is doing something more than mere standard setting, then the nature of DoC's response to ICANN's actions is legally significant.

If ICANN is engaged in policymaking, and if DoC is reviewing these decisions and retaining the authority to countermand them, then DoC's adoption of or approval of ICANN's regulatory and policy decisions are subject to the APA. One could argue as to whether DoC's approval is an informal adjudication under the APA,[45] or whether due to its overwhelming influence over ICANN and due to its adopting ICANN's rules, DoC is engaged in rulemaking without proper notice and comment. In either case, however, the APA has been violated.

If, on the other hand, ICANN is engaged in policymaking and DoC does not retain the power to countermand ICANN's decisions, then DoC has delegated rulemaking and policymaking power to ICANN. This probably violates the APA, since it was done without proper rulemaking; regardless of the applicability of the APA, it violates the Due Process Clause and the nondelegation doctrine of the U.S. Constitution, as well as basic public policy norms designed to hold agencies and officials accountable for their use of public power. Since ICANN's board and staff operate largely in secret, it is difficult for outsiders to know how much influence DoC has over ICANN's [*pg 34] decisionmaking. As a result, the statutory and constitutional arguments in this Article are presented in the alternative. The two arguments are very closely related, however, in that both rely on legal doctrines designed to promote accountability and prevent the arbitrary exercise of government power.

My analysis is substantially different from both DoC's and ICANN's accounts of their roles and their relationship. DoC's account of its relationship with ICANN relies on what I shall call the private party story and the standard-setting story. The private party story relies on ICANN's status as a California nonprofit corporation. Government agencies have to observe due process, and many rules about openness, even-handedness, and especially advance notice, not least of which are the procedures set out in the Administrative Procedure Act. If they fail to observe these requirements, they are subject to judicial review. Because ICANN is (formally) a private corporation, it does not face similar obligations. It is beyond argument that private parties are almost never subject to the APA.[46]

In fact, as detailed below, ICANN's relationship to DoC is nothing like the arms-length relationship suggested by the private party story. Although ICANN is private, it is no ordinary corporation, and its relationship with DoC is highly unusual. ICANN is totally beholden to DoC for its creation, its initial policies, and especially DoC's loan of control over the root. This control over the root is the sole basis of ICANN's relevance, power, and financing, and DoC can take it away on 120 days' notice, a right that persists even after the recent renewal of ICANN's contract.[47] More than anything, ICANN [*pg 35] seeks to achieve permanent and, perhaps, irrevocable control of the root when the current memorandum of understanding (MoU) expires. DoC has some control over ICANN through the stick of the MoU, but the real control comes from the carrot. ICANN's ability to retain or expand its control over the root is entirely at DoC's discretion.

The standard-setting story focuses on what ICANN does. In this story, ICANN does only "technical coordination" relating to the DNS. ICANN does not do "policy"; if there was any policy to be done (DoC is a little vague on this), it was done in the White Paper -- a statement of policy. And ICANN most certainly does not do "regulation" or "governance." ICANN is at most implementing the key pieces of the White Paper policy: privatization, Internet stability, increasing competition, bottom-up coordination. To the extent that ICANN might be making decisions that have impacts on third parties, this is merely setting standards, not making policy, and it is well settled that the government can rely on private groups to set standards.[48]

There is no question that contractors can administer a federally owned resource, such as the snack bar in a federal building. Moreover, the United States has created a number of federal government corporations, mostly to undertake commercial activities; some are private, a few have mixed ownership, but all have federal charters and direct congressional authorization.[49] While the federal use of state- [*pg 36] chartered corporations to undertake federal tasks is rare, and usually criticized,[50] if it were true that ICANN was limited to "technical coordination," that would rebut the claim of an unconstitutional delegation of power. In fact, as detailed below, the standard-setting story ignores reality. While some of what ICANN does can fairly be characterized as standard setting, key decisions would certainly have been rulemaking if done directly by DoC and remain regulatory even when conducted by its proxy.[51]

Having said what this Article is about, a few words about what it is not about may also be in order. Opinions differ -- radically -- as to the wisdom of ICANN's early decisions, decisions with important worldwide consequences.[52] Opinions also differ as the adequacy of ICANN's decisionmaking procedures. And many legitimate questions have been raised about ICANN's ability or willingness to follow its own rules.[53] Whether ICANN is good or bad for the Internet and whether the U.S. government should have such a potentially dominant role over a critical Internet resource are also important questions. This Article is not, however, primarily concerned with any of these questions. Nor is it an analysis of the legality of actions taken by ICANN's officers, directors, or employees. In particular, this Article does not discuss whether ICANN's actions comply with the requirements of California law regarding nonprofit corporations. Despite their importance, all of these issues will appear only tangentially insofar as they are relevant to the central, if perhaps parochial, question: whether a

U.S. administrative agency is, or should be, allowed to call into being a private corporation and then lend it sufficient control over a government resource so that the corporation can use that con- [*pg 37] trol effectively to make policy decisions that the agency cannot -- or dares not -- make itself.

Although focused on DoC's actions, this Article has implications for ICANN. If the government's actions in relation to ICANN are illegal or unconstitutional, then several -- but perhaps not all -- of ICANN's policy decisions are either void or voidable, and DoC might reasonably be enjoined from further collaboration with ICANN in other than carefully delineated areas. Some of these implications for ICANN, and for the Internet, are canvassed in Part IV.

I. THE DOMAIN NAME SYSTEM

As a result of its hierarchical design, Internet custom, and the prevalence of one program, the domain name system has become a uniquely hierarchical system in an otherwise relatively decentralized Internet. Section A of this part explains how this control is exercised; in order to do so, it sets out what a domain name is, what domain names do for the smooth functioning of the Internet, and how domain names are assigned and acquired. Section B of this part explains why control over the DNS system matters.

A. Domain Names and Their Uses[54]

1. Domain Name Basics. Domain names are the alphanumeric text strings to the right of an "@" in an e-mail address, or immediately following the two slashes in a World Wide Web address. By practice and convention, domain names can be mapped to a thirty-two-bit number consisting of four octets (sets of eight binary digits) that specifies a network address and a host ID on a TCP/IP network. These are the "Internet protocol" (IP -- not to be confused with "intellectual property") numbers -- the numbers that play a critical role in addressing all communications over the Internet, including e-mail and World Wid Web traffic.[55] They have justly been called the [*pg 38] "human-friendly address of a computer."[56] Their potential "friendliness" is also the source of legal and commercial disputes: businesses have come to view their domain names as an important identifier, even a brand. And as both businesses and users increasingly have come to view domain names as having connotations that map to the world outside the Internet, rather than as arbitrary identifiers, conflicts, often involving claims of trademark infringemen unfair competition, have become more frequent.[57]

The Internet works the way it does because it is able to route information quickly from one machine to another. IP numbers provide the identifying information that allows an e-mail to find its destination or allows a request for a web page to reach the right computer across the Internet. Until recently,[58] web page accesses, unlike e-mail, always could be achieved with an IP number. Thus, for example, was equivalent to . However, e-mail to froomkin@129.171.187.10 will not inevitably reach me -- or anyone else. (On most systems, however, e-mail to froomkin@[129.171.187.10] will reach me. But it is not inevitable or easy to type.) Because IP numbers are hard for people to remember, the designers of the Internet introduced easier alphanumeric domain names as mnemonics. When a user types an

alphanumeric Uniform Resource Locator (URL) into a web browser, the host computer must "resolve" the domain name -- that is, translate it into an IP number.[59] Both domain names and IP numbers are ordinarily unique (subject to minor exceptions if resources are interchangeable). Using domain names also increases portability -- since numbers can be arbitrarily assigned to names, the names can stay constant even when the resources to which they refer change. The system by which these unique domain names and IP numbers are allocated and domain names resolved to IP numbers is a critical function on the Internet. Each of the thirteen legacy root name servers handles millions of [*pg 39] DNS queries a day,[60] and uncounted millions more are handled downstream by ISPs and others who cache the most frequently requested domain names to IP mappings.

Currently, the large majority of domain names for Internet resources intended to be used by the public have a relationship to two organized hierarchies. (Internet-based resources for private use, such as intranets, can be organized differently.) The first, very visible hierarchy relates to naming conventions domain names and constrains how domain names are allocated. The second, and largely invisible, hierarchy determines the ways in which domain names are resolved into the IP numbers that actually make Internet communication possible. The two hierarchies are closely related but not identical.

Domain naming conventions treat a domain name as having three parts: in the address for example, "edu," the rightmost part, is the "top-level domain" or "TLD," while "miami" is the second-level domain (SLD), and any other parts are lumped together as third-or-higher-level domains. Domain names are just conventions, and a core part of the current dispute over them arises from the conflict over whether new TLDs should be added to the so-called "legacy root" -- the most widely used, and thus most authoritative, list of which TLDs will actually map to IP numbers. It should be noted that in addition to the "legacy root" TLDs discussed in this Article, there are a large number of "alternate" TLDs that are not acknowledged by the majority of domain name servers.[61] There is no technical bar to their existence, and anyone who knows how to tell his software to use an alternate domain name server can access both the "legacy root" and whatever alternate TLDs are supported by that name server. Thus, for example, choosing to get domain name services from 205.189.73.102 and 24.226.37.241 makes it possible to resolve where a legacy DNS would only return an error message.

The legacy root is currently made up of 244 two-letter country code TLDs (ccTLDs), seven three-letter generic TLDs (gTLDs), and [*pg 40] one four-letter TLD (.arpa).[62] The 244 ccTLDs are almost all derived from the International Organization for Standardization's ISO Standard 3166.[63] Not every ccTLD is necessarily controlled by the government that has sovereignty over the territory associated with that country code, however. This is likely to be an area of increasing controversy, as (some) governments argue that the ccTLD associated with "their" two-letter ISO 3166 country code is somehow an appurtenance of sovereignty.[64] The ccTLDs sometimes have rules that make registration difficult or even next to impossible; as a result, the gTLDs, and especially .com, have the lion's share of the registrations. Three gTLDs are open to anyone who can afford to pay for a registration: .com, .org, and .net. Other gTLDs impose additional criteria for registration: .mil (U.S. military),[65] .gov (U.S. government),[66] .int (international organizations), .edu (institutions of higher education, mostly U.S.-

based), and .arpa.[67] Domains registered in ccTLDs and gTLDs are equally accessible from any computer on the Internet.

[*pg 41]

2. The Registration Hierarchy. The registration side of the current DNS architecture is arranged hierarchically to ensure that each domain name is unique. At least prior to the recent introduction of a "shared registry" system,[68] which seems to have introduced some at least transitory uncertainty about whether the master list of second-level domain names is authoritative, a master file of the registrations each TLD was held by a single registry.[69] In theory, and ignoring software glitches, having a single registry ensures that once a name is allocated to one person, it cannot simultaneously be assigned to a different person. End-users seeking to obtain a unique domain name must obtain one from a registrar.[70] A registrar can be the registry or it can be a separate entity that has an agreement with the registry for the TLD in which the domain name will appear. Before issuing a registration, the registrar queries the registry's database to make certain the name is available. If it is, it marks it as taken, and (currently) associates various contact details provided by the registrant with the record.[71]

While one can imagine other possible system architectures, the current domain name system requires that each domain name be "unique" in the sense that it be managed by a single registrant rather than in the sense that it be associated with a single IP number. The registrant may associate the domain name with varying IP numbers if that will produce a desired result. For example, a busy website might have several servers, each with its own IP number, that take turns serving requests directed to a single domain name.[72] In a different [*pg 42] Internet, many computers controlled by different people might answer to . In that world, users who entered that URL, or clicked on a link to it, would either be playing a roulette game with unpredictable results, or they would have to pass through some sort of gateway or query system so their requests could be routed to the right place. (One can spin more complex stories involving intelligent agents and artificial intelligences that seek to predict user preferences, but this only changes the odds in the roulette game.) Such a system would probably be time-consuming and frustrating, especially as the number of users sharing popular names grew. In any case, it would not be compatible with today's e-mail and other non-interactive communications mechanisms.[73]

3. The Domain Name Resolution Hierarchy. The name resolution side of the domain name system is an interdependent, distributed, hierarchical database.[74] At the top of the hierarchy lies a single data file that contains the list of the machines that have the master lists of registrations in each TLD. This is the "root zone," or "root," also sometimes known as the "legacy root." Although there is no technical obstacle to anyone maintaining a TLD that is not listed in the legacy root, these "alternate" TLDs can only be resolved by users whose machines, or Internet service providers (ISPs) as the case may be, use a domain name server that includes this additional data or knows where to find it. A combination of consensus, lack of knowledge, and inertia among the people running the machines that administer domain name lookups means that domain names in TLDs outside the legacy root, e.g.,

http://lightning.faq, cannot be accessed by the large majority of people who use the Internet, unless the do some tinkering with obscure parts of their browser settings.[75]

[*pg 43]

Domain names are resolved by sending queries to a set of databases linked hierarchically. The query starts at the bottom, at the name server selected by the user or her ISP. A name server is a network service that enables clients to name resources or objects and share this information with other objects the network.[76] If the data is not in the name server, the query works its way up the chain until it can be resolved. At the top of the chain is the root zone file maintained in parallel on thirteen different computers.[77] These thirteen machines, currently identified by letters from A-M, contain a copy of the list of the TLD servers that have the full databases of registered names and their associated IP numbers (To confuse matters, some of these machines have both a copy of the root zone file and second-level domain registration data for one or more TLDs.) Each TLD has a registry that has the authoritative master copy of the second-level domain names registered for that TLD, and the root zone file tells domain name resolving programs where to find them.

B. The Source and Import of Control of the Legacy Root

The heart of the DNS controversy is actually very simple. At issue is who should control a single small file of computer data kept in Herndon, Virginia,[78] and how the power flowing from control of that file should be exercised. This "root" file or "root zone" file is the authoritative list of top-level domain nam For each name it gives the Internet address of the computer that has the authoritative list of who has registered domain names in that top-level domain (TLD). Currently there are 252 TLDs and associated addresses in the file.[79] The data is authoritative because the right people use it -- it is the file from whic the thirteen computers known as the legacy root name [*pg 44] servers get their data.[80] And they, in turn, are authoritative because almost every computer on the Internet gets its data from one of those root servers, or from a cached downstream copy of their data. This Internet monoculture is the result o the ubiquity of a single DNS program called BIND.[81] BIND comes pre-configured to get data from one of the thirteen legacy root name servers, and few users or domain name service providers ever change the setting.

Thus, any discussion of the U.S. government's, or anybody else's, authority and control over the DNS occurs in the shadow of the peculiar fact that "control" does not work in a way familiar to lawyers. The United States does not "own" the entire DNS, although it has contracts with key players and owns a minority of the root servers. Most domain resolution functions take place on privately owned machines that may get their DNS data from other private machines, or from foreign machines, or from U.S. government contractors. The U.S. government's interest in the DNS indeed can be characterized in different ways. It could be argued that the U.S. government's control is ephemeral, since the only reason the root file matters is that the root server operators choose to get their base DNS data from it and that almost all other Internet users choose to get their root data from the thirteen legacy root servers.

Alternately, it could be argued that the U.S. government "owns" the root file that sits at the top of the DNS hierarchy, since the file is managed by NSI, under U.S. government contract. Indeed, in 1998, DoC amended its contract with NSI to make explicit DoC's power to decide what gets listed in the root file.[82] Yet, although DoC clearly controls the content of the file, the government's power over the root seems to sound more in contract than in property. Indeed, it is difficult to say that the U.S. government's interest is a traditional chattel [*pg 45] property right, since NSI owns the machine on which the root file resides. Nor is it easy to characterize DoC's interest as an intellectual property righ Although the root shares with domain names the property that it is a pointer to something,[83] it is just a small file of data. The root file lacks sufficient originality to be copyrightable, nor is it the sort of collection likely to be entitled to a compilation copyright. Furthermore, if the root file belongs to the government, and it is continually published, then under the 1976 Copyright Act, it is a "work" not subject to copyright.[84]

Whatever control DoC enjoys over the content of the root file remains meaningful only so long as othe participants in the DNS -- and especially the twelve other root servers[85] at the next level of the hierarchy -- continue to rely on a U.S. government-controlled root server as their source of the master DNS root file. As long as the United States retains its control of the root file, however, the danger that the twelve root server operators will choose to get their data from elsewhere seems very remote for four reasons: First, of the twelve root servers that draw data directly from the "A" root server at the top of the DNS hierarchy, seven currently are owned by the U.S. government or operated by its contractors. Only three of the servers are located outside the United States.[86] Any move by the non- [*pg 46] U.S. or even non-U.S. government root servers to choose a new source for the master file would be certain to split the root, because the U.S. servers would not follow suit. Second, the old Internet hands who manage key parts of the infrastructure such as the root servers have a very great aversion to anything that looks as if it might split the root.[87] Third, the ur-lord of the DNS, the late Jon Postel, apparently tried to redirect the root from the "A" server and was intimidated into withdrawing the attempt.[88] If Postel could not do it, it is unlikely that others could today. And, fourth, ICANN is currently seeking to move the root file to its own server and to negotiate direct agreements with the other root server operators, which could make the whole issue moot by reducing their independence from ICANN.[89] If DoC were to choose not to renew its contracts with ICANN at some point in the future, then DoC or its designee as ICANN's successor presumably would become the beneficiary of any agreements ICANN had concluded with the root server operators.[90] Ironically, in this scenario, the "privatization" of the DNS proposed in the White Paper could lead ultimately lead to tighter U.S. government control over the DNS.

Control of the root potentially confers substantial economic and political power. The root determines which TLDs are visible to the vast majority of Internet users. The most naked exercise of this power involves deciding what data is contained in the single data file that comprises the root. Given current Internet architecture and customs, [*pg 47] the data in that file determines which gTLDs the vast majority of Internet users can access.[91]

People who register Internet domain names do so in hopes that anyone in the worldwide network will be able to reach them. It may be that they wish their websites to be visible around the world, or it may be that they want to get e-mail, or to engage in two-way chat. Whatever the application, a domain name that cannot be resolved into an IP number[92] by the vast majority of users is of very limited value on the Internet. Similarly, registrars selling domain name registrations understand that only domain names that "work" in the sense of being part of the global network carry much value. The ability to list a registration in a registry that is part of the "legacy" root is thus of paramount importance to a registrar. Similarly, every registry knows that its database of domain name to IP mappings is of limited value if n one can find it. Registries thus need to be listed in the root or they (and all the domains they list) become effectively invisible. As only being listed in the legacy root currently provides visibility for a TLD and the domains listed in it, control of the root creates powerful leverage.

The power to add TLDs to the legacy root has implications for intellectual property rights, consumer choice, competition, the ease of political discourse, and e-commerce generally. It even has implicatior for nation-building and international law. The root authority can add the top-level domain of any nation or pretender to nationhood; it can create gTLDs such as .shop or .biz in minutes, and within a day or so the results of these decisions automatically echo around the world. For example, when Palestinians wanted to have .ps created as a country code, they first persuaded the keepers of the ISO country code list to add .ps. Since the current policy for determining which "countries" should be listed in the root relies on this list, once the Internet Assigned Numbers Authority (IANA)[93] determined that the ISO 3166-1 list had been amended to include .ps as a code for "Palestine," it certified that .ps should be added to the root and announced that it was accepting an application from a Palestinian academic to run the new [*pg 48] .ps domain.[94] At some subsequent point, the Department of Commerce must have approved the change in writing, since its agreement with NSI requires written confirmation for all changes to the root.[95] Although at this writing .ps does not appear to be accepting applications for second-level domain names, the ccTLD is listed in the root.[96]

The power to create is also, at least temporarily, the power to destroy. Because the servers in the DNS chain regularly refresh their cached data from the servers above them in the chain, the root server's decision to remove a nation's TLD from the web could make it effectively inaccessible to everyone wh did not have alternate means of turning a domain name into an IP number. Delisting would severely lim the victim's Internet communications -- at least until the managers of other DNS servers in the world manually reinserted the deleted data in their copies of the root. Thus, control over the DNS confers substantial economic and political power. Since both civilian and military infrastructures in many natio are becoming increasingly dependent on the existence of the Internet, the ability to [*pg 49] disrupt an enemy's communications might be a strategic asset in wartime.[97]

However, even if it could be effective, this ploy would work at most once, because, were the U.S. to use the root for strategic advantage, all root servers located abroad would undoubtedly stop mirroring the data served from the U.S. immediately, even if it split the root.

A more subtle, but already commonplace, use of the root authority involves putting contractual conditions on access to the root. ICANN has imposed a number of conditions on registrars and commercial gTLD (but not ccTLD) registries on a take-it-or-be-delisted basis. For example, ICANN not only forbids anonymous registrations; it also forbids the Internet equivalent of an unlisted telephon number. Under ICANN's contractually imposed regulations, which continue the practices it inherited from NSI, every registrant of a domain name in a gTLD must consent to worldwide publication of her name, telephone number and address.[98] Unlike NSI, however, ICANN provides for rigorous enforcement of this rule, since under ICANN's mandatory arbitration policy, the Uniform Domain Name Dispute Resolution Policy, a domain name registration in "bad faith" is a key ground for transferring a domain from a registrant to a trademark holder,[99] and failing to provide accurate contact details is evidence of bad faith.[100] The addition of the UDRP is a radical change: under ICANN, every registrant in a gTLD must agree to a third-party beneficiary arbitration clause. Anyone anywhere who [*pg 50] believes that the registration or use of the domain name infringes a trademark or service mark can invoke this clause to force arbitration before one of a list of ICANN-approved arbitration service providers paid for and selected by the complainant.101

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...3. *The State Actor Question.* ICANN is currently able to take measures such as the UDRP because it is formally independent from DoC. ICANN is a California nonprofit corporation. It is not a federal agency. It has a board of directors, a staff, and a budget. As a formal matter there is no question that ICANN has independent legal existence and personality. Form, however, is not everything; substance matters.[417] Given that DoC called for an ICANN to exist, clothed it with authority, persuaded other government contractors to enter into agreements with it (including the one with NSI that provides the bulk of ICANN's revenue), and has close and continuing contacts with ICANN, a strong, but not unassailable, case can be made that ICANN is a state actor. If ICANN is a state actor, then it [*pg 114] must comply with due process.[418] It is highly unlikely that the procedures used to impose the UDRP on domain name registrants would meet this standard, and it is even debatable whether the UDRP itself would do so.

The Supreme Court recently reviewed and restated the test for state action in a case that bears some similarity to DoC's reliance on ICANN's UDRP; the differences between the circumstances in that cas and those surrounding the UDRP, however, are as instructive as the similarities. *American Manufacturers Mutual Insurance Co. v. Sullivan*[419] concerned a section 1983 challenge to insurers' invocation of a Pennsylvania Workers' Compensation statute that allows insurers to withhold payments for disputed treatment pending a "utilization review" conducted by a private, state-regulated "utilization review organization" (URO). Insurers trigger the review by filing a short form with a state bureau, whic then randomly selects a URO from its list of qualifying medical service providers.[420] Applying for the review suspends the insurer's obligation to make payments, which resumes only if the URO finds the treatment justified, or, if the URO finds the treatment was not justified, if the worker wins an appeal to state agency or, ultimately, a court.[421] Plaintiff workers sued, arguing that the procedure deprives them of a due process pre-deprivation right to notice and a hearing.[422] The Third Circuit held that the state's

participation in the launching of the review, and its extensive regulation of the UROs and workers' compensation generally, made the insurers state actors when they used the UROs.[423]

Chief Justice Rehnquist, writing for the Court, held that there was no state action on the part of the insurers. He began by restating [*pg 115] the basic tests for state action. First, the "'[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State.'"[424] Thu a private party

> will not be held to constitutional standards unless "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." Whether such a "close nexus" exists . . . depends on whether the State "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[425]

On the facts of the *Sullivan* case, the Chief Justice found that there was an insufficient nexus, since by creating a right to apply to UROs the state was only providing "encouragement" to insurers rather than requiring them to use the URO procedure; similarly, the state did not seek to influence the outcomes o individual cases. Rather, all the state did was "enable" the procedure, and give legal effect to its outcome.[426]

In *Sullivan*, a section 1983 action, the plaintiffs were not challenging the validity of the Pennsylvania statute authorizing insurers to withhold payments if they prevailed before a URO, but rather were claiming that the action of the insurers, who initiated the URO review by filing a form, was itself state action. ICANN's imposition of the UDRP differs from *Sullivan* in who the actor is, what the action is, and who is acted upon; each of these differences suggests that the argument for state action in the case of ICANN is much stronger than in *Sullivan*.

Sullivan involved action in the shadow of a statute. In contrast, part of the problem with ICANN's somewhat similar imposition of the UDRP is precisely that there is no such statute: The Pennsylvania legislature imposed the UROs on workers by making their decisions legally effective; ICANN, not Congress, imposed the UDRP on registrants by requiring that all registrars include standard form third-party beneficiary clauses in their contracts.[427] The Pennsylvania legis- [*pg 116] lature's action was classic, and procedurally legitimate, state action;[428] the issue is whether the nexus between ICANN and DoC is sufficiently tight to compel the conclusion that ICANN stands in the shoes of the state (DoC) when it imposes the cognate requirement on registrars who must then impose it on registrants.[429] The *Sullivan* case does suggest that *if* Congress were to create an arbitration regime for domain name disputes, then the actions of trademark holders in bringing complaints would not be state action, as indeed they most likely are not under the current regime. Nothing makes a trademark holder invoke the UDRP any more than Pennsylvania law made insurers apply to UROs.[430]

The ICANN problem differs from the *Sullivan* facts in ways that shape the state action analysis. The main problem with ICANN's UDRP is not the effect on trademark holders; it is ICANN's regulation of

registrars and, through them, of registrants. Unlike trademark holders or Pennsylvania insurers, registrars and registrants subject to ICANN's rules do not have a choice about the UDRP. ICANN does not allow registrars to deviate from ICANN's mandatory terms in the contracts the registrars offe to their clients. ICANN requires registrars to make domain name registrants in .com, .org, and .net sign a third-party beneficiary agreement that can be invoked by any aggrieved party in the world. If Congress imposed these conditions through legislation, that would of course be procedurally legitimat state action; the procedures created by that legislation would have to conform to due process. Significantly, defendants in *Sullivan* changed [*pg 117] their procedures rather than appealing the Third Circuit's holding that elements of the Pennsylvania URO plan violated due process by providing inadequate notice and failing to give employees a chance to plead their case properly.[431] Were Congress to attempt to impose a plan like the UDRP, similar questions would then be squarely presented for judicial review. In the case of existing DNS regulation, however, the state action issue must be decided first. The critical issue therefore concerns the purported nexus -- whether when the government calls for an ICANN to impose requirements for it, and an ICANN duly appears and does so, ICANN's actions can fairly be charged to the government.

As *Sullivan* reminds us, determining whether governmental authority may dominate an activity to such an extent that its participants should be deemed to act with the authority of the government, and, as a result, be subject to constitutional constraints,[432] is a critical question in state action cases,[433] and one that is primarily a question of fact.[434] In *Edmonson v. Leesville Concrete Co.*,[435] the Supreme Court provided three factors to be weighed: first, "the extent to which the actor relies on governmental assistance and benefits";[436] second, "whether the actor is performing a traditional governmental function";[437] and third, "whether the injury caused is aggravated in a unique way by the incidents of governmental authority."[438]

These three tests suggest that ICANN is a state actor. First, ICANN depends very heavily on government assistance and benefits. ICANN would be irrelevant but for DoC having anointed it as [*pg 118] NewCo and lent it control over the root. The second test focuses on the nature of the function being performed. DNS services have been a government function since the inception of the domain name system. The federal government's provision of root DNS services is thus unlike the provision of electricity in *Jackson v. Metropolitan Edison Co.*,[439] because (until ICANN) the DNS has been "exclusively the province of the state" -- through the offices of the military and government contractors But whether DNS services can be said to be a "traditionally" governmental function, given the relative youth of the Internet, is a little harder to say. In the *Thomas* case, the D.C. Circuit found the provision of registrar services too "recent and novel" to qualify.[440] The idea of a hosts.txt file, the precursor of the modern DNS, goes back at least to 1971;[441] the modern DNS dates from about 1983.[442] Twenty years, or even thirty, may be a little short for a "tradition," even though it is an eternity in "Internet Years."[443] But perhaps this approach mischaracterizes the problem. For it is not ICANN that provides registry and registrar services, nor even that maintains the zone file. Rather, ICANN is fundamentally engaged in a traditional, even quintessential, government function: regulation of service providers. The fact that the objects of that regulation are relatively new types of entities is of no moment -- regulation regulation. The application of the third test, whether the harm is aggravated in a unique [*pg 119] way by

the incidents of government authority, depends on the context in which a state actor claim would arise. The factor may weigh differently in a complaint about a (would-be) top-level domain, whose access to the root is directly controlled by DoC, as opposed to a second-level domain, where the influence of DoC's control of the root is exercised through the registrars.

The leading recent cases considering whether corporations with unusually close ties to the federal government should be considered state actors are *Lebron v. National Railroad Passenger Corp.*[444] and *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*.[445] In *Lebron*, the Supreme Court held that Amtrak was a government actor on the basis of the direct federal control spelled out in Amtrak's federal charter. The Court reached this conclusion despite a statute pronouncing that Amtrak "will not be an agency or establishment of the United States government."[446] *Lebron* thus stands for the proposition that in determining whether a corporation is a government actor, the Court will look at the substance of an entity's relationship with the government rather than relying on legal formalities. Indeed, as Justice Scalia wrote for the Court, "It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form."[447]

Nevertheless, exactly how much control the government must have over a corporation before the firm becomes a government actor remains open to debate. The government's control over Amtrak was direct and complete -- the government appointed a majority of Amtrak's board -- so the case serves only as an upper bound in determining what degree of state control suffices to make a corporation a federal actor. Similarly, *San Francisco Arts & Athletics* provides only an example of a degree of control that is insufficient. Although the government provided part of the USOC's funding[448] and gave it special trademark protection, the Supreme Court held that it was not a [*pg 120] government actor.[449] In reaching this conclusion, the Court offered a (perhaps overly) subtle distinction between a corporation that would be a government actor if it undertook a function that was "traditionally the exclusive prerogative" of the federal government, and the USOC, which merely "serves the public."[450] More clearly, the Court noted that the USOC was not a government actor because the necessary element of *government control* was lacking. The United States, the Court stated, no more controlled the USOC than it did the Miss Universe pageant.[451]

To the extent that ICANN is executing the policies set out in the White Paper under pain of termination ICANN very closely resembles a state actor. The White Paper is not, however, a particularly detailed document, and other than creating the UDRP, ICANN's main function is to make decisions that the federal government was politically unwilling or unable to make itself.[452] The government's control over ICANN falls between the extremes of Amtrak and the USOC. On the one hand, there is no question that DoC lacks the formal control over ICANN that the Department of Transportation enjoys over Amtrak. The United States does not appoint any ICANN board members, and government officials' direct participation within the ICANN structure is limited to the Governmental Advisory Committee. On the other hand, as noted above, DoC has ICANN by the throat: it controls its major asset, all of ICANN's major contractual rights revert to the government if DoC pulls ICANN's plug, and so far at least DoC has kept ICANN on a short leash.

The case for ICANN being a state actor turns on the degree of instruction, and perhaps even continuing coordination, from DoC. As noted above, not only is there substantial evidence that ICANN is making policy and regulating, there is also substantial evidence that ICANN is doing so at the behest, tacit or overt, of the Department of Commerce. As we have seen, the ICANN-DoC MoU speaks of cooperation more than delegation; DoC not only initially enabled ICANN, [*pg 121] but they both agreed contractually to stay in close communication with each other.

What makes ICANN different from Amtrak, and more like the USOC, is that ICANN's board is formally independent. The issue, therefore, is whether that formal independence is overcome by the totality of the relationship between ICANN and DoC. In making this determination, some guidance may be found in a recent Supreme Court decision considering a very similar issue in the context of an Establishment Clause claim. Establishment Clause jurisprudence is not identical to state action jurisprudence,[453] although both lines of cases can require courts to consider whether the government should be held responsible for ostensibly private conduct. As the Establishment Clause can be violated by the appearance of endorsement of private religious speech as well as the actual support of it,[454] a lower level of government control or sponsorship than would be required to find state action in other areas may suffice to trigger an Establishment Clause violation. Even with this caveat, the Supreme Court's recent decision in *Santa Fe Independent School District v. Doe*[455] may be instructive. In *Santa Fe*, the defendant school district argued that student-led, student-initiated prayer at high school football games did not violate the Establishment Clause because it was private speech.[456] The Supreme Court agreed with the distinction between public and private speech, but found the speech to be public because it was "authorized by a government policy and [took] place on government property at government-sponsored school-related events."[457] Similarly, ICANN's management of the domain name system is authorized by government policy -- the White Paper -- and relies on its control over a federal resource, the root.

Various groups will ultimately elect ICANN's board. The intervention of an election -- in which the U.S. government has no votes -- might reasonably be considered to insulate ICANN's policymaking [*pg 122] from state action. However, the Supreme Court has long held that "'fundamental rights may not be submitted to vote; they depend on the outcome of no elections.'"[458] The fundamental rights threatened by ICANN's activities are rights to property in domain names, the right to noninterference in contracts with registrars, rights to due process and, to the extent that domain names are or facilitate speech, First Amendment rights.

In *Santa Fe*, the Supreme Court was unimpressed by the use of a free election as a defense against an Establishment Clause claim and held that it did not prevent the elected person's conduct from being fairly charged to the government. Although the Establishment Clause context does not automatically translate to other forms of state action, the Court's reasoning and language is at least suggestive. The Court noted in *Santa Fe* that "the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced."[4 The Court seemed particularly concerned that in choosing to let students vote to elect a designated prayer leader, the school district knew full well which sort of opinion -- the Christian prayers they had

previously offered themselves -- would prevail, if not necessarily exactly who would speak or what they would say.[460] The parallel to ICANN is imperfect, but the Supreme Court's focus on the full context of the election provides a useful model. In approving ICANN, and in particular in requiring the corporatist constituency structure that privileges business and intellectual property owners at the expense of other domain name registrants, the government in effect rigged the game to ensure a predictable outcome.[461]

Whether the government chose to outsource policymaking from a noble desire to privatize and internationalize the root or for other reasons is of no legal relevance to the question of whether ICANN is a state actor. What matters most is the high degree of control and direction exercised over ICANN by DoC. It may be that some day the [*pg 123] government will remove itself fully from DNS regulation. Until that day, however, ICANN arguably falls within the rule the Supreme Court summarized in *NCAA v. Tarkanian*:[462] Private parties are state actors

if the State creates the legal framework governing the conduct; [or] if it delegates its authority to the private actor . . . . Thus, in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor.[463]

But for that "mantle of authority" DoC gave ICANN over the root, ICANN would be an irrelevance.

Furthermore, although the government does not directly pay ICANN, ICANN's ability to raise funds is entirely due to the government having lent ICANN a federal resource, the government's control over the root. ICANN's funds come from registries and registrars. Registrars pay to be accredited by ICANN so they can sell registrations that will be reflected in the legacy root. NSI, which was both registrar and registry, agreed to pay ICANN as part of the tripartite agreements.[464] Moreover, ICANN may some day be able directly to charge registrants and ccTLD registries, and in each case its ability to compel payment will rely on whatever power it may have to control access to the legacy root. Thus, DoC's loan of control over the root is not only the sole basis of ICANN's relevance and power, but also of its income stream.

Courts also find state action when the private enterprise has multiple contacts with the government. Courts look to see if a "symbiotic relationship"[465] between the public and private entities has been formed. Although the inquiry is highly contextual,[466] the presence of government subsidies or aid is probative of state actor status.[467] Indeed, ICANN does have a "symbiotic" relationship with DoC, and DoC has provided enormous aid to ICANN in lending it the root, [*pg 124] anointing it as NewCo, and forcing NSI to come to terms with it. DoC's relationship with ICANN is different from a normal research contract in which the government defines the parameters of a study and a contractor provides information or expert analysis. ICANN is not simply thinking up new ways to manage the DNS, or providing DNS management services, or even engaged in standard setting for new technical protocols. Instead, it provides the service of making policy on new TLDs, policy on registration in existing TLDs, and policy regarding dispute resolution within gTLDs. Unlike a contractor that provides goods or implementation of a department's policy, ICANN is providing regulation services; most of the actual management of the DNS is, after all, conducted by NSI pursuant to the U.S. government's instructions,[468] which now include doing what ICANN says.[469]

A number of court decisions have examined the federal government's relationship with corporations tha provide expert advice on technical questions. Generally, these decisions hold that the corporations are to be identified with the government when the government acts as a rubber stamp, even if the government has retained a formal right to countermand their decisions.[470] The publicly available evidence makes it difficult to discern the extent to which DoC actually reviews ICANN's decisions. We know that new entries to the root, such as .ps, require ratification by DoC; we know that DoC "consults" intensively with ICANN, and has the equivalent of at least two employees working full time on ICANN matters; and we know that in some cases, such as the proposed and abandoned $1 domain name fee, DoC caused, or participated in causing, ICANN to change its [*pg 125] mind. However, we also know that after calling for action against cybersquatters in the White Paper, DoC took no public role in ICANN's decision to impose the UDRP; thus, it is impossible to say how involved DoC was in formulating the decision, and what review, if any, took place at DoC after ICANN resolved to impose the UDRP on registrants.[471]

One thing, however, seems logically clear. Either DoC does not review ICANN decisions[472] such as the decision to adopt UDRP or the coming decision as to which gTLDs to put in the root, or DoC does some sort of review. If DoC does no review, the case for calling ICANN a state actor is strong, since the body uses its control over a federal resource to affect the legal rights of citizens. On the other hand if DoC does conduct a meaningful review, then its decisions to adopt or to allow ICANN's decisions and pronouncements to take legal effect are decisions subject to the APA. .....

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D. Constitutional Issues

As we have seen, DoC's delegation to ICANN could be portrayed as somewhat metaphysical. There is a grain of truth to the sometimes-heard claim that whatever it is that DoC has to give ICANN is only the confidence reposed in it by the root server operators. Nothing stops the non-U.S. government servers from pointing their servers anywhere they choose -- although since the U.S. government controls three of the thirteen root servers directly and several more indirectly,554 such a decision like would produce a split in the root, and ultimately might lead to a divided Internet.555 Depending on how one chose to characterize it, DoC's delegation to ICANN of [*pg 142] power over the root could be described in ways ranging from the precatory to full-bore command and control, including:

an announcement that inspires willing or altruistic compliance among the root servers; or

an announcement that compels compliance among the root servers because they understand the network effects of sharing a single root; or

a lease or loan of government property -- the root file itself, or some intellectual property right to it; o

the transfer of part of the government's interest in its contract with NSI; or

the transfer of the power to regulate, with the root file being the means to enforce compliance.

However one chooses to characterize the delegation, it seems clear that control of the legacy root system undoubtedly confers power over domain name registrants and would-be registrants.

If DoC is neither regulating directly nor indirectly via a state actor, then DoC's delegation of the power to regulate violates the Constitution. A delegation of federal power to a private corporation differs from delegations to an agency. A private person -- even a legal person -- has independent powers. When the federal government delegates power to specific persons, it transfers power to a private group that is often small and unrepresentative or self-interested and presumptively less accountable to the public than are legislators who must face re-election or administrators who must report to the President.556

If DoC has handed this power over to ICANN, even on a temporary basis, without keeping the right to review its decisions, then that delegation violates the nondelegation doctrine and raises major due process concerns. These constitutional concerns are substantially [*pg 143] magnified by the absence of a clear congressional pronouncement authorizing the handing over, even on a trial basis, of policymaking authority over the root. The usual type of delegation to private persons that winds up in court originates in a statute. The ICANN case is unusual because Congress has made no such determination. Rather, the delegation from DoC is contractual. The case for the constitutionality of a delegation of public power to private persons is surely strongest when Congress determines that the delegation is necessary and proper to achieve a valid end, and the case is weaker when the delegation is the agency's independent action.557 Oddly, the GAO -- which focused on statutory issues to the exclusion of the constitutional ones -- seems to have concluded the opposite, reasoning that because DoC had no statutory duty to manage the DNS, its "sub-delegation" of the authority violated no congressional command.558 That analysis works at the statutory level when the issue is DoC's power to enter into contracts with ICANN; it does not work when the issue is delegations of dubious constitutional legitimacy.

1. Origins and Purpose of the Nondelegation Doctrine. The nondelegation doctrine has fallen out of favor. Notoriously used by a reactionary court to strike down elements of FDR's New Deal reforms, the constitutional doctrine preventing excessive delegations carries some heavy baggage. Since the famous "switch in time" that defanged FDR's Court-packing plan, the Supreme Court has upheld a legion of congressional delegations that suggest the pre-New Deal decisions are, at best, moribund. Any argument that seeks to invoke nondelegation principles must, therefore, do some heavy lifting. What follows seeks to take up that challenge by, first, demonstrating that the pre-New Deal decisions were animated by important constitutional values and were correct at least insofar as they placed limits on the delegation of public power to private parties. Second, it shows that, at least as regards the issue of constitutional limits on [*pg 144] delegations to private parties, the pre-New Deal cases remain valid today, both because they have never been overruled and, more importantly, because the principles on which they relied remain relevant and vital.

The nondelegation doctrine instantiates a fundamental public policy against the arbitrary exercise of public power.559 Most famously expounded in two pre-New Deal cases, Carter v. Carter Coal Co.560 and A.L.A. Schechter Poultry Corp. v. United States,561 the doctrine has two related but

distinct forms: the public nondelegation doctrine, which constrains Congress's delegations to the executive,562 and the private nondelegation doctrine, which constrains Congress's delegations to nongovernmental actors. Carter Coal addresses the limits of the legislature's power to vest "lawmaking power in private hands, an issue which had also arisen in Schechter Poultry.563

The better-known and recently revived564 public nondelegation doctrine embodies separation of powers concerns and limits Con- [*pg 145] gress's ability to make standardless delegations to administrative agencies by imposing a limited particularity requirement on delegations of congressiona authority to federal agencies.565 Only government agencies in the executive branch may exercise executive powers.566 It follows that an agency that is responsible to Congress or to the courts may not execute the laws,567 and it goes almost without saying that even executive branch agencies may only exercise those powers delegated to them by Congress.568 The public nondelegation doctrine prevents Congress from surrendering a core part of its role -- making certain fundamental policy choices -- to the executive.

[*pg 146]

In contrast to the separation of powers concerns that animate the public nondelegation doctrine, the private nondelegation doctrine focuses on the dangers of arbitrariness, lack of due process, and self-dealing when private parties are given the use of public power without being subjected to the shackles of proper administrative procedure. Both doctrines stem from a long tradition of seeking to ensure that public power is exercised in a manner that makes it both formally and, insofar as possible, actually accountable to elected officials, and through them -- we hope -- to the electorate.569 This concern for proper sources and exercise of public authority promotes both the rule of law and accountability.570

Concern about delegations to private parties also has a long pedigree. In Eubank v. City of Richmond,571 the Supreme Court struck down an ordinance allowing owners of two-thirds of the properties on a street to make a zoning rule defining setbacks. The Court said this was unconstitutional because it gave one group of property owners the power "to virtually control and dispose of the proper rights of others" and lacked any "standard by which the power thus given is to be exercised."572 Similarly, in Washington v. Roberge,573 the Court held that an ordinance requiring the prior approval of owners of two-thirds [*pg 147] of properties within 400 feet of a proposed home for the aged poor was a rule "uncontrolled by any standard or rule prescribed by legislative action."574 This limited electorate, the Court noted, was "free to withhold consent for selfish reasons or arbitrarily."575 Two generations later, in City of Eastlake v. Forest City Enterprises, Inc.,576 the Court upheld a city charter provision requiring proposed land-use changes to be ratified by 55% of the people voting at a city-wide referendum.577 Distinguishing the "standardless delegation of power" properly struck down in Eubank

and Roberge, the Court stated that a city-wide referendum was not a delegation of power because "[i]n establishing legislative bodies, the people can reserve to themselves power to deal directly with matter which might otherwise be assigned to the legislature."578

The Schechter Poultry case involved both public and private delegation issues. The National Industrial Recovery Act set up a process by which trade or industrial associations could devise codes of fair competition and petition the President to make them binding on their trade or industry. (In the absence of such a request, the President could also promulgate codes himself.)579 Trade associations and firm would select an "industry advisory committee"; this committee, in turn, would appoint a "code supervisor," subject to the approval of the Secretary of Agriculture and the Administrator for Industrial Recovery, with firms taxed to pay for him "proportionately upon the basis of volume of business, or such other factors as the advisory committee may deem equitable," subject again to federal review.580

The President was empowered to accept and enforce a trade or industrial code upon finding

(1) that such associations or groups "impose no inequitable restrictions on admission to membership therein and are truly representative," and (2) that such codes are not designed "to promote mo- [*pg 148] nopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy" [of the statute.]581

The President could condition his approval on whatever provisions he thought necessary "for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest."582 Violation of a duly approved code was a misdemeanor punishable by a fine of $500 per day.

In response to the Schechters' challenge to the statute, the Supreme Court defined the issue as whether the statute adequately defined the authority delegated to the President or to trade associations. In both cases, the Supreme Court held, the standards that described the extent of the delegation were too vague to be constitutionally acceptable because they were sufficiently plastic to permit any rule. Citing its then-recent decision in Panama Refining v. Ryan,583 the Court said that such "virtually unfettered" delegations to the executive were unconstitutional;584 it then extended the Panama Refining ruling to apply to delegations to private groups also. Thus, the Supreme Court asked rhetorically whether

it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? . . . The answer is obvious. Such a delegation . . . is utterly inconsistent with the constitutional prerogatives and duties of Congress.585

In Carter v. Carter Coal, the Supreme Court struck down the Bituminous Coal Conservation Act of 1935 because it unconstitutionally delegated public power to private groups.586 The facts of Carter

Coal eerily foreshadow the ICANN story -- with the key differences that the Bituminous Coal Conservation Act was the direct and intentional result of a congressional enactment and that violators c the act might [*pg 149] be subject to fiscal sanctions.587 Just as ICANN regulates the DNS on the basis of voluntary contractual agreements with private parties, so, too, the Coal Act relied on the "voluntary" acceptance by mine owners and operators of privately written codes of conduct that were created by each of twenty-three coal districts. The codes fixed maximum and minimum prices and rule relating to wages and working conditions.588 Congress gave the power to determine the content of the district's code to producers of more than two-thirds the annual national tonnage production for the preceding year; a majority of the mine workers employed in the district could fix the maximum hours c labor.589 Producers of more than two-thirds of the district annual tonnage during the preceding year and a majority of the miners shared the power to fix minimum wages for the district. "The effect," the Court concluded, "in respect of wages and hours, is to subject the dissentient minority, either of producers or miners or both, to the will of the stated majority . . . ."590 The coal boards' decisions went into effect directly, without review or intervention by the federal government.

The kicker in the Coal Act was that Congress set up a prohibitive "excise tax" on coal.591 Mine owners could only avoid the tax by "voluntarily" signing on to the codes of conduct. Furthermore, the Act required the U.S. government to buy coal only from mines that complied with a code and to impose the same requirement on all its contractors.592 Despite operating in what is now derided as a formalist era, the pre-New Deal Supreme Court made short work of this legal fiction of voluntariness, stating "[o]ne who does a thing in order to avoid a monetary penalty does not agree; he yields to compulsion precisely the same as though he did so to avoid a term in jail."593 Thus, [*pg 150] "[t]o 'accept,' in these circumstances, is not to exercise a choice, but to surrender to force."594

The consequences of refusing to submit to a privately drafted code were not penal; they were severe, but purely economic. Nevertheless, the Court excoriated the Coal Act as "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."595 Chief Justice Hughes, writing separately, also faulted the Coal Act fo violating the due process rights of mine owners and workers.596 Justice Cardozo, dissenting, defende the Coal Act by noting that it required the coal boards to act justly and equitably, to take account of market factors, and to avoid undue prejudice or preference between producers,597 but these factors failed to sway the majority.

2. Modern Reception of the Private Nondelegation Doctrine. Since the New Deal, Schechter Poultry has been all but rejected as an authority, and both the Carter Coal doctrine and the standard nondelegation doctrine have been, at best, legal backwaters in the federal courts,598 although nondelegation survives, even flourishes, in the state courts.599 For years the public delegation doctrin bowed to the modern administrative state, which includes any number of congressional delegations of power to the executive that stretch the nondelegation doctrine almost beyond recognition. In decisions

upholding these delegations, ranging from Yakus v. United States600 and Fahey v. Malonee601 to Amalgamated Meat Cutters v. Connally,602 the federal courts' willingness to approve virtually any delegation [*pg 151] prompted Justice Marshall to suggest that the nondelegation doctrine has been "abandoned by the Court for all practical purposes."603 While a number of cases cite nondelegation concerns as a reason to construe statutes narrowly,604 until the D.C. Circuit's recent, and very controversial,605 decision suggesting that an EPA regulation might be void on nondelegation grounds,606 the leading judicial suggestions that the classic nondelegation doctrine might not be dead were a concurring opinion by then-Justice Rehnquist607 and a dissent by Justice Scalia.608

Although it represents a separate, less-criticized doctrine than Schechter Poultry's public nondelegatio doctrine, the private nondelegation doctrine of Carter Coal remains one of the decisions that prompted FDR's Court-packing proposal, and it found little favor in the federal courts after the "switch in time tha saved nine."609 Parts of it -- notably the suggestion that the Commerce Clause does not attach to mining because products only enter the stream of commerce after extraction -- clearly have been repudiated. And, only a few years after Carter Coal, the Supreme Court limited the reach of the private nondelegation doctrine. In Currin v. Wallace,610 the Court upheld a statute authorizing the Secretary o Agriculture to fix standards for the grading and weighing of tobacco. The statute also authorized the Secretary to designate tobacco auction markets that would be forbidden from selling tobacco unless it was described and measured according [*pg 152] to the new national standards. An auction could be designated as a covered tobacco market only if two-thirds of the growers who had sold tobacco there the previous season approved of the designation.611 Plaintiffs attacked this vote as an unconstitutional delegation of power, but the Court rejected their nondelegation claim as "untenable."612 Because the authority for the entire regulatory scheme, including the requirement for the vote of approval, originate directly from Congress, and perhaps because the Secretary rather than private parties made the rules, the Court distinguished the vote from "a case where a group of producers may make the law and force it upon a minority or where a prohibition of an inoffensive and legitimate use of property is imposed nc by the legislature but by other property owners."613

Without a doubt, the ban against delegation to private parties has suffered erosion.614 This erosion is most visible at the state level615 but, like states, the federal government relies on private parties' decisions for a number of administrative matters. For example, the federal government relies on accreditation decisions made by private parties to make funding choices,616 although this reliance, and thus collaterally the underlying decision, is subject to basic due process review.617 The federal government also reviews and administers self-regulatory bodies. The best example of this sort of delegation is the regulation of exchanges, in which securities dealers write their own regulations, then submit them to the SEC for review.618 Once ap- [*pg 153] proved through ordinary notice and comment rulemaking, the securities dealers' rules take on the force of law.

E. Due Process Issues

Given its reception since the 1930s, it seems fair to ask if Carter Coal is still good law.619 A fair answer is that, while the federal courts have largely acquiesced to Congress's loaning out its legislative power to actors not conceived via Article I, the demand that this power be exercised with due process remains vital.620 The Carter Coal doctrine is known as a nondelegation doctrine, but in a way the name is misleading. Unlike the public nondelegation doctrine, which relies on the separation of powers to prevent Congress from making standardless delegations to administrative agencies, the Carter Coal doctrine forbidding delegation of public power to private groups is, in fact, rooted in a prohibition against self-interested regulation that sounds more in the Due Process Clause than in the separation of powers. The evil that the Carter Coal doctrine seeks to avoid is that of a private person being a judge or regulator, especially where there is a possible conflict of interest.621 The danger comes in its starkest form when some members of an industry are given the power to regulate their competitors, but is present whenever a judge or regulator lacks the neutrality due process demands. Viewed this way, it is not surprising that in Luxton v. North River Bridge622 the Supreme Court unanimously agreed that it was "beyond dispute" that Congress may give a private corporation the power of eminent domain,623 because a government-sponsored taking entitles the owner to just compensation -- which can be secured [*pg 154] in court if necessary. Anyone harmed by self-dealing would have a full remedy.

The strongest argument for the continuing vitality -- or, if need be, revival -- of the Carter Coal doctrine is that undue delegations to private parties entrench a kind of officially sanctioned self-interested regulation that violates due process or equal protection.624 It was the self-interested regulation that the Carter Coal Court called the "most obnoxious form" of delegation.625 Several courts626 and commentators627 have agreed that delegations to private groups are more troubling than those to public agencies because the accountability mecha- [*pg 155] nisms are weaker or non-existent. Although modern ideas of how much can be delegated to public bodies have changed substantially in the last ninety years, the principle that specific legislative authority should be required to support an otherwise dubious delegation by contract remains as sensible today as ever.

Thus, even though the Supreme Court has not decided a case turning on the private nondelegation doctrine in sixty years,628 there is reason to believe that Carter Coal's fundamental limit on delegation of public power to private groups retains its validity.629 Admittedly, the formal clues are sparse. While never overturned,630 post(Schechter Poultry Supreme Court commentary on Carter Coal is rare.631 Many legal scholars have argued that the doctrine is or should be dead,632 although others have argued that it retains or deserves vitality.633

But while the Supreme Court has had no modern opportunities to revisit the private nondelegation doctrine, the state courts have had that chance, and their treatment of the issue underlines the importance of the doctrine today. Perhaps the best example comes from Texas, where the state supreme court recently reaffirmed the impor- [*pg 156] tance of the doctrine after a thorough and scholarly examination of the role of the private nondelegation doctrine.

The Texas Constitution does not permit occupation taxes on agricultural products.634 In order to have cotton growers pay for a Boll Weevil eradication campaign, the Texas legislature authorized the Texas Commissioner of Agriculture to certify a nonprofit organization representing cotton growers to create "'Official Cotton Growers' Boll Weevil Eradication Foundation.'"635 The Foundation in turn would be empowered to propose geographic eradication zones and to conduct referenda in each zone to see if the cotton growers in it wished to become an "eradication zone." Zones that voted yes would elect a member to represent them on the Foundation's board.636 The Foundation then would set proposed assessments for eradication efforts, which the growers would have to approve by referendum.637 Although its funding required a confirmatory referendum, the statute gave the Foundation broad powers, including the powers to decide what eradication program to pursue, to take on debt, to penalize late payers of assessments, to enter private property for eradication purposes, and even to require the destruction of uninfected cotton crops for nonpayment of assessments.638 Very soon after the legislature passed the statute, a nonprofit corporation formed "to allow a forum for discussion of problems and activities of mutual interest to the Texas Cotton Industry,"639 which had lobbied for the statute,640 and pe- [*pg 157] titioned the Commissioner of Agriculture to be allowed to form the Foundation. Upon receiving that permission, the corporation created the Foundation, and -- in seeming morphic resonance with ICANN -- impaneled an initial board (even though the statute had no prevision for one) and began operations. Growers subjected to the Foundations assessment soon brought suit.

The court began its discussion of the constitutionality of the delegation to the Boll Weevil Foundation noting that many delegations to private parties were "frequently necessary and desirable," such as the delegation of the power to marry or the decision to promulgate existing or future versions of industrial codes and professional standards.641 Nevertheless, the court warned, delegations to private parties create greater dangers of conflict of interest and, thus, deserve more searching scrutiny, than do delegations, however great, to public bodies.642

There being an absence of judicially crafted standards available to guide whether such delegations were permissible, the court decided to craft them.643 It decided, based on its review of federal and state precedent, and of academic writings, that there were eight key questions:

1. Are the private delegate's actions subject to meaningful review by a state agency or other branch of state government?

[*pg 158]

2. Are the persons affected by the private delegate's actions adequately represented in the decisionmaking process?

3. Is the private delegate's power limited to making rules, or does the delegate also apply the law to particular individuals?

4. Does the private delegate have a pecuniary or other personal interest that may conflict with his or he public function?

5. Is the private delegate empowered to define criminal acts or impose criminal sanctions?

6. Is the delegation narrow in duration, extent, and subject matter?

7. Does the private delegate possess special qualifications or training for the task delegated to it?

8. Has the Legislature provided sufficient standards to guide the private delegate in its work?644

The court did not, however, explain how these eight factors were to be weighed. Instead, it found five factors weighing against the delegation, one in favor, and two either neutral or severable.645 A concurring justice was more blunt; he described the Foundation as "little more than a posse: volunteers and private entities neither elected nor appointed, privately organized and supported by the majority of some small group, backed by law but without guidelines or supervision, wielding great power over people's lives and property but answering virtually to no one."646

A subsequent decision suggested that the first and fourth factors are the most important. The importance of the first factor reflects the [*pg 159] fact that "one of the central concerns in private delegations is the potential compromise of our 'democratic rule under a republican form of government.'"647 The fourth factor gains pride of place because the nondelegation doctrine's "other central concern is the potential that the delegate may have a 'personal or pecuniary interest [which is] inconsistent with or repugnant to the public interest to be served.'"648

While the post(New Deal federal judicial record is consistent with claims that Carter Coal may be a candidate for desuetude, these decisions of the Texas supreme court demonstrate that the principles that animated the private nondelegation doctrine remain valid and are, if anything, more relevant today than ever. ICANN is only an extreme example of a more general phenomenon in which suspicion of government and exaltation of the private sector have led to a general push for privatization.649 While privatization may be a more efficient way to produce goods and services, there is no reason to believe that privatized governance is preferable to a system in which government is elected by and responsible to the governed. Covert corporatism should not be confused with privatization.650

It remains the case that it is Congress's inalienable role to make "the important choices of social policy"651 as regards how public power will be used. Giving private bodies or small groups of citizens the right to commandeer the power of the state to make decisions that affect neighbors, fellow citizens competitors, or customers undermines democratic, or republican, government and creates a dangerous opportunity for self-interested regulation.

II Free Speech in Cyberspace

A. Case Study: The Communications Decency Act

The CDA As Actually Passed, 47 U.S.C.A. §§ 223, 230

47 U.S.C.A. § 223

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER II--COMMON CARRIERS
PART I--COMMON CARRIER REGULATION

Current through P.L. 104-207, approved 9-30-96

§ 223. Obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications

(a) Prohibited general purposes

Whoever--

(1) in interstate or foreign communications--

(A) by means of a telecommunications device knowingly--

(i) makes, creates, or solicits, and

(ii) initiates the transmission of,

any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person;

(B) by means of a telecommunications device knowingly--

(i) makes, creates, or solicits, and

(ii) initiates the transmission of,

any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;

(C) makes a telephone call or utilizes a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications;

(D) makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or

(E) makes repeated telephone calls or repeatedly initiates communication with a telecommunications device, during which conversation or communication ensues, solely to harass any person at the called number or who receives the communication; or

(2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity,

shall be fined under Title 18, or imprisoned not more than two years, or both.

(b) Prohibited commercial purposes; defense to prosecution

(1) Whoever knowingly--

(A) within the United States, by means of telephone, makes (directly or by recording device) any obscene communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or

(B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A),

shall be fined in accordance with Title 18, or imprisoned not more than two years, or both.

(2) Whoever knowingly--

(A) within the United States, by means of telephone, makes (directly or by recording device) any indecent communication for commercial purposes which is available to any person under 18 years of age or to any other person without that person's consent, regardless of whether the maker of such communication placed the call; or

(B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined not more than $50,000 or imprisoned not more than six months, or both.

(3) It is a defense to prosecution under paragraph (2) of this subsection that the defendant restricted access to the prohibited communication to persons 18 years of age or older in accordance with subsection (c) of this section and with such procedures as the Commission may prescribe by regulation.

(4) In addition to the penalties under paragraph (1), whoever, within the United States, intentionally violates paragraph (1) or (2) shall be subject to a fine of not more than $50,000 for

each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(5)(A) In addition to the penalties under paragraphs (1), (2), and (5), whoever, within the United States, violates paragraph (1) or (2) shall be subject to a civil fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(B) A fine under this paragraph may be assessed either--

(i) by a court, pursuant to civil action by the Commission or any attorney employed by the Commission who is designated by the Commission for such purposes, or

(ii) by the Commission after appropriate administrative proceedings.

(6) The Attorney General may bring a suit in the appropriate district court of the United States to enjoin any act or practice which violates paragraph (1) or (2). An injunction may be granted in accordance with the Federal Rules of Civil Procedure.

(c) Restriction on access to subscribers by common carriers; judicial remedies respecting restrictions

(1) A common carrier within the District of Columbia or within any State, or in interstate or foreign commerce, shall not, to the extent technically feasible, provide access to a communication specified in subsection (b) of this section from the telephone of any subscriber who has not previously requested in writing the carrier to provide access to such communication if the carrier collects from subscribers an identifiable charge for such communication that the carrier remits, in whole or in part, to the provider of such communication.

(2) Except as provided in paragraph (3), no cause of action may be brought in any court or administrative agency against any common carrier, or any of its affiliates, including their officers, directors, employees, agents, or authorized representatives on account of--

(A) any action which the carrier demonstrates was taken in good faith to restrict access pursuant to paragraph (1) of this subsection; or

(B) any access permitted--

(i) in good faith reliance upon the lack of any representation by a provider of communications that communications provided by that provider are communications specified in subsection (b) of this section, or

(ii) because a specific representation by the provider did not allow the carrier, acting in good faith, a sufficient period to restrict access to communications described in subsection (b) of this section.

(3) Notwithstanding paragraph (2) of this subsection, a provider of communications services to which subscribers are denied access pursuant to paragraph (1) of this subsection may bring an action for a declaratory judgment or similar action in a court. Any such action shall be limited to the question of whether the communications which the provider seeks to provide fall within the category of communications to which the carrier will provide access only to subscribers who have previously requested such access.

(d) Sending or displaying offensive material to persons under 18

Whoever--

(1) in interstate or foreign communications knowingly--

(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

(B) uses any interactive computer service to display in a manner available to a person under 18 years of age,

any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or

(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity,

shall be fined under Title 18, or imprisoned not more than two years, or both.

(e) Defenses

In addition to any other defenses available by law:

(1) No person shall be held to have violated subsection (a) or (d) of this section solely for providing access or connection to or from a facility, system, or network not under that person's control, including transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or connection that does not include the creation of the content of the communication.

(2) The defenses provided by paragraph (1) of this subsection shall not be applicable to a person who is a conspirator with an entity actively involved in the creation or knowing distribution of communications that violate this section, or who knowingly advertises the availability of such communications.

(3) The defenses provided in paragraph (1) of this subsection shall not be applicable to a person who provides access or connection to a facility, system, or network engaged in the violation of this section that is owned or controlled by such person.

(4) No employer shall be held liable under this section for the actions of an employee or agent unless the employee's or agent's conduct is within the scope of his or her employment or agency and the employer (A) having knowledge of such conduct, authorizes or ratifies such conduct, or (B) recklessly disregards such conduct.

(5) It is a defense to a prosecution under subsection (a)(1)(B) or (d) of this section, or under subsection (a)(2) of this section with respect to the use of a facility for an activity under subsection (a)(1)(B) of this section that a person--

(A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or

(B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.

(6) The Commission may describe measures which are reasonable, effective, and appropriate to restrict access to prohibited communications under subsection (d) of this section. Nothing in this section authorizes the Commission to enforce, or is intended to provide the Commission with the authority to approve, sanction, or permit, the use of such measures. The Commission shall have no enforcement authority over the failure to utilize such measures. The Commission shall not endorse specific products relating to such measures. The use of such measures shall be admitted as evidence of good faith efforts for purposes of paragraph (5) in any action arising under subsection (d) of this section. Nothing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers.

(f) Violations of law required; commercial entities, nonprofit libraries, or institutions of higher education

(1) No cause of action may be brought in any court or administrative agency against any person on account of any activity that is not in violation of any law punishable by criminal or civil penalty, and that the person has taken in good faith to implement a defense authorized under this section or otherwise to restrict or prevent the transmission of, or access to, a communication specified in this section.

(2) No State or local government may impose any liability for commercial activities or actions by commercial entities, nonprofit libraries, or institutions of higher education in connection with an activity or action described in subsection (a)(2) or (d) of this section that is inconsistent with the treatment of those activities or actions under this section: Provided, however, That nothing herein shall preclude any State or local government from enacting and enforcing complementary oversight, liability, and regulatory systems, procedures, and requirements, so long as such systems, procedures, and requirements govern only intrastate services and do not result in the imposition of inconsistent rights, duties or obligations on the provision of interstate services. Nothing in this subsection shall preclude any State or local government from governing conduct not covered by this section.

(g) Application and enforcement of other Federal law

Nothing in subsection (a), (d), (e), or (f) of this section or in the defenses to prosecution under subsection (a) or (d) of this section shall be construed to affect or limit the application or enforcement of any other Federal law.

(h) Definitions

For purposes of this section--

(1) The use of the term "telecommunications device" in this section--

(A) shall not impose new obligations on broadcasting station licensees and cable operators covered by obscenity and indecency provisions elsewhere in this chapter; and

(B) does not include an interactive computer service.

(2) The term "interactive computer service" has the meaning provided in section 230(e)(2) of this title.

(3) The term "access software" means software (including client or server software) or enabling tools that do not create or provide the content of the communication but that allow a user to do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

(4) The term "institution of higher education" has the meaning provided in section 1141 of Title 20.

(5) The term "library" means a library eligible for participation in State- based plans for funds under title III of the Library Services and Construction Act (20 U.S.C. 355e et seq.).

CREDIT(S)

1991 Main Volume

(June 19, 1934, c. 652, Title II, § 223, as added May 3, 1968, Pub.L. 90-299, § 1, 82 Stat. 112, and amended Dec. 8, 1983, Pub.L. 98-214, § 8(a), (b), 97 Stat. 1469, 1470; Apr. 28, 1988, Pub.L. 100-297, Title VI, § 6101, 102 Stat. 424; Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7524, 102 Stat. 4502; Nov. 21, 1989, Pub.L. 101-166, Title V, § 521(1), 103 Stat. 1192.)

1996 Electronic Update

(As amended Oct. 25, 1994, Pub.L. 103-414, Title III, § 303(a)(9), 108 Stat. 4294; Feb. 8, 1996, Pub.L. 104-104, Title V, § 502, 110 Stat. 133.)

Amendments

1996 Amendments. Subsec. (a). Pub.L. 104-104, § 502(1), added provisions relating to knowledge requirements, making, creating, or soliciting communications, initiating the transmission of communications, and recipients under 18 years of age, and struck out provisions relating to the District of Columbia.

Subsecs. (d) to (h). Pub.L. 104-104, § 502(2), added subsecs. (d) to (h).

Expedited Review

Section 561 of Pub.L. 104-104 provided that:

"(a) Three-Judge District Court Hearing.--Notwithstanding any other provision of law, any civil action challenging the constitutionality, on its face, of this title or any amendment made by this title, [Title V of Pub.L. 104-104, Feb. 8, 1996, 110 Stat. 133, the Communications Decency Act of 1996, for distribution of which, see Short Title note set out under section 609 of this title] or any provision thereof, shall be heard by a district court of 3 judges convened pursuant to the provisions of section 2284 of title 28, United States Code [section 2284 of Title 28, Judiciary and Judicial Procedure].

"(b) Appellate Review.--Notwithstanding any other provision of law, an interlocutory or final judgment, decree, or order of the court of 3 judges in an action under subsection (a) holding this title or an amendment made by this title, or any provision thereof, unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court. Any such appeal shall be filed not more than 20 days after entry of such judgment, decree, or order."

II. A. Case Study: The Communications Decency Act

47 U.S.C.A. § 230

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER II--COMMON CARRIERS
PART I--COMMON CARRIER REGULATION

Current through P.L. 104-207, approved 9-30-96

§ 230. Protection for private blocking and screening of offensive material

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States--

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "good samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

(d) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on Communications Privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(e) Definitions

As used in this section:

(1) Internet

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider

The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

II. A. Case Study: The Communications Decency Act

II. Free Speech in Cyberspace

B. The First Amendment

1. Basic Concepts

William Van Alstyne, A Graphic Review of the Free Speech Clause,
70 California Law Review 107 (1982)

A number of years ago, Professors Tussman and tenBroek published in this Review an excellent analysis of the equal protection clause.[É] Using Venn diagrams, they sought to disaggregate various ways of looking at equal protection claims in order to aid our understanding of what that clause might mean. Their article was not the first word ever published on the equal protection clause, of course, and certainly it was not meant to be the last. But it did impose an extremely helpful clarity on what was even then a murky, undisciplined subject, and it filled a gap in the unruly professional literature. Three decades later, students of constitutional law still find Tussman-tenBroek graphics a useful starting place.

A similar presentation of the free speech clause is the main object of this Article. Like the Tussman-tenBroek piece, it disaggregates a jumble of rival judicial doctrines that purport to define a correct way of framing questions arising under the free speech clause. My aim is to determine what is at stake among contending interpretations, and to see why great importance tends to be attached to such matters. Written principally for students, this Article, too, proceeds through a series of graphic depictions, each designed to reflect a distinct impression or interpretation of the free speech clause. To be sure, the different constructions of the clause reflected in these graphics are not exhaustive.[ÉÉ] They do embrace, however, nearly all the basic interpretations that have competed most strongly for judicial favor during the past century of Supreme Court adjudications. The Article begins with the simple, unqualified construction suggested by the face of the clause. Each successive depiction purports to respond to some shortcoming or some perceived difficulty in the more literal or rudimentary graphic it aims to displace.

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I

THE LITERAL CONSTRUCTION

[É] Tussman & tenBroek, The Equal Protection of the Laws, 37 CALIF. L. REV. 341 (1949).

[ÉÉ] Three versions that will not be reviewed here are the "bad tendency," "advocacy of illegal conduct," and "no prior restraint" versions. The first tended to characterize the Supreme Court majority position throughout the 1920's. See, e.g., Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); Abrams v. United States, 250 U.S. 616 (1919). The second was put forward by Learned Hand in Masses Pub. Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917), and is well described in Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 STAN. L. REV. 719 (1975). The third was the sole concern of the common law as summarized in 4 W. BLACKSTONE, COMMENTARIES ON THE COMMON LAW 150-54 (1st Am. ed. 1772), discussed in Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 9-12 (1942). For an excellent recent review of contending doctrines early in this century, see Rabban, The First Amendment in Its Forgotten Years, 90 YALE L.J. 514 (1981).

In respect to freedom of speech, the first amendment is exceptionally crisp and unambiguous. Thus, it provides: Congress shall make no law abridging the freedom of speech. Most of the principal affirmative restrictions on government power are far more ambiguous or equivocal. For instance, the fourth amendment protects "the right of the people to be secure in their persons, houses, papers, and effects" only against "unreasonable searches and seizures." The fifth amendment assures each person that he or she will not be deprived of life, liberty, or property, without "due process." The eighth amendment prohibits only such bail or such fines as are "excessive" and forbids only "cruel and unusual punishments."

* * *

None of this is to say that no difficult questions of construction arise under the first amendment. They are questions, however, that arise only in instances where the facts are not clearly within the terms of the amendment. For instance, an act of Congress making it a crime to criticize the president, as applied to a person speaking critically of the president, is plainly within the amendment and therefore plainly unconstitutional. Whether an act of Congress making it a crime to destroy a draft registration card is also within the amendment, on the other hand, may be debatable; it is contingent upon one's view of equating the tearing of a pasteboard in the course of a speech against the draft with speech.[ÉÉÉÉÉÉÉÉÉ] Similarly, an act of Congress making it a crime to criticize any federal judge is plainly within the amendment and, accordingly, invalid. On the other hand, whether an attempt by a federal judge to silence either a witness in court or speakers outside the courtroom also raises any kind of first amendment issues is a different (and more difficult) question. The amendment says only that Congress shall make no law abridging the freedom of speech; on its face, the first amendment is not directed either to the judiciary or to the executive.[ÉÉÉÉÉÉÉÉÉÉ]

[ÉÉÉÉÉÉÉÉÉ]It is not speech, of course, but there may be persuasive instrumental reasons for deeming it so. See United States v. O'Brien, 391 U.S. 367 (1968) (burning of draft cards, in the setting of an anti-war rally, given marginal first amendment protection).

[ÉÉÉÉÉÉÉÉÉÉ]A surprising number of commentators have concluded that, for this reason alone, the first amendment cannot be taken literally because it would leave unrestrained, incorrigible opportunities for the executive and judicial departments of the United States to suppress free speech in ways that must have been meant to be forbidden under the first amendment. It is not clear, however, whether such easy criticism is well founded. The extent of the problem depends partly upon one's view of how much of the executive power and how much of the judicial power do not depend upon acts of Congress.

Most of what the President can do may in fact be derived from enabling legislation by Congress, rather than by force of his power as provided for in article II. The same is true of our federal courts under article III. When particular uses of the executive and judicial power proceed pursuant to authorizations and enabling legislation by Congress, they are subject to the first amendment, which makes no exception for acts of Congress merely because they may also be in aid of the executive or judicial powers, as distinct from acts of Congress in aid of its own enumerated powers. The consequence may be that the actual ambit of executive and judicial power unaffected by a literal first amendment (because not consequential to any act of Congress) would be very small, confined at the outset, and not as important to restrict as that of Congress. I have dealt with this problem obliquely in a different article, however, and there is little reason to deal with it here. See Van Alstyne, The Role of Congress in Determining

If the source of abridgment is a law made by Congress and if what the law expressly abridges is speech, however, the amendment itself appears to end the inquiry.[É] What kind of speech is involved (e.g., whether political or commercial, private or public, obscene or religious) is, on the face of the amendment, not a question. And equally, whether the speech seems trivial rather than important, reprehensible rather than edifying, or remarkably insightful rather than fraught with danger, are also not questions. For the point, again, is that while one may always have an appropriate interest as to how this amendment came about (e.g., what purposes it was meant to serve, why it was proposed, whether as approved and ratified it enacted a proposition thoughtful people would find entirely too dogmatic), it is nonetheless this amendment that did come about.[ÉÉ] If one finds it too strong or ridiculous (e.g., if one thinks it should be recast in terms consistent with the moderation of the fourth, fifth, and eighth amendments, or if one thinks that nothing more than a speech fetishism could account for such an amendment), article V of the Constitution provides

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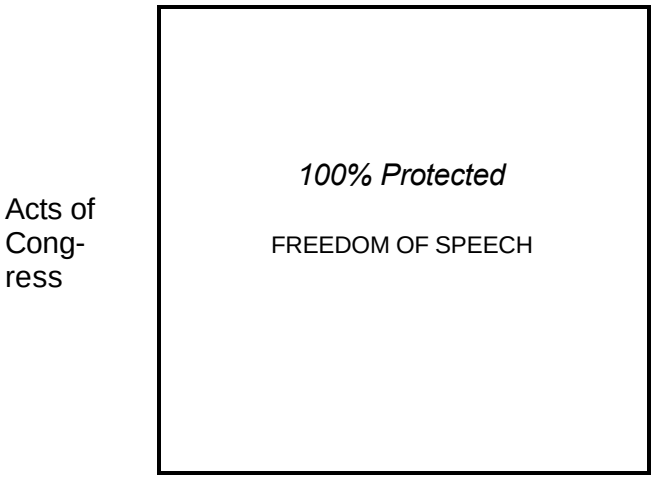
Incidental Powers of the President and of the Federal Courts, 40 L. & CONTEMP. PROB. 102 (1976).

[É]The inquiry may not be ended if it is the kind of speech that the copyright clause enables Congress to confide an exclusive property right in others to control pursuant to its power under art. I, § 8, cl. 8, "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." For an opening discussion, see Nimmer, Does Copyright Abridge the First Amendment Guarantee of Free Speech and Press?, 17 U.C.L.A. L. REV. 1180 (1970).

[ÉÉ] Note, for instance, how the first amendment differs from the second amendment in this respect. The first amendment does not link the protection it provides with any particular objective and may, accordingly, be deemed to operate without regard to anyone's view of how well the speech it protects may or may not serve such an objective. The second amendment expressly links the protection it provides with a stated objective ("A well regulated Militia, being necessary to the security of a free state") and might, therefore, be deemed to operate only insofar as the right it protects ("the right of the people to keep and bear arms") can be shown to be connected with that objective.

The different modes of the first and second amendments are not unique in this regard. The enumeration of powers vested in Congress, in art. I, § 8, reflects a similar difference. For instance, whatever the reasons contributing to the grant, the vesting of power in Congress to "regulate commerce among the several states" is textually not bounded by any statement of purpose or objective in respect to the exercise of that power. On the other hand, the vesting of power in Congress to secure "to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" has two textual qualifications. The first may be implied by the introductory phrase accompanying the grant of power, that this power is vested in Congress "to promote the Progress of Science and useful Arts." The second is express, in that the power is one to grant an "exclusive Right" for "limited Times," and not in perpetuity. Thus, while the Supreme Court might defer to Congress on both matters, it might also, consistent with the text, check Congress with respect to either matter. The Court might, for example, hold unconstitutional a vesting of exclusive patent or copyright that in the Court's view has no rational connection with promoting the progress of science or any useful art, or it might hold unconstitutional a vesting of exclusive patent or copyright that in the Court's view is unnecessarily long or excessive to fair protection. On the other hand, the court would regard the commerce power as plenary, as indeed it has in an overwhelming number of cases. See, e.g., Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946) (congressionally approved discriminatory state tax statute sustained); Champion v. Ames, 188 U.S. 321 (1903) (act of Congress destroying, rather than enhancing, interstate commerce sustained); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

a mechanism for implementing the change that requisite majorities in Congress and in the states may prefer. In the meantime, we have the first amendment as it appears and, as it does appear it is in contrast to, rather than in similarity to, the moderation of other provisions in the Bill of Rights. A suitable graphic of the first amendment might therefore look like this:



There are no lines, no intersecting points, no shaded areas of less protected or of unprotected speech. The graphic, though singularly uninteresting, is also perfect and inviolate.

II

"THE" FREEDOM OF SPEECH

Despite the simplicity and logical force of a literal interpretation of the first amendment, it has never commanded a majority of the Supreme Court. Primarily it has failed against the pressures of irresistible counterexamples, rationalized by an uncertain early history. An "irresistible counterexample" is an instance that is plainly within the literal prohibition of the amendment, but that one is nonetheless unwilling to defend. The necessary consequence is to concede that there must be some degree of moderation contemplated by the first amendment despite first impressions to the contrary.

Possibly the best known counterexample is a variation of an instance used by Mr. Justice Holmes: a person knowingly and falsely shouting "Fire!" in a crowded theater for the perverse joy of anticipating the spectacle of others being trampled to death as the panicked ***114** crowd surges toward the theater exit.[É] The counterexample could as well be: the mere oral statement of one person to another, offering to pay $5,000 for the murder of the offeror's spouse; a Congressman's

[É] Schenck v. United States, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

bribe solicitation; an interstate manufacturer's deliberately false and misleading commercial advertisements; a witness committing perjury in the course of a trial; or a member of the public interrupting (by speaking) someone else already speaking at a city council meeting. The counterexample need not be more complicated than a simple, soft statement made to the president that he will be shot if he fails to veto a particular bill or fails to grant a certain pardon.

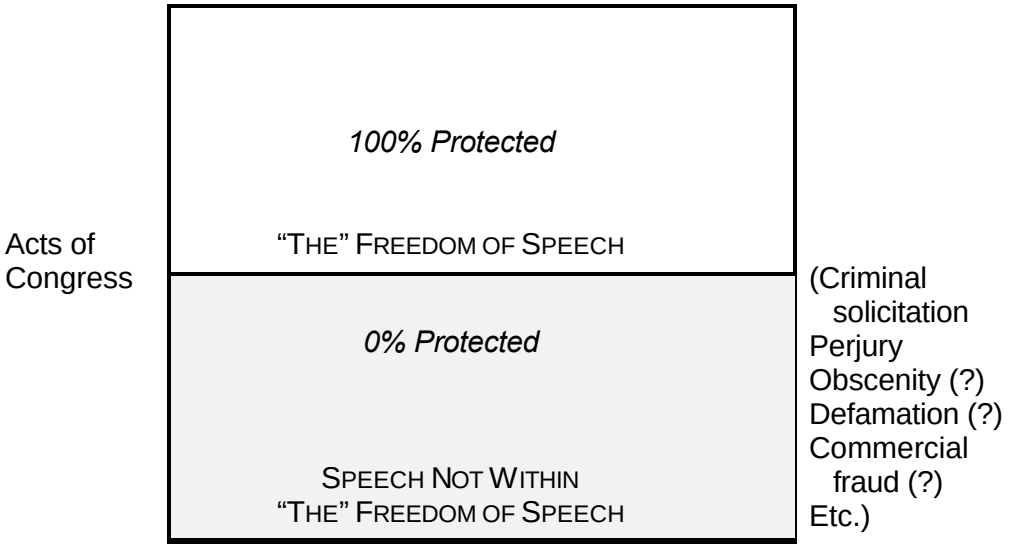
Some of these examples may be defended (i.e., some persons will be willing to defend some of them as protected by the first amendment), and some may be distinguished (i.e., it will be said that they do not involve speech or that, rather, they involve "speech plus").[É] Most of us, however, will recognize that this second response is a mere cavil. Lying on the witness stand is not less speech than lying about the weather (or, for that matter, than telling the truth about the weather), although it may also be perjury. The shout of "Fire!" is not less speech in the Holmes instance than the shout of "Fire!" from the mouth of an actor on the stage of the same theater, spoken as but a word in a play.[ÉÉ] It is futile to argue that an appropriately tailored law that punishes any or all of these utterances does not abridge speech. It does, it is meant to, and one should not take recourse to verbal subterfuge, e.g., that it is "speech-brigaded-with-action" or "conduct" alone that is curtailed by laws reaching these cases. These ersatz arguments prove too much; the same definitional artifices must necessarily operate to demolish the simple, compelling picture of a literal first amendment.

The objection of the irresistible counterexample thus upsets one's confidence in an absolute freedom of speech, despite the singular language of the first amendment itself. And, on closer examination, even the language of the first amendment may provide explicit accommodation (i.e., exclusion) of an indefinite number of these counterexamples. Specifically, it provides (merely) that: Congress shall make no law abridging the freedom of speech.

In complete fidelity to that language, a graphic depiction of the first amendment might look like this:

[É] In several cases, Justice Black wrote strongly and approvingly of a first amendment with no exceptions. See, e.g., his opinions in New York Times Co. v. Sullivan, 376 U.S. 254, 293 (1964) (Black, J., concurring); Konigsberg v. State Bar, 366 U.S. 36, 56 (1961) (Black, J., dissenting); Barenblatt v. United States, 360 U.S. 109, 140 (1959) (Black, J., dissenting). Even so, his own discernment of "speech plus" led him to vote to sustain many aws believed to be unconstitutional under the first amendment even by more conservative colleagues not sharing his "absolute" commitment to the first amendment. See, e.g., Cohen v. California, 403 U.S. 15 (1971); Street v. New York, 394 U.S. 576, 609 (1969) (Black, J., dissenting); Tinker v. Des Moines School Dist., 393 U.S. 503, 515 (1969) (Black, J., dissenting); Adderly v. Florida, 385 U.S. 39 (1966); Brown v. Louisiana, 383 U.S. 131, 151 (1966) (Black, J., dissenting); Cox v. Louisiana, 379 U.S. 559 (1965); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949). See also Kalven, Upon Rereading Mr. Justice Black on the First Amendment, 14 U.C.L.A. L. REV. 428 (1967). Efforts at such distinctions have created difficulties for other "strong" first amendment writers as well. See, e.g., T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 80-89 (1970).

[ÉÉ] The point has not escaped theatrical parody. See T. STOPPARD, ROSENCRANTZ & GUILDENSTERN ARE DEAD, Act II, at 60 (1967).



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It is noteworthy, however, that there is still no balancing or weighing of circumstances so far as the first amendment is concerned, whichever side of the line particular speech may lie. If it is within "the" freedom of speech, as we have already noted, it is absolutely protected. If it is not within "the" freedom of speech, the first amendment (by its own terms) does not affect it at all. Correspondingly, the first amendment imposes no special burden on Congress to justify laws abridging utterances not within "the" freedom of speech. The amendment is not directed to those utterances; it demands nothing of laws presuming to abridge such speech. Accordingly, it is inappropriate to require that any sort of "clear and present danger" be proved in respect to such speech for the very same reason that, on the other side of the line, it remains utterly irrelevant for government to try to prove some sort of "clear and present danger" to defend an abridgment.

The second graphic is thus fundamentally like the first graphic in respect to a common characteristic that continues to distinguish it from other portions of the Bill of Rights-the quality of absoluteness that makes balancing irrelevant. It differs from the first graphic only with respect to the unsettling uncertainty it introduces by compelling an unspecified external reference to settle the content of "the" freedom of speech. The proper reference is to ... what? There is obviously no appendix attached to the first amendment that authoritatively lists the varieties of speech within and without "the" freedom of speech. And neither has anyone claimed discovery of such a lucid, uniform, and established consensus respecting "the" freedom of speech in 1789 such that, by clear convention, its content was (or is) universally obvious.[ÉÉÉÉÉÉÉÉÉÉÉÉÉÉÉ]

[ÉÉÉÉÉÉÉÉÉÉÉÉÉÉÉ]For example, Professor Chafee concluded that the central minimum intention of the drafters and ratifiers of the first amendment was "to wipe out the common law of sedition, and make further prosecutions for criticism of the government, without any incitement to law-breaking, forever impossible in the United States of

To a significant extent, however, the second graphic is reflected in the case law of the first amendment. The Supreme Court has treated speech deemed "obscene," for instance, as not within "the" freedom of speech absolutely protected by the first amendment. Rather, the case law neither absolutely protects obscene speech nor even requires any first amendment compelled

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America." Z. CHAFEE, supra note 2, at 21. The Supreme Court has accepted this conclusion. New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) ("Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history * * * [There has been] a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.").

The matter, however, did not always appear so clear. There is, for instance, a growth in the impressions of Justice Holmes on the same question who wrote in 1907:

> [T]he main purpose of such constitutional provisions is 'to prevent all such previous restraints upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.

Patterson v. Colorado, 205 U.S. 454, 462 (1907).

Then, by 1919, he wrote:

> It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in Patterson v. Colorado * * *

Schenck v. United States, 249 U.S. 47, 51-52 (1919).

Finally, much more emphatically in the same year, he stated:

> I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting opinion).

Yet, in 1960, Professor Levy reluctantly concluded:

> If ... a choice must be made between two propositions, first, that the clause [i.e., the freedom of speech-and-press clause] substantially embodied the Blackstonian definition and left the law of seditious libel in force, or second, that it repudiated Blackstone and superseded the common law, the known evidence points strongly in support of the former proposition. Contrary to Justice Holmes, history favors the notion.

L. LEVY, supra note 6, at 248 (1960).

justification for its criminalization.[É] And in general, the same holds true for ordinary criminal solicitation,[ÉÉ] as it once did (although no longer does) for libel, "fighting words,"[ÉÉÉ] and "commercial speech."[ÉÉÉÉ] Since none of these is within "the" freedom of speech that Congress may make no law abridging, Congress has been allowed to abridge these kinds of speech except insofar as other kinds of constitutional constraints lying outside the first amendment may affect the problem (e.g., constraints of enumerated powers, due process, or fifth amendment standards of equal protection).

III

DETERMINING THE BOUNDARIES OF "THE" FREEDOM OF SPEECH

Even if the definitional boundary between "the" freedom of speech, which may not be abridged, and speech that may be abridged is the sole uncertainty respecting the first amendment,

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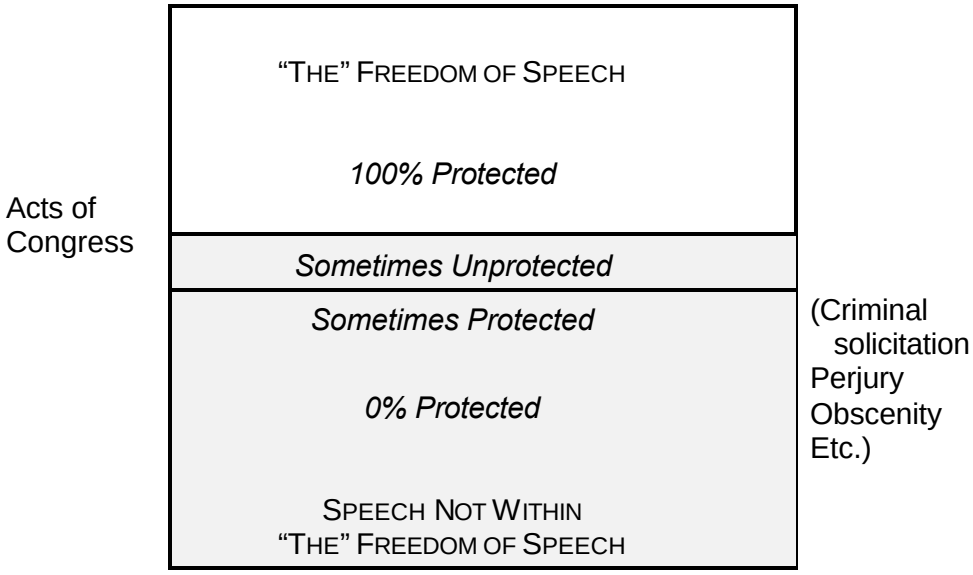
[É] Roth v. United States, 354 U.S 476, 483, 485 (1957) ("In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance* * * We hold that obscenity is not within the area of constitutionally protected speech or press."). The principle was subsequently reaffirmed. Miller v. California, 413 U.S. 15, 23 (1973) ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment."). The most recent effort to defend this distinction is Schauer, Speech and "Speech"-Obscenity and "Obscenity": An Exercise in the Interpreting of Constitutional Language, 67 GEO. L.J. 899, 905-06 (1979). See also T. EMERSON, supra note 15, at 401-12. A more general defense of "definitional balancing" (i.e., judicially defining which kinds of speech are, and which are not, within the protection of the first amendment) is presented in Nimmer, The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy, 56 CALIF. L. REV. 935 (1968).

[ÉÉ] The subject is comprehensively reviewed in Greenawalt, Speech and Crime, 1980 AM. B. FOUNDATION RESEARCH J. 645.

[ÉÉÉ] Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words.") (emphasis added), overruled in part, New York Times Co. v. Sullivan, 376 U.S. 255, 268 (1964) ("[L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."). See also Gooding v. Wilson, 405 U.S. 518, 520 (1972) (reversing conviction of person scuffling with a police officer who had told him, "White son of a bitch, I'll kill you"; "you son of a bitch, I'll choke you to death"); Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (modifying Chaplinsky to apply only when the willfully provocative language "rises far above public inconvenience, annoyance, or unrest," without regard to whether it "stirs people to anger"). For an impressive recent case, see Collin v. Smith, 447 F. Supp. 676 (N.D. Ill.), aff'd, 578 F.2d 1197 (7th Cir. 1978) (proposed Nazi march planned for neighborhood inhabited by many Jews personally victims of German concentration camps). See also Skokie v. National Socialist Party, 69 Ill. 2d 605, 373 N.E.2d 21 (1978).

[ÉÉÉÉ] Valentine v. Chrestensen, 316 U.S. 52 (1942), overruled in part, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 760-62 (1976) ("Here, ... [the] question whether there is a First Amendment exception for 'commercial speech' is squarely before us* * * Our question, then, is whether this communication is wholly outside the protection of the First Amendment* * * Our answer is that it is not.").

the picture provided by the second graphic may be somewhat incomplete. If we stipulate that Congress shall make no law abridging "the" freedom of speech, it remains important to secure absolute protection of whatever speech is protected. Advertently or otherwise, however, in making laws abridging unprotected speech, Congress may in fact make a law that abridges the protected freedom of speech. If it drafts a postal obscenity law too broadly, for instance, the law thus made by Congress may at once "abridge" speech that itself is within "the" freedom of speech, although no one in fact has yet been prosecuted. * * *



The third graphic presents a discouraging picture of a first amendment less perfect and less self-executing than the first depiction in two respects we have noted. First, consistent with its own language and consistent with a number of irresistible counterexamples, the third graphic, like the second graphic, admits that there are kinds of speech not within "the" freedom of speech. The more discouraging consequence of this observation, moreover, is that the amendment itself not only fails explicitly to list those excluded kinds of speech, but on its face, provides no clue as to what they are. Necessarily, then, courts are compelled to discover them at large with ample room to reach differing enumerations. This latitude subjects much of first amendment adjudication to fashions of judicial discretion.

Second, because the Constitution itself provides no mechanism to perfect an appeal from Congress, congressional abridgments of "the" protected freedom of speech may not be immediately challenged, which allows the literal command of the first amendment prohibiting the making of such laws to be defeated. The discretion of the judiciary in determining when a case may be brought and who may bring it also operates to commit the actual fate of "the" freedom of speech to judicial vagary.

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IV

THE BOUNDED SCOPE OF "THE FREEDOM" OF SPEECH

The logical force of the second and third graphics lies in their accommodation of irresistible counterexamples and almost literal consistency with the complete language of the first amendment. However, there is an alternative equally responsive to both concerns. Indeed, it may be superior to both the second and third graphics insofar as it eliminates the boundary between "the" freedom of speech (which alone is protected by the amendment) and other speech placed outside the amendment's protection. This alternative view thus forecloses any claim of judicial discretion to fix an unstable boundary and, to that extent, is superior.

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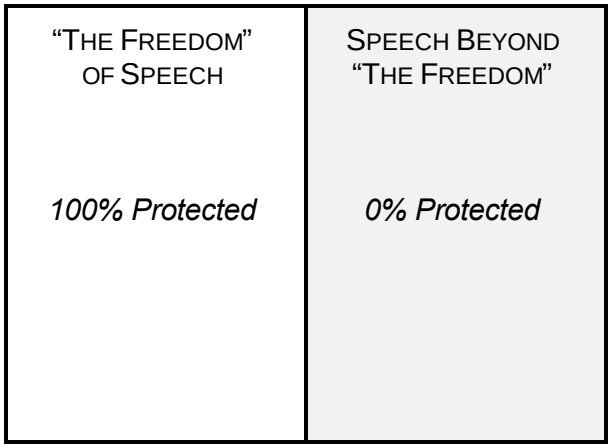
* * *"The freedom of speech" that Congress may make no law abridging is a qualifying phrase, albeit not in the manner suggested in graphics two or three. Rather, "the freedom of speech" that Congress may not by law abridge is a reference to some scope of freedom implied by the very term "the freedom" and, logically, therefore, a scope of freedom bounded. In short, it stands not as a synonym for complete freedom, but as a contrast with complete freedom. "The freedom" of speech that Congress may make no law abridging is therefore that degree, or that extent, of freedom of speech that Congress may make no law abridging.

This view of the amendment abandons judicial discretion to say what is and what is not the subject matter of speech protected by the amendment- although it necessarily asserts an alternative discretion to say what is the scope of "the freedom of speech" within the meaning of "the freedom" as distinct from unlimited or unqualified complete freedom. Again, and unavoidably, it compels even a conscientious and reluctant judiciary to utilize some reference external to the first amendment to determine that scope. Thus, it inevitably reintroduces instability into the first amendment, although in a different way. But the instability is another instance that cannot be helped, since the force of the irresistible counterexample will not go away and the very language of the first amendment contributes to the integrity of coping with it in this fashion (quite apart from the highly uncertain history associated with the amendment). A graphic depiction of the first amendment thus described might look like this:



All Kinds of Speech

Note, then, these several features. First, all speech is encompassed by the amendment, whether it be talk about the weather, one's choice of elected representatives, or procuring heroin. Second, "the freedom" of speech refers to a latitude, rather than to a subject or a kind of speech. Third, the exclusive question in each case is merely whether the utterances were within that latitude of freedom of speech comprising "the freedom" of speech that Congress may make no law abridging. And the irresistible counterexample is accounted for insofar as it may be expected to fall outside the latitude of "the freedom" of speech, albeit the referent for determining whether it does is not provided by the first amendment itself and necessarily, therefore, requires the judiciary to look elsewhere.

To a considerable extent, this view of the first amendment has not only characterized a substantial number of Supreme Court decisions, but also dominated the entire first amendment case law. Indeed, the main struggle has been among contending views respecting the appropriate test according to which speech is held to be either within "the freedom" of speech protected from abridging laws, or beyond that freedom and therefore unaffected by the first amendment. A leading example is the following formulation proposed by Judge Learned Hand and approved by a Supreme Court majority in 1951 in Dennis v. United States: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[ÉÉÉÉÉÉÉÉÉÉÉÉÉÉÉ] Note the discrete elements of this formulation, and especially the several unavoidable determinations that it commits to the judiciary. Most obviously, it commits to the judiciary a textually unaided directive to rank-order all possible "evils." As well, of course, it implicitly directs a determination of what legislatures are constitutionally empowered to define as evil for purposes of criminalizing speech likely to produce that evil. The determination of what may be deemed evils and the rank-order of their gravities is imperative, because the requisite degree of probability sufficient to place particular speech beyond "the freedom" of speech forbidden to be abridged is itself dependent upon the evil's gravity. The greater evil, the less probable need

[ÉÉÉÉÉÉÉÉÉÉÉÉÉÉÉ]341 U.S. 494, 510 (1951).

be its occurrence to forbid speech generating some tendency that the evil might occur. The particular formulation looks like this:

Insert graph p. 124

The vertical axis is graduated from zero probability to absolute certainty. The horizontal axis is graduated from evils of zero gravity to those of absolute gravity. The diagonal line cutting across the graphic marks the boundary of that scope of speech within "the freedom" of speech that Congress may make no law abridging. All cases to the left of the line are protected. All cases to the right of the line are unprotected.

* * *

"Reasonable time, place, and manner" restrictions do not forbid particular utterances (e.g., advocacy of trespass, incitement of arson or homicide, obscenity, or racial epithets) but merely restrict the time or the place of speech or regulate the manner of speaking. For example, a disorderly conduct law may not apply to one who shouts his message or even amplifies his speech over loudspeakers in an auditorium,[ÉÉÉÉÉÉÉÉÉÉÉÉÉÉ] but may apply to one who shouts his message on a street corner downtown or amplifies his speech over loudspeakers carried on a van through residential neighborhoods.[ÉÉÉÉÉÉÉÉÉÉÉÉÉÉ] The Hand formulation we have been examining is adequate in responding to this problem: merely isolate the evil alleged to arise from the time, place, or manner of speaking; determine initially whether it rests within the legislative prerogative to deem

[ÉÉÉÉÉÉÉÉÉÉÉÉÉÉ]Terminiello v. Chicago, 337 U.S. 1 (1949) (breach of peace conviction of speaker reversed where demagogic auditorium harangue attracted angry crowd outside).

[ÉÉÉÉÉÉÉÉÉÉÉÉÉÉ]Feiner v. New York, 340 U.S. 315 (1951) (disorderly conduct conviction for refusing police officer's request to cease street corner harangue attracting hostile crowd at busy intersection affirmed); Kovacs v. Cooper, 336 U.S. 77 (1949) (misdemeanor conviction for "loud and raucous sounding truck" in business district upheld; dicta suggesting court would be favorable to similar restriction in residential areas).

it an evil; identify its relative gravity at the proper point somewhere along the horizontal axis; and finally, ascertain in the particular case the probability that the particular time, place, or manner of the speech will in fact bring about that evil. Having thus located the degree of probability at some point on the vertical axis, it is easy enough as a figurative exercise to draw the proper lines to see whether they intersect in the protected zone or the unprotected zone of the rectangle.

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V

THE CLEAR AND PRESENT DANGER THRESHHOLD

There are nonetheless objectionable features to the Learned Hand formulation quite apart from the quintessential difficulty that it, too, compels even conscientious courts to look outside the first amendment to resolve such imponderables as what evils shall be deemed of more-or-less gravity than others in measuring the scope of "the freedom" of speech. For example, when the evil to be avoided is serious, then, as shown on the graphic, the test virtually dispenses with any probability requirement as a precondition of punishing or of preventing speech. Thus, a large (and uncertain) category of speech cases is treated not significantly differently than in the second graphic in which perjury, criminal solicitation, and obscenity were treated as kinds of speech per se not within "the" freedom of speech. While that apparent conformance is exceedingly helpful and comforting in one respect (i.e., it reconciles those cases), in another respect it poses a severe problem.

According to that earlier graphic, "political" speech was not among the outcast kinds of speech. To the contrary, it was altogether within the 100% protected field. But the Hand approach precludes this easy (and protective?) definitional address to the first amendment. For the question according to the Hand test is not simply whether the speech in question involved politics or government in some generic, loose sense; rather, the focus is not on the speech at all, it is on the alleged evil to be avoided by outlawing the speech.

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Under this view, although violence itself may be passionately advocated, when the feared danger lacks clarity and imminence, such speech remains within the latitude of speech that defines "the freedom" of speech.[ÉÉÉÉÉÉÉÉÉÉÉÉÉÉÉ] And this, of course, is the earlier, substantially more protective formula proposed by Mr. Justice Holmes in 1919, in Schenck v. United States: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress

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[ÉÉÉÉÉÉÉÉÉÉÉÉÉÉÉ] John Stuart Mill's powerful essay, On Liberty, contains an extraordinarily resolute anticipation of the clear and present danger test in the concrete example of "tyrannicide," a topic that in contemporary terms might embrace advocating the desirability of presidential assassination. Note the anticipation of later defenses as to why advocacy of illegal (and clearly dangerous) action is deemed defensible:

> If the arguments of the present chapter are of any validity, there ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it may be considered. It would, therefore, be irrelevant and out of place to examine here, whether the doctrine of Tyrannicide deserves that title. I shall content myself with saying that the subject has been at all times one of the open questions of morals; that the act of a private citizen in striking down a criminal, who, by raising himself above the law, has placed himself beyond the reach of legal punishment or control, has been accounted by whole nations, and by some of the best and wisest of men, not a crime, but an act of exalted virtue; and that, right or wrong, it is not of the nature of assassination, but of civil war. As such, I hold that the instigation of it, in a specific case, may be a proper subject of punishment, but only if an overt act has followed, and at least a probable connection can be established between the act and the instigation.

J.S. MILL, On Liberty, in UTILITARIANISM, LIBERTY, & REPRESENTATIVE GOVERNMENT 78 n.1 (1910) (emphasis added).

has a right to prevent."[É] In a slightly different iteration, it is the formula reasserted quite unanimously by the Court in 1969, in Brandenburg v. Ohio: "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[ÉÉ]

* * *

Even the addition of "clear and present danger" to the formulation thus leaves the graphic dramatically incomplete. There remains virtually unlimited elbowroom for legislatures to do in two steps what they might not do in one. If a given kind of detested speech does not generate a constitutionally sufficient danger of one kind of evil to rationalize its abridgment, the legislature may simply describe as an evil something the detested kind of speech is likely to bring about. The

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[É] 249 U.S. 47, 52 (1919) (emphasis added).

[ÉÉ] 395 U.S. 444, 447 (1969). The equivalent to the requirement that the danger must be "clear and present" is that the lawless action must be "imminent ... and ... likely." The Brandenburg formulation is additionally rigorous in its scienter requirement, i.e., that the advocacy must be "directed to" produce the lawless action (the "evil"). The formulation thus protects the speaker to the extent that it forbids making the speaker an insurer of his audience; it holds him criminally responsible only insofar as he meant to produce the imminent lawless action likely-in-fact to be produced by his utterances. In this respect, then, it borrows the advantage of Learned Hand's original formulation in Masses Pub. Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917), and combines it with the advantage of the Holmes formulation. See Gunther, supra note 2, at 754-55. The intent requirement mitigates a problem in the clear and present danger test well illustrated in the following example by Justice Rutledge:

> It is axiomatic that a democratic state may not deny its citizens the right to criticize existing laws and to urge that they be changed. And yet, in order to succeed in an effort to legalize polygamy it is obviously necessary to convince a substantial number of people that such conduct is desirable. But conviction that the practice is desirable has a natural tendency to induce the practice itself. Thus, depending on where the circular reasoning is started, the advocacy of polygamy may either be unlawful as inducing a violation of law, or be constitutionally protected as essential to the proper functioning of the democratic process.

Musser v. Utah, 333 U.S. 95, 101-02 (1948) (dissenting opinion). In the original clear and present danger formulation, intent was an alternative standard. Thus, in his Abrams dissent, Justice Holmes had declared: "It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned." Abrams v. United States, 250 U.S. 616, 628 (1919) (emphasis added). Currently, even when merely "private rights" such as reputation are concerned, some degree of scienter (at least negligence) must be established to provide recovery of money damages. The foundation case on this point is unquestionably New York Times Co. v. Sullivan, 376 U.S. 254 (1964). See Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). The first amendment need for some kind of scienter requirement to avoid the self-censoring consequences of a strict liability standard, is self-evident.

For an excellent general review of the Brandenburg standard, see Comment, Brandenburg v. Ohio: A Speech Test for All Seasons, 43 U. CHI. L. REV. 151 (1975).

speech may then, constitutionally, be abridged. For instance, the street corner distribution of Communist handbills may be too remote from any likelihood of inducing violence against the government to suppress on that account. But their distribution under the circumstances is nonetheless very likely to produce litter. Litter in the public streets is assuredly something a legislature may deem an evil. A flat prohibition of any ***133** handbill distribution may, under the circumstances, be necessary to avoid the danger of that litter. The result would be no more handbills, Communist or otherwise.

The Holmes formulation, in its original terms, plainly embraces this outcome since it requires no determination of the gravity of the evil. It is not quite clear whether the Hand formulation does so. It leaves open the possibility that although a complete prohibition of handbills may be necessary to avoid the danger, the gravity of that evil still may be constitutionally insufficient to "justify such invasion of free speech." In brief, is regulation of some evils (e.g., aesthetic blight, mental anguish) otherwise within the capacity of legislatures to avoid nonetheless prohibited when it curtails freedom of speech? In a later and stronger formulation of the Holmes' test, the answer was emphatic: yes. The first amendment forbids sanctions against speech except as necessary to avoid "serious" evils. The appropriate graphic looks like this:

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Thus, Mr. Justice Brandeis suggested in 1927: "Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society."[ÉÉÉÉÉÉÉÉÉÉÉÉÉÉÉ] It followed that a certain degree of litter, unwelcome noise, mental perturbation, violated anonymity, and degraded reputation are withdrawn from the general police

[ÉÉÉÉÉÉÉÉÉÉÉÉÉÉÉ] Whitney v. California, 274 U.S. 357, 377 (1927).

power to protect against that latitude of free speech contemplated by "the freedom" of speech.[É]

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VII

CORRELATING PROTECTION TO KINDS OF SPEECH

Dennis defined the principal task of the courts as graduating the kinds and degrees of evil to be balanced against the improbability of their occurrence resulting from particular speech to determine whether the degree of abridgment was unavoidable and therefore permissible. Correspondingly, an increasingly fashionable view holds that it is important to graduate the kind of

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[É]Thus, Justice Brandeis used the example of advocacy of a moral right or duty "to cross unenclosed, unposted, waste land" as an example of an instance when such advocacy could not be punished-even when directed to the urging of such trespass, "even if there was imminent danger that advocacy would lead to a trespass," and even assuming that the trespassers, acting on the advocacy, could themselves be punished. Id. at 377-79 ("[T]he evil apprehended [must be] relatively serious.... There must be the probability of serious injury to the states.... [T]he evil apprehended [must be] so substantial as to justify the stringent restriction interposed by the legislature."). This rule was applied in Grayned v. City of Rockford, 408 U.S. 104, 115 (1972) ("The right to use a public place for expressive activity may be restricted only for weighty reasons."); Cohen v. California, 403 U.S. 15 (1971) (reversing breach of peace conviction for exhibiting jacket with "Fuck the Draft" in a courthouse corridor before women and children, holding that the privacy interests of the unwilling and offended persons from distasteful vulgarities in such a place were insufficiently "substantial"); Terminiello v. Chicago, 337 U.S. 1, 4 (1949) ("[F]reedom of speech, though not absolute, ... is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience [or] annoyance ...."); Bridges v. California, 314 U.S. 252, 263 (1941) ("[T]he substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."); Schneider v. State, 308 U.S. 147, 162 (1939) (public interest in clean streets insufficient to justify antihandbilling ordinance). See also Time, Inc. v. Hill, 385 U.S. 374 (1967) (family who had declined to sell rights in their story involving intrusion by escaping felons into their home, who plainly wanted no attention, and who were placed in a false (but not unflattering) light by a Life Magazine story, recovered money damages under New York privacy statutes but were reversed in the Supreme Court). See the excellent discussion of these issues in Kalven, Privacy in Tort Law-Were Warren and Brandeis Wrong?, 31 L. & CONTEMP. PROB. 326 (1966); Kalven, The Concept of the Public Forum, 1965 SUP. CT. REV. 1.

There, is incidentally, a tendency to say that a statute directly abridging speech must serve a "compelling state interest," rather than that it must be necessary to avoid a "serious" evil. See, e.g., L. TRIBE, AMERICAN CONSTITUTIONAL LAW 602 (1978). In certain respects, this different figure of speech seems to be just as good, retaining as it does the notion that something more than interests suitable to sustain the police power in general must clearly be forthcoming in first amendment cases. Because of the facile use of this phrase ("compelling state interest") in connection with other clauses in the Constitution (e.g., the equal protection clause of the fourteenth amendment), however, we may come to regret the tendency to use it in connection with the free speech clause. Other clauses are not as emphatic as the first amendment, a difference that sets this clause apart. If (as seems desirable) one wants to retain a special stringency for the first amendment, it may be vital to avoid linguistic usages that tend to blur or merge its treatment with cases, doctrines, and standards drawn from less robust sections in the Constitution.

speech to be invaded.[ÉÉÉÉÉÉÉÉÉÉÉÉÉÉÉ] If it is political speech (e.g., rhetoric praising or abusing candidates for office, or rhetoric exaggerating the alleged effects, provisions, merits, or demerits of existing laws), the speech is deemed of such central importance to the functions of the first amendment that even the high probability of a reprehensible evil (e.g., that a far more honest and intelligent candidate will lose to a dishonest, manipulative, selfish demagogue) will not justify any recourse against the wretched slanders of the victor. If it is commercial speech, on the other hand, the evil of consumer deception may be avoided on a lesser probability of fraud than in the political speech case, although commercial speech will not, on that account alone, be treated as 100% unprotected,[ÉÉÉÉÉÉÉÉÉÉÉÉÉÉÉ] as is obscenity or solicitation of homicide. Graphics carrying these additional views of first amendment priority may look like either of the following:

[ÉÉÉÉÉÉÉÉÉÉÉÉÉÉÉ]Probably the leading example is the differentiated first amendment standards that must be met as a prerequisite for recovering damages for libel, e.g., whether the plaintiff is a political official (or at least a "public figure") or a private figure uninvolved in government. See Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); New York Times Co. v. Sullivan, 376 U.S. 254 (1964). For general discussions ranking speech protection according to its bearing upon government and social change, see A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Blasi, The Checking Value in First Amendment Theory, 1977 AM. B. FOUNDATION RESEARCH J. 521; Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1964 SUP. CT. REV. 191.

[ÉÉÉÉÉÉÉÉÉÉÉÉÉÉÉ] As previously noted (note 49 supra), the Court currently takes the view that some commercial speech is wholly unprotected while that which is protected nonetheless is subject to restriction on grounds less demanding than if noncommercial ideological communication were involved. Metromedia, Inc. v. City of San Diego, 101 S. Ct. 2882, 2890 nn.11 & 12 (1981). For a recent helpful review and analysis on the subject, see Farber, Commercial Speech and First Amendment Theory, 74 NW. U.L. REV. 372 (1979).

Inserts pages 140 and 141

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In effect, then, these graphics illuminate an additional perspective, but they do not reduce the margins of uncertainty, instability, external reference, and elbowroom for judicial administration in the regime of the first amendment. Perhaps, moreover, the point illustrated by these variations is that there is no sure formula for reading the first amendment in any way that (a) copes with the irresistible counterexample, (b) fits with its syntax, and (c) enjoys even a plausible congruence with history, to make it foolproof. Which among these graphics seems better (or merely less poor) than the rest is assuredly debatable.

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Frederick Schauer, The Second-best First Amendment,
31. Wm. and Mary L. Rev. 1 (1989)

"If men were angels,'" James Madison wrote in Federalist 51, "no government would be necessary.'"[1] So too with the first amendment. If those in power were angels, or if their power represented more of an opportunity than a threat, the first amendment would also be unnecessary. True, the first amendment's protection of freedom of speech and press is commonly idealized, whether in newspaper editorials, in Fourth of July orations, or in law reviews. Freedom of speech, it is said, is basic, and the freedom to speak and to write is precisely what separates democracy from totalitarianism, liberty from restraint, and freedom from bondage. The first amendment, it follows, is the bedrock of all that we are and all that we wish to be.

Yet the claim underlying the slogans glorifying the first amendment is ambiguous, for most common versions of the claim confuse speaking freely, or even freedom to speak, with a principle or rule that categorially protects a wide range of communicative acts. Were we to focus on the rule-like nature of the first amendment, we would see that the first amendment's foundations lie not with ideal aspirations, but instead with the kind of arguably necessary pessimism that Madison's famous line captures. Not only the first amendment, but also the very idea of a principle of freedom of speech, is an embodiment of a risk-averse distrust of decisionmakers. Once we understand this, we are able to understand as well that the first amendment is not the reflection of a society's highest aspirations, but rather of its fears, being simultaneously the pessimistic and necessary manifestation of the fact that, in practice, neither a population nor its authoritative decisionmakers can even approach their society's most ideal theoretical aspirations. Or so I will attempt to show here.

I

I start with the premise, which I hope by now is commonplace, that the first amendment's protection of freedom of speech and press is interesting and important because, and only because, it immunizes from governmental control certain acts that would not be so immune were their regulation measured merely against a rational basis standard. Under the rational basis baseline for assessing the constitutional permissibility of government regulation, including prohibitory regulation of individual behavior, virtually any nonlaughable (and an occasional laughable) justification for governmental regulation is constitutionally sufficient.[2]

Were we to apply this prevailing standard of "nonlaughability'" to recent successful first amendment challenges to government regulation, we would discover that all of the asserted but ultimately unavailing

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[1]THE FEDERALIST No. 51, at 160 (J. Madison) (Fairfield 2d ed. 1981).

[2] See, e.g., City of Dallas v. Stanglin, 109 S.Ct. 1591, 1597 (1989) (equal protection; limiting admission of teenagers to certain dance halls but not to comparatively similar skating rinks is rational because "skating involves less physical contact than dancing'"); City of New Orleans v. Dukes, 427 U.S. 297, 305 (1976) (equal protection; allowing otherwise prohibited pushcart vendors to operate in the Vieux Carre if they have operated for the previous eight years is rational because, inter alia, such long term vendors would likely operate their businesses in a manner more consistent with the traditions of the area); Williamson v. Lee Optical, 348 U.S. 483, 491 (1955) (due process and equal protection; prohibiting opticians from placing patients' old lenses in new frames unless they are given a prescription from an optometrist or ophthalmologist is rational because it furthers the objective of raising "'treatment of the human eye to a strictly professional level'").

justifications for the challenged restrictions on communicative activity would have satisfied the rational basis baseline. Whether it be promoting newspapers and some types of ***3** magazines,[1] maintaining the integrity of political parties,[2] preventing the annoyance of travelers in airports,[3] preserving the peace and quiet of residential neighborhoods,[4] maintaining the appearance of dignity in the legal profession,[5] protecting women against the effects of material glorifying sexual violence,[6] controlling factually false public ridicule,[7] or protecting Holocaust victims from emotional distress,[8] the courts routinely reject as constitutionally insufficient under the first amendment various rationales for controlling the behavior of the citizenry that would be constitutionally sufficient were mere rational basis the standard of measurement. The first amendment, therefore, does not invalidate irrational restrictions of speech; it invalidates numerous restrictions of speech in spite of their rationality.

Once we understand the way in which the bite of the first amendment lies in its prohibition of otherwise rational controls, we are drawn to search for reasons for treating a class of governmental actions in that way. Although I have views about the validity or invalidity of various background justifications for the first amendment,[9] my agenda here is not to return to that territory. Rather, for my purposes now, we need only find some background reason for having the freedom of speech and, consequently, the first amendment.[10]

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[1]Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987).

[2]Eu v. San Francisco County Democratic Cent. Comm., 109 S.Ct. 1013 (1989).

[3]Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569 (1987).

[4] Frisby v. Schultz, 108 S.Ct. 2495 (1988).

[5]Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).

[6] American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd mem., 475 U.S. 1001 (1986).

[7]Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

[8]Collin v. Smith, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978).

[9] See F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982); Schauer, Must Speech Be Special?, 78 NW. U.L. REV. 1284 (1983).

[10] The existence of a reason for protecting freedom of speech presupposes an instrumental account of free speech that could be otherwise. Perhaps the value of speech is itself foundational, as is pleasure for the hedonist utilitarian, or certain other primary goods for the ideal-consequentialist, or dignity or equal concern and respect for various nonconsequentialist theorists. Thus, speaking or communicating, or something of that order, could possibly be a fundamental, foundational, irreducible good. Under this account, an account whose implausibility is indicated albeit not proved by the empty set of its proponents, the very idea of a theory about why we protect speech collapses because maximizing speech for speech's sake is all the theory we need.

The protection of freedom of speech can be seen instrumentally as furthering some background justification, or rationale, or goal. For example, it might further the goal of facilitating popular decisionmaking,[1] or the goal of providing criticism of or a check on institutional government,[2] or the goal of fostering the search for and the identification of truth or error,[3] or the goal of inculcating attitudes of tolerance,[4] or the goal of permitting individual autonomy in decisionmaking,[5] or the goal of promoting variously described components of personal liberty and self- realization,[6] or some number of other less well-established goals.[7] Whatever the goal may be, however, the point is only that the special protection for speech fosters something, some justification.

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[1]See A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 16-17 (1948); BeVier, The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle, 30 STAN. L. REV. 299, 304-22 (1978); Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 20-35 (1971); Meiklejohn, The First Amendment Is an Absolute, 1961 SUP. CT. REV. 245, 255-57.

[2]See H. KALVEN, A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 69-70 (1988); Blasi, The Checking Value in First Amendment Theory, 1977 AM. B. FOUND. RES. J. 521, 529-44; Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment,"' 1964 SUP. CT. REV. 191, 205.

[3] See Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); J.S. Mill, On Liberty, in SELECTED WRITINGS OF JOHN STUART MILL 121, 134-71 (M. Cowling ed. 1968); Milton, Areopagetica, in COMPLETE POETRY AND SELECTED PROSE OF JOHN MILTON 677, 710-24 (Mod. Lib. ed. 1950); K. POPPER, 2 THE OPEN SOCIETY AND ITS ENEMIES 42-43 (5th ed. 1966); Duval, Free Communication of Ideas and the Quest for Truth: Towards a Teleological Approach to First Amendment Adjudication, 41 GEO. WASH. L. REV. 161, 188-94 (1972).

[4] See L. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 175-212 (1986).

[5]See Scanlon, A Theory of Freedom of Expression, 1 PHIL. & PUB. AFF. 204, 216 (1972); Wellington, On Freedom of Expression, 88 YALE L.J. 1105, 1121- 25 (1979).

[6] See M. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 47-48 (1984); Baker, The Process of Change and the Liberty Theory of the First Amendment, 55 S. CAL. L. REV. 293, 331-37 (1981); Baker, The Scope of the First Amendment Freedom of Speech, 25 UCLA L. REV. 964, 990-1109 (1978); Baker, Commercial Speech: A Problem in the Theory of Freedom, 62 IOWA L. REV. 1, 5- 9 (1976); Redish, The Value of Free Speech; 130 U. PA. L. REV. 591, 622-29 (1982); Redish, Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker, 130 U. PA. L. REV. 678, 679-85 (1982); Richards, Free Speech and Obscenity Law: Towards a Moral Theory of the First Amendment, 123 U. PA. L. REV. 45, 83-90 (1974). Because all of these arguments see the value of speech in terms of what it does or what it promotes rather than what it is, they are, for my purposes, consequentialist, see supra note 12, even though the arguments are components of a larger vision that is not itself consequentialist.

[7] For excellent analytical surveys of background first amendment theories, see Cass, Commercial Speech, Constitutionalism, Collective Choice, 56 U. CIN. L. REV. 1317 (1988); Cass, The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory, 34 UCLA L. REV. 1405 (1987); Greenawalt, Free Speech Justifications, 89 COLUM. L. REV. 119 (1989).

Importantly, all of these background justifications are defined in terms that do not themselves refer to speech or communication. Indeed, that is what makes them justifications of freedom of speech, rather than merely question-begging restatements of the principle of free speech. One can explain autonomous decisionmaking, or popular sovereignty, or the identification of truth, or limiting the excesses of government officials, or even self-realization without incorporating speech into the description, and thus all of these goals, or theories, of what free speech does or promotes are logically antecedent to a theory of free speech. A theory of free speech is thus a theory that posits a rationale, or justification, or goal, in terms other than free speaking, and then maintains that freedom to speak, or write, or communicate, will promote that posited rationale, justification, or goal.

* * *

II

Freedom of speech is thus ordinarily seen instrumentally, as the vehicle for promoting some supposed primary, or at least more fundamental, value. But that leads naturally to the question of why we have or need free speech, or theories of free speech, at all. Would it not be possible merely to protect the primary or fundamental values against restriction?

Assume that we are dealing with a search for truth justification. Why could there not be simply a prohibition on governmental controls that interfere with the search for truth? "Congress shall make no law abridging the search for truth." If some putative restriction on behavior interfered with the search for truth, that restriction would be impermissible, and whether the restriction was or was not a restriction of speech would make no difference. Many of these impermissible restrictions would indeed be restrictions on speech, but many would not. For example, were a "search for truth" justification to be applied directly to various government restrictions, we might find that many restrictions on experimentation, travel, and other noncommunicative experiences would be impermissible. Conversely, were we again to apply the "search for truth" justification directly to particular cases, it might be that various forms of now-protected speech would not be protected. For example, consider an intentional factual falsehood, but one not directed at individuals and, thus, presumably protected under current understandings of New York Times Co. v. Sullivan. It would certainly be possible to make an "all things considered" judgment in a particular case that such an action hindered rather than fostered the search for truth (even given the empirical assumptions of the "marketplace of ideas" theory), and thus would not be protected by direct application of the "search for truth" justification to that particular case.

We can identify the same phenomenon with respect to any number of other free

speech justifications. Were we to apply a "popular sovereignty" justification directly to particular cases, some number of restrictions on voting, not involving communication, might be judged impermissible, and some number of currently impermissible restrictions on communication might no longer be thought troublesome. For example, restrictions on misleading campaign promises or claims, now impermissible unless the constraints of New York Times are satisfied, n23 might be permitted, as would restrictions on now-unrestrictable market-distorting spending or other power disparities.

Similarly, if we were to apply a "self-realization" justification directly to particular cases, some currently unprotected noncommunicative acts of self-realization might be protected,while some communicative (speech) but nonself-realizing acts might not. Again, no point is served by quibbling about individual cases. The claim is only that were we to think in terms of justifications for free speech as applied to particular cases, as opposed to "freedom of speech" being applied to particular cases, the results would be at least slightly different. From this perspective, "freedom of speech" is necessarily both underinclusive and overinclusive with respect to its background justification, whatever that background justification might be.

III

The activity of speaking is thus underinclusive and overinclusive with respect to any background justification for protecting it. One should note that this is not a function of the crudeness of "speech" as compared to more justification-tailored subsets of speech. For example, even if we were considering "political speech" under a democratic theory rationale, or

"ideological" or "scientific" speech under a rationale making that kind of speech worthy of special protection, there would still be cases in which a particular instance of that kind of speech would not serve its background justification, and others in which an instance of something outside of the definition of the "kind" would serve that justification. Only by defining the kind in terms of its background justification will this possibility be avoided; but by doing so, we have just decided to apply that background justification directly to particular cases. If, however, we do not do this, and define the coverage of freedom of speech in terms that are not coincident with the terms used to define free speech's background justification, then the existence of an area of underinclusiveness and overinclusiveness for free speech vis-a-vis its background justification is inevitable.

Note that even my use of "background justification" is a simplifying but unnecessary assumption. The justification for freedom of speech is ordinarily

part of a larger array of justifications, or is merely the instrumental manifestation of an even deeper justification, such as the promotion of human dignity, the maximization of happiness, the promotion of public welfare, or whatever. In that respect even a justification for freedom of speech may itself be underinclusive or overinclusive with respect to its background justification, or with respect to the array of justifications of which this is but one component. Suppose, for example, that free speech is perceived as a way of promoting popular decisionmaking, but that popular decisionmaking, at the next remove, is perceived as a way of embodying equality among all persons. We may then discover that some forms of popular decisionmaking do not promote equality, and that equality is promoted by forms of decisionmaking that are not popular. With respect to such cases, popular decisionmaking appears to be both underinclusive and overinclusive with respect to its background justification.

If we were to assemble all of the justifications that go as deeply as it is possible to go within a given perspective on justification, we could then say that, with respect to every event or every set of facts, there is some best "all things considered" result that is the product of applying those deepest justifications (or that one deepest justification) directly to that event. Whether we get there directly or indirectly through several levels of intermediate justification, we will discover that freedom of speech is underinclusive and overinclusive with respect to direct application of the "all things considered" array of justifications to particular cases.

IV

Why, then, at the level of political theory, do we not just forget about "freedom of speech" and apply its background justifications directly to particular cases? And why, at the level of constitution-making, does the Constitution refer to "the freedom of speech" rather than to those background principles that for its drafters explained the importance of protecting freedom of speech in the first place? Why do we accept the necessary imperfection that comes from the underinclusiveness and overinclusiveness that is built into defining the right to free speech (or any other right) in a description that is extensionally divergent from the description of its background justification?

This question appears to have a two-part answer. First, we commonly believe that in most cases the coverage (or extension) of the right as defined will track rather than diverge from the coverage of its background justification. When we instantiate a justification, whether with a rule or with a right, we believe that the instantiation will indicate, at least probabilistically, the results that direct application of the background justification would generate.

The relationship is one of tendency rather than inexorability or inevitability. Thus, when we instruct police officers always to give a Miranda warning before interrogating a suspect, we do not believe that giving such a warning will serve the purposes behind Miranda v. Arizona in every case. Rather, we think that giving the warning will serve those purposes in most cases. Behind any nonfrivolously constructed rule (or right) is a statistical presupposition -- that the presence of the triggering facts identified in the rule indicates, at the very least, the applicability of the rule's justification to a greater extent than would be indicated by purely random application. Thus, the existence of a triggering set of facts -- interrogation of a suspect by a police officer -- indicates a greater likelihood of the applicability of the justifications behind Miranda than would be indicated by random identification of police behavior.

Normally, of course, the correlation between rule and justification, the degree of indication provided by the rule, will be substantially higher than this minimal statistical threshold, even as it falls short of the perfect indication provided when all cases of the applicability of the rule are cases of the applicability of its background justification. Ordinarily, rules are designed in such a way that the applicability of the rule at least usually indicates the applicability of its justification.

This probabilistic analysis of the relationship between a rule and its justification applies to the relationship between freedom of speech and its justifications. Immunizing political speech from regulation under a popular sovereignty justification, for example, is premised on the belief that immunizing political speech from governmental regulation will usually serve the goals of promoting popular sovereignty immunizing political speech from governmental regulation will usually serve the goals of promoting popular sovereignty. Similarly, we might believe that protecting individual statements of opinion from restriction will usually promote self-realization, or that disabling government from restricting speech on account of its supposed falsity will usually advance the search for truth, and so on. The instantiation of the background justification in terms of a right to "speech" n31 is premised on the presupposition that "speaking" will ordinarily, or usually, or almost always, serve the goals embodied in the background justification itself.

The presence of this probabilistic relationship, of at least a tendency, n32 is not sufficient, of course, to establish the existence of a **rule** because we could be dealing not with a "real" rule at all, but only with a **rule of thumb**, one that provides no decisionmaking guidance qua rule, and which

therefore furnishes no reason for following it in cases in which its background justification is inapplicable. n33 Where rules are but rules of thumb, the decisionmaker does not follow the rule in its area of underinclusiveness or overinclusiveness. If the decisionmaker has reason to believe that the result indicated by the rule of thumb is not that which would be indicated by direct application of the rule of thumb's background justification, she is free to ignore the prescriptions of the rule of thumb. Consequently, rules of thumb, however heuristically useful they may be, are decisionally superfluous, for the results under a rule of thumb decision procedure are those that would be generated by direct application of the rule's background justification.

More substantial rules exist, therefore, when, and only when, the probabilistic relationship I have just described is converted into a universal one. That is, rules operate as rules, in the sense I am now describing, n34 only when the fact that an event falls within the coverage of the rule provides a reason for deciding in that way, even when the event would not fall within the rule's justification.

V

Once we understand how rules operate in relation to their background justifications, we can see that free speech decisionmaking operates in just this way, and that "free speech" is the rule instantiating its background justification. On numerous occasions, the presence of an event within the coverage of some notion of "speech" is sufficient to trigger application of the "more than rational basis" protection of the first amendment, even though the event does not fall within the coverage of its justification, or would not be decided in the same way were we to apply the best "all things considered" judgment of the society's prevailing political theory. In this regard consider not only the cases that invalidate democracy-promoting restrictions on political speech, but also those that protect racial epithets and other racist speech, subordinate women, intend to cause injury to others, involve false speech, and so on. Again, I am sure that readers will quarrel with this or that example, but my point is only that these are examples, to me, of cases in which direct application of the reasons behind the protection of freedom of speech could well have yielded the opposite result. Others may find different examples of the same phenomenon, but only the phenomenon and not the examples is important here. From the perspective informed by identification of this phenomenon, these appear to be cases in which freedom of speech is operating in rule-like fashion. If something is speech in the relevant sense, and that relevant sense is some number of further rules still not coextensive

with free speech's background justification, then there is at least presumptive protection, even if the background justification would not be served, and even if an "all things considered" judgment about this particular case might have come out the other way.

Let me reemphasize that my point is not that free speech rules, such as the ones that generated each of the foregoing results, rules like those set forth in Brandenberg v. Ohio, New York Times Co. v. Sullivan, Miller v. California, and Central Hudson Gas & Electric Corp. v. Public Service Commission, are crude implements. *Rather, my point is that the very idea of free speech is a crude implement, to the core, protecting acts that its background justifications would not protect, and failing to protect acts that its background justifications would protect. Were we to eliminate this crudeness, and tailor free speech decisionmaking precisely to its background justification, we would discover that free speech had become superfluous, because we would be applying the nonspeech-defined background justifications directly to particular cases. Were this the case, quite a bit of speech would still be protected, and quite a bit of freedom to speak would still exist. But this protection of speech would be merely incidental to protecting democratic decisionmaking, or activities searching for truth, or self-realizing behavior, or conduct checking the abuses of governmental officials, and so on.* The fact of an event being an instance of speech would mean nothing if that event were not also an instance of the background justification, and the fact of an event not being an instance of speech would also mean nothing if that event were an instance of the background justification. Consequently, all of the normative work would be done by the background justification, and the fact of an event being an instance of speech would be decisionally irrelevant.

We can now see why there is nothing ideal about the protection of freedom of speech as we know it. Were we searching for the ideal, we would apply background justifications directly, or make particularistic "all things considered" judgments about individual cases, applying the best political theory directly to particular cases as best we could. Even if "speech" is qualified by numerous rules giving it a highly technical meaning, the very fact that the generalization "speech" makes a difference indicates a decision to avoid the ideal, to protect speech in some number of cases in which ideally it ought not to be protected. It is not that the free speech rules we have are less than ideal. It is that free speech itself is a willingness to settle for less than the ideal.

[Emphasis added, later footnotes redacted.]

CHAPLINSKY
v.
STATE OF NEW HAMPSHIRE.
62 S.Ct. 766

No. 255.

Argued Feb. 5, 1942. Decided March 9, 1942.

Appeal from the Supreme Court of the State of New Hampshire.

Affirmed.

Mr. Justice MURPHY delivered the opinion of the Court.

Appellant, a member of the sect known as Jehovah's Witnesses, was convicted in the municipal court of Rochester, New Hampshire, for violation of Chapter 378, Section 2, of the Public Laws of New Hampshire: 'No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.'

The complaint charged that appellant 'with force and arms, in a certain public place in said city of Rochester, to wit, on the public sidewalk on the easterly side of Wakefield Street, near unto the entrance of the City Hall, did unlawfully repeat, the words following, addressed to the complainant, that is to say, 'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists' the same being offensive, derisive and annoying words and names'.

* * *

By motions and exceptions, appellant raised the questions that the statute was invalid under the Fourteenth Amendment of the Constitution of the United States in that it placed an unreasonable restraint on freedom of speech, freedom of the press, and freedom of worship, and because it was vague and indefinite. These contentions were overruled and the case comes here on appeal.

There is no substantial dispute over the facts. Chaplinsky was distributing the literature of his sect on the streets ***570** of Rochester on a busy Saturday afternoon. Members of the local citizenry complained to the City Marshal, Bowering, that Chaplinsky was denouncing all religion as a 'racket'. Bowering told them that Chaplinsky was lawfully engaged, and then warned Chaplinsky that the crowd was getting restless. Some time later a disturbance occurred and the traffic officer on duty at the busy intersection started with Chaplinsky for the police station, but did not inform him that he was under arrest or that he was going to be arrested. On the way they encountered Marshal Bowering who had been advised that a riot was under way and was therefore hurrying to the scene. Bowering repeated his earlier warning to Chaplinsky who then addressed to Bowering the words set forth in the complaint.

* * *

It is now clear that 'Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state ***571** action'. Lovell v. City of Griffin, 303 U.S. 444, 450, 58 S.Ct. 666, 668, 82 L.Ed. 949. * * * ****769** Freedom of worship is similarly sheltered. Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 128 A.L.R. 1352.

* * *

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. * * * There are certain well-defined and narrowly limited classes of speech, the prevention ***572** and punishment of which has never been thought to raise any Constitutional problem. * * * These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. * * * It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. * * * 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' Cantwell v. Connecticut, 310 U.S. 296, 309, 310, 60 S.Ct. 900, 906, 84 L.Ed. 1213, 128 A.L.R. 1352.

The state statute here challenged comes to us authoritatively construed by the highest court of New Hampshire. It has two provisions--the first relates to words or names addressed to another in a public place; * * *

On the authority of its earlier decisions, the state court declared that the statute's purpose was to preserve the public peace, no words being 'forbidden except such as have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed'. * * * It was further said: 'The word 'offensive' is not to be defined in terms of what a particular addressee thinks. * * * The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. * * * The English language has a number of words and expressions which by general consent and 'fighting words' when said without a disarming smile. * * * Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. * * * The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker--including 'classical fighting words', words

in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats.'

We are unable to say that the limited scope of the statute as thus construed contravenes the constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace. Cf. Cantwell v. Connecticut, 310 U.S. 296, 311, 60 S.Ct. 900, 906, 84 L.Ed. 1213, 128 A.L.R. 1352; Thornhill v. Alabama, ***574** 310 U.S. 88, 105, 60 S.Ct. 736, 745, 84 L.Ed. 1093. This conclusion necessarily disposes of appellant's contention that the statute is so vague and indefinite as to render a conviction thereunder a violation of due process. A statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law. Cf. Fox v. Washington, 236 U.S. 273, 277, 35 S.Ct. 383, 384, 59 L.Ed. 573.

Nor can we say that the application of the statute to the facts disclosed by the record substantially or unreasonably impinges upon the privilege of free speech. Argument is unnecessary to demonstrate that the appellations 'damn racketeer' and 'damn Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.

* * *

Affirmed.

Coleman A. YOUNG, Mayor the City of Detroit, et al., Petitioners,
v.
AMERICAN MINI THEATRES, INC., et al.

96 S.Ct. 2440

No. 75-312.

Argued March 24, 1976.
Decided June 24, 1976.
Rehearing Denied Oct. 4, 1976.

See 429 U.S. 873, 97 S.Ct. 191.

Mr. Justice Powell filed an opinion concurring in part.

Mr. Justice Stewart dissented and filed opinion in which Mr. Justice Brennan, Mr. Justice Marshall and Mr. Justice Blackmun joined.

Mr. Justice Blackmun dissented and filed opinion in which Mr. Justice Brennan, Mr. Justice Stewart and Mr. Justice Marshall joined.

Mr. Justice STEVENS delivered the opinion of the Court. [FN*]

FN** Part III of this opinion is joined by only THE CHIEF JUSTICE, Mr. Justice WHITE, and Mr. Justice REHNQUIST.

Zoning ordinances adopted by the city of Detroit differentiate between motion picture theaters which exhibit sexually explicit "adult" movies and those which do not. The principal question presented by this case is whether that statutory classification is unconstitutional because it is based on the content of communication protected by the First Amendment.

* * *

As they did in the District Court, respondents contend (1) that the ordinances are so vague that they violate the Due Process Clause of the Fourteenth Amendment; (2) that they are invalid under the First Amendment as prior restraints on protected communication; and (3) that the classification of theaters on the basis of the content of their exhibitions violates the Equal Protection Clause of the Fourteenth Amendment. We consider their arguments in that order.

I

* * *

Because the ordinances affect communication protected by the First Amendment, respondents argue that they may raise the vagueness issue even though there is no uncertainty about the impact of the ordinances on their own rights. On several occasions we have determined that a defendant whose own speech was unprotected had standing to challenge the constitutionality of a statute which purported to prohibit protected speech, or even speech arguably protected. * * * This exception ***60** from traditional rules of standing to raise constitutional issues has reflected the Court's judgment that the very existence of some statutes may cause persons not before the Court to refrain from engaging in constitutionally protected speech or expression. See Broadrick v. Oklahoma, 413 U.S. 601, 611-614, 93 S.Ct. 2908, 2915-2917, 37 L.Ed.2d 830. The exception is justified by the overriding importance of maintaining a free and open market for the interchange of ideas. Nevertheless, if the statute's deterrent effect on legitimate expression is not "both real and substantial," and if the statute is "readily subject to a narrowing construction by the state courts," see Erznoznik v. City of Jacksonville, 422 U.S. 205, 216, 95 S.Ct. 2268, 2276, 45 L.Ed.2d 125, the litigant is not permitted to assert the rights of third parties.

We are not persuaded that the Detroit zoning ordinances will have a significant deterrent effect on the exhibition of films protected by the First Amendment. ***61** As already noted, the only vagueness in the ****2448** ordinances relates to the amount of sexually explicit activity that may be portrayed before the material can be said to "characterized by an emphasis" on such matter. For most films the question will be readily answerable; to the extent that an area of doubt exists, we see no reason why the ordinances are not "readily subject to a narrowing construction by the state courts." Since there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance, and since the limited amount of uncertainty in the ordinances is easily susceptible of a narrowing construction, we think this is an inappropriate case in which to adjudicate the hypothetical claims of persons not before the Court.

* * *

III

A remark attributed to Voltaire characterizes our zealous adherence to the principle that the government may not tell the citizen what he may or may not say. Referring to a suggestion that the violent overthrow of tyranny might be legitimate, he said: "I disapprove of what you say, but I will defend to the death your right to say it."[19] The essence of that comment has been repeated time after time in our decisions invalidating attempts by the government to impose selective controls upon the dissemination of ideas.

Thus, the use of streets and parks for the free expression of views on national affairs may not be conditioned upon the sovereign's agreement with what a speaker may intend to say. * * * Nor may speech be curtailed because it ***64** invites dispute, creates dissatisfaction with conditions the way they are, or even stirs people to anger. * * * The sovereign's agreement or disagreement with the content of what a speaker has to say may not affect the regulation of the time, place, or manner of presenting the speech.

* * * As we said in Mosley :

> "* * * But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. * * * To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' New York Times Co. v. Sullivan, supra, 376 U.S., at 270, 84 S.Ct., at 721.
>
> "Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government

[19] S. Tallentrye, The Friends of Voltaire 199 (1907).

> may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." 408 U.S., at 95-96, 92 S.Ct., at 2290. (Footnote omitted.)

This statement, and others to the same effect, read literally and without regard for the facts of the case in which it was made, would absolutely preclude any regulation of expressive activity predicated in whole or in part on the content of the communication. But we learned long ago that broad statements of principle, no matter how correct in the context in which they are made, are sometimes qualified by contrary decisions before the absolute limit of the stated principle is reached. * * * When we review this Court's actual adjudications in the First Amendment area, we find this to have been the case ***66** with the stated principle that there may be no restriction whatever on expressive activity because of its content.

The question whether speech is, or is not, protected by the First Amendment often depends on the content of the speech. Thus, the line between permissible advocacy and impermissible incitation to crime or violence depends, not merely on the setting in which the speech occurs, but also on exactly what the speaker had to say. * * * Similarly, it is the content of the utterance that determines whether it is a protected epithet or an unprotected "fighting comment." * * * And in time of war "the publication of the sailing dates of transports or the number and location of troops" may unquestionably be restrained, see Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716, 51 S.Ct. 625, 631, 75 L.Ed. 1357, although publication of news stories with a different content would be protected.

Even within the area of protected speech, a difference in content may require a different governmental response. * * * More directly in point are opinions dealing with the question whether the First Amendment prohibits the State and Federal Governments from wholly suppressing sexually oriented materials on the basis of their "obscene character." In Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195, the Court upheld a conviction for selling to a minor magazines which were concededly not "obscene" if shown to adults. Indeed, the Members of the Court who would accord the greatest protection to such materials have repeatedly indicated that the State could prohibit the distribution or exhibition of such materials to juveniles and unconsenting adults.[33] Surely the First Amendment does not

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[33]In Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73, 93 S.Ct. 2628, 2665, 37 L.Ed.2d 446, Mr. Justice Brennan, in a dissent joined by Mr.Justice Stewart and Mr. Justice Marshall, explained his approach to the difficult problem of obscenity under the First Amendment:
"I would hold, therefore, that at least in the

foreclose such a prohibition;yet it is equally clear that any such prohibition must rest squarely on an appraisal of the content of material otherwise within a constitutionally protected area.

Such a line may be drawn on the basis of content without violating the government's paramount obligation of neutrality in its regulation of protected communication. For the regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message a film may be intended to communicate; whether a motion picture ridicules or characterizes one point of view or another, the effect of the ordinances is exactly the same.

Moreover, even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis ***71** for placing them in a different classification from other motion pictures.

Mr. Justice STEWART, with whom Mr. Justice BRENNAN, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN join, dissenting.

The Court today holds that the First and Fourteenth Amendments do not prevent the city of Detroit from using a system of prior restraints and criminal sanctions to enforce content-based restrictions on the geographic location of motion picture theaters that exhibit nonobscene but sexually oriented films. I dissent from this drastic departure from established principles of First Amendment law.

This case does not involve a simple zoning ordinance, * * * or a content- neutral time, place, and manner restriction, * * ***85** or a regulation of obscene expression or other speech that is entitled to less than the full protection of the First Amendment. * * * The kind of expression at issue here is no doubt objectionable to some, but that fact does not diminish its protected status any more than did the particular content of the "offensive" expression in Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (display of nudity on a drive-in movie screen); * * *

What this case does involve is the constitutional permissibility of selective interference with protected speech whose content is thought to produce distasteful

absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents. Nothing in this approach precludes those governments from taking action to serve what may be strong and legitimate interests through regulation of the manner of distribution of sexually oriented material." Id., at 113, 93 S.Ct., at 2662.

effects. It is ****2460** elementary that a prime function of the First Amendment is to guard against just such interference. * * * By refusing to invalidate Detroit's ordinance the Court rides roughshod over cardinal principles of First Amendment ***86** law, which require that time, place, and manner regulations that affect protected expression be content neutral except in the limited context of a captive or juvenile audience. * * * In place of these principles the Court invokes a concept wholly alien to the First Amendment. Since "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice," Ante, at 2452, the Court implies that these films are not entitled to the full protection of the Constitution. This stands "Voltaire's immortal comment," Ibid., on its head. For if the guarantees of the First Amendment were reserved for expression that more than a "few of us" would take up arms to defend, then the right of free expression would be defined and circumscribed by current popular opinion. The guarantees of the Bill of Rights were designed to protect against precisely such majoritarian limitations on individual liberty. * * *

The fact that the "offensive" speech here may not address "important" topics "ideas of social and political significance," in the Court's terminology, Ante, at 2447 does not mean that it is less worthy of constitutional protection. "Wholly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons." Winters v. New York, 333 U.S. 507, 528, 68 S.Ct. 665, 676, 92 L.Ed. 840 (Frankfurter, J., dissenting); accord, Cohen v. California, supra, 403 U.S., at 25, 91 S.Ct., at 1788. Moreover, in the absence of a judicial determination of obscenity, it is by no means clear that the speech is not "important" even on the Court's terms. "(S)ex and obscenity are not synonymous. . . . The portrayal of sex, E. g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." Roth v. United States, 354 U.S. 476, 487, 77 S.Ct. 1304, 1310, 1 L.Ed.2d 1498 (footnotes omitted). See also Kingsley Pictures Corp. v. Regents, supra, 360 U.S., at 688-689, 79 S.Ct., at 1365.

I can only interpret today's decision as an aberration. The Court is undoubtedly sympathetic, as am I, to the well-intentioned efforts of Detroit to "clean up" its streets and prevent the proliferation of "skid rows." But it is in those instances where protected speech grates most unpleasantly against the sensibilities that judicial vigilance must be at its height.

Heretofore, the Court has not shied from its responsibility to protect "offensive" speech from governmental interference. Just last Term in Erznoznik v. City of Jacksonville, supra, the Court held that a city could not, consistently with the First and Fourteenth Amendments, make it a public nuisance for a drive-in movie theater to show films containing nudity if the screen were visible ***88** from a public street or place. The factual parallels between that case and this one are striking. There, as here, the ordinance did not forbid altogether the "distasteful" expression but merely required alteration in the physical setting of the forum. There, as here, the city's principal asserted interest was in minimizing the "undesirable" effects of speech having a particular content. And, most significantly, the particular content of the restricted speech at issue in Erznoznik precisely parallels the content restriction embodied in s 1 of Detroit's

definition of "Specified Anatomical Areas." Compare Jacksonville Municipal Code s 330.313 with Detroit Ordinance No. 742-G, s 32.0007. In short, Erznoznik is almost on "all fours" with this case.

The Court must never forget that the consequences of rigorously enforcing the guarantees of the First Amendment are frequently unpleasant. Much speech that seems to be of little or no value will enter the market place of ideas, threatening the quality of our social discourse and, more generally, the serenity of our lives. But that is the price to be paid for constitutional freedom.

William M. BROADRICK et al., Appellants, v. State of OKLAHOMA et al.

93 S.Ct. 2908

No. 71--1639.

Argued March 26, 1973.
Decided June 25, 1973.

Affirmed.

Mr. Justice Douglas dissented and filed opinion.

Mr. Justice Brennan dissented and filed opinion in which Mr. Justice Stewart and Mr. Justice Marshall joined.

* * *

Mr. Justice WHITE delivered the opinion of the Court.

Section 818 of Oklahoma's Merit System of Personnel Administration Act, Okla.Stat.Ann., Tit. 74, s 801 et seq., restricts the political activities of the State's classified civil servants in much the same manner that the Hatch Act proscribes partisan political activities of federal employees. Three employees of the Oklahoma Corporation Commission who are subject to the proscriptions of s 818 seek to have two of its paragraphs declared unconstitutional on their face and enjoined because of asserted vagueness and overbreadth. * * *

* * * We have little doubt that s 818 is similarly not so vague that 'men of common intelligence must necessarily guess at its meaning. * * * Whatever other problems there are with s 818, it is all but frivolous to suggest that the section fails to give adequate warning of what activities it proscribes or fails to set out 'explicit standards' for those who must apply it. Grayned v. City of Rockford, supra, 408 U.S., at 108, 92 S.Ct., at 2298. In the plainest language, it prohibits any state classified employee from being 'an officer or member' of a 'partisan political club' or a candidate for 'any paid public office.' It forbids solicitation of contributions 'for any political organization, candidacy or other political purpose' and taking part 'in the management or affairs of any political party or in any political campaign.' Words inevitably contain germs of uncertainty and, as with the Hatch Act, there may be disputes over the meaning of such terms in s 818 as 'partisan,' or 'take part in,' or 'affairs of' political parties. But what was said in Letter Carriers, supra, 413 U.S., at 578-- 579, 93 S.Ct., at 2897, is applicable here: 'there are limitations in the English language ****2914** with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest. * * * Moreover, even if the outermost boundaries of s 818 may be imprecise, any such uncertainty has little relevance here, where appellants' conduct falls squarely within the 'hard core' of the statute's proscriptions and appellants concede as much. * * *

* * *

Appellants assert that s 818 has been construed as applying to such allegedly protected political expression as the wearing of political buttons or the displaying ***610** of bumper stickers. * * * But appellants did not engage in any such activity. They are charged with actively engaging in partisan political activities--including the solicitation of money--among their coworkers for the benefit of their superior. Appellants concede--and correctly so, see Letter Carriers, supra--that s 818 would be constitutional as applied to this type of conduct. * * * They nevertheless maintain that the statute is overbroad and

purports to reach protected, as well as unprotected conduct, and must therefore be struck down on its face and held to be incapable of any constitutional application. We do not believe that the overbreadth doctrine may appropriately be invoked in this manner here.

Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.

* * *

In the past, the Court has recognized some limited exceptions to these principles, but only because of the most 'weighty countervailing policies.' United States v. Raines, 362 U.S., at 22--23, 80 S.Ct., at 523--524. * * * One such exception is where individuals not parties to a particular suit stand to lose by its outcome and yet have no effective avenue of preserving their rights themselves. * * * Another exception have been carved out in the area of the First Amendment.

It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression ***612** has to give way to other compelling needs of society. * * * As a corollary, the Court has altered its traditional rules of standing to permit--in the First Amendment area--'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' Dombrowski v. Pfister, 380 U.S., at 486, 85 S.Ct., at 1121. Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

Such claims of facial overbreadth have been entertained in cases involving statutes which, by their terms, seek to regulate 'only spoken words. * * * In such cases, it has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes. Overbreadth attacks have also been allowed where the Court thought rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations. * * * Facial ***613** overbreadth claims have also been entertained where statutes, by their terms, purport to regulate the time, place, and manner of expressive or communicative conduct* * *

The consequence of our departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression. Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute. ...

* * *

To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. It is our view that s 818 is not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-***616** case analysis of the fact situations to which its sanctions, assertedly, may not be applied.

* * *

The judgment of the District Court is affirmed.

It is so ordered.

Affirmed.

* * *

Mr. Justice BRENNAN, with whom Mr. Justice STEWART and Mr. Justice MARSHALL join, dissenting.

Whatever one's view of the desirability or constitutionality of legislative efforts to restrict the political activities of government employees, one must regard today's decision upholding s 818 of the Oklahoma Merit System of Personnel Administration Act [FN1] as a wholly unjustified retreat from fundamental and previously well-established First and Fourteenth Amendment principles. For the purposes of this decision, the Court assumes-- perhaps even concedes--that the statute at issue here sweeps too broadly, barring speech and conduct that are constitutionally protected even under the standards announced in United Public Workers v. Mitchell, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947), and reiterated today in United States Civil Service Commission v. National Association of Letter Carriers, AFL--CIO, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796. Nevertheless, the Court rejects appellants' contention that the statute is unconstitutional on its face, reasoning that 'where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. It is our view that s 818 is not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.' Ante, at 2918. That conclusion finds no support in previous decisions of this Court, and it effectively overrules our decision just two Terms ago in Coates v. City of Cincinnati, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971). I remain convinced that Coates was correctly decided, and I must therefore respectfully dissent.

* * *

It is possible, of course, that the inherent ambiguity of the Oklahoma statute might be cured by judicial construction of its terms. But the Oklahoma Supreme Court has never attempted to construe the Act or narrow its apparent reach. Plainly, this Court cannot undertake that task* * *. I must assume, therefore, that the Act, subject to whatever gloss is provided by the administrative regulations, * * * is capable of applications that would prohibit speech and conduct clearly protected by the First Amendment. Even on the assumption that the statute's regulatory aim is permissible, the manner in which state power is exercised is one that unduly infringes protected freedoms. * * * The State has failed, in other words, to provide the necessary

'sensitive tools' to carry out the 'separation of legitimate from illegitimate speech.'

* * *Nevertheless, we have repeatedly recognized that 'the transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'' * * * We have adhered to that view because the guarantees of the First Amendment are 'delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. * * * The mere existence of a statute that sweeps too broadly in areas protected by the First Amendment 'results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. . . . ***630** Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression.' Thornhill v. Alabama, 310 U.S. 88, 98, 60 S.Ct. 736, 742, 84 L.Ed. 1093 (1940). See Note, The First Amendment Overbreadth Doctrine, 83 Harv.L.Rev. 844, 853--854 (1970).

Although the Court declines to hold the Oklahoma Act unconstitutional on its face, it does expressly recognize that overbreadth review is a necessary means of preventing a 'chilling effect' on protected expression. Nevertheless, the Court reasons that the function of the doctrine 'attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct--even if expressive--falls within the scope of otherwise valid criminal laws the reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.' Ante, at 2917. Where conduct is involved, a statute's overbreadth must henceforth be 'substantial' before the statute can properly be found invalid on its face.

I cannot accept the validity of that analysis. In the first place, the Court makes no effort to define what it means by 'substantial overbreadth.' We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application, and in that sense a requirement of substantial overbreadth is already implicit in the doctrine. Cf. Note, The First Amendment Overbreadth Doctrine, supra, at 858-- 860, 918. Whether the Court means to require some different or greater showing of substantiality is left obscure by today's opinion, in large part because the Court makes no effort to explain why ***631** the overbreadth of the Oklahoma Act, White real, is somehow not quite substantial. No more guidance is provided than the Court's conclusory assertion that appellants' showing here falls below the line.

More fundamentally, the Court offers no rationale to explain its conclusion that, for purposes of overbreadth analysis, deterrence of conduct should be viewed differently from deterrence of speech, even where both are equally protected by the First Amendment. Indeed, in the case before us it is hard to know whether the protected activity falling within the Act should be considered speech or conduct.

* * *

At this stage, it is obviously difficult to estimate the probable impact of today's decision. If the requirement of 'substantial' overbreadth is construed to mean only that facial review is inappropriate where the

likelihood of an impermissible application of the statute is too small to generate a 'chilling effect' on protected speech or conduct, then the impact is likely to be small. On the other hand, if today's decision necessitates the drawing of artificial distinctions between protected speech and protected conduct, and if the 'chill' on protected conduct is rarely, if ever, found sufficient to require the facial invalidation of an overbroad statute, then the effect could be very grave indeed. * * *

I. Free Speech in Cyberspace

B. The First Amendment 2. Pornography and Obscenity

Marvin MILLER, Appellant,v. State of CALIFORNIA.

93 S.Ct. 2607

No. 70--73.

Argued Jan. 18--19, 1972.
Reargued Nov. 7, 1972.
Decided June 21, 1973.
Rehearing Denied Oct. 9, 1973.

See 414 U.S. 881, 94 S.Ct. 26.

Mr. Justice Douglas filed a dissenting opinion.

Mr. Justice Brennan filed a dissenting opinion in which Mr. Justice Stewart and Mr. Justice Marshall joined.

Vacated and remanded.

Mr. Chief Justice BURGER delivered the opinion of the Court.

* * *

I

This case involves the application of a State's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials. This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material[2] ***19** when the mode of dissemination carries with it a significant danger of

[2]This Court has defined 'obscene material' as 'material which deals with sex in a manner appealing to prurient interest,' Roth v. United States, supra, 354 U.S., at 487, 77 S.Ct., at 1310, but the Roth definition does not reflect the precise meaning of 'obscene' as traditionally used in the English language. Derived from the Latin obscaenus, ob, to, plus caenum, filth, 'obscene' is defined in the Webster's Third New International Dictionary (Unabridged 1969) as '1a: disgusting to the senses . . . b: grossly repugnant to the generally accepted notions of what is appropriate . . . 2: offensive or revolting as countering or violating some ideal or principle.' The Oxford English Dictionary (1933 ed.) gives a similar definition, '(o)ffensive to the senses, or to taste or refinement, disgusting, repulsive, filthy, foul, abominable, loathsome.

The material we are discussing in this case is more accurately defined as 'pornography' or 'pornographic material.' 'Pornography' derives from the Greek (porne, harlot, and graphos, writing). The word now means '1: a description of prostitutes or prostitution 2: a depiction (as in writing or painting) of licentiousness or lewdness: a a portrayal of erotic behavior designed to cause sexual excitement.' Webster's Third New International Dictionary, supra. Pornographic material which is obscene forms a subgroup of all 'obscene' expression, but not the whole, at least as the word 'obscene' is now used in our language. We note, therefore, that the words 'obscene material,' as

offending the sensibilities of unwilling recipients or of exposure to juveniles. * * * It is in this context that we are called ***20** on to define the standards which must be used to identify obscene material that a State may regulate without infringing on the First Amendment as applicable to the States through the Fourteenth Amendment.

The dissent of Mr. Justice BRENNAN reviews the background of the obscenity problem, but since the Court now undertakes to formulate standards more concrete than those in the past, it is useful for us to focus on two of the landmark cases in the somewhat tortured ****2613** history of the Court's obscenity decisions. In Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), the Court sustained a conviction under a federal statute punishing the mailing of 'obscene, lewd, lascivious or filthy . . .' materials. The key to that holding was the Court's rejection of the claim that obscene materials were protected by the First Amendment. Five Justices joined in the opinion stating:

> All ideas having even the slightest redeeming social importance--unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion--have the full protection of the (First Amendment) guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . . This is the same judgment expressed by this Court in Chaplinsky v. New Hampshire, 315 U.S. 568, 571--572, 62 S.Ct. 766, 768--769, 86 L.Ed. 1031:
>
> ". . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . .. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social ***21** value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .' (Emphasis by Court in Roth opinion.)
>
> 'We hold that obscenity is not within the area of constitutionally protected speech or press.' 354 U.S., at 484--485, 77 S.Ct., 1309 (footnotes omitted).

Nine years later, in Memoirs v. Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966), the Court veered sharply away from the Roth concept and, with only three Justices in the plurality opinion, articulated a new test of obscenity. The plurality held that under the Roth definition as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because if affronts contemporary community standards relating to the

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used in this case, have a specific judicial meaning which derives from the Roth case, i.e., obscene material 'which deals with sex.' Roth, supra, at 487, 77 S.Ct., at 1310. See also ALI Model Penal Code s 251.4(l) 'Obscene Defined.' (Official Draft, 1962.)

description or representation of sexual matters; and (c) the material is utterly without redeeming social value.' Id., at 418, 86 S.Ct., at 977.

The sharpness of the break with Roth, represented by the third element of the Memoirs test and emphasized by Mr. Justice White's dissent, id., at 460-- 462, 86 S.Ct., at 999, was further underscored when the Memoirs plurality went on to state:

> The Supreme Judicial Court erred in holding that a book need not be 'unqualifiedly worthless before it can be deemed obscene.' A book cannot be proscribed unless it is found to be utterly without redeeming social value.' Id., at 419, 86 S.Ct., at 978 (emphasis in original).

While Roth presumed 'obscenity' to be 'utterly without redeeming social importance,' Memoirs required ***22** that to prove obscenity it must be affirmatively established that the material is 'utterly without redeeming social value.' Thus, even as they repeated the words of Roth, the Memoirs plurality produced a drastically altered test that called on the prosecution to prove a negative, i.e., that the material was 'utterly without redeeming social value'--a burden virtually impossible to discharge under our criminal standards of proof. Such considerations caused Mr. Justice Harlan to wonder if the 'utterly without redeeming social value' test had any meaning at all. See Memoirs v. Massachusetts, id., at 459, 86 S.Ct., at 998 (Harlan, J., dissenting). ****2614** See also id., at 461, 86 S.Ct., at 999 (White, J., dissenting); United States v. Groner, 479 F.2d 577, 579--581 (CA,5 1973).

* * *

* * * But now the Memoirs test has been abandoned as unworkable by its author, and no Member of the Court today supports the Memoirs formulation.

II

This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment* * *.As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed* * *. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, * * * (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constituional standard the 'utterly without redeeming social value' test of Memoirs v. Massachusetts,

***25** 383 U.S., at 419, 86 S.Ct., at 977; that concept has never commanded the adherence of more than three Justices at one time* * *.

We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representation or descriptions of masturbation, excretory functions, and lews exhibition of the genitals.

Sex and nudity may not be exploited without limit by films or pictures ****2616** exhibited or sold in places of public accommodation any more than live sex and nudity can ***26** be exhibited or sold without limit in such public places. * * * At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection. * * * For example, medical books for the education of physicians and related personnel necessarily use graphic illustrations and descriptions of human anatomy. In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members.[9]

Mr. Justice BRENNAN, * * *has abandoned his former position and now maintains that no formulation of this Court, the Congress, or the States can adequately distinguish obscene material unprotected by the First Amendment from protected expression,* * * Paradoxically, Mr. Justice BRENNAN indicates that suppression of unprotected obscene material is permissible to avoid exposure to unconsenting adults, as in this case, and to juveniles, although he gives no indication of how the division between protected and nonprotected materials may be drawn with greater precision for these purposes than for regulation of commercial exposure to consenting adults only. Nor does he indicate where in the Constitution he fines the authority to distinguish between a willing 'adult' one month past the state law age of majority and a weilling 'juvenile' one month younger.

Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed.

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[9]The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged. As this Court observed in Roth v. United States, 354 U.S., at 492 n. 30, 77 S.Ct., at 1313 n. 30, 'it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. Cf. Dunlop v. United States 486, 499-500.'

We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities ****2617** may bring prosecution. * * *[1] If the inability to define regulated materials with ultimate, god-like precision altogether removes the power of the States or the Congress to regulate, then 'hard core' pornography may be exposed without limit to the juvenile, the passerby, and the consenting adult alike, as, indeed, Mr. Justice Douglas contends. * * *

* * *

III

Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.' These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient,' it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law. To require a State to structure obscenity proceedings around evidence of a national 'community standard' would be an exercise in futility.

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[1]As Mr. Justice Brennan stated for the Court in Roth v. United States, supra, 354 U.S., at 491--492, 77 S.Ct., at 1312--1313:

> Many decisions have recognized that these terms of obscenity statutes are not precise. (Footnote omitted.) This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '. . . (T)he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' United States v. Petrillo, 332 U.S. 1, 7--8, 67 S.Ct. 1538, 1542, 91 L.Ed. 1877. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '. . . boundaries sufficiently distinct for judges and juries to fairly administer the law . . .. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . .' Id., 332 U.S. at page 7, 67 S.Ct., at page 1542. See also United States v. Harriss, 347 U.S. 612, 624, n. 15, 14 S.Ct. 808, 815, 98 L.Ed. 989; Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340, 72 S.Ct. 329, 330, 96 L.Ed. 367; United States v. Ragen, 314 U.S. 513, 523--524, 62 S.Ct. 374, 378, 86 L.Ed. 383; United States v. Wurzbach, 280 U.S. 396, 50 S.Ct. 167, 74 L.Ed. 508; Hygrade Provision Co. v. Sherman, 266 U.S. 497, 45 S.Ct. 141, 69 L.Ed. 402; Fox. v. Washington, 236 U.S. 273, 35 S.Ct. 383, 59 L.Ed. 573; Nash v. United States, 229 U.S. 373, 33 S.Ct. 780, 57 L.Ed. 1232.

* * *

It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City* * * People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.

* * *

IV

* * *

The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. 'The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of ***35** political and social changes desired by the people,' Roth v. United States, supra, 354 U.S., at 484, 77 S.Ct., ****2621** at 1308 (emphasis added). See Kois v. Wisconsin, 408 U.S., at 230--232, 92 S.Ct., at 2246--2247; Thornhill v. Alabama, 310 U.S., at 101--102, 60 S.Ct., at 743--744. But the public portrayal of hard- core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.[15]

* * *

Mr. Justice Brennan finds 'it is hard to see how state-ordered regimentation of our minds can ever be forestalled.' Paris Adult Theatre I v. Slaton, 413 U.S., at 110, 93 S.Ct., at 2661 (Brennan, J., dissenting). These doleful anticipations assume that courts cannot distinguish commerce in ideas, protected by the First Amendment, from commercial exploitation of obscene material. Moreover, state regulation of hard-core pornography so as to make it unavailable to nonadults, a regulation which Mr. Justice Brennan finds constitutionally permissible, has all the elements of 'censorship' for adults; indeed even more rigid enforcement techniques may be called for with such dichotomy of regulation. See Interstate Circuit, Inc. v. Dallas, 390 U.S., at 690, 88 S.Ct., at 1306.[17] One can concede that the 'sexual revolution' of recent years may have had useful byproducts in striking layers of prudery from a subject long irrationally kept from needed ventilation. But it does

[15]In the apt words of Mr. Chief Justice Warren, the appellant in this case was 'plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct. That is all that these cases present to us, and that is all we need to decide.' Roth v. United States, supra, 354 U.S., at 496, 77 S.Ct., at 1315 (concurring opinion).

[17](W)e have indicated . . . that because of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults. Ginsberg v. New York, . . . (390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968)).' Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 690, 88 S.Ct. 1298, at 1306, 20 L.Ed.2d 225 (1968) (footnote omitted).

not follow that no regulation of patently offensive 'hard core' materials is needed or permissible; civilized people do not allow unregulated access to heroin because it is a derivative of medicinal morphine.

In sum, we (a) reaffirm the Roth holding that obscene material is not protected by the First Amendment; (b) hold that such material can be regulated by the States, subject to the specific safeguards enunciated ***37** above, without a showing that the material is 'utterly without redeeming social value'; and (c) hold that obscenity is to be determined by applying 'contemporary community standards,' see Kois v. Wisconsin, supra, 408 U.S., at 230, 92 S.Ct., at 2246, and Roth v. United States, supra, 354 U.S., at 489, 77 S.Ct., at 1311, not 'national standards.' The judgment of the Appellate Department of the Superior Court, Orange County, California, is vacated and the case remanded to that court for further proceedings not inconsistent with the First Amendment standards established by this opinion. See United States v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123, at 130 n. 7, 93 S.Ct. 2665, at 2670 n. 7, 37 L.Ed.2d 500.

Vacated and remanded.

Mr. Justice DOUGLAS, dissenting.

I

* * *

Today the Court retreats from the earlier formulations of the constitutional test and undertakes to make new definitions. This effort, like the earlier ones, is earnest and well intentioned. The difficulty is that we do not deal with constitutional terms, since 'obscenity' is not mentioned in the Constitution or Bill ****2624** of Rights. And the First Amendment makes no such exception from 'the press' which it undertakes to protect nor, as I have said on other occasions, is an exception necessarily implied, for there was no recognized exception to the free press at the time the Bill of Rights was adopted which treated 'obscene' publications differently from other types of papers, magazines, and books. So there are no constitutional guidelines for deciding what is and what is not 'obscene.' The Court is at large because we deal with tastes and standards of literature. What shocks me may ***41** be sustenance for my neighbor. What causes one person to boil up in rage over one pamphlet or movie may reflect only his neurosis, not shared by others. We deal here with a regime of censorship which, if adopted, should be done by constitutional amendment after full debate by the people.

* * *

My contention is that until a civil proceeding has placed a tract beyond the pale, no criminal prosecution should be sustained. For no more vivid illustration of vague and uncertain laws could be designed than those we have fashioned* * *.

* * *

II

If a specific book, play, paper, or motion picture has in a civil proceeding been condemned as obscene and review of that finding has been completed, and thereafter a person publishers, shows, or displays that particular book or film, then a vague law has been made specific. There would remain the underlying question whether the First Amendment allows an implied exception in the case of obscenity. I do not think it does ... ****2625** and my views ***43** on the issue have been stated over and over again. * * * But at least a criminal prosecution brought at that juncture would not violate the time- honored void-for-vagueness test.[8]

No such protective procedure has been designed by California in this case. Obscenity--which even we cannot define with precision--is a hodge-podge. To send ***44** men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process.

III

* * *

The First Amendment was designed 'to invite dispute,' to induce 'a condition of unrest,' to 'create dissatisfaction with conditions as they are,' and even to stir 'people' to anger.' Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 896, 93 L.Ed. 1131. The idea that the First Amendment permits punishment for ideas that are 'offensive' to the particular judge or jury sitting in judgment is astounding. No greater leveler of speech or literature has ever been designed. To give the power to the censor, as we do today, is to make a sharp and radical break with the traditions of a free society. The First Amendment was not fashioned as a vehicle for ***45** dispensing tranquilizers to

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[8]The Commission on Obscenity and Pornography has advocated such a procedure:

'The Commission recommends the enactment, in all jurisdictions which enact or retain provisions prohibiting the dissemination of sexual materials to adults or young persons, of legislation authorizing prosecutors to obtain declaratory judgments as to whether particular materials fall within existing legal prohibitions . . ..

A declaratory judgment procedure . . . would permit prosecutors to proceed civilly, rather than through the criminal process, against suspected violations of obscenity prohibition. If such civil procedures are utilized, penalties would be imposed for violation of the law only with respect to conduct occurring after a civil declaration is obtained. The Commission believes this course of action to be appropriate whenever there is any existing doubt regarding the legal status of materials; where other alternatives are available, the criminal process should not ordinarily be invoked against persons who might have reasonably believed, in good faith, that the books or films they distributed were entitled to constitutional protection, for the threat of criminal sanctions might otherwise deter the free distribution of constitutionally protected material.

Report of the Commission on Obscenity and Pornography 63 (1970).

the people. Its prime function was to keep debate open to 'offensive' as well as to 'staid' people. The tendency throughout history has been to subdue the individual and to exalt the power of government. The use of the standard 'offensive' gives authority to government that cuts the very vitals out of the First Amendment.[1] As is intimated by the Court's opinion, the materials before us may be garbage. But so is much of what is said in political campaigns, in the daily press, on TV, or over the radio. By reason of the First Amendment--and solely because of it--speakers and publishers have not been threatened or subdued because their thoughts and ideas may be 'offensive' to some.

* * *

[1]Obscenity law has had a capricious history:
'The white slave traffic was first exposed by W. T. Stead in a magazine article, 'The Maiden Tribute.' The English law did absolutely nothing to the profiteers in vice, but put Stead in prison for a year for writing about an indecent subject. When the law supplies no definite standard of criminality, a judge in deciding what is indecent or profane may consciously disregard the sound test of present injury, and proceeding upon an entirely different theory may condemn the defendant because his words express ideas which are thought liable to cause bad future consequences. Thus musical comedies enjoy almost unbridled license, while a problem play is often forbidden because opposed to our views of marriage. In the same way, the law of blasphemy has been used against Shelley's Queen Mab and the decorous promulgation of pantheistic ideas, on the ground that to attack religion is to loosen the bonds of society and endanger the state. This is simply a roundabout modern method to make heterodoxy in sex matters and even in religion a crime.' Z. Chafee, Free Speech in the United States 151 (1942).

Ginsberg v. State of New York

88 S.Ct. 1274
20 L.Ed.2d 195, 1 Media L. Rep. 1424
(Cite as: 390 U.S. 629, 88 S.Ct. 1274)

Sam GINSBERG, Appellant,
v.
STATE OF NEW YORK.

No. 47.

Supreme Court of the United States

Argued Jan. 16, 1968.

Decided April 22, 1968.
Rehearing Denied June 3, 1968.

See 391 U.S. 971, 88 S.Ct. 2029.

***631** Mr. Justice BRENNAN delivered the opinion of the Court.

This case presents the question of the constitutionality on its face of a New York criminal obscenity statute which ****1276** prohibits the sale to minors under 17 years of age of material defined to be obscene on the basis of its appeal to them whether or not it would be obscene to adults.

[1][2] Appellant and his wife operate 'Sam's Stationery and Luncheonette' in Bellmore, Long Island. They have a lunch counter, and, among other things, also sell magazines including some so-called 'girlie' magazines. Appellant was prosecuted under two informations, each in two counts, which charged that he personally sold a 16-year-old boy two 'girlie' magazines on each of two dates in October 1965, in violation of s 484--h of the New York Penal Law, McKinney's Consol.Laws, c. 40. He was tried before a judge without a jury in Nassau County District Court and was found guilty on both counts. [FN1] The judge found (1) that the ***632** magazines contained pictures which depicted female 'nudity' in a manner defined in subsection 1(b), that is 'the showing of * * * female * * * buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple * * *,' and (2) that the pictures were 'harmful to minors' in that they had, within the meaning of subsection 1(f) ***633** 'that quality of * * * representation * * * of nudity * * * (which) * * * (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors.' He held ****1277** that both sales to the 16-year-old boy therefore constituted the violation under s 484--h of 'knowingly to sell * * * to a minor' under 17 of '(a) any picture * * * which depicts nudity * * * and which is harmful to minors,' and '(b) any * * * magazine * * * which contains * * * (such pictures) * * * and which, taken as a whole, is harmful to minors.' The conviction was affirmed without opinion by the Appellate Term, Second Department, of the Supreme Court. Appellant was denied leave to appeal to the New York Court of Appeals and then appealed to this Court. We noted probable jurisdiction. 388 U.S. 904, 87 S.Ct. 2108, 18 L.Ed.2d 1344. We affirm. [FN2]

FN1. Appellant makes no attack upon s 484--h as applied. We therefore have no occasion to consider the

sufficiency of the evidence, or such issues as burden of proof, whether expert evidence is either required or permissible, or any other prerequisite to engaging in the luncheonette application of the statute. Appellant does argue that because the trial judge included a finding that two of the magazines 'contained verbal descriptions and narrative accounts of sexual excitement and sexual conduct,' an offense not charged in the informations, the conviction must be set aside under Cole v. State of Arkansas, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644. But this case was tried and the appellant was found guilty only on the charges of selling magazines containing pictures depicting female nudity. It is therefore not a case where defendant was tried and convicted of a violation of one offense when he was charged with a distinctly and substantially different offense.

The full text of s 484--h is attached as Appendix A. It was enacted in L.1965, c. 327, to replace an earlier version held invalid by the New York Court of Appeals in People v. Kahan, 15 N.Y.2d 311, 258 N.Y.S.2d 391, 206 N.E.2d 333, and People v. Bookcase, Inc., 14 N.Y.2d 409, 252 N.Y.S.2d 433, 201 N.E.2d 14. Section 484--h in turn was replaced by L.1967, c. 791, now ss 235.20--235.22 of the Penal Law. The major changes under the 1967 law added a provision that the one charged with a violation 'is presumed to (sell) with knowledge of the character and content of the material sold * * *,' and the provision that 'it is an affirmative defense that: (a) The defendant had reasonable cause to believe that the minor involved was seventeen years old or more; and (b) Such minor exhibited to the defendant a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor was seventeen years old or more.' Neither addition is involved in this case. We intimate no view whatever upon the constitutional validity of the presumption. See in general Smith v. People of State of California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205; Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460; 41 N.Y.U.L.Rev. 791 (1966); 30 Albany L.Rev. 133 (1966).

The 1967 law also repealed outright s 484--i which had been enacted one week after s 484--h. L.1965, c. 327. It forbade sales to minors under the age of 18. The New York Court of Appeals sustained its validity against a challenge that it was void for vagueness. People v. Tannenbaum, 18 N.Y.2d 268, 274 N.Y.S.2d 131, 220 N.E.2d 783. For an analysis of s 484--i and a comparison with s 484--h see 33 Brooklyn L.Rev. 329 (1967).

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[3] The 'girlie' picture magazines involved in the sales here are not obscene for adults, Redrup v. State of New York, 386 U.S. 767, 87 S.Ct. 1414, 18 L.2d.2d 515. [FN3] But s 484--h does not ****1278** bar the appellant ***635** from stocking the magazines and selling them to persons 17 years of age or

older, and therefore the conviction is not invalid under our decision in Butler v. State of Michigan, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412.

[4] Obscenity is not within the area of protected speech or press. Roth v. United States, 354 U.S. 476, 485, 77 S.Ct. 1304, 1309, 1 L.Ed.2d 1498. The three-pronged test of subsection 1(f) for judgment the obscenity of material sold to minors under 17 is a variable from the formulation for determining obscenity under Roth stated in the plurality opinion in A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney General of Com. of Massachusetts, 383 U.S. 413, 418, 86 S.Ct. 975, 977, 16 L.Ed.2d 1. Appellant's primary attack upon s 484--h is leveled at the power of the State to adapt this Memoirs formulation to define the material's obscenity on the basis of its appeal to minors, and thus exclude material so defined from the area of protected expression. He makes no argument that the magazines are not 'harmful to minors' within the definition in subsection 1(f). Thus '(n)o issue is presented * * * concerning the obscenity of the material involved.' Roth, 354 U.S., at 481, 77 S.Ct. at 1307, n. 8.

The New York Court of Appeals 'upheld the Legislature's power to employ variable concepts of obscenity' [FN4] ***636** in a case in which the same challenge to state power to enact such a law was also addressed to s 484-- h. Bookcase, Inc. v. Broderick, 18 N.Y.2d 71, 271 N.Y.S.2d 947, 218 N.E.2d 668, appeal dismissed for want of a properly presented federal question, sub nom. Bookcase, Inc. v. Leary, 385 U.S. 12, 87 S.Ct. 81, 17 L.Ed.2d 11. In sustaining state power to enact the law, the Court of Appeals said, Bookcase, Inc. v. Broderick, 18 N.Y.2d, p. 75, 271 N.Y.S.2d, p. 952, 218 N.E.2d, p. 671:

> FN4. People v. Tannenbaum, 18 N.Y.2d 268, 270, 274 N.Y.S.2d 131, 133, 220 N.E.2d 783, 785, dismissed as moot, 388 U.S. 439, 87 S.Ct. 2107, 18 L.Ed.2d 1300. The concept of variable obscenity is developed in Lockhart & McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn.L.Rev. 5 (1960). At 85 the authors state:
> 'Variable obscenity * * * furnishes a useful analytical took for dealing with the problem of denying adolescents access to material aimed at a primary audience of sexually mature adults. For variable obscenity focuses attention upon the make-up of primary and peripheral audiences in varying circumstances, and provides a reasonably satisfactory means for delineating the obscene in each circumstance.'

'(M)aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise ****1279** its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults.'

Appellant's attack is not that New York was without power to draw the line at age 17. Rather, his contention is the broad proposition that the scope of the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend upon whether the citizen is an adult or a minor. He accordingly insists that the denial to minors under 17 of access to material condemned by s 484--h, insofar as that material is not obscene for persons 17 years of age or older, constitutes an unconstitutional deprivation of protected liberty.

[5] We have no occasion in this case to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State, cf. In re Gault, 387 U.S. 1, 13, 87 S.Ct. 1428, 1436, 18 L.Ed.2d 527. It is enough for the purposes of this case that we inquire whether it was ***637** constitutionally impermissible for New York, insofar as s 484--h does so, to accord minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what sex material they may read or see. We conclude that we cannot say that the statute invades the area of freedom of expression constitutionally secured to minors. [FN5]

FN5. Suggestions that legislatures might give attention to laws dealing specifically with safeguarding children against pornographic material have been made by many judges and commentators. See, e.g., Jacobellis v. State of Ohio, 378 U.S. 184, 195, 84 S.Ct. 1676, 1682, 12 L.Ed.2d 793 (opinion of Justices Brennan and Goldberg); id., at 201, 84 S.Ct., at 1685 dissenting opinion of THE CHIEF JUSTICE); Ginzberg v. United States, 383 U.S. 463, 498, 86 S.Ct. 942, 956, 16 L.Ed.2d 31, n. 1 (dissenting opinion of MR. JUSTICE STEWART); Interstate Circuit, Inc. v. City of Dallas, 5 Cir., 366 F.2d 590, 593; In re Louisiana News Co. v. Dayries, D.C., 187 F.Supp. 241, 247; United States v. Levine, 2 Cir., 83 F.2d 156; United States v. Dennett, 2 Cir., 39 F.2d 564, 76 A.L.R. 1092; R. Kuh, Foolish Figleaves? 258--260 (1967); Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 939 (1963); Gerber, A Suggested Solution to the Riddle of Obscenity, 112 U.Pa.L.Rev. 834, 848 (1964); Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Col.L.Rev. 391, 413, n. 68 (1963); Kalven, The Metaphysics of the Law of Obscenity, 1960 Sup.Ct.Rev. 1, 7; Magrath, The Obscenity Cases: Grapes of Roth, 1966 Sup.Ct.Rev. 7, 75.

The obscenity laws of 35 other States include provisions referring to minors. The laws are listed in Appendix B to this opinion. None is a precise counterpart of New York's s 484--h and we imply no view whatever on questions of their constitutionality.

[6][7] Appellant argues that there is an invasion of protected rights under s 484--h constitutionally indistinguishable from the invasions under the Nebraska statute forbidding children to study German, which was struck down in Meyer v. State of Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042; the Oregon statute interfering with children's attendance at private and parochial schools, which was struck down in

Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070; and the statute compelling children against their religious scruples to give the flag salute, which was struck down in West Virginia ***638** State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628. We reject that argument. We do not regard New York's regulation in defining obscenity on the basis of its appeal to minors under 17 as involving an invasion of such minors' constitutionally protected freedoms. Rather s 484--h simply adjusts the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in term of the sexual interests * * *' of such minors. Mishkin v. ****1280** State of New York, 383 U.S. 502, 509, 86 S.Ct. 958, 16 L.Ed.2d 56; Bookcase, Inc. v. Broderick, supra, 18 N.Y.2d, at 75, 271 N.Y.S.2d, at 951, 218 N.E.2d, at 671. That the State has power to make that adjustment seems clear, for we have recognized that even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults * * *.' Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 170, 64 S.Ct. 438, 444, 88 L.Ed. 645. [FN6] In Prince we sustained the conviction ***639** of the guardian of a nine-year-old girl, both members of the sect of Jehovah's Witnesses, for violating the Massachusetts Child Labor Law by permitting the girl to sell the sect's religious tracts on the streets of Boston.

> FN6. Many commentators, including many committed to the proposition that '(n)o general restriction on expression in terms of 'obscenity' can * * * be reconciled with the first amendment,' recognize that 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults,' and accordingly acknowledge a supervening state interest in the regulation of literature sold to children, Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 938, 939 (1963):
>
> 'Different factors come into play, also, where the interest at stake is the effect of erotic expression upon children. The world of children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose different rules. Without attempting here to formulate the principles relevant to freedom of expression for children, it suffices to say that regulations of communication addressed to them need not conform to the requirements of the first amendment in the same way as those applicable to adults.'
>
> See also Gerber, supra, at 848; Kalven, supra, at 7; Magrath, supra, at 75. Prince v. Commonwealth of Massachusetts is urged to be constitutional authority for such regulation. See, e.g., Kuh, supra, at 258--260; Comment, Exclusion of Children from Violent Movies, 67 Col.L.Rev. 1149, 1159--1160 (1967); Note, Constitutional Problems in Obscenity Legislation Protecting Children, 54 Geo.L.J. 1379 (1966).

[8][9] The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations in s 484--h upon the availability of sex material to minors under 17, at least if it was rational for

the legislature to find that the minors' exposure to such material might be harmful. First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' Prince v. Commonwealth of Massachusetts, supra, at 166, 64 S.Ct., at 442. The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility. Indeed, subsection 1(f)(ii) of s 484--h expressly recognizes the parental role in assessing sex-related material harmful to minors according 'to prevailing standards in the adult community as a whole with respect to what is suitable material for minors.' Moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children. [FN7]

> FN7. One commentator who argues that obscenity legislation might be constitutionally defective as an imposition of a single standard of public morality would give effect to the parental role and accept laws relating only to minors. Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Col.L.Rev. 391, 413, n. 68 (1963):
> 'One must consider also how much difference it makes if laws are designed to protect only the morals of a child. While many of the constitutional arguments against morals legislation apply equally to legislation protecting the morals of children, one can well distinguish laws which do not impose a morality on children, but which support the right of parents to deal with the morals of their children as they see fit.'
> See also Elias, Sex Publications and Moral Corruption: The Supreme Court Dilemma, 9 Wm. & Mary L.Rev. 302, 320--321 (1967).

****1281 *640** The State also has an independent interest in the well-being of its youth. The New York Court of Appeals squarely bottomed its decision on that interest in Bookcase, Inc. v. Broderick, supra, 18 N.Y.2d at 75, 271 N.Y.S.2d, at 951, 218 N.E.2d, at 671. Judge Fuld, now Chief Judge Fuld, also emphasized its significance in the earlier case of People v. Kahan, 15 N.Y.2d 311, 258 N.Y.S.2d 391, 206 N.E.2d 333, which had struck down the first version of s 484--h on grounds of vagueness. In his concurring opinion, 15 N.Y.2d, at 312, 258 N.Y.S.2d, at 392, 206 N.E.2d, at 334, he said:

> 'While the supervision of children's reading may best be left to their parents, the knowledge that parentalcontrol or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults.'

In Prince v. Commonwealth of Massachusetts, supra, 321 U.S., at 165, 64 S.Ct., at 441, this Court, too, recognized that

the State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well- developed men ***641** and citizens.' The only question remaining, therefore, is whether the New York Legislature might rationally conclude, as it has, that exposure to the materials proscribed by s 484--h constitutes such an 'abuse.'

[10][11][12] Section 484--e of the law states a legislative finding that the material condemned by s 484--h is 'a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state.' It is very doubtful that this finding expresses an accepted scientific fact. [FN8] But obscenity is not protected expression and may be suppressed without a showing of the circumstances which lie behind the phrase 'clear and present danger' in its application to protected speech. Roth v. United States, supra, 354 U.S., at 486--487, 77 S.Ct., at 1309--1310. [FN9] To sustain state power to exclude material defined as obscenity by s 484--h requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors. In Meyer v. State of Nebraska, supra, 262 U.S., at 400, 43 S.Ct., at 627, we were able to say that children's knowledge of the German language 'cannot reasonably be regarded as harmful.' That cannot be said by us of minors' reading and seeing sex material. To be sure, there is no lack of 'studies' which purport to demonstrate ****1282** that obscenity is or is not 'a basic factor in impairing the ethical and moral development of * * * youth and a clear and present ***642** danger to the people of the state.' But the growing consensus of commentators is that 'while these studies all agree that a causal link has not been demonstrated, they are equally agreed that a causal link has not been disproved either.' [FN10] We do not demand of legislatures ***643** 'scientifically certain criteria of legislation.' Noble State Bank v. Haskell, 219 U.S. 104, 110, 31 S.Ct. 186, 187, 55 L.Ed. 112. We therefore cannot say that s 484--h, in defining the obscenity of material on the basis of its appeal to minors under 17, has no rational relation to the objective of safeguarding such minors from harm.

FN8. Compare Memoirs v. Massachusetts, 383 U.S., at 424, 86 S.Ct., at 980 nopinion of Douglas, J.) with id., at 441, 86 S.Ct. at 988 (opinion of Clark, J.). See Kuh, supra, cc. 18--19; Gaylin, Book Review, 77 Yale L.J. 579, 591--595 (1968); Magrath, supra, at 52.

FN9. Our conclusion in Roth, 354 U.S., at 486--487, 77 S.Ct., that the clear and present danger test was irrelevant to the determination of obscenity made it unnecessary in that case to consider the debate among the authorities whether exposure to pornography caused antisocial consequences. See also Mishkin v. State of New York, supra; Ginzburg v. United States, supra; Memoirs v. Massachusetts, supra.

FN10. Magrath, supra, at 52. See, e.g., id., at 49--56; Dibble, Obscenity: A State Quarantine to Protect Children, 39 So.Cal.L.Rev. 345 (1966); Wall, Obscenity and Youth: The Problem and a Possible Solution, Crim.L.Bull., Vol. 1, No. 8, pp. 28, 30 (1965); Note, 55 Cal.L.Rev. 926, 934 (1967);

Comment, 34 Ford.L.Rev. 692, 694 (1966). See also J., Paul & M. Schwartz, Federal Censorship: Obscenity in the Mail, 191--192; Blakey, Book Review, 41 Notre Dame Law, 1055, 1060, n. 46 (1966); Green, Obscenity, Censorship, and Juvenile Delinquency, 14 U. Toronto L.Rev. 229, 249 (1962); Lockhart & McClure, Literature, The Law of Obscenity, and the Constitution, 38 Minn.L.Rev. 295, 373--385 (1954); Note 52 Ky.L.J. 429, 447 (1964). But despite the vigor of the ongoing controversy whether obscene material will perceptibly create a danger of antisocial conduct, or will probably induce its recipients to such conduct, a medical practitioner recently suggested that the possibility of harmful effects to youth cannot be dismissed as frivolous. Dr. Gaylin of the Columbia University Psychoanalytic Clinic, reporting on the views of some psychiatrists in 77 Yale L.J., at 592--593, said:

'It is in the period of growth (of youth) when these patterns of behavior are laid down, when environmental stimuli of all sorts must be integrated into a workable sense of self, when sensuality is being defined and fears elaborated, when pleasure confronts security and impulse encounters control--it is in this period, undramatically and with time, that legalized pornography may conceivably be damaging.'

Dr. Gaylin emphasizes that a child might not be as well prepared as an adult to make an intelligent choice as to the material he chooses to read:

'(P)sychiatrists * * * made a distinction between the reading of pornography, as unlikely to be per se harmful, and the permitting of the reading of pornography, which was conceived as potentially destructive.

> The child is protected in his reading of pornography by the knowledge that it is pornographic, i.e., disapproved. It is outside of parental standards and not a part of his identification processes. To openly permit implies parental approval and even suggests seductive encouragement. If this is so of parental approval, it is equally so of societal approval--another potent influence on the developing ego.' Id., at 594.

II.

[13] Appellant challenges subsections (f) and (g) of s 484--h as in any event void for vagueness. The attack on subsection (f) is that the definition of obscenity 'harmful to minors' is so vague that an honest distributor of publications cannot know when he might be held to have violated s 484--h. But the New York Court of Appeals construed this definition to be 'virtually identical to the Supreme Court's most recent statement of the elements of obscenity. (A Book Named 'John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of Commonwealth of Massachusetts, 383 U.S. 413, 418, 86 S.Ct. 975, 977, 16 L.Ed.2d 1),' Bookcase, Inc. v. Broderick, supra, 18 N.Y.2d, at 76, 271 N.Y.S.2d, at 953, 218 N.E.2d, at 672. The definition therefore gives 'men in acting adequate notice of what is prohibited' and does not offend the requirements of due process. Roth v. United States, supra, 354 U.S., at 492, 77 S.Ct., at 1313, see also

Winters v. People of State of New York, 333 U.S. 507, 520, 68 S.Ct. 665, 672, 92 L.Ed. 840.

****1283** [14] As is required by Smith v. People of State of California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205, s 484--h prohibits only those sales made 'knowingly.' The challenge to the scienter requirement of subsection (g) centers on the definition of 'knowingly' insofar as it includes 'reason to know' or 'a belief or ground for belief which warrants further inspection or inquiry of both: (i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and (ii) the age of the ***644** minor, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.'

As to (i), s 484--h was passed after the New York Court of Appeals decided People v. Finkelstein, 9 N.Y.2d 342, 214 N.Y.S.2d 363, 174 N.E.2d 470, which read the requirement of scienter into New York's general obscenity statute, s 1141 of the Penal Law. The constitutional requirement of scienter, in the sense of knowledge of the contents of material, rests on the necessity 'to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity,' Mishkin v. State of New York, supra, 383 U.s., at 511, 86 S.Ct. at 965. The Court of Appeals in Finkelstein interpreted s 1141 to require 'the vital element of scienter' and defined that requirement in these terms: 'A reading of the statute (s 1141) as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent but calculated purveyance of filth which is exorcised * * *.' 9 N.Y.2d, at 344--345, 214 N.Y.S.2d, at 364, 174 N.E.2d, at 471. (Emphasis supplied.) In Mishkin v. State of New York, supra, 383 U.S., at 510--511, 86 S.Ct., at 964, we held that a challenge to the validity of s 1141 founded on Smith v. People of State of California, supra, was foreclosed in light of this construction. When s 484--h was before the New York Legislature its attention was directed to People v. Finkelstein, as defining the nature of scienter required to sustain the statute. 1965 N.Y.S.Leg.Ann. 54--56. We may therefore infer that the reference in provision (i) to knowledge of 'the character and content of any material described herein' incorporates the gloss given the term 'character' in People v. Finkelstein. In that circumstance Mishkin requires rejection of appellant's challenge to provision (i) and makes it unnecessary for ***645** us to define further today 'what sort of mental element is requisite to a constitutionally permissible prosecution,' Smith v. People of State of California, supra, 361 U.S., at 154, 80 S.Ct., at 219.

Appellant also attacks provision (ii) as impermissibly vague. This attack however is leveled only at the proviso according the defendant a defense of 'honest mistake' as to the age of the minor. Appellant argues that 'the statute does not tell the bookseller what effort he must make before he can be excused.' The argument is wholly without merit. The proviso states expressly that the defendant must be acquitted on the ground of 'honest mistake' if the defendant proves that he made 'a reasonable bona fide attempt to ascertain the true age of such minor.' Cf. 1967 Penal Law s 235.22(2), n. 1, supra.

Affirmed.

APPENDIX A TO OPINION OF THE COURT.

New York Penal Law s 484--h as enacted by L. 1965, c. 327, provides:

s 484--h. Exposing minors to harmful materials

1. Definitions. As used in this section:

(a) 'Minor' means any person under the age of seventeen years.

(b) 'Nudity' means the showing of the human male or female genitals, pubic ****1284** area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

***646** (c) 'Sexual conduct' means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, public area, buttocks or, if such person be a female, breast.

(d) 'Sexual excitement' means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) 'Sado-masochistic abuse' means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) 'Harmful to minors' means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:

(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and

(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and

(iii) is utterly without redeeming social importance for minors.

(g) 'Knowingly' means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and

(ii) the age of the minor, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

***647** 2. It shall be unlawful for any person knowingly to sellor loan for monetary consideration to a minor:

(a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sadomasochistic abuse and which is harmful to minors, or

(b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of subdivision two hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual

excitementSexual conduct or sado-masochistic abuse and which, taken as a whole is harmful to minors.

3. It shall be unlawful for any person knowingly to exhibit for a monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.

4. A violation of any provision hereof shall constitute a misdemeanor.

Mr. Justice STEWART, concurring in the result.

A doctrinaire, knee-jerk application of the First Amendment would, of course, dictate the nullification of ***649** this New York statute. [FN1] But that result is not required, I think, if we bear in mind what it is that the First Amendment protects.

> FN1. The First Amendment is made applicable to the States through the Fourteenth Amendment. Stromberg v. People of State of California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117.

The First Amendment guarantees liberty of human expression in order to preserve in our Nation what Mr. Justice Holmes called a 'free trade in ideas.' [FN2] To that end, the Constitution protects more than just a man's freedom to say or write or publish what he wants. It secures as well the liberty of each man to decide for himself what he will read and to what he will listen. The Constitution guarantees, in short, a society of free choice. Such a society presupposes the capacity of its members to choose.

> FN2. Abrams v. United States, 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63 L.Ed. 1173 (dissenting opinion).

When expression occurs in a setting where the capacity to make a choice is absent, government regulation of that expression may co-exist with and even implement First Amendment guarantees. So it was that this Court sustained a city ordinance prohibiting people from imposing their opinions on others 'by way of sound trucks with loud and raucous noises on city streets.' [FN3] And so it was that my Brothers BLACK and DOUGLAS thought that the First Amendment itself prohibits a person from foisting his uninvited views upon the members of a captive audience. [FN4]

> FN3. Kovacs v. Cooper, 336 U.S. 77, 86, 69 S.Ct. 448, 453, 93 L.Ed. 513.

> FN4. Public Utilities Comm'n of District of Columbia v. Pollak, 343 U.S. 451, 466, 72 S.Ct. 813, 822, 96 L.Ed. 1068 (dissenting opinion of MR. JUSTICE BLACK), 467, 72 S.Ct. 823 (dissenting opinion of MR. JUSTICE DOUGLAS).

I think a State may permissibly determine that, at least in some precisely ****1286** delineated areas, a child [FN5]--like someone in a captive audience-- is not possessed of that ***650** full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights--the right to marry, for example, or the right to

vote--deprivations that would be constitutionally intolerable for adults. [FN6]

FN5. The appellant does not challenge New York's power to draw the line at age 17, and I intimate no view upon that question.

FN6. Compare Loving v. Commonwealth of Virginia, 388 U.S. 1, 12, 87 S.Ct. 1817, 1823, 18 L.Ed.2d 1010; Carrington v. Rash, 380 U.S. 89, 96, 85 S.Ct. 775, 780, 13 L.Ed.2d 675.

I cannot hold that this state law, on its face, [FN7] violates the First and Fourteenth Amendments.

FN7. As the Court notes, the appellant makes no argument that the material in this case was not 'harmful to minors' within the statutory definition, or that the statute was unconstitutionally applied.

Mr. Justice DOUGLAS, with whom Mr. Justice BLACK concurs, dissenting.

While I would be willing to reverse the judgment on the basis of Redrup v. State of New York, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515, for the reasons stated by my Brother FORTAS, my objections strike deeper.

If we were in the field of substantive due process and seeking to measure the propriety of state law by the standards of the Fourteenth Amendment, I suppose there would be no difficulty under our decisions in sustaining this act. For there is a view held by many that the so-called 'obscene' book or tract or magazine has a deleterious effect upon the young, although I seriously doubt the wisdom of trying by law to put the fresh, evanescent, natural blossoming of sex in the category of 'sin.'

That, however, was the view of our preceptor in this field. Anthony Comstock, who waged his war against 'obscenity' from the year 1872 until his death in 1915. Some of his views are set forth in his book Traps for the Young, first published in 1883, excerpts from which I set out in Appendix I to this opinion.

***651** The title of the book refers to 'traps' created by Satan 'for boys and girls especially.' Comstock, of course, operated on the theory that every human has an 'inborn tendency toward wrongdoing which is restrained mainly by fear of the final judgment.' In his view any book which tended to remove that fear is a part of the 'trap' which Satan created. Hence, Comstock would have condemned a much wider range of literature than the present Court is apparently inclined to do. [FN1]

FN1. Two writers have explained Comstock as follows:
'He must have known that he could not wall out from his own mind all erotic fancies, and so he turned all the more fiercely upon the ribaldry of others.' H. Broun & M. Leech, Anthony Comstock 27 (1927).
A notable forerunner of Comstock was an Englishman, Thomas Bowdler. Armed with a talent for discovering the 'offensive,' Bowdler expurgated Shakespeare's plays and Gibbon's History of the Decline and Fall of the Roman Empire. The result was 'The Family Shakespeare,' first published in 10 volumes in 1818, and a version of Gibbon's famous history 'omitting

> everything of an immoral or irreligious nature, and incidentally rearranging the order of chapters to be in the strict chronology so dear to the obsessional heart.' M. Wilson, The Obsessional Compromise, A Note on Thomas Bowdler (1965) (paper in Library of the American Psychiatric Association, Washington, D.C.).

It was Comstock who was responsible for the Federal Anti-Obscenity Act of March 3, 1873. 17 Stat. 598. It was he who was also responsible for the New York Act which soon followed. He was responsible for the organization of the New York Society for the Suppression of Vice, which by its act of incorporation ****1287** was granted one-half of the fines levied on people successfully prosecuted by the Society or its agents.

I would conclude from Comstock and his Traps for the Young and from other authorities that a legislature could not be said to be wholly irrational [FN2] (Ferguson ***652** v. Skrupa, 372 U.S. 726, 83 S.Ct. 1928, 10 L.Ed.2d 93; and see Williamson v. Lee Optical Co. of Okl., 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563; Daniel v. Family Sec. Ins. Co., 336 U.S. 220, 69 S.Ct. 550, 93 L.Ed. 632; Olsen v. State of Nebraska, 313 U.S. 236, 61 S.Ct. 862, 85 L.Ed. 1305) if it decided that sale of 'obscene' material to the young should be banned. [FN3]

> FN2. 'The effectiveness of more subtle forms of censorship as an instrument of social control can be very great. They are effective over a wider field of behavior than is propaganda in that they affect convivial and 'purely personal' behavior.
> 'The principle is that certain verbal formulae shall not be stated, in print or in conversation; from this the restriction extends to the discussion of certain topics. A perhaps quite rationally formulated taboo is imposed; it becomes a quasi-religious factor for the members of the group who subscribe to it. If they are a majority, and the taboo does not affect some master-symbol of an influential minority, it is apt to become quite universal in its effect. A great number of taboos--to expressive and to other acts--are embodied in the mores of any people. The sanction behind each taboo largely determines its durability--in the sense of resistance opposed to the development of contradictory counter-mores, or of simple disintegration from failure to give returns in personal security. If it is to succeed for a long time, there must be recurrent reaffirmations of the taboo in connection with the sanctioning power.
> 'The occasional circulation of stories about a breach of the taboo and the evil consequences that flowed from this to the offender and to the public cause (the sanctioning power) well serves this purpose. Censorship of this sort has the color of voluntary acceptance of a ritualistic avoidance, in behalf of oneself and the higher power. A violation, after the primitive patterns to which we have all been exposed, strikes at both the sinner and his god.' The William Alanson White Psychiatric Foundation Memorandum: Propaganda &

Censorship, 3 Psychiatry 628, 631 (1940).

FN3. And see Gaylin, Book Review: The Prickly Problems of Pornography, 77 Yale L.J. 579, 594.

The problem under the First Amendment, however, has always seemed to me to be quite different. For its mandate (originally applicable only to the Federal Government but now applicable to the States as well by reason of the Fourteenth Amendment) is directed to any law 'abridging the freedom of speech, or of the press.' I appreciate that there are those who think that ***653** 'obscenity' is impliedly excluded; but I have indicated on prior occasion why I have been unable to reach that conclusion. [FN4] See Ginzburg v. United States, 383 U.S. ***654** 463, 482, 86 S.Ct. 942, 953, 16 L.Ed.2d 31 (dissenting opinion); Jacobellis v. State of Ohio, ****1288** 378 U.S. 184, 196, 84 S.Ct. 1676, 1682, 12 L.Ed.2d 793 (concurring opinion of Mr. Justice Black); Roth v. United States, 354 U.S. 476, 508, 77 S.Ct. 1304, 1321, 1 L.Ed.2d 1498 (dissenting opinion). And the corollary of that view, as I expressed it in Public Utilities Comm'n of District of Columbia v. Pollak, 343 U.S. 451, 467, 468, 72 S.Ct. 813, 823, 96 L.Ed. 1068 (dissenting opinion), is that Big Brother can no more say what a person shall listen to or read than he can say what shall be published.

FN4. My Brother HARLAN says that no other Justice of this Court, past or present, has ever 'stated his acceptance' of the view that 'obscenity' is within the protection of the First and Fourteenth Amendments. 390 U.S., at 705, 88 S.Ct., at 1314. That observation, however, should not be understood as demonstrating that no other members of this Court, since its first Term in 1790, have adhered to the view of my Brother BLACK and myself. For the issue 'whether obscenity is utterance within the area of protected speech and press' was only 'squarely presented' to this Court for the first time in 1957. Roth v. United States, 354 U.S. 476, 481, 77 S.Ct. 1304, 1307. This is indeed understandable, for the state legislatures have borne the main burden in enacting laws dealing with 'obscenity'; and the strictures of the First Amendment were not applied to them through the Fourteenth until comparatively late in our history. In Gitlow v. People of State of New York, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138, decided in 1925, the Court assumed that the right of free speech was among the freedoms protected against state infringement by the Due Process Clause of the Fourteenth Amendment. See also Whitney v. People of State of California, 274 U.S. 357, 371, 373, 47 S.Ct. 641, 646-- 647, 71 L.Ed. 1095; Fiske v. State of Kansas, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108. In 1931, Stromberg v. People of State of California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117, held that the right of free speech was guaranteed in full measure by the Fourteenth Amendment. But even after these events 'obscenity' cases were not inundating this Court; and even as late as 1948, the Court could say that many state obscenity statutes had 'lain dormant for decades.' Winters v. People of State of New York, 333 U.S. 507, 511, 68 S.Ct. 665, 668, 92 L.Ed. 840. In several cases prior to Roth, the Court reviewed convictions

under federal statutes forbidding the sending of 'obscene' materials through the mails. But in none of these cases was the question squarely presented or decided whether 'obscenity' was protected speech under the First Amendment; rather, the issues were limited to matters of statutory construction, or questions fo procedure, such as the sufficiency of the indictment. See United States v. Chase, 135 U.S. 255, 10 S.Ct. 756, 34 L.Ed. 117; Grimm v. United States, 156 U.S. 604, 15 S.Ct. 470, 39 L.Ed. 550; Rosen v. United States, 161 U.S. 29, 16 S.Ct. 434, 40 L.Ed. 606; Swearingen v. United States, 161 U.S. 446, 16 S.Ct. 562, 40 L.Ed. 765; Andrews v. United States, 162 U.S. 420, 16 S.Ct. 798, 40 L.Ed. 1023; Price v. United States, 165 U.S. 311, 17 S.Ct. 366, 41 L.Ed. 727; Dunlop v. United States, 165 U.S. 486, 17 S.Ct. 375, 41 L.Ed. 799; Bartell v. United States, 227 U.S. 427, 33 S.Ct. 383, 57 L.Ed. 583; Dysart v. United States, 272 U.S. 655, 47 S.Ct. 234, 71 L.Ed. 461; United States v. Limehouse, 285 U.S. 424, 52 S.Ct. 412, 76 L.Ed. 843. Thus, Roth v. United States, supra, which involved both a challenge to 18 U.S.C. s 1461 (punishing the mailing of 'obscene' material) and, in a consolidated case (Roth v. United States (Alberts v. State of California), an attack upon Cal.Pen.Code s 311 (prohibiting, inter alia, the keeping for sale or advertising of 'obscene' material), was the first case authoritatively to measure federal and state obscenity statutes against the prohibitions of the First and Fourteenth Amendments. I cannot speak for those who preceded us in time; but neither can I interpret occasional utterances suggesting that 'obscenity' was not protected by the First Amendment as considered expressions of the views of any particular Justices of the Court. See, e.g., Chaplinsky v. State of New Hampshire, 315 U.S. 568, 571--572, 62S.Ct. 766, 768--769, 86 L.Ed. 1031; Beauharnais v. People of State of Illinois, 343 U.S. 250, 266, 72 S.Ct. 725, 735, 96 L.Ed. 919. The most that can be said, then, is that no other members of this Court since 1957 have adhered to the view of my Brother BLACK and myself.

This is not to say that the Court and Anthony Comstock are wrong in concluding that the kind of literature New York condemns does harm. As a matter of fact, the notion of censorship is founded on the belief that speech and press sometimes do harm and therefore can be regulated. I once visited a foreign nation where the regime of censorship was so strict that all I could find in the bookstalls were tracts on religion and tracts on mathematics. Today the Court determines the constitutionality of New York's law regulating the sale of literature to children on the basis of the reasonableness of the law in light of the welfare of the child. If the problem of state and federal regulation of 'obscenity' is in the field of substantive due process, I see no reason to limit the legislatures to protecting children alone. The 'juvenile delinquents' I have known are mostly over ***655** 50 years of age. If rationality is the measure of the validity of this law, then I can see how modern Anthony Comstocks could make out a case for 'protecting' many groups in our society, not merely children.

While I find the literature and movies which come to us for clearance exceedingly dull and boring, I understand how some can and do become very excited and alarmed and think that something should ****1289** be done to stop the flow. It is one thing for parents [FN5] and the religious organizations to be active and involved. It is quite a different matter for the state to become implicated as a censor. As I read the First Amendment, it was designed to keep the state and the hands of all state officials off the printing presses of America and off the distribution systems for all printed literature. Anthony Comstock wanted it the other way; he indeed put the police and prosecutor in the middle of this publishing business.

FN5. See Appendix II to this opinion.

I think it would require a constitutional amendment to achieve that result. If there were a constitutional amendment, perhaps the people of the country would come up with some national board of censorship. Censors are, of course, propelled by their own neuroses. [FN6] ***656** That is why a universally accepted definition of obscenity is impossible. Any definition is indeed highly subjective, turning on the neurosis of the censor. Those who have a deep-seated, subconscious conflict may well become either great crusaders against a particular kind of literature or avid customers of it. [FN7] That, of course, is the danger of letting any group of citzens be the judges of what other people, young or old, should read. Those would be issues to be canvassed and debated in case of a constitutional amendment creating a regime of censorship in the country. And if the people, in their wisdom, launched us on that course, it would be a considered choice.

FN6. Reverend Fr. Juan de Castaniza of the 16th century explained those who denounced obscenity as expressing only their own feelings. In his view they had too much reason to suspect themselves of being 'obscene,' since 'vicious men are always prone to think others like themselves.' T. Schroeder, A Challenge to Sex Censors 44--45 (1938).

'Obscenity, like witchcraft * * * consists, broadly speaking, of a (delusional) projection of certain emotions (which, as the very word implies, emanate from within) to external things and an endowment of such things (or in the case of witchcraft, of such persons) with the moral qualities corresponding to these inward states * * *.

'Thus persons responsible for the persistent attempts to suppress the dissemination of popular knowledge concerning sex matters betray themselves unwittingly as the bearers of the very impulses they would so ostentatiously help others to avoid. Such persons should know through their own experience that ignorance of a subject does not insure immunity against the evils of which it treats, nor does the propitiatory act of noisy public disapproval of certain evils signify innocence or personal purity.' Van Teslaar, Book Review, 8 J. Abnormal Psychology 282, 286 (1913).

FN7. See Appendix III to this opinion.

Today this Court sits as the Nation's board of censors. With all respect I do not know of any group in the country less qualified first, to know what obscenity is when they see it,

and second, to have any considered judgment as to what the deleterious or beneficial impact of a particular publication may be on minds either young or old.

I would await a constitutional amendment that authorized the modern Anthony Comstocks to censor literature before publishers, authors, or distributors can be fined or jailed for what they print or sell.

APPENDIX I TO OPINION OF MR. JUSTICE DOUGLAS, DISSENTING.
A. COMSTOCK, TRAPS FOR THE YOUNG 20--22 (1883).

And it came to pass that as Satan went to and fro upon the earth, watching his traps and rejoicing over ***657** his numerous victims, he found room for improvement in some of his schemes. The daily press did not meet all his requirements. The weekly illustrated papers of crime would do for young men and sports, for brothels, gin-mills, and thieves' resorts, but were found to be so gross, so libidinous, so monstrous, that every decent person spurned them. They were excluded from the home on sight. They were too highpriced****1290** for children, and too cumbersome to be conveniently his from the parent's eye or carried in the boy's pocket. So he resolved to make another trap for boys and girls especially.

He also resolved to make the most of these vile illustrated weekly papers, by lining the news-stands and shop-windows along the pathway of the children from home to school and church, so that they could not go to and from these places of instruction without giving him opportunity to defile their pure minds by flaunting these atrocities before their eyes.

And Satan rejoiced greatly that professing Christians were silent and apparently acquiesced in his plans. He found that our most refined men and women went freely to trade with persons who displayed these traps for sale; that few, if any, had moral courage to enter a protest against this public display of indecencies, and scarcely one in all the land had the boldness to say to the dealer in filth, 'will not give you one cent of my patronage so long as you sell these devil-traps to ruin the young.' And he was pround of professing Christians and respectable citizens on this account, and caused honorable mention to be made of them in general order to his imps, because of the quiet and orderly assitance thus rendered him.

Satan stirred up certain of his willing tools on earth by the promise of a few paltry dollars to improve greatly on the death-dealing quality of the weekly deathtraps, and forthwith came a series of new snares of fascinating ***658** construction, small and tempting in price, and baited with high-sounding names. These sure-ruin traps comprise a large variety of halfdime novels, five and ten cent story papers, and low-priced pamphlets for boys and girls.

This class includes the silly, insipid tale, the coarse, slangy story in the dialect of the barroom, the blood-and-thunder romance of border life, and the exaggerated details of crimes, real and imaginary. Some have highly colored sensational reports of real crimes, while others, and by far the larger number, deal with most improbable creations of fiction. The unreal far outstrips the real. Crimes are gilded, and lawlessness is painted to resemble valor, making a bid for bandits, brigands, murderers, thieves, and criminals in general. Who would go to the State prison, the

gambling saloon, or the brothel to find a suitable companion for the child? Yet a more insidious foe is selected when these stories are allowed to become associates for the child's mind and to shape and direct the thoughts.

The finest fruits of civilization are consumed by these vermin. Nay, these products of corrupt minds are the eggs from which all kinds of villainies are hatched. Put the entire batch of these stories together, and I challenge the publishers and vendors to show a single instance where any boy or girl has been elevated in morals, or where any noble or refined instinct has been developed by them.

The leading character in many, if not in the vast majority of these stories, is some boy or girl who possesses usually extraordinary beauty of countenance, the most superb clothing, abundant wealth, the strength of a giant, the agility of a squirrel, the cunning of a fox, the brazen effrontery of the most daring villain, and who is utterly destitute of any regard for the laws of God or man. Such a one is foremost among desperadoes, the companion and ***659** beau- ideal of maidens, and the high favorite of some rich person, who by his patronage and indorsement lifts the young villain into lofty positions in society, and provides liberally of his wealth to secure him immunity for his crimes. These stories link the pure maiden with the most foul and loathsome criminals. Many of them favor violation of marriage laws and cheapen female virtue.
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Mr. Justice FORTAS, dissenting.

This is a criminal prosecution. Sam Ginsburg and his wife operate a luncheonette at which magazines are offered for sale. A 16-year-old boy was enlisted by his mother to go to the luncheonette and buy some ***672** 'girlie' magazines so that Ginsberg could be prosecuted. He went there, picked two magazines from a display case, paid for them, and walked out. Ginsberg's offense was duly reported to the authorities. The power of the State of New York was invoked. Ginsberg was prosecuted and convicted. The court imposed only a suspended sentence. But as the majority here points out, under New York law this conviction may mean that Ginsberg will lose the license necessary to operate his luncheonette.

The two magazines that the 16-year-old boy selected are vulgar 'girlie' periodicals. However tasteless and tawdry they may be, we have ruled (as the Court acknowledges) that magazines indistinguishable from them in content and offensiveness are not 'obscene' within the constitutional standards heretofore applied. See, e.g., Redrup v. State of New York (Gent v. State of Arkansas) 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967). These rulings have been in cases involving adults.

The Court avoids facing the problem whether the magazines in the present case are 'obscene' when viewed by a 16-year-old boy, although not 'obscene' when viewed by someone 17 years of age or older. It says that Ginsberg's lawyer did not choose to challenge the conviction on the ground that the magazines are not 'obscene.' He chose only to attack the statute on its face. Therefore, the Court reasons, we need not look at the magazines and determine whether they may be excluded from the ambit of the First Amendment as 'obscene' for purposes of this case. But this Court has made strong and comprehensive statements about its duty in First Amendment cases--statements with which I

agree. See, e.g., Jacobellis v. State of Ohio, 378 U.S. 184, 187--190, 84 S.Ct. 1676, 1677-- 1679, 12 L.Ed.2d 793 (1964) (opinion of Brennan, J.). [FN*]

> FN* '(W)e reaffirm the principle that, in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved isconstitutionally protected.' 378 U.S., at 190, 84 S.Ct., at 1679. See Cox v. State of Louisiana, 379 U.S. 536, 545, n. 8, 85 S.Ct. 453, 459, 13 L.Ed.2d 471 (1965).

***673** In my judgment, the Court cannot properly avoid its fundamental duty to define 'obscenity' for purposes of censorship of material sold to youths, merely because of counsel's position. By so doing the Court avoids the essence of the problem; for if the State's power to censor freed from the prohibitions of the First Amendment depends upon obscenity, and if obscenity turns on the specific content of the publication, how can we sustain the conviction here without deciding whether the particular magazines in question are obscene?

The Court certainly cannot mean that the States and cities and counties and villages have unlimited power to withhold anything and everything that is written or pictorial from younger people. But it here justifies the conviction of Sam Ginsberg because the impact of the Constitution, it says, is variable, and what is not obscene for an adult may be obscene for a child. This it calls 'variable obscenity.' I do not disagree with this, but I insist that to assess the principle--certainly to apply it--the ****1298** Court must define it. We must know the extent to which literature or pictures may be less offensive than Roth requires in order to be 'obscene' for purposes of a statute confined to youth. See Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957).

I agree that the State in the exercise of its police power--even in the First Amendment domain--may make proper and careful differentiation between adults and children. But I do not agree that this power may be used on an arbitrary, free-wheeling basis. This is not a case where, on any standard enunciated by the Court, ***674** the magazines are obscene, nor one where the seller is at fault. Petitioner is being prosecuted for the sale of magazines which he had a right under the decisions of this Court to offer for sale, and he is being prosecuted without proof of 'fault'--without even a claim that he deliberately, calculatedly sought to induce children to buy 'obscene' material. Bookselling should not be a hazardous profession.

The conviction of Ginsberg on the present facts is a serious invasion of freedom. To sustain the conviction without inquiry as to whether the material is 'obscene' and without any evidence of pushing or pandering, in face of this Court's asserted solicitude for First Amendment values, is to give the State a role in the rearing of children which is contrary to our traditions and to our conception of family responsibility. Cf. In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). It begs the question to present this undefined, unlimited censorship as an aid to parents in the rearing of their children. This decision does not merely protect children from activities which all sensible parents would condemn. Rather, its undefined and unlimited approval of state

censorship in this area denies to children free access to books and works of art to which many parents may wish their children to have uninhibited access. For denial of access to these magazines, without any standard or definition of their allegedly distinguishing characteristics, is also denial of access to great works of art and literature.

If this statute were confined to the punishment of pushers or panderers of vulgar literature I would not be so concerned by the Court's failure to circumscribe state power by defining its limits in terms of the meaning of 'obscenity' in this field. The State's police power may, within very broad limits, protect the parents and their children from public aggression of panderers and pushers. This is defensible on the theory that they cannot ***675** protect themselves from such assaults. But it does not follow that the State may convict a passive luncheonette operator of a crime because a 16-year-old boy maliciously and designedly picks up and pays for two girlie magazines which are presumably not obscene.

I would therefore reverse the conviction on the basis of Redrup v. State of New York, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967) and Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966).

AMERICAN BOOKSELLERS ASSOCIATION, INC.,v. William H. HUDNUT, III, Mayor, City of Indianapolis, et al., Defendants-Appellants.

771 F.2d 323

No. 84-3147.

United States Court of Appeals, Seventh Circuit.

Argued June 4, 1985.

Decided Aug. 27, 1985.
Rehearing and Rehearing En Banc Denied Sept. 20, 1985.

Before CUDAHY and EASTERBROOK, Circuit Judges, and SWYGERT, Senior Circuit Judge.

EASTERBROOK, Circuit Judge.

Indianapolis enacted an ordinance defining "pornography" as a practice that discriminates against women. "Pornography" is to be redressed through the administrative and judicial methods used for other discrimination. The City's definition of "pornography" is considerably different from "obscenity," which the Supreme Court has held is not protected by the First Amendment.

To be "obscene" under Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), "a publication must, taken as a whole, appeal to the prurient interest, must contain patently offensive depictions or descriptions of specified sexual conduct, and on the whole have no serious literary, artistic, political, or scientific value." Brockett v. Spokane Arcades, Inc., --- U.S. ----, 105 S.Ct. 2794, 2800, 86 L.Ed.2d 394 (1985). Offensiveness must be assessed under the standards of the community. Both offensiveness and an appeal to something other than "normal, healthy sexual desires" (Brockett, supra, 105 S.Ct. at 2799) are essential elements of "obscenity."

"Pornography" under the ordinance is "the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following :

> (1) Women are presented as sexual objects who enjoy pain or humiliation; or
>
> (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
>
> (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
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> (4) Women are presented as being penetrated by objects or animals; or
>
> (5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or
>
> (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display."

Indianapolis Code § 16-3(q). The statute provides that the "use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section." The ordinance as passed in April 1984 defined "sexually explicit" to mean actual or simulated intercourse or the uncovered exhibition of the genitals, buttocks or anus. An amendment in June 1984 deleted this provision, leaving the term undefined.

The Indianapolis ordinance does not refer to the prurient interest, to offensiveness, or to the standards of the community. It ***325** demands attention to particular depictions, not to the work judged as a whole. It is irrelevant under the ordinance whether the work has literary, artistic, political, or scientific value. The City and many amici point to these omissions as virtues. They maintain that pornography influences attitudes, and the statute is a way to alter the socialization of men and women rather than to vindicate community standards of offensiveness. And as one of the principal drafters of the ordinance has asserted, "if a woman is subjected, why should it matter that the work has other value?" Catharine A. MacKinnon, Pornography, Civil Rights, and Speech, 20 Harv.Civ.Rts.--Civ.Lib.L.Rev. 1, 21 (1985).

* * *

The ordinance discriminates on the ground of the content of the speech. Speech treating women in the approved way--in sexual encounters "premised on equality" (MacKinnon, supra, at 22)--is lawful no matter how sexually explicit. Speech treating women in the disapproved way--as submissive in matters sexual or as enjoying humiliation--is unlawful no matter how significant the literary, artistic, or political qualities of the work taken as a whole. The state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents.

I

* * *

The district court held the ordinance unconstitutional. 598 F.Supp. 1316 (S.D.Ind.1984). The court concluded that the ordinance regulates speech rather than the conduct involved in making pornography. The regulation of speech could be justified, the court thought, only by a compelling interest in reducing sex discrimination, an interest Indianapolis had not established. The ordinance is also vague and overbroad, the court believed, and establishes a prior restraint of speech.

* * *

III

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943). Under the First Amendment the government must leave to the people the evaluation of ideas. Bald or subtle, an idea is as powerful as the audience allows it to ***328** be. A belief may be pernicious--the beliefs of Nazis led to the death of millions, those of the Klan to the repression of millions. A pernicious

belief may prevail. Totalitarian governments today rule much of the planet, practicing suppression of billions and spreading dogma that may enslave others. One of the things that separates our society from theirs is our absolute right to propagate opinions that the government finds wrong or even hateful.

The ideas of the Klan may be propagated. Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969). Communists may speak freely and run for office. DeJonge v. Oregon, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278 (1937). The Nazi Party may march through a city with a large Jewish population. Collin v. Smith, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916, 99 S.Ct. 291, 58 L.Ed.2d 264 (1978). People may criticize the President by misrepresenting his positions, and they have a right to post their misrepresentations on public property. Lebron v. Washington Metropolitan Area Transit Authority, 749 F.2d 893 (D.C.Cir.1984) (Bork, J.). People may teach religions that others despise. People may seek to repeal laws guaranteeing equal opportunity in employment or to revoke the constitutional amendments granting the vote to blacks and women. They may do this because "above all else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas* * *" Police Department v. Mosley, 408 U.S. 92, 95, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972). See also Geoffrey R. Stone, Content Regulation and the First Amendment, 25 William & Mary L.Rev. 189 (1983); Paul B. Stephan, The First Amendment and Content Discrimination, 68 Va.L.Rev. 203, 233-36 (1982).

Under the ordinance graphic sexually explicit speech is "pornography" or not depending on the perspective the author adopts. Speech that "subordinates" women and also, for example, presents women as enjoying pain, humiliation, or rape, or even simply presents women in "positions of servility or submission or display" is forbidden, no matter how great the literary or political value of the work taken as a whole. Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual content. This is thought control. It establishes an "approved" view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not.

Indianapolis justifies the ordinance on the ground that pornography affects thoughts. Men who see women depicted as subordinate are more likely to treat them so. Pornography is an aspect of dominance.[1] It

[1]"Pornography constructs what a woman is in terms of its view of what men want sexually* * * Pornography's world of equality is a harmonious and balanced place. Men and women are perfectly complementary and perfectly bipolar* * * All the ways men love to take and violate women, women love to be taken and violated* * * What pornography does goes beyond its content: It eroticizes hierarchy, it sexualizes inequality. It makes dominance and submission sex. Inequality is its central dynamic; the illusion of freedom coming together with the reality of force is central to its working* * * [P]orgraphy is neither harmless fantasy nor a corrupt and confused misrepresentation of an otherwise neutral and healthy sexual situation. It institutionalizes the sexuality of male supremacy, fusing the erotization of dominance and submission with the social construction of male and female* * * Men treat women as who they see women as being. Pornography constructs who that is. Men's

does not persuade people so much as change them. It works by socializing, by establishing the expected and the permissible. In this view pornography is not an idea; pornography is the injury.

There is much to this perspective. Beliefs are also facts. People often act in ***329** accordance with the images and patterns they find around them. People raised in a religion tend to accept the tenets of that religion, often without independent examination. People taught from birth that black people are fit only for slavery rarely rebelled against that creed; beliefs coupled with the self-interest of the masters established a social structure that inflicted great harm while enduring for centuries. Words and images act at the level of the subconscious before they persuade at the level of the conscious. Even the truth has little chance unless a statement fits within the framework of beliefs that may never have been subjected to rational study.

* * *

Yet this simply demonstrates the power of pornography as speech. * * * If pornography is what pornography does, so is other speech. Hitler's orations affected how some Germans saw Jews. Communism is a world view, not simply a Manifesto by Marx and Engels or a set of speeches. Efforts to suppress communist speech in the United States were based on the belief that the public acceptability of such ideas would increase the likelihood of totalitarian government.

* * *

Racial bigotry, anti-semitism, violence on television, reporters' biases--these and many more influence the culture and shape our socialization. None is directly answerable by more speech, unless that speech too finds its place in the popular culture. Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.

* * *

It is possible to interpret the claim that the pornography is the harm in a different way. Indianapolis emphasizes the injury that models in pornographic films and pictures may suffer. The record contains materials depicting sexual torture, penetration of women by red-hot irons and the like. These concerns have nothing to do with written materials subject to the statute, and physical injury can occur with or without the "subordination" of women. As we discuss in Part IV, a state may make injury in the course of producing a film unlawful independent of the viewpoint expressed in the film.

* * *

Much of Indianapolis's argument rests on the belief that when speech is

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power over women means that the way men see women defines who women can be. Pornography ... is a sexual reality." MacKinnon, supra, at 17-18 (note omitted, emphasis in original). See also Andrea Dworkin, Pornography: Men Possessing Women (1981). A national commission in Canada recently adopted a similar rationale for controlling pornography. Special Commission on Pornography and Prostitution, 1 Pornography and Prostitution in Canada 49-59 (Canadian Government Publishing Centre 1985).

"unanswerable," and the metaphor that there is a "marketplace of ideas" does not apply, the First Amendment does not apply either. The metaphor is honored; Milton's Aeropagitica and John Stewart Mill's On Liberty defend freedom of speech on the ground that the truth will prevail, and many of the most important cases under the First Amendment recite this position. The Framers undoubtedly believed it. As a general matter it is true. But the Constitution does not make the dominance of truth a necessary condition of freedom of speech. To say that it does would be to confuse an outcome of free speech with a necessary condition for the application of the amendment.

A power to limit speech on the ground that truth has not yet prevailed and is not likely to prevail implies the power to declare truth* * *If the government may declare the truth, why wait for the failure of speech? Under the First Amendment, however, there is no such thing as a false idea, Gertz v. Robert Welch, Inc., 418 U.S. 323, 339, 94 S.Ct. 2997, 3006, 41 L.Ed.2d 789 (1974), so the government may not restrict speech on the ground that in a free exchange truth is not yet dominant.

* * *

The Supreme Court has rejected the position that speech must be "effectively answerable" to be protected by the Constitution. ...

We come, finally, to the argument that pornography is "low value" speech, that it is enough like obscenity that Indianapolis may prohibit it. Some cases hold that speech far removed from politics and other subjects at the core of the Framers' concerns may be subjected to special regulation. E.g., FCC v. Pacifica Foundation, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978); Young v. American Mini Theatres, Inc., 427 U.S. 50, 67-70, 96 S.Ct. 2440, 2450-52, 49 L.Ed.2d 310 (1976) (plurality opinion); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72, 62 S.Ct. 766, 768-69, 86 L.Ed. 1031 (1942). These cases do not sustain statutes that select among viewpoints, however. In Pacifica the FCC sought to keep vile language off the air during certain times. The Court held that it may; but the Court would not have sustained a regulation prohibiting scatological descriptions of Republicans but not scatological descriptions of Democrats, or any other form of selection among viewpoints. See Planned Parenthood Ass'n v. Chicago Transit Authority, 767 F.2d 1225, 1232-33 (7th Cir.1985).

At all events, "pornography" is not low value speech within the meaning of these cases. Indianapolis seeks to prohibit certain speech because it believes this speech influences social relations and politics on a grand scale, that it controls attitudes at home and in the legislature. This precludes a characterization of the speech as low value. True, pornography and obscenity have sex in common. But Indianapolis left out of its definition any reference to literary, artistic, political, or scientific value. The ordinance applies to graphic sexually explicit subordination in works great and small.[3] The Court

[3]Indianapolis briefly argues that Beauharnais v. Illinois, 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919 (1952), which allowed a state to penalize "group libel," supports the ordinance. In Collin v. Smith, supra, 578 F.2d at 1205, we concluded that cases such

sometimes balances the value of speech against the costs of its restriction, but it does this by category of speech and not by the content of particular works. See John Hart Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv.L.Rev. 1482 (1975); Geoffrey R. Stone, Restrictions of Speech Because of its Content: The Strange Case of Subject-Matter Restrictions, 46 U.Chi.L.Rev. 81 (1978). Indianapolis has created an approved point of view and so loses the support of these cases.

Any rationale we could imagine in support of this ordinance could not be limited to sex discrimination. Free speech has been on balance an ally of those seeking change. Governments that want stasis start by restricting speech. Culture is a powerful force of continuity; Indianapolis paints pornography as part of the culture of power. Change in any complex system ultimately depends on the ability of outsiders to challenge accepted views and the reigning institutions. Without a strong guarantee of freedom of speech, there is no effective right to challenge what is.

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as New York Times v. Sullivan had so washed away the foundations of Beauharnais that it could not be considered authoritative. If we are wrong in this, however, the case still does not support the ordinance. It is not clear that depicting women as subordinate in sexually explicit ways, even combined with a depiction of pleasure in rape, would fit within the definition of a group libel. The well received film Swept Away used explicit sex, plus taking pleasure in rape, to make a political statement, not to defame. Work must be an insult or slur for its own sake to come within the ambit of Beauharnais, and a work need not be scurrilous at all to be "pornography" under the ordinance.

UNITED STATES of America, v. Robert Alan THOMAS (94-6648) and Carleen Thomas (94-6649), Defendants-Appellants.

74 F.3d 701

Nos. 94-6648 and 94-6649.

United States Court of Appeals,
Sixth Circuit.

Argued Oct. 11, 1995.

Decided Jan. 29, 1996.
Rehearing and Suggestion for Rehearing En Banc Denied March 12, 1996.

Defendants were convicted in the United States District Court, Western District of Tennessee, Julia Smith Gibbons, Chief Judge, of federal obscenity charges concerning their operation of computer bulletin board business. Defendants appealed. The Court of Appeals, Edmunds, District Judge, sitting by designation, held that: (1) allegedly intangible form by which computer- generated images moved from defendants' bulletin board in one state to personal computer in another state did not preclude prosecution for interstate transportation of obscene materials; (2) venue was appropriate in judicial district in which allegedly obscene materials were received; (3) defendants' right of privacy did not preclude prosecution; (4) government was not required to present expert testimony regarding prurient appeal of images and videotapes available from defendants' bulletin board; (5) district court's refusal of request for separate counsel did not deny defendant effective assistance of counsel; and (6) defendants were not entitled to two-level reduction for acceptance of responsibility.

Affirmed.

MARTIN and BATCHELDER, Circuit Judges; EDMUNDS, District Judge.

EDMUNDS, District Judge.

Defendants Robert and Carleen Thomas appeal their convictions and sentences for violating 18 U.S.C. §§ 1462 and 1465, federal obscenity laws, in connection with their operation ***705** of an electronic bulletin board. For the following reasons, we AFFIRM Robert and Carleen Thomas' convictions and sentences.

I.

Robert Thomas and his wife Carleen Thomas began operating the Amateur Action Computer Bulletin Board System ("AABBS") from their home in Milpitas, California in February 1991. The AABBS was a computer bulletin board system that operated by using telephones, modems, and personal computers. Its features included e-mail, chat lines, public messages, and files that members could access, transfer, and download to their own computers and printers.

Information loaded onto the bulletin board was first converted into binary code, i.e., 0's and 1's, through the use of a scanning device. After purchasing sexually-explicit magazines from public adult book stores in California, Defendant Robert Thomas used an electronic device called a scanner to convert pictures from the magazines into computer files called Graphic Interchange Format files or "GIF" files. The AABBS contained approximately 14,000 GIF files. Mr. Thomas also purchased, sold, and delivered sexually-explicit videotapes to AABBS members. Customers ordered the tapes by sending Robert Thomas an e-mail message, and

Thomas typically delivered them by use of the United Parcel Service ("U.P.S.").

Persons calling the AABBS without a password could view the introductory screens of the system which contained brief, sexually-explicit descriptions of the GIF files and adult videotapes that were offered for sale. Access to the GIF files, however, was limited to members who were given a password after they paid a membership fee and submitted a signed application form that Defendant Robert Thomas reviewed. The application form requested the applicant's age, address, and telephone number and required a signature.

Members accessed the GIF files by using a telephone, modem and personal computer. A modem located in the Defendants' home answered the calls. After they established membership by typing in a password, members could then select, retrieve, and instantly transport GIF files to their own computer. A caller could then view the GIF file on his computer screen and print the image out using his printer. The GIF files contained the AABBS name and access telephone number; many also had "Distribute Freely" printed on the image itself.

In July 1993, a United States Postal Inspector, Agent David Dirmeyer ("Dirmeyer"), received a complaint regarding the AABBS from an individual who resided in the Western District of Tennessee. Dirmeyer dialed the AABBS' telephone number. As a non-member, he viewed a screen that read "Welcome to AABBS, the Nastiest Place On Earth," and was able to select various "menus" and read graphic descriptions of the GIF files and videotapes that were offered for sale.

Subsequently, Dirmeyer used an assumed name and sent in $55 along with an executed application form to the AABBS. Defendant Robert Thomas called Dirmeyer at his undercover telephone number in Memphis, Tennessee, acknowledged receipt of his application, and authorized him to log-on with his personal password. Thereafter, Dirmeyer dialed the AABBS's telephone number, logged-on and, using his computer/modem in Memphis, downloaded the GIF files listed in counts 2-7 of the Defendants' indictments. These GIF files depicted images of bestiality, oral sex, incest, sado-masochistic abuse, and sex scenes involving urination. Dirmeyer also ordered six sexually-explicit videotapes from the AABBS and received them via U.P.S. at a Memphis, Tennessee address. Dirmeyer also had several e-mail and chat-mode conversations with Defendant Robert Thomas.

On January 10, 1994, a search warrant was issued by a U.S. Magistrate Judge for the Northern District of California. The AABBS' location was subsequently searched, and the Defendants' computer system was seized.

On January 25, 1994, a federal grand jury for the Western District of Tennessee returned a twelve-count indictment charging Defendants Robert and Carleen Thomas with the following criminal violations: one count under 18 U.S.C. § 371 for conspiracy ***706** to violate federal obscenity laws--18 U.S.C. §§ 1462, 1465 (Count 1), six counts under 18 U.S.C. § 1465 for knowingly using and causing to be used a facility and means of interstate commerce--a combined computer/telephone system--for the purpose of transporting obscene, computer-generated materials (the GIF files)

in interstate commerce (Counts 2-7), three counts under 18 U.S.C. § 1462 for shipping obscene videotapes via U.P.S. (Counts 8-10), one count of causing the transportation of materials depicting minors engaged in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(1) as to Mr. Thomas only (Count 11), and one count of forfeiture under 18 U.S.C. § 1467 (Count 12).

Both Defendants were represented by the same retained counsel, Mr. Richard Williams of San Jose, California. They appeared twice in federal district court for the Northern District of California, San Jose division, before being arraigned on March 15, 1994, in federal court in Memphis, Tennessee. They did not retain local counsel for the Tennessee criminal prosecution. Both Defendants were tried by a jury in July, 1994. Defendant Robert Thomas was found guilty on all counts except count 11 (child pornography). Defendant Carleen Thomas was found guilty on counts 1-10. The jury also found that the Defendants' interest in their computer system should be forfeited to the United States. Robert and Carleen Thomas were sentenced on December 2, 1994 to 37 and 30 months of incarceration, respectively. They filed their notices of appeal on December 9, 1994.

II.
A.

Defendants contend that their conduct, as charged in counts 1-7 of their indictments, does not constitute a violation of 18 U.S.C. § 1465. This presents a question of statutory interpretation, a matter of law, and is reviewed by this court under a de novo standard. United States v. Hans, 921 F.2d 81, 82 (6th Cir.1990).[1]

Defendants' challenge to their convictions under counts 1-7, rests on two basic premises: 1) Section 1465 does not apply to intangible objects like the computer GIF files at issue here,[2] and 2) Congress did

[1]Defendants assert that an appellate court is required to conduct an independent review of the entire record to ensure that their First Amendment rights are protected. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 505, 104 S.Ct. 1949, 1962, 80 L.Ed.2d 502 (1984). It is true that in Bose, the United States Supreme Court recognized that an appellate court is to conduct an independent review of the record when constitutional facts are at issue, i.e., actual malice in a libel case or the finding of obscenity in pornography cases. There is no need to conduct an independent review when constitutional facts are not at issue. Accordingly, this first issue, which involves only statutory interpretation is reviewed under a de novo standard.

[2]Section 1465 provides:

> Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution, or knowingly travels in interstate commerce, or uses a facility or means of interstate commerce for the purpose of transporting obscene material in interstate or foreign commerce, any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined under this title or

not intend to regulate computer transmissions such as those involved here because 18 U.S.C. § 1465 does not expressly prohibit such conduct.

In support of their first premise, Defendants cite a Tenth Circuit dial-a-porn decision which holds that 18 U.S.C. §§ 1462 and 1465 prohibit the interstate transportation of tangible objects; not intangible articles like pre-recorded telephone messages. See United States v. Carlin Commun., Inc., 815 F.2d 1367, 1371 (10th Cir.1987). Defendants claim Carlin is controlling because transmission of the GIF files at issue under counts 1-7 involved an intangible string of 0's and 1's ***707** which became viewable images only after they were decoded by an AABBS member's computer. We disagree.

The subject matter in Carlin--telephonic communication of pre-recorded sexually suggestive comments or proposals--is inherently different from the obscene computer-generated materials that were electronically transmitted from California to Tennessee in this case. Defendants erroneously conclude that the GIF files are intangible, and thus outside the scope of § 1465, by focusing solely on the manner and form in which the computer-generated images are transmitted from one destination to another. United States v. Gilboe, 684 F.2d 235 (2nd Cir.1982), cert. denied, 459 U.S. 1201, 103 S.Ct. 1185, 75 L.Ed.2d 432 (1983), illustrates this point.

In Gilboe, the Second Circuit rejected the argument that the defendant's transmission of electronic impulses could not be prosecuted under a criminal statute prohibiting the transportation of money obtained by fraud. The Gilboe court reasoned that:

> [e]lectronic signals in this context are the means by which funds are transported. The beginning of the transaction is money in one account and the ending is money in another. The manner in which the funds were moved does not affect the ability to obtain tangible paper dollars or a bank check from the receiving account.

Id. at 238. The same rationale applies here. Defendants focus on the means by which the GIF files were transferred rather than the fact that the transmissions began with computer-generated images in California and ended with the same computer-generated images in Tennessee. The manner in which the images moved does not affect their ability to be viewed on a computer screen in Tennessee or their ability to be printed out in hard copy in that distant location.

> imprisoned not more than five years, or both.
>
> The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption is rebuttable. 42 U.S.C.A. § 1465 (West 1995 Supp.).

The record does not support Defendants' argument that they had no knowledge, intent or expectation that members of their AABBS would download and print the images contained in their GIF files. They ran a business that advertised and promised its members the availability and transportation of the sexually-explicit GIF files they selected. In light of the overwhelming evidence produced at trial, it is spurious for Defendants to claim now that they did not intend to sell, disseminate, or share the obscene GIF files they advertised on the AABBS with members outside their home and in other states.

We also disagree with Defendants' corollary position, raised at oral argument, that they were prosecuted under the wrong statute and that their conduct, if criminal at all, falls within the prohibitions under 47 U.S.C. § 223(b)[1] rather than 18 U.S.C. § 1465. As recognized by the Supreme Court, Section 223(b) of the Communications Act of 1934, was drafted and enacted by Congress in 1982 "explicitly to address 'dial-a-porn.' " Sable Communications of Cal., Inc. v. F.C.C., 492 U.S. 115, 120-121, 109 S.Ct. 2829, 2833, 106 L.Ed.2d 93 (1989). Congress amended Section 223(b) in 1988 to impose a total ban "on dial-a-porn, making it illegal for adults, as well as children, to have access to sexually-explicit messages" that are indecent or obscene. Id. at 122-123, 109 S.Ct. at 2834-35.[2] 47 U.S.C. § 223(b) addresses commercial dial-a-porn operations that communicate sexually-explicit telephone messages; not commercial computer bulletin boards that use telephone facilities for the purpose of transmitting obscene, computer-generated images to approved members.

Defendants' second premise, that Congress did not intend to regulate computer transmissions because the statute does not expressly prohibit such conduct, is faulty as well. We have consistently recognized that when construing federal statutes, our duty is to " 'construe the language so as to give effect to the intent of Congress.' " United States v. Underhill, 813 F.2d 105, 111 (6th Cir.), cert. denied, 482 U.S. 906, 107 S.Ct. 2484, 96 L.Ed.2d 376 (1987) (quoting United States v. American Trucking Associations, Inc., 310 U.S. 534, 542-44, 60 S.Ct. 1059, 1063-64, 84 L.Ed. 1345 (1940)). The Supreme Court observed this principle when it rejected an argument similar to one Defendants raise here, i.e., that Congress could not possibly have intended to include conduct not expressly

[1]47 U.S.C. § 223(b) provides:

(1) Whoever knowingly

(A) within the United States, by means of telephone, makes (directly or by recording device) any obscene communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or

(B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A),

shall be fined in accordance with Title 18, or imprisoned not more than two years, or both.

[2]In Sable, the Supreme Court affirmed the lower court's decision which upheld Section 223(b)'s "prohibition against obscene interstate telephone communications for commercial purposes, but enjoined the enforcement of the statute insofar as it applied to indecent messages." Id. at 117, 109 S.Ct. at 2832.

prohibited in the statute. See United States v. Alpers, 338 U.S. 680, 70 S.Ct. 352, 94 L.Ed. 457 (1950).

In United States v. Alpers, the Supreme Court considered the question whether obscene phonograph records--at the time, a novel means of transmitting obscenity--came within the prohibition of 18 U.S.C. § 1462. Initially, the Court acknowledged that criminal statutes are to be strictly construed and that "no offense may be created except by the words of Congress used in their usual and ordinary way." Id. at 681, 70 S.Ct. at 353. The Court emphasized, however, that Congress' intent is the most important determination and statutory language is not to be construed in a manner that would defeat that intent.

Applying those principles, the Court held that the rule of ejusdem generis[1] should not be "employed to render general words meaningless" or "be used to defeat the obvious purpose of legislation." Id. at 681-83, 70 S.Ct. at 354. It recognized that "[t]he obvious purpose of [Section 1462] was to prevent the channels of interstate commerce from being used to disseminate" any obscene matter. Id. at 683, 70 S.Ct. at 354. The Court further recognized that Section 1462 "is a comprehensive statute, which should not be constricted by a mechanical rule of construction." Id. at 684, 70 S.Ct. at 354. Accordingly, the Court rejected the defendant's argument that the general words "other matter of indecent character" could not be interpreted to include objects comprehensible by hearing (phonographic recordings) rather than sight; an argument similar to the tangible/intangible one raised here, and held that obscene records fell within the scope of the criminal statute.

In reaching its decision, the Alpers Court found that the legislative history of Section 1462 did not support defendant's sight/sound distinction. It was not persuaded that Congress' amendment of Section 1462 to add motion picture films to the list of prohibited materials "evidenced an intent that obscene matter not specifically added was without the prohibition of the statute." Id. Rather, the Court concluded that the amendment evidenced Congress' preoccupation "with making doubly sure that motion-picture film was within the Act, and was concerned with nothing more or less." Id. We are similarly unpersuaded by Defendants' arguments that the absence of the words "including by computer" in Section 1465, despite Congress' addition of those words in other legislation, is evidence of its intent not to criminalize conduct, such as Defendants' that falls within the plain language and intent of Section 1465.

Furthermore, under similar facts, the U.S. Air Force Court of Criminal Appeals recently considered § 1465's plain language and its intended purpose. In United States v. Maxwell, 42 M.J. 568 (A.F.Ct.Crim.App.1995), a defendant was charged with violating Section 1465 because he had transmitted obscene visual images electronically through the use of an on-line computer service. He argued that since the statute is silent concerning computer transmissions, such transmissions were not to be included within the terms "transporting obscene materials in interstate or foreign

[1]This rule of statutory construction "limits general terms which follow specific ones to matters similar to those specified." Alpers, 338 U.S. at 683, 70 S.Ct. at 354.

commerce." The court observed that well-established principles of statutory construction require a court to look first to the statute's plain language. Maxwell, 42 M.J. at 580 (citing Rubin v. United States, 449 U.S. 424, 430, 101 S.Ct. 698, 701-02, 66 ***709** L.Ed.2d 633 (1981)). Applying that principle, the Maxwell court concluded that the defendant's conduct fell within the plain language of Section 1465. Specifically, the court held:

> [t]he use of the terms "transports," "distribution," "picture," "image" and "electrical transcription" leads us to the inescapable conclusion the statute is fully applicable to the activities engaged in by applicant* * * It is clear Congress intended to stem the transportation of obscene material in interstate commerce regardless of the means used to effect that end.

Maxwell, 42 M.J. at 580.

Likewise, we conclude that Defendants' conduct here falls within the plain language of Section 1465.[1] Moreover, our interpretation of Section 1465 is consistent with Congress' intent to legislate comprehensively the interstate distribution of obscene materials. Id.

B.

Defendants also challenge venue in the Western District of Tennessee for counts 2-7 of their indictments. They argue that even if venue was proper under count 1 (conspiracy) and counts 8-10 (videotapes sent via U.P.S.), counts 2-7 (GIF files) should have been severed and transferred to California because Defendants did not cause the GIF files to be transmitted to the Western District of Tennessee. Rather, Defendants assert, it was Dirmeyer, a government agent, who, without their knowledge, accessed and downloaded the GIF files and caused them to enter Tennessee. We disagree. To establish a Section 1465 violation, the Government must prove that a defendant knowingly used a facility or means of interstate commerce for the purpose of distributing obscene materials. Contrary to Defendants' position, Section 1465 does not require the Government to prove that Defendants had specific knowledge of the destination of each transmittal at the time it occurred.

"Venue lies in any district in which the offense was committed," and the Government is required to establish venue by a preponderance of the evidence. United States v. Beddow, 957 F.2d 1330, 1335 (6th Cir.1992) (quoting United States v. Williams, 788 F.2d 1213, 1215 (6th Cir.1986)). This court examines the propriety of venue by taking " 'into account a number of factors--the site of the defendant's acts, the elements and nature of the crime, the locus of the effect of the criminal conduct, and the suitability of each district for accurate fact finding ...' " Id.

[1]Our holding here renders moot Defendants' arguments that the district court's instructions on conspiracy were erroneous because they allowed for a conviction based upon a conspiracy to commit conduct wrongfully charged in counts 2-7 of their indictments.

Section 1465 is an obscenity statute, and federal obscenity laws, by virtue of their inherent nexus to interstate and foreign commerce, generally involve acts in more than one jurisdiction or state. Furthermore, it is well-established that "there is no constitutional impediment to the government's power to prosecute pornography dealers in any district into which the material is sent." United States v. Bagnell, 679 F.2d 826, 830 (11th Cir.1982), cert. denied, 460 U.S. 1047, 103 S.Ct. 1449, 75 L.Ed.2d 803 (1983); United States v. Peraino, 645 F.2d 548, 551 (6th Cir.1981). Thus, the question of venue has become one of legislative intent. Bagnell, 679 F.2d at 830.

The Bagnell court examined both §§ 1462 and 1465 and found that each statute established a continuing offense within the venue provisions of 18 U.S.C. § 3237(a) "that occur[s] in every judicial district which the material touches." Id. at 830. This court likewise recognized that "venue for federal obscenity prosecutions lies 'in any district from, through, or into which' the allegedly obscene material moves." Peraino, 645 F.2d at 551 (citing 18 U.S.C. § 3237).

Substantial evidence introduced at trial demonstrated that the AABBS was set up so members located in other jurisdictions could access and order GIF files which would then be instantaneously transmitted in interstate commerce. Moreover, AABBS materials were distributed to an approved AABBS member known to reside in the Western ***710** District of Tennessee. Specifically, Defendant Robert Thomas knew of, approved, and had conversed with an AABBS member in that judicial district who had his permission to access and copy GIF files that ultimately ended up there. Some of these GIF files were clearly marked "Distribute Freely." In light of the above, the effects of the Defendants' criminal conduct reached the Western District of Tennessee, and that district was suitable for accurate fact-finding. Accordingly, we conclude venue was proper in that judicial district.

C.

Defendants further argue that their convictions under counts 1-7 of their indictments violate their First Amendment rights to freedom of speech. As the Supreme Court noted in Bose, when constitutional facts[1] are at issue, this court has a duty to conduct an independent review of the record "both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 505, 104 S.Ct. 1949, 1962, 80 L.Ed.2d 502 (1984).

1. Defendants' Right to Possess the GIF Files in their Home

Defendants rely on Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), and argue they have a

[1]Some examples of constitutional facts include those that support: the finding of actual malice in a defamation or libel suit; the finding that obscene materials were used solely in the home and were thus protected under Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), or the finding that material is obscene under the test for obscenity set forth in Miller v. California, 413 U.S. 15, 24, 93 S.Ct. 2607, 2614-15, 37 L.Ed.2d 419 (1973).

constitutionally protected right to possess obscene materials in the privacy of their home. They insist that the GIF files containing sexually-explicit material never left their home. Defendants' reliance on Stanley is misplaced.

The Supreme Court has clarified that Stanley "depended not on any First Amendment Right to purchase or possess obscene materials, but on the right to privacy in the home." United States v. 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. 123, 126, 93 S.Ct. 2665, 2668, 37 L.Ed.2d 500 (1973). It has also recognized that the right to possess obscene materials in the privacy of one's home does not create "a correlative right to receive it, transport it, or distribute it" in interstate commerce even if it is for private use only. Nor does it create "some zone of constitutionally protected privacy [that] follows such material when it is moved outside the home area." United States v. Orito, 413 U.S. 139, 141-42, 93 S.Ct. 2674, 2677, 37 L.Ed.2d 513 (1973); see also 12 200-Ft. Reels, 413 U.S. at 128, 93 S.Ct. at 2669.

Defendants went beyond merely possessing obscene GIF files in their home. They ran a business that advertised and promised its members the availability and transportation of the sexually-explicit GIF files they selected. In light of the overwhelming evidence produced at trial, it is spurious for Defendants to claim now that they did not intend to sell, disseminate, or share the obscene GIF files they advertised on the AABBS with members outside their home and in other states.

1. The Community Standards to be Applied When Determining Whether the GIF Files Are Obscene

In Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), the Supreme Court set out a three-prong test for obscenity. It inquired whether (1) " 'the average person applying contemporary community standards' would find that the work, taken as a whole appeals to the prurient interest"; (2) it "depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law"; and (3) "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Id. at 24, 93 S.Ct. at 2615.

Under the first prong of the Miller obscenity test, the jury is to apply "contemporary community standards." Defendants acknowledge the general principle that, in ***711** cases involving interstate transportation of obscene material, juries are properly instructed to apply the community standards of the geographic area where the materials are sent. Miller, 413 U.S. at 15, 30-34, 93 S.Ct. at 2610, 2618-20. Nonetheless, Defendants assert that this principle does not apply here for the same reasons they claim venue was improper. As demonstrated above, this argument cannot withstand scrutiny. The computer-generated images described in counts 2-7 were electronically transferred from Defendants' home in California to the Western District of Tennessee. Accordingly, the community standards of that judicial district were properly applied in this case.

Issues regarding which community's standards are to be applied are tied to those involving venue. It is well-established that:

> [v]enue for federal obscenity prosecutions lies "in any district from, through, or into which" the allegedly obscene material moves, according to 18 U.S.C. § 3237. This may result in prosecutions of persons in a community to which they have sent materials which is obscene under that community's standards though the community from which it is sent would tolerate the same material.

United States v. Peraino, 645 F.2d 548, 551 (6th Cir.1981). Prosecutions may be brought either in the district of dispatch or the district of receipt, Bagnell, 679 F.2d at 830-31, and obscenity is determined by the standards of the community where the trial takes place. See Miller, 413 U.S. at 15, 30-34, 93 S.Ct. at 2610, 2618-20; Hamling v. United States, 418 U.S. 87, 105- 6, 94 S.Ct. 2887, 2901-02, 41 L.Ed.2d 590 (1974); Sable, 492 U.S. at 125, 109 S.Ct. at 2836. Moreover, the federal courts have consistently recognized that it is not unconstitutional to subject interstate distributors of obscenity to varying community standards. Hamling, 418 U.S. at 106, 94 S.Ct. at 2901-02; United States v. Sandy, 605 F.2d 210, 217 (6th Cir.), cert. denied, 444 U.S. 984, 100 S.Ct. 490, 62 L.Ed.2d 412 (1979).

2. The Implications of Computer Technology on the Definition of "Community"

Defendants and Amicus Curiae appearing on their behalf[1] argue that the computer technology used here requires a new definition of community, i.e., one that is based on the broad-ranging connections among people in cyberspace rather than the geographic locale of the federal judicial district of the criminal trial. Without a more flexible definition, they argue, there will be an impermissible chill on protected speech because BBS operators cannot select who gets the materials they make available on their bulletin boards. Therefore, they contend, BBS operators like Defendants will be forced to censor their materials so as not to run afoul of the standards of the community with the most restrictive standards.

Defendants' First Amendment issue, however, is not implicated by the facts of this case. This is not a situation where the bulletin board operator had no knowledge or control over the jurisdictions where materials were distributed for downloading or printing. Access to the Defendants' AABBS was limited. Membership was necessary and applications were submitted and screened before passwords were issued and materials were distributed. Thus, Defendants had in place methods to limit user access in jurisdictions where the risk of a finding of obscenity was greater than that in California. They knew they had a member in Memphis; the member's address and local phone number were provided on his application form. If Defendants did not wish

[1]The following Amicus Curiae submitted briefs on behalf of Defendants in this matter: the American Civil Liberties Union, the Interactive Services Association, the Society for Electronic Access, and The Electronic Frontier Foundation.

to subject themselves to liability in jurisdictions with less tolerant standards for determining obscenity, they could have refused to give passwords to members in those districts, thus precluding the risk of liability.

This result is supported by the Supreme Court's decision in Sable Communications of Cal., Inc. v. F.C.C. where the Court rejected Sable's argument that it should not be compelled to tailor its dial-a-porn messages to the standards of the least tolerant community. ***712** 492 U.S. 115, 125- 26, 109 S.Ct. 2829, 2836-37, 106 L.Ed.2d 93 (1989). The Court recognized that distributors of allegedly obscene materials may be subjected to the standards of the varying communities where they transmit their materials, citing Hamling, and further noted that Sable was "free to tailor its messages, on a selective basis, if it so chooses, to the communities it chooses to serve." Id. at 125, 109 S.Ct. at 2836. The Court also found no constitutional impediment to forcing Sable to incur some costs in developing and implementing a method for screening a customer's location and "providing messages compatible with community standards." Id.

Thus, under the facts of this case, there is no need for this court to adopt a new definition of "community" for use in obscenity prosecutions involving electronic bulletin boards. This court's decision is guided by one of the cardinal rules governing the federal courts, i.e., never reach constitutional questions not squarely presented by the facts of a case. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 502, 105 S.Ct. 2794, 2801, 86 L.Ed.2d 394 (1985).

D.

Defendants next raise a number of challenges to the jury instructions given at their trial. Initially, they claim that, as to counts 2, 3, 6 and 9, the district court should have included an augmented unanimity instruction because those counts involved more than one GIF file or videotape. The district court instructed the jury that "[i]f more than one article is alleged to be obscene in a particular count, the government is required to show only that one of these articles was obscene." There was no request for an augmented unanimity instruction and there was no objection at trial to the instruction given. The issue was raised for the first time at sentencing. Accordingly, this court reviews for plain error. United States v. Mendez- Ortiz, 810 F.2d 76 (6th Cir.1986), cert. denied, 480 U.S. 922, 107 S.Ct. 1384, 94 L.Ed.2d 697 (1987).

We have recognized that "[t]he plain error doctrine is to be used 'only in exceptional circumstances' and only where the error is so plain that 'the trial judge and the prosecutor were derelict in countenancing it.' " Id. at 78. Moreover, "[w]e consider whether the instructions, when taken as a whole, were so clearly wrong as to produce a grave miscarriage of justice." United States v. Sanderson, 966 F.2d 184, 187 (6th Cir.1992).

When one count of an indictment charges that a defendant committed an offense by "multiple alternative 'conceptually' distinct acts," the defendant can request that the court give the jury an augmented unanimity instruction, i.e., one that tells them that, with regard to this particular count, they must all agree that the defendant committed one of those distinct acts. United States v.

Duncan, 850 F.2d 1104, 1110 (6th Cir.1988). With regard to specific, or augmented unanimity instructions, this court has recognized that the instruction is not necessary "unless 1) a count is extremely complex, 2) there is variance between the indictment and the proof at trial, or 3) there is a tangible risk of jury confusion." Sanderson, 966 F.2d at 187. Contrary to Defendants' assertions, this court's decision in Duncan does not require a court to sua sponte instruct the jury on specific unanimity when more than one basis for conviction is presented in a single count. Rather, we have consistently recognized that the need arises when it is shown that there is a "genuine risk that the jury is confused or that a conviction may occur as the result of different jurors concluding that a defendant committed different acts." United States v. Sims, 975 F.2d 1225, 1241 (6th Cir.1992), cert. denied, 507 U.S. 932, 113 S.Ct. 1315, 122 L.Ed.2d 702 (1993).

In Duncan, the court held that an augmented unanimity instruction should have been given because the court had been apprised of the unanimity problem in pretrial motions and by "a mid-deliberation question from the jury raising the genuine possibility that conviction could occur as the result of different jurors using a different false statement as the underlying factual predicate for guilt." Duncan, 850 F.2d at 1105. Defendants have not demonstrated that there was a tangible risk of jury confusion here. Thus, this case is easily distinguished from Duncan.

Furthermore, counts 2, 3, 6 and 9 were not complex, and there was no variance between the indictment and the proof at trial. Accordingly, none of the circumstances existed that would give rise to the need for a specific unanimity instruction. Consequently, we conclude that the district court did not commit error when it gave general instructions on unanimity. Furthermore, considering the subject matter of each GIF file and videotape listed in counts 2, 3, 6 and 9, we find it unlikely that the jury would have had any trouble reaching unanimity on the fact that one item described in each of those counts was obscene.

E.

We next address the Defendants' argument that the district court erred when it instructed the jury that the government was not required to present expert testimony regarding the prurient appeal of the materials at issue here.[1] Under the first prong of the

[1]The district court instructed the jury as follows:

> You have heard testimony from an expert witness presented on behalf of the defendants. An expert is allowed to express his opinion on those matters about which he has special knowledge and training. Expert testimony is presented to you on the theory that someone that is experienced in the field can assist you in understanding the evidence or in reaching an independent decision on the facts. There is no requirement, however, that expert testimony be presented in an obscenity case. The government need not produce expert evidence that the materials are obscene, but may rely on the computer generated images and videotapes themselves for its

Miller obscenity test, the jury must consider whether the allegedly obscene material "appeals to the prurient interest." Miller, 413 U.S. at 24, 93 S.Ct. at 2615.

The computer-generated images and videotapes involved here portrayed bestiality, incest, rape, and sex scenes involving defecation, urination, and sado-masochistic abuse. Defendants argue that the Government is required to present expert testimony when sexually-explicit material is directed at a deviant group. We disagree. Neither the United States Supreme Court nor this court has adopted any such per se rule.

The Supreme Court has consistently recognized that "[e]xpert testimony is not necessary to enable the jury to judge the obscenity of material which ... has been placed into evidence." Hamling v. United States, 418 U.S. 87, 100, 94 S.Ct. 2887, 2899, 41 L.Ed.2d 590 (1974) (citing Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56, 93 S.Ct. 2628, 2634-35, 37 L.Ed.2d 446 (1973), Kaplan v. California, 413 U.S. 115, 120-21, 93 S.Ct. 2680, 2684-2685, 37 L.Ed.2d 492 (1973), Ginzburg v. United States, 383 U.S. 463, 465, 86 S.Ct. 942, 944-45, 16 L.Ed.2d 31 (1966)). In Paris Adult Theatre I, the Court observed that the allegedly obscene materials, "obviously, are the best evidence of what they represent" and have been consistently recognized as " 'sufficient in themselves for the determination of the question.' " 413 U.S. at 56, 93 S.Ct. at 2634-35 (quoting Ginzburg, 383 U.S. at 465, 86 S.Ct. at 944). The Paris I Court further elaborated that:

> [t]his is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. No such assistance is needed by jurors in obscenity cases; indeed the "expert witness" practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony.

Id. at 56, n. 6, 93 S.Ct. at 2634, n. 6 (citations omitted).

The Court has explicitly reserved judgment on the issue whether expert testimony is required in the "extreme case" where "contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest." Id. In Pinkus v. United States, 436 U.S. 293, 98 S.Ct. 1808, 56 L.Ed.2d 293 (1978), the Court once again reserved judgment on this question, finding that it was not presented with the "extreme case" referenced in Paris I because there was expert testimony in evidence which, when "combined with the exhibits themselves, sufficiently guided the jury." Pinkus, 436 U.S. at 303, 98 S.Ct. at 1815.

Expert testimony on prurient appeal to deviant groups was also presented in this case. Defendants' expert, Dr. Victor Pascale, a licensed clinical psychologist, testified at trial about how certain groups of

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argument that the materials are obscene.

individuals can become sexually aroused by objects or conduct not normally thought of as sexual in nature, i.e., the use of whips, cross-dressing, urination, defecation, infliction of pain (sado-masochism), and voyeurism. Thus, as in Pinkus, we find that the expert testimony, when combined with the allegedly obscene materials themselves, was sufficient to guide the jury with regard to prurient appeal.

Defendants rely heavily on decisions from the Second Circuit. See United States v. Klaw, 350 F.2d 155 (2nd Cir.1965); United States v. Petrov, 747 F.2d 824 (2nd Cir.1984), cert. denied, 471 U.S. 1025, 105 S.Ct. 2037, 85 L.Ed.2d 318 (1985). In Petrov, however, the court concluded that Klaw is "properly understood to require expert testimony that material appeals to the prurient interest of a deviant group only when the material portrays conduct not generally understood to be sexual." Id. at 836. Furthermore, the Petrov court concluded that expert testimony is "not required to establish the prurient appeal of photographs depicting bestiality." Id. at 837. The court further clarified that although Klaw required expert testimony on depictions of sado-masochistic activity, the requirement was met where the defendant's expert testified on cross-examination that such materials would appeal to the sexual interest of a small minority of individuals even though they would not appeal to the average person. Id. at 830-31. Thus, Petrov does not compel a different result, and this court concludes that the challenged jury instruction was not erroneous.

F.

A required element of § 1465 is that the defendant knowingly "used a facility or means of interstate commerce" for the purpose of transporting or transmitting obscene material. Defendants argue that the district court's instruction, that "facility or means of interstate commerce" includes "any method of communication between different states," improperly expanded the meaning of this criminal statute. Defendants failed to object to the instruction, therefore, it is examined for plain error. We conclude that there is no plain error here.

Contrary to Defendants' argument, the instruction finds support in 2 Devitt, Blackmar and O'Malley, Federal Jury Practice and Instruction, Criminal, (4th Ed.1990), § 46.06 at 664, which provides:

> The term "uses any facility in interstate ... commerce" means employing or utilizing any method of communication or transportation between one state and another. The term "uses any facility in interstate ... commerce", for example, includes the use of the telephone and mails.

G.

Defendants claim they were denied due process of law and a fair trial by the admission of uncharged GIF files and descriptions of uncharged materials at their trial. We will not disturb the district court's admission of this evidence and its determinations of relevancy absent a clear abuse of discretion. United States v. Seago, 930 F.2d 482, 494 (6th Cir.1991). We also apply an abuse of discretion standard to the district court's decision in balancing the potentially unfair prejudicial impact of

evidence against its probative value. United States v. Feinman, 930 F.2d 495, 499 (6th Cir.1991). In reviewing how such a balance is weighed, "the appellate court must view the evidence in the light most favorable to its proponent, giving 'the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.' " United States v. Moore, 917 F.2d 215, 233 (6th Cir.1990), cert. denied, 499 U.S. 963, 111 S.Ct. 1590, 113 L.Ed.2d 654 (1991).

Defendants complain that the district court erred when it allowed the Government to introduce 31 uncharged GIF files, portions of 2 uncharged videos, and the AABBS' descriptions of uncharged GIF files and videotapes at trial. They assert that the material had no probative value, and its introduction served only to unfairly prejudice the jury. Based on our review of the record, we find no abuse of discretion.

With regard to the videotapes, the record reveals that the district court considered whether the probative value of two minutes of one of the three "child nudist" videotapes sent by Defendant Robert Thomas to Dirmeyer was substantially outweighed by the danger of unfair prejudice. F.R.E. 401, 403. Despite an objection from Defendants' counsel, the district court ruled that the material was probative to the issue of Mr. Thomas' predisposition in light of his entrapment defense to count 11, charging him with knowing receipt of child pornography. We find no error in the admission of the videotapes since they were properly introduced in response to the entrapment defense.

Defendants' claim that the district court erred when it permitted the jury to see 31 uncharged GIF files is likewise without merit. Each of the GIF file images was made from the charged videotapes by stopping the tapes at a certain point, making a still frame or photograph, and then scanning it onto the AABBS and making it available for distribution as a separate item. Because the entire videotape was properly admitted and viewed by the jury, we reject Defendants' claim of unfair prejudice.

Defendants also complain that the district court erred by allowing the jury to hear sexually-explicit descriptions of other uncharged GIF files and videotapes. Contrary to Defendants' contention, this material did have probative value, i.e., it was relevant to establishing scienter and pandering. Defendants posted these graphic descriptions in the public areas of the AABBS, and this was one way they advertised for members. See Mishkin v. New York, 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56 (1966); Pinkus, 436 U.S. at 303, 98 S.Ct. at 1814-15. Accordingly, we reject Defendants' argument that the above evidence was clearly more prejudicial than probative under F.R.E. 403, and find no abuse of discretion in its admission under F.R.E. 401.

H.

Defendants next contend that they were denied effective assistance of counsel at their trial because their retained counsel failed to: (1) move for dismissal based on Carlin; (2) object to the admission of evidence at trial; (3) move for judgment of acquittal based on the government's requirement to provide expert testimony regarding "prurient appeal" to deviant groups; (4) recognize the conflict of interest inherent in his dual representation of both Defendants; (5) sever the child pornography

count; (6) file a suppression motion; (7) request discovery; (8) challenge the indictment as duplicative; (9) move for a mistrial; (10) submit a theory-of- the-case instruction; (11) introduce comparable sexually-explicit videotapes available in Memphis; and (12) with regard to Carleen Thomas, failed to move for a judgment of acquittal at the close of the government's case for lack of evidence of scienter and then called her to the stand when her testimony could only incriminate her.

As a general rule, this court "will not review claims of ineffective counsel that are raised for the first time on appeal." United States v. Seymour, 38 F.3d 261, 263 (6th Cir.1994). These claims are " 'best brought by a defendant in a post-conviction proceeding under 28 U.S.C. § 2255 so that the parties can develop an adequate record on the issue.' " Id. (quoting United States v. Daniel, 956 F.2d 540, 543 (6th Cir.1992)). We consider such claims on direct appeal only where the record has been sufficiently developed so as to allow us to evaluate counsel's performance. Seymour, 38 F.3d at 263. We find that the record here is not adequately developed for us to consider the ineffective assistance of counsel claims asserted above.

We will, however, consider Defendant Carleen Thomas' argument that she was denied effective assistance of counsel because the district court refused her request for separate counsel without adequate inquiry as to her reasons. Unlike the above claims, we find the record below is sufficiently developed to address this issue.

Carleen Thomas first raised her request for separate counsel on the day of trial. The Government informed the district court that Defendants had previously been informed of their right to separate counsel but they had waived that right. While considering Carleen Thomas' late request, the district court made additional inquiries and reviewed the record to determine whether she had indeed been informed of, and had waived, that right. ***716** The inquiry revealed both events had occurred. The district court refused to delay the trial that was set to begin immediately but did offer to arrange for separate standby counsel for Carleen Thomas. The court also informed Carleen Thomas that, because she was not indigent, she would have to reimburse this counsel at the rate charged by court-appointed attorneys. After considering the court's offer, Carleen Thomas stated on the record that she wished to continue with Mr. Williams as her retained counsel. In light of the above, we reject Carleen Thomas' claim.

I.

Defendants' final argument challenges the district court's denial of a two-level reduction in their sentences for acceptance of responsibility. They claim they are entitled to the reduction because they fully acknowledged their conduct in running the AABBS. The sentencing court's finding regarding acceptance of responsibility is entitled to great deference and is reversed only if found to be clearly erroneous. See United States v. Ivery, 999 F.2d 1043, 1045 (6th Cir.1993); see also U.S.S.G. § 3E1.1(a), comment, n. 5.

U.S.S.G. § 3E1.1(a) provides for a two-level reduction for a defendant who "clearly demonstrates acceptance of responsibility." To qualify for this reduction,

Defendants were required to show by a preponderance of the evidence that they had accepted responsibility for the crime committed. United States v. Williams, 940 F.2d 176 (6th Cir.), cert. denied, 502 U.S. 1016, 112 S.Ct. 666, 116 L.Ed.2d 757 (1991). U.S.S.G. 3E1.1(a), comment, n. 2 clarifies that the reduction is "not intended for a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." This comment further clarifies that only in "rare situations" will the adjustment apply after a trial and verdict of guilt, e.g., where the defendant makes a challenge to the applicability of a statute to his conduct. Defendants assert that they fit the "rare situation" and should not have been denied the reduction.

The sentencing judge, however, stated more than one ground for denying the two-level reduction. She noted that neither Defendant acknowledged the character of the materials found to be obscene. In addition, she found no indication that either of them had put aside making their living through the same means. U.S.S.G. § 3E1.1(a), comment n. 1(b) lists voluntary termination or withdrawal from criminal conduct as a factor to be considered by the court. This court has recognized that the two-level adjustment is properly denied under circumstances where the defendant continues conduct that is the same type as the underlying offense. See United States v. Reed, 951 F.2d 97, 99-100 (6th Cir.1991), cert. denied, 503 U.S. 996, 112 S.Ct. 1700, 118 L.Ed.2d 409 (1992); United States v. Snyder, 913 F.2d 300, 305 (6th Cir.1990), cert. denied, 498 U.S. 1039, 111 S.Ct. 709, 112 L.Ed.2d 698 (1991). Accordingly, we hold that the sentencing court's denial of the two- level reduction was not clearly erroneous.

III.

For the foregoing reasons, this court AFFIRMS Robert and Carleen Thomas' convictions and sentences.

II. Free Speech in Cyberspace

B. The First Amendment
3. .. in Different Media

FCC v. Pacifica 98 S.Ct. 3026
57 L.Ed.2d 1073, 3 Media L. Rep. 2553
(Cite as: 438 U.S. 726, 98 S.Ct. 3026)

FEDERAL COMMUNICATIONS COMMISSION, Petitioner,
v.
PACIFICA FOUNDATION.

No. 77-528.

Supreme Court of the United States

Argued April 18, 19, 1978.

Decided July 3, 1978.
Rehearing Denied Oct. 2, 1978.

See 439 U.S. 883, 99 S.Ct. 227.

***729** Mr. Justice STEVENS delivered the opinion of the Court (Parts I, II, III and IV-C) and an opinion in which THE CHIEF JUSTICE and Mr. Justice REHNQUIST joined (Parts IV-A and IV-B).

This case requires that we decide whether the Federal Communications Commission has any power to regulate a radio broadcast that is indecent but not obscene.

A satiric humorist named George Carlin recorded a 12-minute monologue entitled "Filthy Words" before a live audience in a California theater. He began by referring to his thoughts about "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever." He proceeded to list those words and repeat them over and over again in a variety of colloquialisms. The transcript of the recording, which is appended to this opinion, indicates frequent laughter from the audience.

At about 2 o'clock in the afternoon on Tuesday, October 30, 1973, a New York radio station, owned by respondent Pacifica ***730** Foundation, broadcast the "Filthy Words" monologue. A few weeks later a man, who stated that he had heard the broadcast while driving with his young son, wrote a letter complaining to the Commission. He stated that, although he could perhaps understand the "record's being sold for private use, I certainly cannot understand the broadcast of same over the air that, supposedly, you control."

* * *

***731** In its memorandum opinion the commission stated that it intended to "clarify the ****3031** standards which will be utilized in considering" the growing number of complaints about indecent speech on the airwaves. Id., at 94. Advancing several reasons for treating broadcast speech differently from other forms of expression, [FN2] the Commission found a power to regulate indecent broadcasting in two statutes: 18 U.S.C. § 1464 (1976 ed.), which forbids the use of "any obscene, indecent, or profane language by means of radio communications," [FN3] and 47 U.S.C. § 303(g), which requires the Commission to "encourage the larger and more effective use of radio in the public interest." [FN4]

> FN2. Broadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference, see Rowan v. Post Office Dept., 397 U.S. 728 [90 S.Ct. 1484, 25 L.Ed.2d 736] (1970); (3) unconsenting adults may tune in a

station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore

license in the public interest. Of special concern to the Commission as well as parents is the first point regarding the use of radio by children." Id., at 97.

FN3. Title 18 U.S.C. § 1464 (1976 ed.) provides:
"Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."

FN4. Section 303(g) of the Communications Act of 1934, 48 Stat. 1082, as amended, as set forth in 47 U.S.C. § 303(g), in relevant part, provides:
"Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall--

* * *

"(g) . . . generally encourage the larger and more effective use of radio in the public interest."

The Commission characterized the language used in the Carlin monologue as "patently offensive," though not necessarily obscene, and expressed the opinion that it should be regulated by principles analogous to those found in the law of nuisance where the "law generally speaks to channeling behavior more than actually prohibiting it. . . . [T]he concept ***732** of 'indecent' is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience." 56 F.C.C.2d, at 98. [FN5]

FN5. Thus, the Commission suggested, if an offensive broadcast had literary, artistic, political, or scientific value, and were preceded by warnings, it might not be indecent in the late evening, but would be so during the day, when children are in the audience. 56 F.C.C.2d, at 98.

Applying these considerations to the language used in the monologue as broadcast by respondent, the Commission concluded that certain words depicted sexual and excretory activities in a patently offensive manner, noted that they "were broadcast at a time when children were undoubtedly in the audience (i. e., in the early afternoon)," and that the prerecorded language, with these offensive words "repeated over and over," was "deliberately broadcast." Id., at 99. In summary, the Commission stated: "We therefore hold that the language as broadcast was indecent and prohibited by 18 U.S.C. [§] 1464." * * * Ibid.

****3032** After the order issued, the Commission was asked to clarify its opinion by ruling that the broadcast of indecent words as part of a live newscast would not be prohibited. The Commission issued another opinion in which it pointed out that ***733** it "never intended to place an absolute prohibition on the broadcast of this type of

language, but rather sought to channel it to times of day when children most likely would not be exposed to it." 59 F.C.C.2d 892 (1976). The Commission noted that its "declaratory order was issued in a specific factual context," and declined to comment on various hypothetical situations presented by the petition. [FN7] Id., at 893. It relied on its "long standing policy of refusing to issue interpretive rulings or advisory opinions when the critical facts are not explicitly stated or there is a possibility that subsequent events will alter them." Ibid.

> FN7. The Commission did, however comment:
> " '[I]n some cases, public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing.' Under these circumstances we believe that it would be inequitable for us to hold a licensee responsible for indecent language. . . . We trust that under such circumstances a licensee will exercise judgment, responsibility, and sensitivity to the community's needs, interests and tastes." 59 F.C.C.2d, at 893 n. 1.

* * *

Having granted the Commission's petition for certiorari, 434 U.S. 1008, 98 S.Ct. 715, 54 L.Ed.2d 749, we must decide: (1) whether the scope of judicial review encompasses more than the Commission's determination that the monologue was indecent "as broadcast"; (2) whether the Commission's order was a form of censorship forbidden by § 326; (3) whether the broadcast was indecent within the meaning of § 1464; and (4) whether the order violates the First Amendment of the United States Constitution.

I

The general statements in the Commission's memorandum opinion do not change the character of its order. Its action was an adjudication under 5 U.S.C. § 554(e) (1976 ed.); it did not purport to engage in formal rulemaking or in the promulgation of any regulations. The order "was issued in a specific factual context"; questions concerning possible action in other contexts were expressly reserved for the future. The specific holding was carefully confined to the monologue "as broadcast."

* * *

II

The relevant statutory questions are whether the Commission's action is forbidden "censorship" within the meaning of 47 U.S.C. § 326 and whether speech that concededly is not obscene may be restricted as "indecent" under the authority of 18 U.S.C. § 1464 (1976 ed.). The questions are not unrelated, for the two statutory provisions have a common origin. Nevertheless, we analyze them separately.

* * *

The prohibition against censorship unequivocally denies the Commission any power to edit proposed broadcasts in advance and to excise material considered inappropriate for the airwaves. The prohibition, however, has never been construed to deny the Commission the power to review the content of completed broadcasts in the performance of its regulatory duties. [FN9]

FN9. Zechariah Chafee, defending the Commission's authority to take into account program service in granting licenses, interpreted the restriction on "censorship" narrowly: "This means, I feel sure, the sort of censorship which went on in the seventeenth century in England--the deletion of specific items and dictation as to what should go into particular programs." 2 Z. Chafee, Government and Mass Communications 641 (1947).

* * *

[5][6] Entirely apart from the fact that the subsequent review of program content is not the sort of censorship at which the statute was directed, its history makes it perfectly clear that it was not intended to limit the Commission's power to regulate the broadcast of obscene, indecent, or profane language* * *

* * *

We conclude, therefore, that § 326 does not limit the Commission's authority to impose sanctions on licensees who engage in obscene, indecent, or profane broadcasting.

III

The only other statutory question presented by this case is whether the afternoon broadcast of the "Filthy Words" ***739** monologue was indecent within the meaning of § 1464. * * * Even that question is narrowly confined by the arguments of the parties.

The Commission identified several words that referred to excretory or sexual activities or organs, stated that the repetitive, deliberate use of those words in an afternoon broadcast when children are in the audience was patently offensive, and held that the broadcast was indecent. Pacifica takes issue with the Commission's definition of indecency, but does not dispute the Commission's preliminary determination that each of the components of its definition was present. Specifically, Pacifica does not quarrel with the conclusion that this afternoon broadcast was patently offensive. Pacifica's claim that the broadcast was not indecent within the meaning of the statute rests entirely on the absence of prurient appeal.

[8] The plain language of the statute does not support Pacifica's argument. The words "obscene, indecent, or profane" are ***740** written in the disjunctive, implying that each has a separate meaning. Prurient appeal is an element of the obscene, but the normal definition of "indecent" merely refers to nonconformance with accepted standards of morality. [FN14]

FN14. Webster defines the term as "a: altogether unbecoming: contrary to what the nature of things or what circumstances would dictate as right or expected or appropriate: hardly suitable: UNSEEMLY . . . b: not conforming to generally accepted standards of morality: . . . ." Webster's Third New International Dictionary (1966).

Pacifica argues, however, that this Court has construed the term "indecent" in related statutes to mean "obscene," as that term was defined in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419* * *

* * *

[10] Because neither our prior decisions nor the language or history of § 1464 supports the conclusion that prurient appeal is an essential component of indecent language, we reject Pacifica's construction of the statute. When that construction is put to one side, there is no basis for disagreeing with the Commission's conclusion that indecent language was used in this broadcast.

***742** IV

Pacifica makes two constitutional attacks on the Commission's order. First, it argues that the Commission's construction of the statutory language broadly encompasses so much constitutionally protected speech that reversal is required even if Pacifica's broadcast of the "Filthy Words" monologue is not itself protected by the First Amendment. Second, Pacifica argues that inasmuch as the recording is not obscene, the Constitution forbids any abridgment of the right to broadcast it on the radio.

****3037** A

The first argument fails because our review is limited to the question whether the Commission has the authority to proscribe this particular broadcast. As the Commission itself emphasized, its order was "issued in a specific factual context." 59 F.C.C.2d, at 893. That approach is appropriate for courts as well as the Commission when regulation of indecency is at stake, for indecency is largely a function of context--it cannot be adequately judged in the abstract.

The approach is also consistent with Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371. In that case the Court rejected an argument that the Commission's regulations defining the fairness doctrine were so vague that they would inevitably abridge the broadcasters' freedom of speech. The Court of Appeals had invalidated the regulations because their vagueness might lead to self-censorship of controversial program ***743** content. Radio Television News Directors Assn. v. United States, 400 F.2d 1002, 1016 (CA7 1968). This Court reversed. After noting that the Commission had indicated, as it has in this case, that it would not impose sanctions without warning in cases in which the applicability of the law was unclear, the Court stated:

> "We need not approve every aspect of the fairness doctrine to decide these cases, and we will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable, United States v. Sullivan, 332 U.S. 689, 694, [68 S.Ct. 331, 92 L.Ed. 297] (1948), but will deal with those problems if and when they arise." 395 U.S., at 396, 89 S.Ct., at 1809.

It is true that the Commission's order may lead some broadcasters to censor themselves. At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. [FN18] While some of these references may be protected, they surely lie at the periphery of First Amendment concern. Cf. Bates v. State Bar of Arizona, 433 U.S. 350, 380-381, 97 S.Ct. 2691, 2707-2708, 53 L.Ed.2d 810. Young v. American Mini Theatres, Inc., 427 U.S. 50, 61, 96 S.Ct. 2440, 2448, 49 L.Ed.2d 310. The danger dismissed so summarily in Red Lion, in contrast, was that broadcasters would

respond to the vagueness of the regulations by refusing to present programs dealing with important social and political controversies. Invalidating any rule on the basis of its hypothetical application to situations not before the Court is "strong medicine" to be applied "sparingly and only as a last resort." Broadrick v. Oklahoma, 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830. We decline to administer that medicine to preserve the vigor of patently offensive sexual and excretory speech.

> FN18. A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language.

***744** B

When the issue is narrowed to the facts of this case, the question is whether the First Amendment denies government any power to restrict the public broadcast of indecent language in any circumstances. [FN19] For if the government has any such power, this was an appropriate occasion for its exercise.

> FN19. Pacifica's position would, of course, deprive the Commission of any power to regulate erotic telecasts unless they were obscene under Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419. Anything that could be sold at a newsstand for private examination could be publicly displayed on television.
>
> We are assured by Pacifica that the free play of market forces will discourage indecent programming. "Smut may," as Judge Leventhal put it, "drive itself from the market and confound Gresham," 181 U.S.App.D.C., at 158, 556 F.2d, at 35; the prosperity of those who traffic in pornographic literature and films would appear to justify skepticism.

The words of the Carlin monologue are unquestionably "speech" within the meaning ****3038** of the First Amendment. It is equally clear that the Commission's objections to the broadcast were based in part on its content. The order must therefore fall if, as Pacifica argues, the First Amendment prohibits all governmental regulation that depends on the content of speech. Our past cases demonstrate, however, that no such absolute rule is mandated by the Constitution.

* * *

The question in this case is whether a broadcast of patently offensive words dealing with sex and excretion may be regulated because of its content. * * * Obscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral standards. Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498. But the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ***746** ideas. * * * If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content--or even to the fact that it satirized contemporary attitudes about four-letter words [FN22]--First Amendment

****3039** protection might be required. But that is simply not this case. These words offend for the same reasons that obscenity offends. [FN23] Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said: "Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Chaplinsky v. New Hampshire, 315 U.S., at 572, 62 S.Ct., at 769.

FN22. The monologue does present a point of view; it attempts to show that the words it uses are "harmless" and that our attitudes toward them are "essentially silly." See supra, at 3030. The Commission objects, not to this point of view, but to the way in which it is expressed. The belief that these words are harmless does not necessarily confer a First Amendment privilege to use them while proselytizing, just as the conviction that obscenity is harmless does not license one to communicate that conviction by the indiscriminate distribution of an obscene leaflet.

FN23. The Commission stated: "Obnoxious, gutter language describing these matters has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions . . . ." 56 F.C.C.2d, at 98. Our society has a tradition of performing certain bodily functions in private, and of severely limiting the public exposure or discussion of such matters. Verbal or physical acts exposing those intimacies are offensive irrespective of any message that may accompany the exposure.

Although these words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment. Some uses of even the most offensive words are unquestionably protected. See, e. g., Hess v. Indiana, 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303. Indeed, we may assume, arguendo, that this monologue would be protected in other contexts. Nonetheless, ***747** the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context. * * * It is a characteristic of speech such as this that both its capacity to offend and its "social value," to use Mr. Justice Murphy's term, vary with the circumstances. Words that are commonplace in one setting are shocking in another. To paraphrase Mr. Justice Harlan, one occasion's lyric is another's vulgarity. Cf. Cohen v. California, 403 U.S. 15, 25, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284. [FN25]

FN25. The importance of context is illustrated by the Cohen case. That case arose when Paul Cohen entered a Los Angeles courthouse wearing a jacket emblazoned with the words "Fuck the Draft." After entering the courtroom, he took the jacket off and folded it. 403 U.S., at 19 n. 3, 91 S.Ct., at 1785. So far as the evidence showed, no one in the courthouse was offended by his jacket. Nonetheless, when he left the courtroom, Cohen was arrested, convicted of disturbing the peace, and sentenced to 30 days in prison.

> In holding that criminal sanctions could not be imposed on Cohen for his political statement in a public place, the Court rejected the argument that his speech would offend unwilling viewers; it noted that "there was no evidence that persons powerless to avoid [his] conduct did in fact object to it." Id., at 22, 91 S.Ct., at 1786. In contrast, in this case the Commission was responding to a listener's strenuous complaint, and Pacifica does not question its determination that this afternoon broadcast was likely to offend listeners. It should be noted that the Commission imposed a far more moderate penalty on Pacifica than the state court imposed on Cohen. Even the strongest civil penalty at the Commission's command does not include criminal prosecution. See n. 1, supra.

In this case it is undisputed that the content of Pacifica's broadcast was "vulgar," "offensive," and "shocking." Because content of that character is not entitled to absolute constitutional protection under all circumstances, we must consider its ***748** context in order to determine whether the Commission's action was constitutionally permissible.

C

We have long recognized that each medium of expression presents special First Amendment problems. Joseph Burstyn, ****3040** Inc. v. Wilson, 343 U.S. 495, 502-503, 72 S.Ct. 777, 780-781, 96 L.Ed. 1098. And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection* * *

* * *

The reasons for these distinctions are complex, but two have relevance to the present case. First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. Rowan v. Post Office Dept., 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he ***749** hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place. [FN27]

> FN27. Outside the home, the balance between the offensive speaker and the unwilling audience may sometimes tip in favor of the speaker, requiring the offended listener to turn away. See Erznoznik v. Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125. As we noted in Cohen v. California:
> "While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue . . . , we have at the same time consistently stressed that 'we are

> often "captives" outside the sanctuary of the home and subject to objectionable speech.' " 403 U.S., at 21, 91 S.Ct., at 1786.
>
> The problem of harassing phone calls is hardly hypothetical. Congress has recently found it necessary to prohibit debt collectors from "plac[ing] telephone calls without meaningful disclosure of the caller's identity"; from "engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number"; and from "us[ing] obscene or profane language or language the natural consequence of which is to abuse the hearer or reader." Consumer Credit Protection Act Amendments, 91 Stat. 877, 15 U.S.C. § 169 2d (1976 ed., Supp. II).

Second, broadcasting is uniquely accessible to children, even those too young to read. Although Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. We held in Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195, that the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression. ***750** Id., at 640 and 639, 88 S.Ct., at 1280. [FN28] The ease with which children may ****3041** obtain access to broadcast material, coupled with the concerns recognized in Ginsberg, amply justify special treatment of indecent broadcasting.

> FN28. The Commission's action does not by any means reduce adults to hearing only what is fit for children. Cf. Butler v. Michigan, 352 U.S. 380, 383, 77 S.Ct. 524, 526, 1 L.Ed.2d 412. Adults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these words. In fact, the Commission has not unequivocally closed even broadcasting to speech of this sort; whether broadcast audiences in the late evening contain so few children that playing this monologue would be permissible is an issue neither the Commission nor this Court has decided.

It is appropriate, in conclusion, to emphasize the narrowness of our holding. This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution. The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, [FN29] and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant. As Mr. Justice Sutherland wrote a "nuisance may be merely a right thing in the wrong place,--like a pig in the parlor instead of the barnyard." Euclid v. Ambler Realty Co., 272 U.S. 365,

388, 47 S.Ct. 114, 118, 71 L.Ed. 303. We simply hold that when the Commission finds that a pig has entered the parlor, the exercise ***751** of its regulatory power does not depend on proof that the pig is obscene.

> FN29. Even a prime-time recitation of Geoffrey Chaucer's Miller's Tale would not be likely to command the attention of many children who are both old enough to understand and young enough to be adversely affected by passages such as: "And prively he caughte hire by the queynte." The Canterbury Tales, Chaucer's Complete Works (Cambridge ed. 1933), p. 58, l. 3276:

The judgment of the Court of Appeals is reversed.

It is so ordered.

* * *

Mr. Justice POWELL, with whom Mr. Justice BLACKMUN joins, concurring in part and concurring in the judgment.

I join Parts I, II, III, and IV-C of Mr. Justice STEVENS' opinion* * * Because I do not subscribe to all that is said in Part IV, however, I state my views separately.

I

It is conceded that the monologue at issue here is not obscene in the constitutional sense* * * Some of the words used have been held protected by the First Amendment in other cases and contexts* * *

But it also is true that the language employed is, to most people, vulgar and offensive. It was chosen specifically for this quality, and it was repeated over and over as a sort of verbal shock treatment. The Commission did not err in characterizing the narrow category of language used here as "patently offensive" to most people regardless of age.

The issue, however, is whether the Commission may impose civil sanctions on a licensee radio station for broadcasting the monologue at two o'clock in the afternoon. The Commission's primary concern was to prevent the broadcast from reaching the ears of unsupervised children who were likely to be in the audience at that hour. In essence, the Commission sought to "channel" the monologue to hours when the fewest unsupervised children would be exposed to it. See 56 F.C.C.2d, at 98. In my view, this consideration provides strong support for the Commission's holding. [FN1]

> FN1. See generally Judge Leventhal's thoughtful opinion in the Court of Appeals. 181 U.S.App.D.C. 132, 155-158, 556 F.2d 9, 32-35 (1977) (dissenting opinion).

The Court has recognized society's right to "adopt more stringent controls on communicative materials available to youths than on those available to adults." Erznoznik v. Jacksonville, 422 U.S. 205, 212, 95 S.Ct. 2268, 2274, 45 L.Ed.2d 125 (1975); * * *

In most instances, the dissemination of this kind of speech to children may be limited without also limiting willing adults' access to it. Sellers of printed and recorded matter and exhibitors of motion pictures and live performances may be required to shut their doors to children, but such a requirement has

no effect on adults' access. See id., at 634-635, 88 S.Ct., at 1277-1278. The difficulty is that such a physical separation of the audience cannot be accomplished in the broadcast media. During most of the broadcast hours, both adults and unsupervised children are likely to be in the broadcast audience, and the broadcaster cannot reach willing adults without also reaching ***759** children. This, as the Court emphasizes, is one of the distinctions between the broadcast and other media to which we often have adverted as justifying a different treatment of the broadcast media for First Amendment purposes. * * * In my view, the Commission was entitled to give substantial weight to this difference in reaching its decision in this case.

A second difference, not without relevance, is that broadcasting--unlike most other forms of communication--comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds* * *. Although the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech when they are in public before they turn away, * * * a different order of values obtains in the home. "That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere." Rowan v. Post Office Dept., supra, 397 U.S., at 738, 90 S.Ct., at 1491. The Commission also was entitled to give this factor appropriate weight in the circumstances of the instant case. This is not to say, however, that the Commission has an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect ***760** unwilling adults from momentary exposure to it in their homes. [FN2] Making the sensitive judgments required in these cases is not easy. But this responsibility has been reposed initially in the Commission, and its judgment is entitled to respect.

> FN2. It is true that the radio listener quickly may tune out speech that is offensive to him. In addition, broadcasters may preface potentially offensive programs with warnings. But such warnings do not help the unsuspecting listener who tunes in at the middle of a program. In this respect, too, broadcasting appears to differ from books and records, which may carry warnings on their face, and from motion pictures and live performances, which may carry warnings on their marquees.

It is argued that despite society's right to protect its children from this kind of speech, and despite everyone's interest in not being assaulted by offensive speech in the home, the Commission's holding in this case is impermissible because it prevents willing adults from listening to Carlin's monologue over the radio in the early afternoon hours. It is said that this ruling will have the effect of "reduc[ing] the adult population . . . to [hearing] only what is fit for children." Butler v. Michigan, 352 U.S. 380, 383, 77 S.Ct. 524, 526, 1 L.Ed.2d 412 (1957). This argument is not without force. The Commission certainly should consider it as it develops standards in this area. But it is not sufficiently strong to leave the Commission powerless to act in circumstances such as those in this case.

The Commission's holding does not prevent willing adults from purchasing Carlin's record, from attending his performances, or, indeed, from reading the transcript reprinted as an appendix to the Court's opinion. On its face, it

does not prevent respondent Pacifica Foundation from broadcasting the monologue during late evening hours when fewer children are likely to be in the audience, nor from broadcasting discussions of the contemporary use of language at any time during the day. The Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated ***761** use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here. In short, I agree that on the facts of this case, the Commission's order did not violate respondent's First Amendment rights.

II

As the foregoing demonstrates, my views are generally in accord with what is said in Part IV-C of Mr. Justice STEVENS' opinion. See ante, at 3039-3041. I therefore join that portion of his opinion. I do not join Part IV-B, however, because I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most "valuable" and hence deserving of the most protection, and which is less "valuable" and hence deserving of less protection* * *

***762** The result turns instead on the unique characteristics of the broadcast media, combined with society's right to protect its children from speech generally agreed to be inappropriate for their years, and with the interest of unwilling adults in not being assaulted by such offensive speech in their homes. Moreover, I doubt whether today's decision will prevent any adult who wishes to receive Carlin's message in Carlin's own words from doing so, and from making for himself a value judgment as to the merit of the message and words. Cf. Id., at 77-79, 96 S.Ct., at 2455-2457 (POWELL, J., concurring). These are the grounds upon which I join the judgment of the Court as to Part IV.

Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL joins, dissenting.

I agree with Mr. Justice STEWART that, under Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974), and United States v. 12 200- ft. Reels of Film, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973), the word "indecent" in 18 U.S.C. § 1464 (1976 ed.) must be construed to prohibit only obscene speech. I would, therefore, normally refrain from expressing my views on any constitutional issues implicated in this case. However, I find the Court's misapplication of fundamental First Amendment principles so patent, and its attempt to impose its notions of propriety on the whole of the American people so misguided, that I am unable to remain silent.

I

For the second time in two years, see Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), the Court refuses to embrace the notion, completely antithetical to basic First Amendment values, that the degree of protection the First ***763** Amendment affords protected speech varies with the social value ascribed to that speech by five Members of this Court. See opinion of Mr. Justice POWELL, ante, at 3046-3047. Moreover, as do all parties, all Members of the Court agree that the Carlin monologue aired by Station WBAI does not fall within one of the categories of speech, such as "fighting words," Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942),

or obscenity, Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), that is totally without First Amendment protection. This conclusion, of course, is compelled by our cases expressly holding that communications containing some of the words found condemnable here are fully protected by the First Amendment in other contexts. See Eaton v. Tulsa, 415 U.S. 697, 94 S.Ct. 1228, 39 L.Ed.2d 693 (1974); Papish v. University of Missouri Curators, 410 U.S. 667, 93 S.Ct. 1197, 35 L.Ed.2d 618 (1973); Brown v. Oklahoma, 408 U.S. 914, 92 S.Ct. 2507, 33 L.Ed.2d 326 (1972); Lewis v. New Orleans, 408 U.S. 913, 92 S.Ct. 2499, 33 L.Ed.2d 321 (1972); Rosenfeld v. New Jersey, 408 U.S. 901, 92 S.Ct. 2479, 33 L.Ed.2d ****3048** 321 (1972); Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). Yet despite the Court's refusal to create a sliding scale of First Amendment protection calibrated to this Court's perception of the worth of a communication's content, and despite our unanimous agreement that the Carlin monologue is protected speech, a majority of the Court [FN1] nevertheless finds that, on the facts of this case, the FCC is not constitutionally barred from imposing sanctions on Pacifica for its airing of the Carlin monologue. This majority apparently believes that the FCC's disapproval of Pacifica's afternoon broadcast of Carlin's "Dirty Words" recording is a permissible time, place, and manner regulation. Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949). Both the opinion of my Brother STEVENS and the opinion of my Brother POWELL rely principally on two factors in reaching this conclusion: (1) the capacity of a radio broadcast to intrude into the unwilling listener's home, ***764** and (2) the presence of children in the listening audience. Dispassionate analysis, removed from individual notions as to what is proper and what is not, starkly reveals that these justifications, whether individually or together, simply do not support even the professedly moderate degree of governmental homogenization of radio communications--if, indeed, such homogenization can ever be moderate given the pre-eminent status of the right of free speech in our constitutional scheme-- that the Court today permits.

> FN1. Where I refer without differentiation to the actions of "the Court," my reference is to this majority, which consists of my Brothers POWELL and STEVENS and those Members of the Court joining their separate opinions.

A

Without question, the privacy interests of an individual in his home are substantial and deserving of significant protection. In finding these interests sufficient to justify the content regulation of protected speech, however, the Court commits two errors. First, it misconceives the nature of the privacy interests involved where an individual voluntarily chooses to admit radio communications into his home. Second, it ignores the constitutionally protected interests of both those who wish to transmit and those who desire to receive broadcasts that many--including the FCC and this Court--might find offensive.

"The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively

empower a majority to silence dissidents simply as a matter of personal predilections." Cohen v. California, supra, 403 U.S., at 21, 91 S.Ct., at 1786. I am in wholehearted agreement with my Brethren that an individual's right "to be let alone" when engaged in private activity within the confines of his own home is encompassed within the "substantial privacy interests" to which Mr. Justice Harlan referred in Cohen, and is entitled to the greatest solicitude. Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). However, I believe that an individual's actions in switching on ***765** and listening to communications transmitted over the public airways and directed to the public at large do not implicate fundamental privacy interests, even when engaged in within the home. Instead, because the radio is undeniably a public medium, these actions are more properly viewed as a decision to take part, if only as a listener, in an ongoing public discourse. See Note, Filthy Words, the FCC, and the First Amendment: Regulating Broadcast Obscenity, 61 Va.L.Rev. 579, 618 (1975). Although an individual's decision to allow public radio communications into his home undoubtedly does not abrogate all of his privacy interests, the residual privacy interests he retains vis-a-vis the communication he voluntarily admits into ****3049** his home are surely no greater than those of the people present in the corridor of the Los Angeles courthouse in Cohen who bore witness to the words "Fuck the Draft" emblazoned across Cohen's jacket. Their privacy interests were held insufficient to justify punishing Cohen for his offensive communication.

Even if an individual who voluntarily opens his home to radio communications retains privacy interests of sufficient moment to justify a ban on protected speech if those interests are "invaded in an essentially intolerable manner," Cohen v. California, supra, 403 U.S., at 21, 91 S.Ct., at 1786, the very fact that those interests are threatened only by a radio broadcast precludes any intolerable invasion of privacy; for unlike other intrusive modes of communication, such as sound trucks, "[t]he radio can be turned off," Lehman v. Shaker Heights, 418 U.S. 298, 302, 94 S.Ct. 2714, 2717, 41 L.Ed.2d 770 (1974)--and with a minimum of effort. As Chief Judge Bazelon aptly observed below, "having elected to receive public air waives, the scanner who stumbles onto an offensive program is in the same position as the unsuspecting passers-by in Cohen and Erznoznik [v. Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975)]; he can avert his attention by changing channels or turning off the set." 181 U.S.App.D.C. 132, 149, 556 F.2d 9, 26 (1977). Whatever the minimal discomfort suffered by a ***766** listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations or flick the "off" button, it is surely worth the candle to preserve the broadcaster's right to send, and the right of those interested to receive, a message entitled to full First Amendment protection. To reach a contrary balance, as does the Court, is clearly to follow Mr. Justice STEVENS' reliance on animal metaphors, ante, at 3041, "to burn the house to roast the pig." Butler v. Michigan, 352 U.S. 380, 383, 77 S.Ct. 524, 526, 1 L.Ed.2d 412 (1957).

The Court's balance, of necessity, fails to accord proper weight to the interests of listeners who wish to hear broadcasts the FCC deems offensive. It permits majoritarian tastes completely to preclude a protected message from entering the homes of a receptive, unoffended minority. No decision of this Court supports such a result. Where the individuals constituting the offended majority

may freely choose to reject the material being offered, we have never found their privacy interests of such moment to warrant the suppression of speech on privacy grounds. Cf. Lehman v. Shaker Heights, supra. Rowan v. Post Office Dept., 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970), relied on by the FCC and by the opinions of my Brothers POWELL and STEVENS, confirms rather than belies this conclusion. In Rowan, the Court upheld a statute, 39 U.S.C. § 4009 (1964 ed., Supp. IV), permitting householders to require that mail advertisers stop sending them lewd or offensive materials and remove their names from mailing lists. Unlike the situation here, householders who wished to receive the sender's communications were not prevented from doing so. Equally important, the determination of offensiveness vel non under the statute involved in Rowan was completely within the hands of the individual householder; no governmental evaluation of the worth of the mail's content stood between the mailer and the householder. In contrast, the visage of the censor is all too discernible here.

***767** B

Most parents will undoubtedly find understandable as well as commendable the Court's sympathy with the FCC's desire to prevent offensive broadcasts from reaching the ears of unsupervised children. Unfortunately, the facial appeal of this justification for radio censorship masks its constitutional insufficiency. Although the government unquestionably has a special interest in the well-being of children and consequently "can adopt more stringent controls on communicative materials available to ****3050** youths than on those available to adults," Erznoznik v. Jacksonville, 422 U.S. 205, 212, 95 S.Ct. 2268, 2274, 45 L.Ed.2d 125 (1975); see Paris Adult Theatre I v. Slaton, 413 U.S. 49, 106-107, 93 S.Ct. 2628, 2659-2660, 37 L.Ed.2d 446 (1973) (BRENNAN, J., dissenting), the Court has accounted for this societal interest by adopting a "variable obscenity" standard that permits the prurient appeal of material available to children to be assessed in terms of the sexual interests of minors. Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968). It is true that the obscenity standard the Ginsberg Court adopted for such materials was based on the then-applicable obscenity standard of Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), and Memoirs v. Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966), and that "[w]e have not had occasion to decide what effect Miller [v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973)] will have on the Ginsberg formulation." Erznoznik v. Jacksonville, supra, 422 U.S., at 213 n. 10, 95 S.Ct., at 2275. Nevertheless, we have made it abundantly clear that "under any test of obscenity as to minors . . . to be obscene 'such expression must be, in some significant way, erotic.' " 422 U.S., at 213 n. 10, 95 S.Ct., at 2275 n. 10, quoting Cohen v. California, 403 U.S., at 20, 91 S.Ct., at 1785.

Because the Carlin monologue is obviously not an erotic appeal to the prurient interests of children, the Court, for the first time, allows the government to prevent minors from gaining access to materials that are not obscene, and are therefore protected, as to them. [FN2] It thus ignores our recent admonition ***768** that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." 422 U.S., at 213-214, 95

S.Ct., at 2275. [FN3] The Court's refusal to follow its own pronouncements is especially lamentable since it has the anomalous subsidiary effect, at least in the radio context at issue here, of making completely unavailable to adults material which may not constitutionally be kept even from children. This result violates in spades the principle of Butler v. Michigan, supra. Butler involved a challenge to a Michigan statute that forbade the publication, sale, or distribution of printed material "tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth." 352 U.S., at 381, 77 S.Ct., at 525. Although Roth v. United States, supra, had not yet been decided, it is at least arguable that the material the statute in Butler was designed to suppress could have been constitutionally denied to children. Nevertheless, this Court ***769** found the statute unconstitutional. Speaking for the Court, Mr. Justice Frankfurter reasoned:

> "The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those ****3051** liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society." 352 U.S., at 383-384, 77 S.Ct., at 526.

Where, as here, the government may not prevent the exposure of minors to the suppressed material, the principle of Butler applies a fortiori. The opinion of my Brother POWELL acknowledges that there lurks in today's decision a potential for " 'reduc[ing] the adult population . . . to [hearing] only what is fit for children,' " ante, at 3046, but expresses faith that the FCC will vigilantly prevent this potential from ever becoming a reality. I am far less certain than my Brother POWELL that such faith in the Commission is warranted, see Illinois Citizens Committee for

> FN2. Even if the monologue appealed to the prurient interest of minors, it would not be obscene as to them unless, as to them, "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 24, 93 S.Ct. 2607, 2615, 37 L.Ed.2d 419 (1973).

> FN3. It may be that a narrowly drawn regulation prohibiting the use of offensive language on broadcasts directed specifically at younger children constitutes one of the "other legitimate proscription[s]" alluded to in Erznoznik. This is so both because of the difficulties inherent in adapting the Miller formulation to communications received by young children, and because such children are "not possessed of that full capacity for individual choice which is the presupposition of the First Amendment guarantees." Ginsberg v. New York, 390 U.S. 629, 649-650, 88 S.Ct. 1274, 1286, 20 L.Ed.2d 195 (1968) (STEWART, J., concurring). I doubt, as my Brother STEVENS suggests, ante, at 3038 n. 20, that such a limited regulation amounts to a regulation of speech based on its content, since, by hypothesis, the only persons at whom the regulated communication is directed are incapable of evaluating its content. To the extent that such a regulation is viewed as a regulation based on content, it marks the outermost limits to which content regulation is permissible.

Broadcasting v. FCC, 169 U.S.App.D.C. 166, 187-190, 515 F.2d 397, 418-421 (1975) (statement of Bazelon, C. J., as to why he voted to grant rehearing en banc); and even if I shared it, I could not so easily shirk the responsibility assumed by each Member of this Court jealously to guard against encroachments on First Amendment freedoms.

In concluding that the presence of children in the listening audience provides an adequate basis for the FCC to impose sanctions for Pacifica's broadcast of the Carlin monologue, the opinions of my Brother POWELL, ante, at 3044-3045, and my Brother STEVENS, ante, at 3040-3041, both stress the time-honored right of a parent to raise his child as he sees fit--a right this Court has consistently been vigilant to protect. See Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). Yet this principle supports a ***770** result directly contrary to that reached by the Court. Yoder and Pierce hold that parents, not the government, have the right to make certain decisions regarding the upbringing of their children. As surprising as it may be to individual Members of this Court, some parents may actually find Mr. Carlin's unabashed attitude towards the seven "dirty words" healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words. Such parents may constitute a minority of the American public, but the absence of great numbers willing to exercise the right to raise their children in this fashion does not alter the right's nature or its existence. Only the Court's regrettable decision does that. [FN4]

FN4. The opinions of my Brothers POWELL and STEVENS rightly refrain from relying on the notion of "spectrum scarcity" to support their result. As Chief Judge Bazelon noted below, "although scarcity has justified increasing the diversity of speakers and speech, it has never been held to justify censorship." 181 U.S.App.D.C., at 152, 556 F.2d, at 29 (emphasis in original). See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 396, 89 S.Ct. 1794, 1809, 23 L.Ed.2d 371 (1969).

C

As demonstrated above, neither of the factors relied on by both the opinion of my Brother POWELL and the opinion of my Brother STEVENS--the intrusive nature of radio and the presence of children in the listening audience--can, when taken on its own terms, support the FCC's disapproval of the Carlin monologue. These two asserted justifications are further plagued by a common failing: the lack of principled limits on their use as a basis for FCC censorship. No such limits come readily to mind, and neither of the opinions constituting the Court serve to clarify the extent to which the FCC may assert the privacy and children-in-the-audience rationales as justification for expunging from the airways protected communications the Commission finds offensive. Taken to their logical extreme, these rationales would support the cleansing of public ***771** radio of any "four-letter words" whatsoever, regardless of their context. The rationales could justify the banning from radio of a myriad of literary works, novels, poems, and plays by the likes of Shakespeare, Joyce, Hemingway, Ben ****3052** Jonson, Henry Fielding, Robert Burns, and Chaucer; they could support the

suppression of a good deal of political speech, such as the Nixon tapes; and they could even provide the basis for imposing sanctions for the broadcast of certain portions of the Bible. [FN5]

> FN5. See, e. g., I Samuel 25:22: "So and more also do God unto the enemies of David, if I leave of all that pertain to him by the morning light any that pisseth against the wall"; II Kings 18:27 and Isaiah 36:12: "[H]ath he not sent me to the men which sit on the wall, that they may eat their own dung, and drink their own piss with you?"; Ezekiel 23:3: "And they committed whoredoms in Egypt; they committed whoredoms in their youth; there were their breasts pressed, and there they bruised the teats of their virginity."; Ezekiel 23:21: "Thus thou calledst to remembrance the lewdnes of thy youth, in bruising thy teats by the Egyptians for the paps of thy youth." The Holy Bible (King James Version) (Oxford 1897).

In order to dispel the specter of the possibility of so unpalatable a degree of censorship, and to defuse Pacifica's overbreadth challenge, the FCC insists that it desires only the authority to reprimand a broadcaster on facts analogous to those present in this case, which it describes as involving "broadcasting for nearly twelve minutes a record which repeated over and over words which depict sexual or excretory activities and organs in a manner patently offensive by its community's contemporary standards in the early afternoon when children were in the audience." Brief for Petitioner 45. The opinions of both my Brother POWELL and my Brother STEVENS take the FCC at its word, and consequently do no more than permit the Commission to censor the afternoon broadcast of the "sort of verbal shock treatment," opinion of Mr. Justice POWELL, ante, at 3044, involved here. To insure that the FCC's regulation of protected speech does not exceed these bounds, my Brother POWELL is content to rely upon the judgment of the ***772** Commission while my Brother STEVENS deems it prudent to rely on this Court's ability accurately to assess the worth of various kinds of speech. [FN6] For my own part, even accepting that this case is limited to its facts, [FN7] I would place the responsibility and the right to weed worthless and offensive communications from the public airways where it belongs and where, until today, it resided: in a public free to choose those communications worthy of its attention from a marketplace unsullied by the censor's hand.

> FN6. Although ultimately dependent upon the outcome of review in this Court, the approach taken by my Brother STEVENS would not appear to tolerate the FCC's suppression of any speech, such as political speech, falling within the core area of First Amendment concern. The same, however, cannot be said of the approach taken by my Brother POWELL, which, on its face, permits the Commission to censor even political speech if it is sufficiently offensive to community standards. A result more contrary to rudimentary First Amendment principles is difficult to imagine.
>
> FN7. Having insisted that it seeks to impose sanctions on radio communications only in the limited circumstances present here, I believe that the FCC is estopped from using either this decision or its own orders in

this case, 56 F.C.C.2d 94 (1975) and 59 F.C.C.2d 892 (1976), as a basis for imposing sanctions on any public radio broadcast other than one aired during the daytime or early evening and containing the relentless repetition, for longer than a brief interval, of "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." 56 F.C.C.2d, at 98. For surely broadcasters are not now on notice that the Commission desires to regulate any offensive broadcast other than the type of "verbal shock treatment" condemned here, or even this "shock treatment" type of offensive broadcast during the late evening.

II

The absence of any hesitancy in the opinions of my Brothers POWELL and STEVENS to approve the FCC's censorship of the Carlin monologue on the basis of two demonstrably inadequate grounds is a function of their perception that the decision will result in little, if any, curtailment of communicative exchanges protected by the First Amendment. Although the extent to ***773** which the Court stands ready to countenance FCC censorship of protected speech is unclear from today's decision, I find the reasoning by which my Brethren conclude ****3053** that the FCC censorship they approve will not significantly infringe on First Amendment values both disingenuous as to reality and wrong as a matter of law.

My Brother STEVENS, in reaching a result apologetically described as narrow, ante, at 3040, takes comfort in his observation that "[a] requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication," ante, at 3037 n. 18, and finds solace in his conviction that "[t]here are few, if any, thoughts that cannot be expressed by the use of less offensive language." Ibid. The idea that the content of a message and its potential impact on any who might receive it can be divorced from the words that are the vehicle for its expression is transparently fallacious. A given word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image. Indeed, for those of us who place an appropriately high value on our cherished First Amendment rights, the word "censor" is such a word. Mr. Justice Harlan, speaking for the Court, recognized the truism that a speaker's choice of words cannot surgically be separated from the ideas he desires to express when he warned that "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." Cohen v. California, 403 U.S., at 26, 91 S.Ct., at 1788. Moreover, even if an alternative phrasing may communicate a speaker's abstract ideas as effectively as those words he is forbidden to use, it is doubtful that the sterilized message will convey the emotion that is an essential part of so many communications. This, too, was apparent to Mr. Justice Harlan and the Court in Cohen.

"[W]e cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys ***774** not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while

> solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated." Id., at 25-26, 91 S.Ct., at 1788.

My Brother STEVENS also finds relevant to his First Amendment analysis the fact that "[a]dults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear [the tabooed] words." Ante, at 3041 n. 28. My Brother POWELL agrees: "The Commission's holding does not prevent willing adults from purchasing Carlin's record, from attending his performances, or, indeed, from reading the transcript reprinted as an appendix to the Court's opinion." Ante, at 3046. The opinions of my Brethren display both a sad insensitivity to the fact that these alternatives involve the expenditure of money, time, and effort that many of those wishing to hear Mr. Carlin's message may not be able to afford, and a naive innocence of the reality that in many cases the medium may well be the message.

The Court apparently believes that the FCC's actions here can be analogized to the zoning ordinances upheld in Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976). For two reasons, it is wrong. First, the zoning ordinances found to pass constitutional muster in Young had valid goals other than the channeling of protected speech. Id., 427 U.S., at 71 n. 34, 96 S.Ct., at 2453 (opinion of STEVENS, J.); id., at 80, 96 S.Ct., at 2457 (POWELL, J., concurring). No such goals are present here. Second, and crucial to the opinions of my Brothers POWELL and STEVENS in Young --opinions, which, as they do in this case, supply the bare five- person majority of the Court--the ordinances did not restrict the access of distributors or exhibitors to the market or impair ***775** the viewing public's access to the regulated material. Id., at 62, 71 n. 35, 96 S.Ct., at 2453 (opinion of STEVENS, J.); id., at 77, ****3054** 96 S.Ct., at 2455 (POWELL, J., concurring). Again, this is not the situation here. Both those desiring to receive Carlin's message over the radio and those wishing to send it to them are prevented from doing so by the Commission's actions. Although, as my Brethren point out, Carlin's message may be disseminated or received by other means, this is of little consolation to those broadcasters and listeners who, for a host of reasons, not least among them financial, do not have access to, or cannot take advantage of, these other means.

Moreover, it is doubtful that even those frustrated listeners in a position to follow my Brother POWELL's gratuitous advice and attend one of Carlin's performances or purchase one of his records would receive precisely the same message Pacifica's radio station sent its audience. The airways are capable not only of carrying a message, but also of transforming it. A satirist's monologue may be most potent when delivered to a live audience; yet the choice whether this will in fact be the manner in which the message is delivered and received is one the First Amendment prohibits the government from making.

III

It is quite evident that I find the Court's attempt to unstitch the warp and woof of First Amendment law in an effort to reshape its fabric to cover the patently wrong result the Court reaches in this case dangerous as well as lamentable. Yet there runs throughout the opinions of my Brothers POWELL and

STEVENS another vein I find equally disturbing: a depressing inability to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the Members of this Court, and who do not share their fragile sensibilities. It is only an acute ethnocentric myopia that enables the Court to approve the censorship of communications solely because of the words they contain.

***776** "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425, 38 S.Ct. 158, 159, 62 L.Ed. 372 (1918) (Holmes, J.). The words that the Court and the Commission find so unpalatable may be the stuff of everyday conversations in some, if not many, of the innumerable subcultures that compose this Nation. Academic research indicates that this is indeed the case. See B. Jackson, "Get Your Ass in the Water and Swim Like Me" (1974); J. Dillard, Black English (1972); W. Labov, Language in the Inner City: Studies in the Black English Vernacular (1972). As one researcher concluded "[w]ords generally considered obscene like 'bullshit' and 'fuck' are considered neither obscene nor derogatory in the [black] vernacular except in particular contextual situations and when used with certain intonations." C. Bins, "Toward an Ethnography of Contemporary African American Oral Poetry," Language and Linguistics Working Papers No. 5, p. 82 (Georgetown Univ. Press 1972). Cf. Keefe v. Geanakos, 418 F.2d 359, 361 (CA1 1969) (finding the use of the word "motherfucker" commonplace among young radicals and protesters).

Today's decision will thus have its greatest impact on broadcasters desiring to reach, and listening audiences composed of, persons who do not share the Court's view as to which words or expressions are acceptable and who, for a variety of reasons, including a conscious desire to flout majoritarian conventions, express themselves using words that may be regarded as offensive by those from different socio-economic backgrounds. [FN8] ***777** In this context, the Court's decision may be seen for what, in the broader perspective, it really is: another of the ****3055** dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking. See Moore v. East Cleveland, 431 U.S. 494, 506-511, 97 S.Ct. 1932, 1939-1942, 52 L.Ed.2d 531 (1977) (BRENNAN, J., concurring).

> FN8. Under the approach taken by my Brother POWELL, the availability of broadcasts about groups whose members constitute such audiences might also be affected. Both news broadcasts about activities involving these groups and public affairs broadcasts about their concerns are apt to contain interviews, statements, or remarks by group leaders and members which may contain offensive language to an extent my Brother POWELL finds unacceptable.

Pacifica, in response to an FCC inquiry about its broadcast of Carlin's satire on " 'the words you couldn't say on the public . . . airwaves,' " explained that "Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words." 56 F.C.C.2d, at 95, 96. In confirming Carlin's prescience as a social commentator by the

result it reaches today, the Court evinces an attitude toward the "seven dirty words" that many others besides Mr. Carlin and Pacifica might describe as "silly." Whether today's decision will similarly prove "harmless" remains to be seen. One can only hope that it will.

89 S.Ct. 1794
23 L.Ed.2d 371, 79 P.U.R.3d 1, 1 Media L. Rep. 2053
(Cite as: 395 U.S. 367, 89 S.Ct. 1794)

RED LION BROADCASTING CO., Inc., etc., et al., Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION et al.
UNITED STATES et al., Petitioners,
v.
RADIO TELEVISION NEWS DIRECTORS ASSOCIATION et al.

Nos. 2 and 717.

Supreme Court of the United States

Argued April 2 and 3, 1969.

Decided June 9, 1969.

Mr. Justice WHITE delivered the opinion of the Court.

The Federal Communications Commission has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage. This is known as the fairness doctrine, which originated very early in the history of broadcasting and has maintained its present outlines for some time. It is an obligation whose content has been defined in a long series of FCC rulings in particular cases, and which is distinct from the statutory ***370** requirement of s 315 of the Communications Act ... that equal time be allotted all qualified candidates for public office. Two aspects of the fairness doctrine, relating to personal attacks in the context of controversial public issues and to political editorializing, were codified more precisely in the form of FCC regulations in 1967. The two cases before us now, which were decided separately below, challenge the constitutional and statutory bases of the doctrine and component rules. Red Lion ***371** involves the application of the fairness doctrine to a particular broadcast, and RTNDA arises as an action to review the FCC's 1967 promulgation of the personal attack and political editorializing regulations, which were laid down after the Red Lion litigation had begun.

I.
A.

The Red Lion Broadcasting Company is licensed to operate a Pennsylvania radio station, WGCB. On November 27, 1964,

WGCB carried a 15-minute broadcast by the Reverend Billy James Hargis as part of a 'Christian Crusade' series. A book by Fred J. Cook entitled 'Goldwater--Extremist on the Right' was discussed ****1797** by Hargis, who said that Cook had been fired by a newspaper for making false charges against city officials; that Cook had then worked for a Communist-affiliated publication; that he had defended Alger Hiss and attacked J. Edgar Hoover and the Central Intelligence Agency; and that he had now written a 'book to smear and destroy Barry Goldwater.' ... When Cook heard of the broadcast he ***372** concluded that he had been personally attacked and demanded free reply time, which the station refused. After an exchange of letters among Cook, Red Lion, and the FCC, the FCC declared that the Hargis broadcast constituted a personal attack on Cook; that Red Lion had failed to meet its obligation under the fairness doctrine as expressed in Times-Mirror Broadcasting Co., 24 P & F Radio Reg. 404 (1962), to send a tape, transcript, or summary of the broadcast to Cook and offer him reply time; and that the station must provide reply time whether or not Cook would pay for it. On review in the Court of Appeals for the District of Columbia Circuit, ... the ***373** FCC's position was upheld as constitutional and otherwise proper. 127 U.S.App.D.C. 129, 381 F.2d 908 (1967).

* * *

C.

Believing that the specific application of the fairness doctrine in Red Lion, and the promulgation of the regulations in RTNDA, are both authorized by Congress and enhance rather than abridge the freedoms of speech and press protected ****1799** by the First Amendment, we hold them valid and constitutional, reversing the judgment below in RTNDA and affirming the judgment below in Red Lion.

* * *

III.

The broadcasters challenge the fairness doctrine and its specific manifestations in the personal attack and political editorial rules on conventional First Amendment grounds, alleging that the rules abridge their freedom of speech and press. Their contention is that the First Amendment protects their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency. No man may be prevented from saying or publishing what he thinks, or from refusing in his speech or other utterances to give equal weight to the views of his opponents. ****1805** This right, they say, applies equally to broadcasters.

A.

[7][8] Although broadcasting is clearly a medium affected by a First Amendment interest, United States v. Paramount Pictures, Inc., 334 U.S. 131, 166, 68 S.Ct. 915. 333, 92 L.Ed. 1260 (1948), differences in the characteristics of new media justify differences in the First Amendment standards applied to them* * *

[9] Just as the Government may limit the use of sound-amplifying equipment

potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others. Associated Press v. United States, 326 U.S. 1, 20, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013 (1945).

* * *

[a]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the lisensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in s 326, which forbids FCC interference with 'the right ***390** of free speech by means of radio communication.' Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount* * * It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. ... It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

B.

* * *

In terms of constitutional principle, and as enforced sharing of a scarce resource, the personal attack and political editorial rules are indistinguishable from the equal-time provision of s 315, a specific enactment of Congress requiring stations to set aside reply time under specified circumstances and to which the fairness doctrine and these constituent regulations are important complements. That provision, which has been part of the law since 1927, Radio Act of 1927, s 18, 44 Stat. 1170, has been held valid by this Court as an obligation of the licensee relieving him of any power in any way to prevent or censor the broadcast, and thus insulating him from liability for defamation. The constitutionality of the statute under the First Amendment was unquestioned. [FN17] Farmers Educ. & Coop. Union v. WDAY, 360 U.S. 525, 79 S.Ct. 1302, 3 L.Ed.2d 1407 (1959).

FN17. This has not prevented vigorous argument from developing on the constitutionality of the ancillary FCC doctrines. Compare Barrow, The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy, 37 U.Cin.L.Rev. 447 (1968), with Robinson, The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation, 52 Minn.L.Rev. 67 (1967), and Sullivan, Editorials and Controversy: The Broadcaster's Dilemma, 32 Geo.Wash.L.Rev. 719 (1964).

***392** Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public. [FN18] Otherwise, ****1808** station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. 'Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.' Associated Press v. United States, 326 U.S. 1, 20, 65 S.Ct. 1416, 1425, 89 L.Ed. 2013 (1945).

109 S.Ct. 2829

FN18. The expression of views opposing those which broadcasters permit to be aired in the first place need not be confined solely to the broadcasters themselves as proxies. 'Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them.' J. Mill, On Liberty 32 (R. McCallum ed. 1947).

* * *

106 L.Ed.2d 93, 57 USLW 4920, 16 Media L. Rep. 1961
(Cite as: 492 U.S. 115, 109 S.Ct. 2829)

SABLE COMMUNICATIONS OF CALIFORNIA, INC., Appellant
v.
FEDERAL COMMUNICATIONS COMMISSION et al.
FEDERAL COMMUNICATIONS COMMISSION, et al., Appellants
v.
SABLE COMMUNICATIONS OF CALIFORNIA, INC.

Nos. 88-515, 88-525.

Supreme Court of the United States

Argued April 19, 1989.

Decided June 23, 1989.

WHITE, J., delivered the opinion for a unanimous Court with respect to Parts I, II, and IV, and the opinion of the Court with respect to Part III, in which REHNQUIST, C.J., and BLACKMUN, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. SCALIA, J., filed a concurring opinion, post, p. 2839. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL and STEVENS, JJ., joined, post, p. 2840.

Justice WHITE delivered the opinion of the Court.

The issue before us is the constitutionality of § 223(b) of the Communications Act of 1934. 47 U.S.C. § 223(b) (1982 ed., Supp. V). The statute, as amended in 1988, imposes an outright ban on indecent as well as obscene interstate commercial telephone messages. The District Court upheld the prohibition against obscene interstate telephone communications for commercial purposes, but enjoined the enforcement of the statute insofar as it applied to indecent messages. We affirm the District Court in both respects.

I

In 1983, Sable Communications, Inc., a Los Angeles-based affiliate of Carlin Communications, Inc., began offering sexually ***118** oriented prerecorded telephone messages [FN1] (popularly known as "dial-a-porn") through the Pacific Bell telephone network. In order to provide the messages, Sable arranged with Pacific Bell to use special telephone lines, designed to handle large volumes of calls simultaneously. Those who called the adult message number were charged a special fee. The fee was collected by Pacific Bell and divided between the phone company and the message provider. Callers outside the Los Angeles metropolitan area could reach the number by means of a long-distance toll call to the Los Angeles area code.

FN1. A typical prerecorded message lasts anywhere from 30 seconds to two minutes and may be called by up to 50,000 people hourly through a single telephone number. Comment, Telephones, Sex, and the First Amendment, 33 UCLA L.Rev. 1221, 1223 (1986).

* * *

The District Court found that a concrete controversy existed and that Sable met the irreparable injury requirement for issuance of a preliminary injunction under Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 2689, 49 L.Ed.2d 547 (1976). 692 F.Supp. 1208, 1209 (C.D.Cal.1988). The District Court denied Sable's request for a preliminary injunction against enforcement of the statute's ban on obscene telephone messages, rejecting the argument that the statute was unconstitutional because it created a national standard of obscenity. The District Court, however, ***119** struck down the "indecent speech" provision of § 223(b), holding that in this respect the statute was overbroad and unconstitutional and that this result was consistent with FCC v. Pacifica ****2833** Foundation, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978). "While the government unquestionably has a legitimate interest in, e.g., protecting children from exposure to indecent dial-a-porn messages, § 223(b) is not narrowly drawn to achieve any such purpose. Its flat-out ban of indecent speech is contrary to the First Amendment." 692 F.Supp., at 1209. Therefore, the court issued a preliminary injunction prohibiting enforcement of § 223(b) with respect to any communication alleged to be "indecent."

* * *

In reaction to that FCC determination, Congress made its first effort explicitly to address "dial-a-porn" when it added a subsection 223(b) to the 1934 Communications Act. The provision, which was the predecessor to the amendment at issue in this case, pertained directly to sexually oriented commercial telephone messages and sought to restrict the access of minors to dial-a-porn. The relevant provision of the Act, Federal Communications Commission Authorization Act of 1983, Pub.L. 98-214, § 8(b), 97 Stat. 1470, made it a crime to use telephone facilities to make "obscene or indecent" interstate telephone communications "for commercial purposes to any person under eighteen years of age or to any other person without that person's consent." 47 U.S.C. § 223(b)(1)(A) (1982 ed., Supp. V). The statute criminalized commercial transmission of sexually oriented communications to minors and required the FCC to promulgate regulations laying out the means by which dial-a-porn sponsors could screen out underaged callers. § 223(b)(2). The enactment provided that it would be a defense to prosecution that the defendant restricted access to adults only, in accordance with procedures established by the FCC. The statute did not criminalize ***121** sexually oriented messages to adults, whether the messages were obscene or indecent.

****2834** The FCC initially promulgated regulations that would have established a defense to message providers operating only between the hours of 9 p.m. and 8 a.m. eastern time (time channeling) and to providers requiring payment by credit card (screening) before transmission of the dial-a-porn message. Restrictions on Obscene or Indecent Telephone Message Services, 47 CFR § 64.201 (1988). In Carlin Communications, Inc. v. FCC, 749 F.2d 113 (1984) (Carlin I), the Court of Appeals for the Second Circuit set aside the time channeling regulations and remanded to the FCC to examine other alternatives, concluding that the operating hours requirement was "both overinclusive and underinclusive" because it denied "access to adults between certain

hours, but not to youths who can easily pick up a private or public telephone and call dial-a-porn during the remaining hours." Id., at 121. The Court of Appeals did not reach the constitutionality of the underlying legislation.

In 1985, the FCC promulgated new regulations which continued to permit credit card payment as a defense to prosecution. Instead of time restrictions, however, the Commission added a defense based on use of access codes (user identification codes). Thus, it would be a defense to prosecution under § 223(b) if the defendant, before transmission of the message, restricted customer access by requiring either payment by credit card or authorization by access or identification code. 50 Fed.Reg. 42699, 42705 (1985). The regulations required each dial-a-porn vendor to develop an identification code data base and implementation scheme. Callers would be required to provide an access number for identification (or a credit card) before receiving the message. The access code would be received through the mail after the message provider reviewed the application and concluded through a written age ascertainment procedure that the applicant ***122** was at least 18 years of age. The FCC rejected a proposal for "exchange blocking" which would block or screen telephone numbers at the customer's premises or at the telephone company offices. In Carlin Communications, Inc. v. FCC, 787 F.2d 846 (C.A.2 1986) (Carlin II), the Court of Appeals set aside the new regulations because of the FCC's failure adequately to consider customer premises blocking. Again, the constitutionality of the underlying legislation was not addressed.

The FCC then promulgated a third set of regulations, which again rejected customer premises blocking but added to the prior defenses of credit card payment and access code use a third defense: message scrambling. 52 Fed.Reg. 17760 (1987). Under this system, providers would scramble the message, which would then be unintelligible without the use of a descrambler, the sale of which would be limited to adults. On January 15, 1988, in Carlin Communications, Inc. v. FCC, 837 F.2d 546 (Carlin III), cert. denied, 488 U.S. 924, 109 S.Ct. 305, 102 L.Ed.2d 324 (1988), the Court of Appeals for the Second Circuit held that the new regulations, which made access codes, along with credit card payments and scrambled messages, defenses to prosecution under § 223(b) for dial-a-porn providers, were supported by the evidence, had been properly arrived at, and were a "feasible and effective way to serve" the "compelling state interest" in protecting minors, 837 F.2d, at 555; but the Court directed the FCC to reopen proceedings if a less restrictive technology became available. The Court of Appeals, however, this time reaching the constitutionality of the statute, invalidated § 223(b) insofar as it sought to apply to nonobscene speech. Id., at 560, 561.

Thereafter, in April 1988, Congress amended § 223(b) of the Communications Act to prohibit indecent as well as obscene interstate commercial telephone communications directed to any person regardless of age. The amended statute, which took effect on July 1, 1988, also eliminated the requirement that the FCC promulgate regulations for restricting ***123** access to minors since a total ban was imposed on dial-a-****2835** porn, making it illegal for adults, as well as children, to have access to the sexually explicit messages, Pub.L. 100-297, 102 Stat. 424. [FN4] It was this version of the statute that was in effect when Sable commenced this action. [FN5]

> FN4. "(b)(1) Whoever knowingly--
> "(A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes

(directly or by recording device) any obscene or indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or

"(B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A),

"shall be fined not more than $50,000 or imprisoned not more than six months, or both."

FN5. After Sable and the federal parties filed their jurisdictional statements with this Court, but before we noted probable jurisdiction, § 223(b) was again revised by Congress in § 7524 of the Child Protection and Obscenity Enforcement Act of 1988, § 7524, 102 Stat. 4502, which was enacted as Title VII, Subtitle N, of the Anti-Drug Abuse Act of 1988, Pub. L. 100-690 (codified at 47 U.S.C. § 223(b) (1988 ed.)). This most recent legislation, signed into law on November 18, 1988, places the prohibition against obscene commercial telephone messages in a subsection separate from that containing the prohibition against indecent messages. In addition, under the new law, the prohibition against obscene or indecent telephone messages is enforceable only through criminal penalties and nolo ger through administrative proceedings by the FCC.

Section 223(b) of the Communications Act of 1934, as amended by § 7524 of the Child Protection and Obscenity Enforcement Act of 1988, states in pertinent part:

"(b)(1) Whoever knowingly--

"(A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or

"(B) permits any telephone facility under such person's control to be used for an activity prohibited by clause (i),

"shall be fined in accordance with title 18 of the United States Code, or imprisoned not more than two years, or both.

"(2) Whoever knowingly--

"(A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or

"(B) permits any telephone facility under such person's control to be used for an activity prohibited by clause (i),

"shall be fined not more than $50,000 or imprisoned not more than six months, or both." 102 Stat. 4502.

Since the substantive prohibitions under this amendment remain the same, this case is not moot.

***124** III

[1][2] In the ruling at issue in No. 88-515, the District Court upheld § 223(b)'s prohibition of obscene telephone messages as constitutional. We agree with that judgment. In contrast to the prohibition on indecent communications, there is no constitutional barrier to the ban on obscene dial- a-porn recordings. We have repeatedly held that the protection of the First Amendment does not extend to obscene speech* * *

In its facial challenge to the statute, Sable argues that the legislation creates an impermissible national standard of obscenity, and that it places message senders in a "double bind" by compelling them to tailor all their messages to the least tolerant community. [FN6]

> FN6. In its jurisdictional statement, Sable also argued that the prohibition on

obscene calls is not severable from the ban on indecent messages. This last claim was not renewed in Sable's brief on the merits, presumably as a result of the subsequent modification of the statute in which Congress specifically placed the ban on obscene commercial telephone messages in a subsection separate from the prohibition against indecent messages. Thus, the severability question is no longer before us.

We do not read § 223(b) as contravening the "contemporary community standards" requirement of Miller v. California, 413 ****2836** U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). Section 223(b) no more establishes a "national standard" of obscenity than do federal statutes ***125** prohibiting the mailing of obscene materials,* * * In United States v. Reidel, 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813 (1971), we said that Congress could prohibit the use of the mails for commercial distribution of materials properly classifiable as obscene, even though those materials were being distributed to willing adults who stated that they were adults. Similarly, we hold today that there is no constitutional stricture against Congress' prohibiting the interstate transmission of obscene commercial telephone recordings.

We stated in United States v. 12 200-ft. Reels of Film, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973), that the Miller standards, including the "contemporary community standards" formulation, apply to federal legislation. As we have said before, the fact that "distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity." Hamling v. United States, supra, 418 U.S., at 106, 94 S.Ct., at 2902.

Furthermore, Sable is free to tailor its messages, on a selective basis, if it so chooses, to the communities it chooses to serve. While Sable may be forced to incur some costs in developing and implementing a system for screening the locale of incoming calls, there is no constitutional impediment to enacting a law which may impose such costs on a medium electing to provide these messages. Whether Sable chooses to hire operators to determine the source of the calls or engages with the telephone company to arrange for the screening and blocking of out-of-area calls or finds another means for providing messages compatible with community

standards is a decision for the message provider to make. There is no constitutional barrier under Miller to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in ***126** others. If Sable's audience is comprised of different communities with different local standards, Sable ultimately bears the burden of complying with the prohibition on obscene messages.

IV

In No. 88-525, the District Court concluded that while the Government has a legitimate interest in protecting children from exposure to indecent dial-a-porn messages, § 223(b) was not sufficiently narrowly drawn to serve that purpose and thus violated the First Amendment. We agree.

[3][4][5][6] Sexual expression which is indecent but not obscene is protected by the First Amendment; and the federal parties do not submit that the sale of such materials to adults could be criminalized solely because they are indecent. The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest. We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards* * * The Government may serve this legitimate interest, but to withstand constitutional scrutiny, "it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms* * *It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends.

* * *

In attempting to justify the complete ban and criminalization of the indecent commercial telephone communications with adults as well as minors, the federal parties rely on FCC v. Pacifica Foundation, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978),* * *.

* * *

The Pacifica opinion also relied on the "unique" attributes of broadcasting, noting that broadcasting is "uniquely pervasive," can intrude on the privacy of the home without prior warning as to program content, and is "uniquely accessible to children, even those too young to read." Id., at 748-749, 98 S.Ct., at 3039-3040. The private commercial telephone communications at issue here are substantially different from the public radio broadcast at issue in Pacifica. In contrast to public displays, unsolicited mailings and other means of expression which the recipient has no meaningful opportunity to avoid, the dial-it ***128** medium requires the listener to take affirmative steps to receive the communication. There is no "captive audience" problem here; callers will generally not be unwilling listeners. The context of dial-in services, where a caller seeks and is willing to pay for the communication, is manifestly different from a situation in which a listener does not want the received message. Placing a telephone call is not the same as turning on a radio

and being taken by surprise by an indecent message* * *

* * *

****2838** The federal parties nevertheless argue that the total ban on indecent commercial telephone communications is justified because nothing less could prevent children from gaining access to such messages. We find the argument quite unpersuasive. The FCC, after lengthy proceedings, determined that its credit card, access code, and scrambling rules were a satisfactory solution to the problem of keeping indecent dial-a-porn messages out of the reach of minors. The Court of Appeals, after careful consideration, agreed that these rules represented a "feasible and effective" way to serve the Government's compelling interest in protecting children. 837 F.2d, at 555.

* * *

* * * Under our precedents, § 223(b), in its present form, has the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear. It is another case of "burn[ing] the house to roast the pig." Butler v. Michigan, 352 U.S., at 383, 77 S.Ct., at 525.

Because the statute's denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages, we hold that the ban does not survive constitutional scrutiny.

Accordingly, we affirm the judgment of the District Court in Nos. 88-515 and 88-525.

It is so ordered.

114 S.Ct. 2445
512 U.S. 622, 129 L.Ed.2d 497, 62 USLW 4647, 22 Media L. Rep. 1865
(Cite as: 114 S.Ct. 2445)

TURNER BROADCASTING SYSTEM, INC., et al., Appellants
v.
FEDERAL COMMUNICATIONS COMMISSION et al.

No. 93-44.

Supreme Court of the United States

Argued Jan. 12, 1994.

Decided June 27, 1994.
Rehearing Denied Aug. 24, 1994.

See U.S. , 115 S.Ct. 30.

KENNEDY, J., announced the judgment of the Court and delivered the opinion for a unanimous Court with respect to Part I, the opinion of the Court with respect to Parts II-A and II-B, in which REHNQUIST, C.J., and BLACKMUN, O'CONNOR, SCALIA, SOUTER, THOMAS, and GINSBURG, JJ., joined, the opinion of the Court with respect to Parts II-C, II-D, and III-A, in which REHNQUIST, C.J., and ***2451** BLACKMUN, STEVENS, and SOUTER, JJ., joined, and an opinion with respect to Part III-B, in which REHNQUIST, C.J., and BLACKMUN and SOUTER, JJ., joined. BLACKMUN, J., filed a concurring opinion. STEVENS, J., filed an opinion concurring in part and concurring in the judgment. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, in which SCALIA and GINSBURG, JJ., joined, and in Parts I and III of which THOMAS, J., joined. GINSBURG, J., filed an opinion concurring in part and dissenting in part.

Justice KENNEDY announced the judgment of the Court and delivered the opinion of the Court, except as to Part III-B.

Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 require cable television systems to devote a portion of their channels to the transmission of local broadcast television stations. This case presents the question whether these provisions abridge the freedom of speech or of the press, in violation of the First Amendment.

The United States District Court for the District of Columbia granted summary judgment for the United States, holding that the challenged provisions are consistent with the First Amendment. Because issues of material fact remain unresolved in the record as developed thus far, we vacate the District Court's judgment and remand the case for further proceedings.

I
A

The role of cable television in the Nation's communications system has undergone dramatic change over the past 45 years. Given the pace of technological advancement and the increasing convergence between cable and other electronic media, the cable industry today

stands at the center of an ongoing telecommunications revolution with still undefined potential to affect the way we communicate and develop our intellectual resources.

* * *

Broadcast and cable television are distinguished by the different technologies through which they reach viewers. Broadcast stations radiate electromagnetic signals from a central transmitting antenna. These signals can be captured, in turn, by any television set within the antenna's range. Cable systems, by contrast, rely upon a physical, point-to-point connection between a transmission facility and the television sets of individual subscribers. Cable systems make this connection much like telephone companies, using cable or optical fibers strung aboveground or buried in ducts to reach the homes or businesses ***2452** of subscribers. The construction of this physical infrastructure entails the use of public rights-of-way and easements and often results in the disruption of traffic on streets and other public property. As a result, the cable medium may depend for its very existence upon express permission from local governing authorities. See generally Community Communications Co. v. Boulder, 660 F.2d 1370, 1377-1378 (CA10 1981).

* * *

B

On October 5, 1992, Congress overrode a Presidential veto to enact the Cable Television Consumer Protection and Competition Act of 1992, Pub.L. 102-385, 106 Stat. 1460 (1992 Cable Act or Act). Among other things, the Act subjects the cable industry to ***2453** rate regulation by the Federal Communications Commission (FCC) and by municipal franchising authorities; prohibits municipalities from awarding exclusive franchises to cable operators; imposes various restrictions on cable programmers that are affiliated with cable operators; and directs the FCC to develop and promulgate regulations imposing minimum technical standards for cable operators. At issue in this case is the constitutionality of the so-called must-carry provisions, contained in §§ 4 and 5 of the Act, which require cable operators to carry the signals of a specified number of local broadcast television stations.

* * *

C

Congress enacted the 1992 Cable Act after conducting three years of hearings on the structure and operation of the cable television industry. See S.Rep. No. 102-92, pp. 3-4 (1991) (describing hearings); H.R.Rep. No. 102-628, p. 74 (1992) U.S.Code Cong. & Admin.News 1992, pp. 1133, 1135, 1136 (same). The conclusions Congress drew from its factfinding process are recited in the text of the Act itself. See §§ 2(a)(1)-(21). In brief, Congress found that the physical characteristics of cable transmission, compounded by the increasing concentration of economic power in the cable industry, are endangering the ability of over-the-air broadcast television stations to compete for a viewing audience and thus for necessary operating revenues. Congress determined that regulation of the market for video programming was

necessary to correct this competitive imbalance.

In particular, Congress found that over 60 percent of the households with television sets subscribe to cable, § 2(a)(3), and for these households cable has replaced over-the-air broadcast television as the primary provider of video programming. § 2(a)(17)* * *

According to Congress, this market position gives cable operators the power and the incentive to harm broadcast competitors. The power derives from the cable operator's ability, as owner of the transmission facility, to "terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position." § 2(a)(15)* * *

* * *

In light of these technological and economic conditions, Congress concluded that unless cable operators are required to carry local broadcast stations, "[t]here is a substantial likelihood that ... additional local broadcast signals will be deleted, repositioned, or not carried," § 2(a)(15); the "marked shift in market share" from broadcast to cable will continue to erode the advertising revenue base which sustains free local broadcast television, §§ 2(a)(13)-(14); and that, as a consequence, "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized." § 2(a)(16).

* * *

A

[2] We address first the Government's contention that regulation of cable television should be analyzed under the same First Amendment standard that applies to regulation of broadcast television. It is true that our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media* * * But the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation.

The justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium. ... As a general matter, there are more would-be broadcasters than frequencies available in the electromagnetic spectrum. And if two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another's signals, so that neither could be heard at all. Id., 319 U.S., at 212, 63 S.Ct., at 1007-1008. The scarcity of broadcast frequencies thus required the establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters* * * In addition, the inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees. Red Lion, 395 U.S., at 390, 89 S.Ct., at 1806-1807. As we said in Red Lion, "[w]here there are substantially more individuals who want to broadcast than there

are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." Id., 395 U.S., at 388, 89 S.Ct., at 1806; see also Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 101, 93 S.Ct. 2080, 2085-2086, 36 L.Ed.2d 772 (1973).

Although courts and commentators have criticized the scarcity rationale since its inception, [FN5] we have declined to question its continuing validity as support for our broadcast jurisprudence, see FCC v. League of Women Voters, supra, 468 U.S., at 376, n. 11, 104 S.Ct., at 3115 n. 11, and see no reason to do so here. The broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium. Indeed, given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium. Nor is there any danger of physical interference between two cable speakers attempting to share the same channel. In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in Red Lion and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation. ...

B

At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal* * * Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. These restrictions "rais[e] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. ----, ----, 112 S.Ct. 501, 508, 116 L.Ed.2d 476 (1991) (slip op., at 9).

For these reasons, the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals. ... ***2459** Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content* * * Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny* * * In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny,..because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.

[7] Deciding whether a particular regulation is content-based or content- neutral is not always a simple task. We have said that the "principal inquiry in determining content-neutrality ... is whether the government has adopted a regulation of

speech because of [agreement or] disagreement with the message it conveys." Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S.Ct. 2746, 2754, 105 L.Ed.2d 661 (1989)* * *The purpose, or justification, of a regulation will often be evident on its face* * * But while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content-based, it is not necessary to such a showing in all cases* * *Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content* * *

As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based. ... By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral* * *

* * *

3

[A]ppellants maintain that strict scrutiny applies because the must-carry provisions single out certain members of the press--here, cable operators--for disfavored treatment* * *

Regulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns. Minneapolis Star, for example, considered a use tax imposed on the paper and ink used in the production of newspapers. We subjected the tax to strict scrutiny for two reasons: first, because it applied only to the press; and, second, because in practical application it fell upon only a small number of newspapers* * *

* * *

* * *But such heightened scrutiny is unwarranted when the differential treatment is "justified by some special characteristic of" the particular medium being regulated. Ibid.

The must-carry provisions, as we have explained above, are justified by special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television. Appellants do not argue, nor does it appear, that other media--in particular, media that transmit video programming such as MMDS and SMATV--are subject to bottleneck monopoly control, or pose a demonstrable threat to the survival of broadcast television. It should come as no surprise, then, that Congress decided to impose the must-carry obligations upon cable operators only.

In addition, the must-carry provisions are not structured in a manner that carries the inherent risk of undermining First Amendment interests. The regulations are broad-based, applying to almost all cable systems in the country, rather than just a select few* * *

III

A

[15] In sum, the must-carry provisions do not pose such inherent dangers to free expression, or present such potential for censorship or manipulation, as to justify application of the most exacting level of First

Amendment scrutiny. We agree with the District Court that the appropriate standard by which to evaluate the constitutionality of must-carry is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech. See Ward v. Rock Against Racism, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989); United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

[16] Under O'Brien, a content-neutral regulation will be sustained if

> "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Id., at 377, 88 S.Ct., at 1679.

To satisfy this standard, a regulation need not be the least speech- restrictive means of advancing the Government's interests. "Rather, the requirement of narrow tailoring is satisfied 'so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' " Ward, supra, 491 U.S., at 799, 109 S.Ct., at 2758 (quoting United States v. Albertini, 472 U.S. 675, 689, 105 S.Ct. 2897, 2906, 86 L.Ed.2d 536 (1985)). Narrow tailoring in this context requires, in other words, that the means chosen do not "burden substantially more speech than is necessary to further the government's legitimate interests." Ward, supra, 491 U.S., at 799, 109 S.Ct., at 2758.

[17] Congress declared that the must-carry provisions serve three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming. S.Rep. No. 102-92, p. 58, (1991); H.R.Rep. No. 102-6 28, 63 (1992), U.S.Code Cong. & Admin.News 1992, p. 1191; 1992 Cable Act, §§ 2(a)(8), (9), and (10). None of these interests is related to the "suppression of free expression," O'Brien, 391 U.S., at 377, 88 S.Ct., at 1679, or to the content of any speakers' messages. And viewed in the abstract, we have no difficulty concluding that each of them is an important governmental interest. Ibid.

* * *

Justice O'CONNOR, with whom Justice SCALIA and Justice GINSBURG join, and with whom Justice THOMAS joins as to Parts I and III, concurring in part and dissenting in part.

There are only so many channels that any cable system can carry. If there are fewer channels than programmers who want to use the system, some programmers will have to be dropped. In the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992, Pub.L. 102-385, 106 Stat. 1460, Congress made a choice: By reserving a little over one- third of the channels on a cable system for broadcasters, it ensured that in most cases it will be a cable programmer who is dropped and a broadcaster who is retained. The question presented in this case is whether this choice comports with the commands of the First Amendment.

I
A

The 1992 Cable Act implicates the First Amendment rights of two classes of speakers. First, it tells cable operators which programmers they must carry, and keeps cable operators from carrying others that they might prefer. Though cable operators do not actually originate most of the programming they show, the Court correctly holds that they are, for First Amendment purposes, speakers. Ante, at 2456. Selecting ***2476** which speech to retransmit is, as we know from the example of publishing houses, movie theaters, bookstores, and Reader's Digest, no less communication than is creating the speech in the first place.

Second, the Act deprives a certain class of video programmers--those who operate cable channels rather than broadcast stations--of access to over one- third of an entire medium. Cable programmers may compete only for those channels that are not set aside by the must-carry provisions. A cable programmer that might otherwise have been carried may well be denied access in favor of a broadcaster that is less appealing to the viewers but is favored by the must-carry rules. It is as if the government ordered all movie theaters to reserve at least one-third of their screening for films made by American production companies, or required all bookstores to devote one-third of their shelf space to nonprofit publishers. As the Court explains in Parts I, II-A and II-B of its opinion, which I join, cable programmers and operators stand in the same position under the First Amendment as do the more traditional media.

Under the First Amendment, it is normally not within the government's power to decide who may speak and who may not, at least on private property or in traditional public fora. The government does have the power to impose content- neutral time, place, and manner restrictions, but this is in large part precisely because such restrictions apply to all speakers. Laws that treat all speakers equally are relatively poor tools for controlling public debate, and their very generality creates a substantial political check that prevents them from being unduly burdensome. Laws that single out particular speakers are substantially more dangerous, even when they do not draw explicit content distinctions. See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 584, 591-592, 103 S.Ct. 1365, 1371, 1375, 75 L.Ed.2d 295 (1983); see also Leathers v. Medlock, 499 U.S. 439, 447, 111 S.Ct. 1438, 1443-1444, 113 L.Ed.2d 494 (1991).

I agree with the Court that some speaker-based restrictions--those genuinely justified without reference to content--need not be subject to strict scrutiny. But looking at the statute at issue, I cannot avoid the conclusion that its preference for broadcasters over cable programmers is justified with reference to content. The findings, enacted by Congress as § 2 of the Act, and which I must assume state the justifications for the law, make this clear. "There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media." § 2(a)(6). "[P]ublic television provides educational and informational programming to the Nation's citizens, thereby advancing the Government's compelling interest in educating its citizens." § 2(a)(8)(A). "A

primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation." § 2(a)(10). "Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate." § 2(a)(11).

Similar justifications are reflected in the operative provisions of the Act. In determining whether a broadcast station should be eligible for must-carry in a particular market, the FCC must "afford particular attention to the value of localism by taking into account such factors as ... whether any other [eligible station] provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community." § 4, 47 U.S.C. § 534(h)(1)(C)(ii) (1988 ed., Supp. IV). In determining whether a low-power station is eligible for must-carry, the FCC must ask whether the station "would address local news and informational needs which are not being adequately served by full power television broadcast stations." § 4, 47 U.S.C. § 534(h)(2)(B) (1988 ed., Supp. IV). Moreover, the Act distinguishes between commercial television stations and ***2477** noncommercial educational television stations, giving special benefits to the latter. Compare § 4 with § 5. These provisions may all be technically severable from the statute, but they are still strong evidence of the statute's justifications.

Preferences for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content. They may not reflect hostility to particular points of view, or a desire to suppress certain subjects because they are controversial or offensive. They may be quite benignly motivated. But benign motivation, we have consistently held, is not enough to avoid the need for strict scrutiny of content-based justifications. Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. ----, ----, 112 S.Ct. 501, 508-509, 116 L.Ed.2d 476 (1991) (slip op., at 10-11); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 228, 107 S.Ct. 1722, 1727, 95 L.Ed.2d 209 (1987). The First Amendment does more than just bar government from intentionally suppressing speech of which it disapproves. It also generally prohibits the government from excepting certain kinds of speech from regulation because it thinks the speech is especially valuable. See, e.g., id., at 231-232, 107 S.Ct., at 1728-1729; Regan v. Time, Inc., 468 U.S. 641, 648-649, 104 S.Ct. 3262, 3266-3267, 82 L.Ed.2d 487 (1984); Metromedia, Inc. v. San Diego, 453 U.S. 490, 514-515, 101 S.Ct. 2882, 2896, 69 L.Ed.2d 800 (1981) (plurality); Carey v. Brown, 447 U.S. 455, 466-468, 100 S.Ct. 2286, 2292-2294, 65 L.Ed.2d 263 (1980); Police Department of Chicago v. Mosley, 408 U.S. 92, 96, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972); Cox v. Louisiana, 379 U.S. 536, 581, 85 S.Ct. 453, 470, 13 L.Ed.2d 471 (1965) (Black, J., concurring); see also R.A.V. v. St. Paul, 505 U.S. ----, ----, 112 S.Ct. 2538, 2545, 120 L.Ed.2d 305 (1992) (slip op., at 8) ("The government may not regulate [speech] based on hostility--or favoritism--towards the underlying message expressed").

This is why the Court is mistaken in concluding that the interest in diversity--in "access to a multiplicity" of "diverse and

antagonistic sources," ante, at 2470 (internal quotation marks omitted)--is content neutral. Indeed, the interest is not "related to the suppression of free expression," ante, at 2469 (emphasis added and internal quotation marks omitted), but that is not enough for content neutrality. The interest in giving a tax break to religious, sports, or professional magazines, see Arkansas Writers' Project, supra, is not related to the suppression of speech; the interest in giving labor picketers an exemption from a general picketing ban, see Carey and Mosley, supra, is not related to the suppression of speech. But they are both related to the content of speech--to its communicative impact. The interest in ensuring access to a multiplicity of diverse and antagonistic sources of information, no matter how praiseworthy, is directly tied to the content of what the speakers will likely say.

* * *

Symposium: Emerging Media Technology and the First Amendment

Cass R. Sunstein, The First Amendment in Cyberspace, 104 YLJ 1757 **(1995)**

Cass R. Sunstein [FN#]

I go on this great republican principle, that the people will have virtue and intelligence to select men of virtue and wisdom. Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks, no form of government, can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea. If there be sufficient virtue and intelligence in the community, it will be exercised in the selection of these men; so that we do not depend on their virtue, or put confidence in our rulers, but in the people who are to choose them. [FN1]

[T]he right of electing the members of the Government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively. [FN2]

> "[T]elevision is just another appliance. It's a toaster with pictures." [FN3]

I. THE FUTURE

Imagine you had a device that combined a telephone, a TV, a camcorder, and a personal computer. No matter where you went or what time it was, your child could see you and talk to you, you could watch a replay of your team's last game, you could browse the latest additions to the library, or you could find the best prices in town on groceries, furniture, clothes-whatever you needed.

Imagine further the dramatic changes in your life if:

. The best schools, teachers, and courses were available to all students, without regard to geography, distance, resources, or disability;

. The vast resources of art, literature, and science were available everywhere, not just in large institutions or big-city libraries and museums;

. Services that improve America's health care system and respond to other important social needs were available on-line, without waiting in line, when and where you needed them;

. You could live in many places without foregoing opportunities for useful and fulfilling employment, by "telecommuting" to your office through an electronic highway ...; * * * . You could see the latest movies, play the hottest video games, or bank and shop from the comfort of your home whenever you chose;

. You could obtain government information directly or through local organizations like libraries, apply for and receive government benefits electronically, and get in touch with government officials easily * * * [FN4]

Thus wrote the Department of Commerce on September 15, 1993, when the federal government announced an "Agenda for Action" with respect to "the National Information Infrastructure." [FN5] The statement may seem weirdly futuristic, but the nation is not at all far from what it prophesies, and in ways that have already altered social and legal relations and categories.

Consider the extraordinarily rapid development of the institution of electronic mail, which lies somewhere between ordinary conversation ("voice mail") and ordinary written communication ("snail mail" or "hard mail"), or which perhaps should be described as something else altogether. E-mail has its own characteristic norms and constraints. Those norms and constraints are an important part of the informal, unwritten law of cyberspace. The norms and constraints are a form of customary law, determining how and when people ***1759** communicate with one another. [FN6] Perhaps there will be a formal codification movement before too long; certainly the norms and constraints are codified in the sense that, without government assistance, they are easily accessible by people who want to know what they are. [FN7]

The Commerce Department's claims about location have started to come true. What it meant to "live in California" became altogether different, after the invention of the airplane, from what it meant in (say) 1910. With the advent of new communications technologies, the meaning of the statement, "I live in California" has changed at least as dramatically. If people can have instant access to all libraries and all movies, and if they can communicate with a wide range of public officials, pharmacists, educators, doctors, and lawyers by touching a few buttons, they may as well (for most purposes) live anywhere.

In any case, the existence of technological change promises to test the system of free expression in dramatic ways. What should be expected with respect to the First Amendment?

II. THE PRESENT: MARKETS AND MADISON

There are two free speech traditions in the United States, not simply one. [FN8] There have been two models of the First Amendment, corresponding to the two free speech traditions. The first emphasizes well-functioning speech markets. It can be traced to Justice Holmes' great Abrams dissent, [FN9] where the notion of a "market in ideas" received its preeminent exposition. The market model emerges as well from Miami Herald Publishing Co. v. Tornillo, [FN10] invalidating a "right of reply" law as applied to candidates for elected office. It finds its most recent defining statement not in judicial decisions, but in an FCC opinion rejecting the fairness doctrine. [FN11]

The second tradition, and the second model, focuses on public deliberation. The second model can be traced from its origins in the work of James Madison, [FN12] with his attack on the idea of seditious libel, to Justice Louis Brandeis, with his suggestion that "the greatest menace to

freedom is an inert ***1760** people," [FN13] through the work of Alexander Meiklejohn, who associated the free speech principle not with laissez-faire economics, but with ideals of democratic deliberation. [FN14] The Madisonian tradition culminated in New York Times v. Sullivan [FN15] and the reaffirmation of the fairness doctrine in the Red Lion case, [FN16] with the Supreme Court's suggestion that governmental efforts to encourage diverse views and attention to public issues are compatible with the free speech principle-even if they result in regulatory controls on the owners of speech sources.

Under the marketplace metaphor, the First Amendment requires-at least as a presumption-a free speech market, or in other words a system of unrestricted economic markets in speech. Government must respect the forces of supply and demand. At the very least, it may not regulate the content of speech so as to push the speech market in its preferred directions. Certainly it must be neutral with respect to viewpoint. A key point for marketplace advocates is that great distrust of government is especially appropriate when speech is at issue. Illicit motives are far too likely to underlie regulatory initiatives. For the marketplace model, Tornillo [FN17] is perhaps the central case. The FCC has at times come close to endorsing the market model, above all in its decision abandoning the fairness doctrine. [FN18] When the FCC did this, it referred to the operation of the forces of supply and demand, and suggested that those forces would produce an optimal mix of entertainment options. [FN19] Hence former FCC Chair Mark Fowler described television as "just another appliance. It's a toaster with pictures." [FN20] Undoubtedly, the rise of new communications technologies will be taken to fortify this claim. [FN21]

Those who endorse the marketplace model do not claim that government may not do anything at all. Of course government may set up the basic rules of property and contract; it is these rules that make markets feasible. Without such rules, markets cannot exist at all. [FN22] Government is also permitted to ***1761** protect against market failures, especially by preventing monopolies and monopolistic practices. Structural regulation is acceptable so long as it is a content-neutral attempt to ensure competition. It is therefore important to note that advocates of marketplaces and democracy might work together in seeking to curtail monopoly. Of course, the prevention of monopoly is a precondition for well-functioning information markets.

Government has a final authority, though this authority does not easily fall within the marketplace model itself. Most people who accept the marketplace model acknowledge that government is permitted to regulate the various well- defined categories of controllable speech, such as obscenity, false or misleading commercial speech, and libel. [FN23] This acknowledgment will have large and not yet explored consequences for government controls on new information technologies. Perhaps the government's power to control obscene, threatening, or libelous speech will justify special rules for cyberspace. [FN24] But with these qualifications, the commitment to free economic markets is the basic constitutional creed.

Many people think that there is now nothing distinctive about the electronic media or about modern communications technologies that justifies an additional governmental role. [FN25] If such a role was ever justified, they would argue, it was because of problems of scarcity. When only three television networks exhausted the available options, a market failure may have called

for regulation designed to ensure that significant numbers of people were not left without their preferred programming. [FN26] But this is no longer a problem. With so dramatic a proliferation of stations, most people can obtain the programming they want, or will be able to soon. [FN27] With cyberspace, people will be able to make or to participate in their own preferred programming in their own preferred "locations" on the Internet. With new technologies, perhaps there are no real problems calling for governmental controls, except for those designed to establish the basic framework.

***1762** The second model, receiving its most sustained attention in the writings of Alexander Meiklejohn, [FN28] emphasizes that our constitutional system is one of deliberative democracy. This system prizes both political (not economic) equality and a shared civic culture. It seeks to promote, as a central democratic goal, reflective and deliberative debate about possible courses of action. The Madisonian model sees the right of free expression as a key part of the system of public deliberation.

On this view, even a well-functioning information market [FN29] is not immune from government controls. Government is certainly not permitted to regulate speech however it wants; it may not restrict speech on the basis of viewpoint. But it may regulate the electronic media or even cyberspace to promote, in a sufficiently neutral way, a well-functioning democratic regime. It may attempt to promote attention to public issues. It may try to ensure diversity of view. It may promote political speech at the expense of other forms of speech. In particular, educational and public-affairs programming, on the Madisonian view, has a special place.

I cannot attempt in this space to defend fully the proposition that the Madisonian conception is superior to the marketplace alternative as a matter of constitutional law; [FN30] a few brief notes will have to suffice. The argument for the Madisonian conception is partly historical; the American free speech tradition owes much of its origin and shape to a conception of democratic self-government. The marketplace conception is a creation of the twentieth century, not of the eighteenth. As a matter of history, it confuses modern notions of consumer sovereignty in the marketplace with democratic understandings of sovereignty, symbolized by the transfer of sovereignty from the King to "We the People." The American free speech tradition finds its origin in that conception of sovereignty, which, in Madison's view, doomed the Sedition Act on constitutional grounds. [FN31]

But the argument for Madisonianism does not rest only on history; it is partly evaluative as well. We are unlikely to be able to make sense of our considered judgments about free speech problems without insisting that the free speech principle is centrally (though certainly not exclusively) connected with democratic goals, [FN32] and without acknowledging that marketplace thinking is inadequately connected with the point and function of a system of free expression. A well-functioning democracy requires a degree of citizen participation, which requires a degree of information; [FN33] and large disparities ***1763** in political (as opposed to economic) equality are damaging to democratic aspirations. [FN34] To the extent that the Madisonian view prizes education, democratic deliberation, and political equality, it is connected, as the marketplace conception is not, with the highest ideals of American constitutionalism.

Some people think that the distinction between marketplace and Madisonian models is now an anachronism. [FN35] Perhaps the two models conflicted at an earlier stage in history; but in one view, Madison has no place in an era of limitless broadcasting options and cyberspace. Perhaps new technologies now mean that Madisonian goals can best be satisfied in a system of free markets. Now that so many channels, e-mail options, and discussion "places" are available, cannot everyone read or see what they wish? If people want to spend their time on public issues, are there not countless available opportunities? Is this not especially true with the emergence of the Internet? Is it not hopelessly paternalistic, or anachronistic, for government to regulate for Madisonian reasons?

I do not believe that these questions are rhetorical. We know enough to know that even in a period of limitless options, our communications system may fail to promote an educated citizenry and political equality. Madisonian goals may be severely compromised even under technologically extraordinary conditions. There is no logical or a priori connection between a well-functioning system of free expression and limitless broadcasting or Internet options. We could well imagine a science fiction story in which a wide range of options coexisted with little or no high-quality fare for children, with widespread political apathy or ignorance, and with social balkanization in which most people's consumption choices simply reinforced their own prejudices and platitudes, or even worse.

Quite outside of science fiction, it is foreseeable that free markets in communications will be a mixed blessing. They could create a kind of accelerating "race to the bottom," in which many or most people see low-quality programming involving trumped-up scandals or sensationalistic anecdotes calling for little in terms of quality or quantity of attention. It is easily imaginable that well-functioning markets in communications will bring about a situation in which many of those interested in politics merely fortify their own unreflective judgments, and are exposed to little or nothing in the way of competing views. [FN36] It is easily imaginable that the content of the most ***1764** widely viewed programming will be affected by the desires of advertisers, in such a way as to produce shows that represent a bland, watered- down version of conventional morality, and that do not engage serious issues in a serious way for fear of offending some group in the audience. [FN37]

Consider, by way of summary of existing fare, the suggestion that

> TV favors a mentality in which certain things no longer matter particularly: skills like the ability to enjoy a complex argument, for instance, or to perceive nuances, or to keep in mind large amounts of significant information, or to remember today what someone said last month, or to consider strong and carefully argued opinions in defiance of what is conventionally called "balance." Its content lurches between violence of action, emotional hyperbole, and blandness of opinion* * * Commercial TV ... has come to present society as a pagan circus of freaks, pseudo-heroes, and wild morons, struggles on the sand of a Colosseum without walls. It thus helps immeasurably to worsen the defects of American public education and of tabloid news in print. [FN38]

From the standpoint of the present, it is easily imaginable that the television-or the personal computer carrying out communications functions-will indeed become "just another appliance ... a toaster with pictures," and that the educative or aspirational goals of the First Amendment will be lost or even forgotten.

I shall say more about these points below. [FN39] For now it is safe to say that the law of free speech will ultimately have to make some hard choices about the marketplace and democratic models. It is also safe to say that the changing nature of the information market will test the two models in new ways. In fact, the Supreme Court has recently offered an important discussion of the topic, Turner Broadcasting System, Inc. v. FCC. [FN40] Turner is also the most sustained exploration of the relationship between conventional legal categories and the new information technologies. The decision contains a range of lessons for the future.

My principal purpose here is to discuss the role of the First Amendment and Madisonianism in cyberspace-or, more simply, the nature of constitutional constraints on government regulation of electronic broadcasting, especially in the aftermath of Turner. In so doing, I will cover a good deal of ground, and a number of issues of law and policy, in a relatively short space. I do, however, offer three relatively simple goals to help organize the discussion. Most important, I attempt to make a defense of Madisonian ***1765** conceptions of free speech, even in a period in which scarcity is no longer a serious problem. The defense stresses the risks of sensationalism, ignorance, failure of deliberation, and balkanization-risks that are in some ways heightened by new developments. In the process I discuss some of the questions that are likely to arise in the next generation of free speech law.

I have two other goals as well. I attempt to identify an intriguing and new model of the First Amendment and to ask whether that model-the Turner model-is well adapted to the future of the speech market. A relatively detailed and somewhat technical discussion of Turner should prove useful, because the case raises the larger issues in a concrete setting.

I also urge that, for the most part, the emerging technologies do not raise new questions about basic principle but instead produce new areas for applying or perhaps testing old principles. The existing analogies are often very good, and this means that the new law can begin by building fairly comfortably on the old. The principal problem with the old law is not so much that it is poorly adapted for current issues-though in some cases it may be-but that it does not depend on a clear sense of the purpose or point of the system of free expression. In building law for an age of cyberspace, government officials- within the judiciary and elsewhere-should be particularly careful not to treat doctrinal categories as ends in themselves. Much less should they act as if the First Amendment is a purposeless abstraction unconnected to ascertainable social goals. Instead they should keep in mind that the free speech principle has a point, or a set of points. Among its points is the commitment to democratic self-government.

III. TURNER: A NEW DEPARTURE?

The Turner case is by far the most important judicial discussion of new media technologies, and it has a range of implications for the future. I therefore begin with that case, turning to broader issues of law and policy in Part V. It is important, however, to say that Turner involved two highly distinctive problems: (a) the peculiar "bottleneck" produced by the current system of cable television, in which cable owners can control access to programming; and (b) the possible risk to free television programming created by the rise of pay television. These problems turned out to be central to the outcome in the case. For this reason, Turner is quite different from imaginable future cases involving new information technologies, including the Internet, which includes no bottleneck problem. Significantly, the Internet is owned by no one and controlled by no organization. But at least potentially, the principles in Turner will extend quite broadly. This is especially true insofar as the Court adopted ingredients of an entirely new model of the First Amendment and insofar as the Court set out principles governing content ***1766** discrimination, viewer access, speaker access, and regulation of owners of speech sources.

A. The Background

In the last decade, it has become clear that cable television will be in potential competition with free broadcasting. In 1992, motivated in large part by concerns about this form of competition, Congress enacted the Cable Television Consumer Protection and Competition Act (the Act). [FN41] The Act contains a range of provisions designed to protect broadcasting and local producers, and also at least nominally designed to protect certain consumers from practices by the cable industry. The relevant provisions include rate regulations for cable operators, a prohibition on exclusive franchise agreements between cable operators and municipalities, and restrictions on affiliations between cable programmers and cable operators. [FN42]

A major part of the Act was motivated by the fear that cable television's success could damage broadcast television. [FN43] If cable flourishes, perhaps broadcasters will fail? The scenario seems at least plausible in light of important differences in relevant technologies. Broadcast television comes, of course, from transmitting antennae. It is available for free, though in its current form, it cannot provide more than a few stations. By contrast, cable systems make use of a physical connection between television sets and a transmission facility, and through this route cable operators can provide a large number of stations. Cable operators are of course in a position to decide which stations, and which station owners, will be available on cable television; cable operators could thus refuse to carry local broadcasters. To be sure, cable operators must respond to forces of supply and demand, and perhaps they would do poorly if they failed to carry local broadcasters. But because they have "bottleneck control" over the stations that they will carry, they are in one sense monopolists, or at least so Congress appears to have thought.

For purposes of policymaking, an important consideration is that about forty percent of Americans lack a cable connection, and must therefore rely on broadcast stations. [FN44] (This is a point of general importance in light of the possibility that access to communications technology will in the future be unequally distributed.) In the Act, the potential conflict between cable and broadcast television led Congress to set out two crucial, hotly disputed provisions.

Both provisions required cable operators to carry the signals of ***1767** local broadcast television stations. These "must-carry" rules were the focus of the Turner case.

The first provision, section 4, imposes must-carry rules for "local commercial television stations." [FN45] Under the Act, cable systems with more than twelve active channels and more than three hundred available channels must set aside as many as one-third of their channels for commercial broadcast stations requesting carriage. [FN46] These stations are defined to include all full-power television broadcasters except those that qualify as "noncommercial educational" stations. [FN47]

Section 5 adds a different requirement. [FN48] It governs "noncommercial educational television stations," defined to include (a) stations that are owned and operated by a municipality and that transmit "predominantly noncommercial programs for educational purposes" [FN49] or (b) stations that are licensed by the FCC as such stations and that are eligible to receive grants from the Corporation for Public Broadcasting. [FN50] Section 5 imposes separate must-carry rules on noncommercial educational stations. A cable system with more than thirty-six channels must carry each local public broadcast station requesting carriage; [FN51] a station having between thirteen and thirty-six must carry between one and three; [FN52] and a station with twelve or fewer channels must carry at least one. [FN53]

What was the purpose of the must-carry rules? This is a complex matter. A skeptic, or perhaps a realist, might well say that the rules were simply a product of the political power of the broadcasting industry. Perhaps the broadcasting industry was trying to protect its economic interests at the expense of cable. This is a quite reasonable suggestion, for it is unlikely that market arrangements would lead to a situation in which significant numbers of Americans are entirely without access to television broadcasting. The scenario that Congress apparently feared-a victory of cable television over the broadcasting industry, with the result that forty percent of Americans would lack television at all-seems wildly unrealistic. Insofar as Congress was responding to the interests of local broadcasters, it may well have been catering to interest-power rather than attempting to protect otherwise deprived consumers.

Here there is a large lesson for the future. New regulations, ostensibly defended as public-interested or as helping viewers and consumers, will often ***1768** be a product of private self-interest, and not good for the public at all. It is undoubtedly true that industries will often seek government help against the marketplace, invoking public-spirited justifications for self- interested ends. [FN54] Whether and to what extent this is a constitutional (as opposed to a political) problem may be disputed. [FN55] But it points to a distinctive and legitimate concern about governmental regulation of the communications industry.

The interest-group account therefore has considerable plausibility. On the other hand, some people might reasonably think that the must-carry rules were a good-faith effort to protect local broadcasters, not because of their political power, but because their speech is valuable. Their speech is valuable because it ensures that viewers will be able to see discussion of local political issues. Perhaps the must-carry rules-especially section 5, but perhaps section 4 as well-had

powerful Madisonian justifications insofar as cable operators might choose stations that failed to offer adequate discussion of issues of public concern, especially to the local community. Other observers might invoke a different justification, also with Madisonian overtones. Perhaps the effort to protect broadcasters was a legitimate effort to safeguard the broadcasting industry, not because of the political power of the broadcasters, and not because of the content of broadcast service, but because millions of Americans must rely on broadcasters for their programming. Perhaps Congress wanted to ensure universal viewer access to the television market. On this view, the key goal behind the must-carry rules was to ensure viewer access.

Let us put these possibilities to one side and take up the constitutional issue. In Turner, the cable operators challenged sections 4 and 5 as inconsistent with the First Amendment. They did not make a distinction between section 4 and section 5; to the cable companies, both provisions were illegitimate interferences with their right to choose such programming as they wished. For obvious reasons, the government also made no such distinctions. The government wanted to defend both provisions, and a defense of section 5, by itself, would produce only a partial victory. The key aspects of the case lay in the operators' contention that both sections amounted to a form of content regulation, and that even if they should be seen as content-neutral, they were unconstitutional because inadequately justified.

B. The Genesis of the Turner Model

In its response, the Court created something very much like a new model for understanding the relationship between new technologies and the First ***1769** Amendment. This model is a competitor to the marketplace and Madisonian alternatives. And while it is somewhat unruly, it is not difficult to describe. It comes from the five basic components of the Court's response to the cable operators' challenge.

First, the Court held that cable television would not be subject to the more lenient free speech limitations applied to broadcasters. [FN56] On the Court's view, the key to the old broadcast cases was scarcity, and scarcity is not a problem for cable stations. To be sure, there are possible "market dysfunctions" for cable television; as noted, cable operators may in a sense be a monopoly by virtue of their "bottleneck control." But this structural fact did not, in the Court's view, dictate a more lenient approach in the cable context. In the Court's view, the key point in the past cases had to do with scarcity.

This is an especially significant holding. [FN57] It suggests that new technologies will generally be subject to ordinary free speech standards, not to the more lenient standards applied to broadcasters. Scarcity is rarely a problem for new technologies.

Second, the Court said that the Act was content-neutral, and therefore subject to the more lenient standards governing content-neutral restrictions on speech. For the Court, the central point is that "the must-carry rules, on their face, impose burdens and confer benefits without reference to the content of speech." [FN58] This is because "the extent of the interference does not depend upon the content of the cable operators' programming." [FN59] In the Court's view,

the regulations are certainly speaker-based, since we have to know who the speaker is to know whether the regulations apply; but they are not content-based, since they do not punish or require speech of a particular content.

This holding is also quite important. It means that Congress will be permitted to regulate particular technologies in particular ways, so long as the regulation is not transparently a subterfuge for a legislative desire to promote particular points of view. It means that Congress can give special benefits to special sources, or impose special burdens on disfavored industries.

Third, the Court said that there was insufficient reason to believe that a content-based "purpose" underlay the content-neutral must-carry law. [FN60] Hence the content neutrality of the law could not be impeached by an investigation of the factors that led to its enactment. The Court explored the relevant ***1770** legislative findings, which showed not only a (by hypothesis questionable [FN61]) congressional interest in encouraging the sorts of programming offered by local broadcasters, but also a distinctive and legitimate concern that cable operators have a strong financial interest in favoring their own affiliated programmers, and in doing so at the expense of broadcast stations. The findings therefore suggested that the cable operators have an economic incentive not to carry local signals.

This fact led to the important problem supporting the Act: Without the must- carry provision, Congress concluded, there would be a threat to the continued availability of free local broadcast television. [FN62] The elimination of broadcast television would in turn be undesirable not because broadcasters deserve protection as such-they do not-but because (a) broadcast television is free and (b) there is a substantial government interest in assuring access to free programming, especially for people who cannot afford to pay for television. As Congress had it, the must-carry rules would ensure that the broadcast stations would stay in business.

The Court said that this purpose-the protection of access to free programming through the protection of broadcast stations-was unrelated to the content of broadcast expression and was therefore legitimate. It was significant in this regard that for Congress to seek to protect broadcasters, Congress did not have to favor any particular kind or speech or any particular point of view. To be sure, and importantly, Congress' description of the purposes of the Act also referred to a content-based concern-to the effect that broadcast programming is "an important source of local news[,] public-affairs programming and other local broadcast services critical to an informed electorate," and also to the judgment that noncommercial television in particular "provides educational and informational programming to the Nation's citizens." [FN63] On the Court's view, however, these statements did not show that the law was content-based. The acknowledgment of certain virtues of broadcast programming did not mean that Congress enacted the legislation because it regarded broadcast programming as substantively preferable to cable programming.

Fourth, the Court said that strict judicial scrutiny was not required by the fact that the provisions (a) compel speech by cable operators, (b) favor broadcast programmers over cable programmers, and (c) single out certain members of the press for disfavored treatment. [FN64]

The fact that speech was mandated was irrelevant because the mandate was content-neutral and because ***1771** cable operators would not be forced to alter their own messages to respond to the broadcast signals. So too, the Court said that a speaker-based regulation would not face special judicial hostility so long as it was content- neutral. It was important in this regard that the regulation of this particular industry was based on the special characteristics of that industry-in short, "the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television." [FN65] In such a case, the Court concluded, legislative selectivity would be acceptable.

These conclusions are also of special importance for the future. They reinforce the point that Congress may favor some industries over others. They also suggest that Congress may compel companies to give access to speakers, at least so long as (a) the companies themselves are permitted to offer the messages they favor and (b) the access rights are given out on a content-neutral basis. The Turner Court stressed the governmental goal of ensuring access to free programming for viewers; but in upholding the Act, it also said that it was legitimate to require access for speakers, so long as the requirement of content neutrality was met.

Finally, the Court explored the question whether the must-carry rules would be acceptable as content-neutral regulations of speech. Content-neutral regulations may well be invalid if they fail a kind of balancing test. [FN66] The Court concluded that "intermediate scrutiny" would be applied. [FN67] The Court said the appropriate test, drawing on familiar cases, [FN68] would involve an exploration whether the regulation furthers an important or substantial government interest and whether the restriction on First Amendment freedoms is no greater than necessary to promote that government interest. The Court had no difficulty in finding three substantial interests: (a) preserving free local television, (b) promoting the widespread dissemination of information from a multiplicity of sources, and (c) promoting fair competition in the market for television programming. [FN69] On the Court's view, each of these was both important and legitimate.

What is of particular interest is the fact that interests (a) and (b) are connected with Madisonian aspirations. Thus in an especially significant step, the Court suggested that a content-neutral effort to promote diversity may well be justified. In its most straightforward endorsement of the Madisonian view, the Court said that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it ***1772** promotes values central to the First Amendment." [FN70] Hence the Court expressed special concern, in a perhaps self-conscious echo of Red Lion, over the cable operator's "gatekeeper[] control over most (if not all) of the television programming that is channeled into the subscriber's home." [FN71] The Court also emphasized "[t]he potential for abuse of this private power over a central avenue of communication." [FN72] It stressed that the First Amendment "does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." [FN73]

On the other hand, the Court thought that it was impossible to decide the case without a better factual record than had been developed thus far. [FN74] As it stood, the record was insufficient to show whether the must-carry rules would serve these legitimate interests. Would local

broadcasters actually be jeopardized without the must-carry rules? Here we should return to the possibility, of which the Court was surely aware, that the rules were really an effort to favor the broadcasting industry, not to help viewers.

The Court suggested that courts should maintain a basic posture of deference to Congress' predictive judgments. [FN75] In its view, judges should not second-guess those judgments even if they distrust them. On the other hand, Congress' judgments would face a form of independent judicial review, designed to ensure that Congress had made "reasonable inferences based on substantial evidence." [FN76] The Court therefore remanded the case to the lower court for factual findings on (a) the question whether cable operators would refuse significant numbers of broadcast stations without the must-carry rules and (b) the question whether broadcast stations, if denied carriage, would deteriorate to a substantial degree or fail altogether.

Justice O'Connor's dissenting opinion, joined by three other Justices, also deserves some discussion, since the opinion may have considerable future importance in view of the obvious internal fragmentation of the Court on these questions. Justice O'Connor insisted above all that the must-carry rules were based on content. [FN77] To reach this conclusion, she investigated the Act and its history to show that the nominally neutral measures were in fact designed to promote local programming. In her view, the existence of content discrimination was not decisive against the must-carry rules. It was still necessary to see whether the government could bring forward a strong interest, ***1773** and show that the regulation promoted that interest. But Justice O'Connor found that the government could not meet its burden.

In Justice O'Connor's view, the interest in "localism" was insufficient justification. [FN78] In words that have considerable bearing on what government may do with any information superhighway:

> It is for private speakers and listeners, not for the government, to decide what fraction of their news and entertainment ought to be of a local character and what fraction ought to be of a national (or international) one. And the same is true of the interest in diversity of viewpoints: While the government may subsidize speakers that it thinks provide novel points of view, it may not restrict other speakers on the theory that what they say is more conventional. [FN79]

Justice O'Connor referred independently to the interests in public-affairs programming and educational programming, finding that these interests are "somewhat weightier" than the interest in localism. But in her view, "it is a difficult question whether they are compelling enough to justify restricting other sorts of speech." [FN80] Because of the difficulty of that question, Justice O'Connor did not say whether "the Government could set some channels aside for educational or news programming." [FN81] (This is of course a central issue for the future.)

In her view, the Act was too crudely tailored to be justified as an educational or public-affairs measure. The Act did not neutrally favor educational or public-affairs programming, since it burdened equally "CNN, C- Span, the Discovery Channel, the New Inspirational Network, and other channels with as much claim as PBS to being educational or related to public affairs."

[FN82] Whether or not a neutral law favoring educational and public-affairs programming could survive constitutional scrutiny, this Act could not, for it was insufficiently neutral.

IV. THE TURNER MODEL

A. Description

I have noted that there have been two free speech traditions and two principal models of free speech. The marketplace model eschews content regulation; it is animated by the notion of consumer sovereignty. The Madisonian model may permit and even welcome content regulation; it is ***1774** rooted in an understanding of political sovereignty. There is now a third model-the Turner model-of what government may do. An interesting question, not fully resolved by Turner itself, has to do with the extent to which the Turner model will incorporate features of its predecessors.

The new model has four simple components. Under Turner, (a) government may regulate (not merely subsidize) new speech sources so as to ensure access for viewers who would otherwise be without free programming and (b) government may require owners of speech sources to provide access to speakers, at least if the owners are not conventional speakers too; but (c) government must do all this on a content-neutral basis (at least as a general rule); but (d) government may support its regulation not only by reference to the provision of "access to free television programming" but also by invoking such democratic goals as the need to ensure "an outlet for exchange on matters of local concern" and "access to a multiplicity of information sources." [FN83]

Remarkably, every Justice on the Court appeared to accept (a), (b), and (c) and parts of (d) (with minor qualifications). Perhaps the most notable feature of the Court's opinion is its emphasis on the legitimacy and the importance of ensuring general public (viewer) access to free programming. In this way, the Court accepted at least a modest aspect of the Madisonian ideal, connected with both political equality and broad dissemination of information. This general goal is likely to have continuing importance in governmental efforts to control the information superhighway so as to ensure viewer and listener access. The Turner Court has put its stamp of approval on that goal. Recall in particular that the government justified the must-carry rules on the theory that without those rules, ordinary broadcasters would be unable to survive. The consequence would be that people without cable would be without broadcasting at all. The Court enthusiastically accepted this claim. It said that "to preserve access to free television programming for the 40 percent of Americans without cable" was a legitimate interest. [FN84] This holding suggests that the government may provide access not only through subsidies, but also through regulation.

On the other hand, the Court's quite odd refusal [FN85] to distinguish between sections 4 and 5 and its use of the presumption against content discrimination seem to support the marketplace model. Certainly the Court did not say that it would be receptive to content discrimination if the discrimination were an effort to promote attention to public affairs and exposure to diverse

sources. The Court did not claim or in any way imply that educational and public-affairs programming could be required consistently with the First Amendment. On the contrary, it suggested that it would view any content discrimination, ***1775** including content discrimination having these goals, with considerable skepticism. The result is a large degree of confusion with respect to whether and how government may promote Madisonian aspirations. I will return to this point.

B. A Problem: Commerce vs. Public Affairs

The Court's major internal dispute involved the question whether the content neutrality of the must-carry rules was impeached by the history suggesting that Congress was particularly enthusiastic about local programming. This is an issue on which reasonable people may disagree; it turns largely on the extent to which statements in the legislative history will be used to cast light on legislative goals. But the issue of content discrimination seems, on inspection, to rest on a matter not discussed by anyone on the Court; it is principally that matter, not the legislative history, that raises special issues about content discrimination.

More concretely: From the standpoint of traditional free speech argument, there is an obvious problem with the analysis offered by the Turner Court. Section 4 and section 5 are quite different; they appear to have different justifications. In any case, different carriage requirements in the two sections, targeted to two different kinds of broadcasting, plainly reveal content discrimination. The two sections explicitly define their correlative obligations in terms of the nature, or content, of the programming. This is proof of content discrimination.

How should that discrimination be handled? Under the Madisonian view, there is all the difference in the world between section 4 and section 5. As I have noted, section 5 imposes certain carriage requirements for educational and public-affairs stations, whereas section 4 imposes different carriage requirements for commercial stations. For Madisonians, section 5 stands on far stronger ground, since it is apparently an effort to ensure education and attention to public issues. It seems to serve straightforward democratic functions. This does not mean that it is necessarily legitimate. Perhaps Justice O'Connor's response-to the effect that section 5 does not adequately promote that goal-is decisive as against a Madisonian defense of section 5. But section 4 appears to stand on far weaker ground from the Madisonian standpoint. Thus Madisonians would distinguish between the two provisions and would be far more hospitable toward section 5. [FN86]

In fact, the Court should have analyzed the two sections differently. The validity of section 4 turned on whether the factual record could support the ***1776** idea that the section was necessary to ensure the continued availability of free public television. On this score the Court's basic solution-a remand-was quite reasonable, even if the statute was treated as content-based. On remand, the question would be whether content regulation of this sort was sufficiently justified as a means of saving free public television.

The analysis for section 5 should be quite different. The provision of educational and public-affairs programming is entirely legitimate, certainly if there is no substantial intrusion on speakers who want to provide another kind of programming. [FN87] The validity of section 5 thus should have turned on whether it was sufficiently tailored to the provision of educational and public-affairs programming. Perhaps Justice O'Connor was right in doubting whether adequate tailoring could be shown; in any case this is the issue to be decided. In short, both provisions are content-based, but this phrase should not be used as a talisman. The question was whether the content-based restrictions were sufficiently connected with legitimate goals. An approach of this kind would have been the most reasonable one to take.

On the other hand, within the marketplace model, the very existence of two separate sections is problematic. Why should the government concern itself with whether stations are commercial or noncommercial? Marketplace advocates would find the Act objectionable simply by virtue of the fact that it distinguishes between commercial and noncommercial stations. To them, the fact that two different sections impose different carriage requirements shows that there is content discrimination in the Act.

Under the two prevailing free speech models, then, it would make sense either to treat section 5 along a different track from section 4 (the better approach), or to question them both as content-discriminatory on their face. Both of these approaches would have been quite plausible. Remarkably, however, no Justice in Turner took either approach. Indeed, no Justice drew any distinction at all between section 4 and section 5, and no Justice urged that the existence of two different sections showed that there was content discrimination.

This is a genuine puzzle. Why did no Justice invoke Madisonian goals to treat section 5 more generously? Why did no Justice invoke content neutrality to complain about the existence of two separate sections? As we have seen, none of the parties raised the issue, and perhaps the question was not squarely presented, permitting the Court to decide the case on a narrower and less controversial ground. Under the approach of both the majority and the dissent, it may not have been necessary to answer the hard questions of whether and how government might promote educational and public-affairs programming. ***1777** But why did no Justice suggest that the two sections embodied content discrimination? This question is much harder to answer.

Perhaps the Court had something like the following in mind. The two sections involve speakers rather than speech; they point to the nature of the station, not to the nature of the programming. Thus the Act may perhaps be understood as imposing a speaker-based restriction of the sort that the Court found legitimate insofar as the Act applied only to cable television.

On reflection, however, this response seems implausible. The kind of speaker- based restriction reflected in the two sections has everything to do with content. The definition of section 5 stations is inextricably intertwined with the speech offered by such stations. So too with the definition of section 4 stations. The Court therefore appears to have blundered in failing to find content discrimination in the existence of two separate sections. Perhaps the content discrimination could have been justified if the Court had attended to separate justifications for the

two provisions, or at least the Court might have upheld section 5 if it could have met Justice O'Connor's concerns. I return to this point below.

C. A Paradox and a Provisional Solution: Madisonians and Marketeers vs. Turner?

Now let us proceed to a larger matter. As I have noted, the Turner Court did not accept a Madisonian model of free speech. The distinction between content- based and content-neutral restrictions was crucial to the opinion, and that distinction hardly emerges from a Madisonian model, which would carve up the free speech universe in a different way. But the Court certainly did not accept the marketplace model in its entirety. In addition to emphasizing the legitimacy of ensuring access to free programming-and of doing so through regulation rather than subsidy-the Court stressed more or less democratic justifications for the must-carry rules, including broad exposure to programming on public issues, and to a multiplicity of sources of information. It might be argued both that Turner is insufficiently responsive to marketplace concerns and that Turner is a Madisonian failure insofar as the Turner model appears to do nothing about the problem of low-quality programming and insufficient exposure to public debate.

1. The Paradox

An especially distinctive feature of the Court's opinion is its ambivalence about the legitimacy of governmental efforts to promote diversity. There is ambivalence on this score because while the Court invoked diversity as a goal, it also made its skepticism about content-based regulation quite clear, and many imaginable efforts to promote diversity are content-based. Consider the ***1778** fairness doctrine as well as many European initiatives to promote diversity in the media. [FN88] The Court found it necessary to insist that Congress was not trying, through the must-carry rules, to ensure exposure to local news sources.

On the other hand, the Court suggested that a content-neutral effort to promote diversity may well be justified. Hence the Court offered a number of justifications for regulation of cable technology. As we have seen, the Court expressed concern over the cable operator's "gatekeeper[] control over most (if not all) of the television programming that is channeled into the subscriber's home." [FN89] The Court emphasized "[t]he potential for abuse of this private power over a central avenue of communication." [FN90] The Court stressed that the First Amendment "does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." [FN91] And thus the Court emphasized "the importance of local broadcasting units" in promoting attention to public issues. [FN92] In these ways, the Turner opinion contains an echo, albeit a faint one, of the highly Madisonian analysis in Red Lion.

There is therefore an important paradox at the heart of the Turner model. The paradox emerges from (a) the presumptive invalidity of content-based restrictions, accompanied by (b) the insistence by the Court on the legitimacy of the goals of providing access to a multiplicity of sources and outlets for exchanges on issues of local concern. This is a paradox because if these goals are legitimate, content-based regulation designed to promote them might well be thought

legitimate too. If government may engage in content-neutral restrictions designed self-consciously to provide access to many sources, why may it not favor certain speech directly? The most natural way to provide certain kinds of programming is through content-based regulation. [FN93]

2. Substantive Doctrine and Institutional Constraints

The question then arises: If diversity is a legitimate goal, why might the Turner model be superior to the Madisonian model? One possible view is that the Turner model is not superior, but that it should be regarded instead as a cautious and incompletely theorized step [FN94] that appropriately leaves gaps for ***1779** future refinement. Perhaps the Turner model will have to be elaborated, as it clearly can be, to make clear that well-tailored efforts to promote diversity and broader democratic goals are legitimate even if they are content-based.

For reasons to be suggested, this would indeed be a sensible step. But there is another point. Despite appearances, there is good reason for the Turner Court's skepticism toward content-based regulation, and the reason operates by reference to institutional considerations involving the distinctive characteristics of judge-made doctrine. Those considerations have everything to do with the potential superiority of (not entirely accurate) rules of law over highly individuated, case-by-case judgments. This defense of Turner says not that the case reflects the best understanding of the substantive content of the free speech principle, but that it may be the best way for the Supreme Court to police that principle in light of its institutional limits.

In brief: In light of the nature of the current electronic media, in which scarcity is a decreasing problem, a presumptive requirement of content neutrality may well be the best way for judges to police objectionable governmental purposes, especially in the form of viewpoint discrimination. [FN95] If government favors speech of certain kinds through content regulation, there is always a risk that it is actually trying to favor certain views. For example, a regulatory requirement of discussion of abortion, or race relations, or feminism would raise serious fears to the effect that government is seeking to promote certain positions. Through insisting on content neutrality-again, at least as a presumption-courts can minimize the risk of impermissibly motivated legislation, and they can do so while limiting the institutional burden faced by judges making more individualized judgments. The presumption in favor of content neutrality has the fortunate consequence of making it unnecessary for courts to answer hard case-by-case questions about the legitimacy of diverse initiatives, many of which will, predictably, be based on illegitimate motivations.

We might thus offer a cautious defense of the Turner model over the Madisonian model. The defense would depend on the view that the Turner model may well best combine the virtues of (a) judicial administrability (a real problem for Madisonians [FN96]), (b) appreciation of the risk of viewpoint discrimination (a real problem for Madisonians too), and (c) an understanding of the hazards of relying on markets alone (addressed by Turner insofar as the Court allows Congress considerable room to maneuver). For this reason, the ***1780** Turner model may well be better, at least in broad outline, than the Madisonian and marketplace alternatives.

3. Countervailing Considerations

There are important countervailing considerations. As indicated above, [FN97] the application of the Turner model to technologies other than cable raises serious problems, for cable presents the special question of "bottleneck control." Many of the other new technologies raise questions not involving anything like "bottleneck control," which was central to the resolution in Turner. In general, regulation of the Internet raises no such problem. In Turner, moreover, the principal access issue was the right to hear; in other cases, the central issue, also one of access, will involve the right to speak. Sometimes the principal question will be whether certain speakers can have access to certain audiences. In other contexts, regulatory efforts may involve educational goals more straightforwardly, as in guarantees of free media time to candidates or in provisions to ensure public-affairs programming or programming for children.

As I have argued, moreover, speech should not be treated as a simple commodity, especially in a period dominated by attention to sensationalistic scandals and low-quality fare. [FN98] In light of the cultural consequences of broadcasting-through, for example, its effects on democratic processes and children's education-we should not think of electronic media as "just ... appliance[s]," or as "toaster[s] with pictures." [FN99] At least part of the First Amendment inquiry should turn on the relationship between what broadcasters provide and what a well-functioning democracy requires. If we have any sympathy for Brandeis' judgment-shared by Madison [FN100]-that "the greatest menace to freedom is an inert people," we will acknowledge that the marketplace model may not perform an adequate educative role, and that a system of free markets may well disserve democratic ideals.

Of course there are hard issues about which bodies are authorized to decide what programming ought to be offered. [FN101] But the Turner model is vulnerable insofar as it brackets the deeper issues and addresses Madisonian concerns with the useful but crude doctrinal categories "content-based" and "content-neutral." Those categories are crude because they are not tightly ***1781** connected with any plausible conception of the basic point or points of a system of free speech.

Some qualifications of the Turner model, pointing in Madisonian directions, are therefore desirable. The majority does not foreclose such qualifications, and Justice O'Connor's dissenting opinion actually makes some space for arguments of this sort. I will suggest some important qualifications that are nonetheless consistent with the general spirit of Turner itself.

V. SPEECH, EMERGING MEDIA, AND CYBERSPACE

A. New Possibilities and New Problems: Referenda in Cyberspace and Related Issues

It should be unnecessary to emphasize that the explosion of new technologies opens up extraordinary new possibilities. As the Department of Commerce's predictions suggest, ordinary people might ultimately participate in a communications network in which hundreds of millions of people, or more, can communicate with each other and indeed with all sorts of service providers-

libraries, doctors, accountants, lawyers, legislators, shopkeepers, pharmacies, grocery stores, museums, Internal Revenue Service employees, restaurants, and more. If you need an answer to a medical question, you may be able to push a few buttons and receive a reliable answer. If you want to order food for delivery, you would be able to do so in a matter of seconds. If you have a question about sports or music or clothing, or about the eighteenth century, you could get an instant answer. People can now purchase many goods on their credit cards without leaving home. It may soon be possible to receive a college education without leaving home. [FN102] As I have suggested, the very notions of "location" and "home" will change in extraordinary ways.

Many of the relevant changes have already occurred. Consider the fact that in 1989, there were about 47.5 million cable television subscribers, accounting for 52.5% of television households-whereas by 1995, there were 59 million subscribers, accounting for 61.8% of television households. [FN103] Consider the following chart: [FN104]

Year	Millions of TV Households	Millions Homes of Homes Passed by Cable	Homes Passed of TV	Millions of Homes Passed as a % Homes	Cable Households	Cable Households as a % Homes	Cable Subscribers of TV Passed	Penetration
1989	90.4	80.0	88.5	47.5	59.4	52.5		
1990	92.1	84.4	91.6	50.5	59.8	54.8		
1991	93.1	87.2	93.7	52.6	60.3	56.5		
1992	92.1 FN105	88.9	96.5	54.3	61.1	59.0		
1993	93.1	90.1	96.8	56.2	62.4	60.4		
1994	94.2	91.3	96.9	57.2	62.7	60.7		
1995	95.4	92.5	97.0	59.0	63.8	61.8		

The number of subscribers to major online services is also increasing rapidly, with 6.3 million American subscribers. [FN106] Consider also the following chart: [FN107]

Technology	Number of Users
Internet	30-40 million
CompuServe	2,700,000
America Online	2,300,000
Prodigy	2,000,000
The WELL	11,000
Women's Wire	1300

The forerunners of the "information superhighway" are thus increasingly available to large numbers of people. In this Section, I discuss some large and general questions about communications in a democracy; I turn to more specific policy issues in Sections B and C.

***1783** 1. Economics and Democracy

Technological developments enjoyed by so many people bring with them extraordinary promise and opportunities from the standpoints of both Madisonianism and the marketplace. From nearly [FN108] any point of view, nostalgia for preexisting speech markets makes little sense.

The economic point is obvious, for the costs of transacting-of obtaining information and entering into mutually beneficial deals-will decrease enormously, and hence it will be much easier for consumers to get what they want, whatever it is that they want. To say the least, a shopping trip-for groceries, books, medicines, housing, trial transcripts, clothing-will be much simpler than it now is; it may well be significantly simpler now than it was when this Essay was first written. [FN109] In these ways the new information technologies are a great boon.

At the same time, and equally important, there are potential democratic gains, since communication among citizens and between citizens and their representatives will be far easier. Citizens may be able to express their views to public officials and to receive answers more effectively. To state a view or ask a question on the issue of the day, no town meeting need be arranged. High- quality, substantive discussions may well be possible among large numbers of people; town meetings that are genuinely deliberative may become commonplace. Voting may occur through the Internet. This is one of the most intriguing features of cyberspace. [FN110] It will be possible to obtain a great deal of information about candidates and their positions.

In fact much of this has already occurred. The practice of journalism has changed in the sense that reporters communicate regularly with readers. [FN111] Before the 1994 elections, public library computers delivered considerable information about the candidates via the World Wide Web of the Internet. [FN112] The Web also allows people to see photographs of candidates and to have access to dozens of pages of information about them and their positions. The Web may be used nationally for these purposes as early as 1996. A number of elected officials-in the White House, the Senate, and the House-now have e-mail addresses and communicate with their constituents in cyberspace.

In Minnesota, five candidates for governor and three candidates for the senate participated in debates on electronic mail. [FN113] In 1993, President ***1784** Clinton established connections with millions of e-mail users, putting his address into their system and inviting them to give reactions on public issues. Candidates generally are obtaining and publicizing e-mail addresses. [FN114] Thus presidential candidate Lamar Alexander launched his campaign with a forum via America Online, in which he spoke to all those who chose to join the forum. [FN115] The Madisonian framework was based partly on the assumption that large-scale substantive discussions would not be practicable. [FN116] Technology may well render that assumption anachronistic.

The result may be of particular benefit for people of moderate or low income. People without substantial means may nonetheless make their views heard. So too relatively poor candidates may be able to communicate more cheaply. [FN117] In this way the new communications technologies may relieve some of the pressure for campaign finance restrictions by promoting the Madisonian goal of political equality. [FN118] In the midst of economic inequality, perhaps technological advances can make political equality a more realistic goal. [FN119]

Moreover, education about public issues will be much simpler and cheaper. The government, and relevant interest groups, will be able to state their cases far more easily. And after touching a few buttons, people will be able to have access to substantial information about policy dilemmas-possible wars, environmental risks and regulations, legal developments, trials, medical reform, and a good deal more. Consider as simply one example, the astonishing service LEXIS Counsel Connect. With this service a lawyer can have access to essentially all proposed laws. A lawyer can also join substantive "discussion groups," dealing with, for example, the Simpson trial, recent tax developments, risk regulation, securities arbitration, affirmative action, LEXIS Counsel Connect, cyberspace, the First Amendment in cyberspace, and much more. The proliferation of

law-related discussion groups on law-related topics is one tiny illustration of a remarkable cultural development. Thus the Usenet includes more than 10,000 discussion groups, dealing with particle physics, ring-tailed lemurs, and Rush Limbaugh, among countless others. [FN120]

***1785** 2. Dangers

At least from the standpoint of the founding era, and from the standpoint of democratic theory, the new technology also carries with it significant risks. There are two major problems. The first is an absence of deliberation. The second is an increase in social balkanization.

a. Absence of Deliberation

The Madisonian view of course places a high premium on public deliberation, and it disfavors immediate and inadequately considered governmental reactions to pressures from the citizenry. [FN121] The American polity is a republic, not a direct democracy, and for legitimate reasons; direct democracy is unlikely to provide successful governance, for it is too likely to be free from deliberation and unduly subject to short-time reactions and sheer manipulation. From the inception of the American system a large point of the system of republicanism has been to "refine and enlarge the public view" through the system of representation. [FN122]

This process of refinement and enlargement is endangered by decreased costs of communication. As I have noted, discussions in cyberspace may well be both substantive and deliberative; electronic mail and the Internet in particular hold out considerable promise on this score. [FN123] But communications between citizens and their representatives may also be reactive to short-term impulses, and may consist of simple referenda results insufficiently filtered by reflection and discussion.

In the current period, there is thus a serious risk that low-cost or costless communication will increase government's responsiveness to myopic or poorly considered public outcries, or to sensationalistic or sentimental anecdotes that are a poor basis for governance. Although the apparent presence of diverse public voices is often celebrated, electoral campaigns and treatment of public issues already suffer from myopia and sensationalism, [FN124] and in a way that compromises founding ideals. On this count it is hardly clear that new technologies will improve matters. They may even make things worse. The phenomenon of "talk radio" has achieved considerable attention in this regard. It is surely desirable to provide forums in which citizens can speak with one ***1786** another, especially on public issues. But it is not desirable if government officials are reacting to immediate reactions to misleading or sensationalistic presentations of issues.

Ross Perot's conception of an "electronic town meeting" is hardly consistent with founding aspirations, at least if the meeting has the power to make decisions all by itself. Democracy by soundbite is hardly a perfect ideal. New technologies may make democracy by soundbite far more likely. Everything depends on how those technologies are deployed in communicating to public officials.

We can make these points more vivid with a thought experiment. Imagine that through the new technologies, the communications options were truly limitless. Each person could design his own communications universe. Each person could see those things that he wanted to see, and only those things. Insulation from unwelcome material would be costless. Choice of particular subjects and points of view would be costless too. Would such a system be a communications utopia? Would it fulfill First Amendment aspirations? [FN125]

The answer is by no means simple. Of course a system of this kind would have advantages. It might well overcome some of the problems produced by extremes of wealth and poverty, at least insofar as poor people could both speak and hear far more cheaply. But the aspiration to an informed citizenry may not be well served. Under the hypothesized system, perhaps most people would be rarely or poorly informed. Perhaps their consumption choices would disserve democratic ideals. [FN126] If the system of free expression is designed to ensure against an "inert people," we cannot know, a priori, whether a system of well-functioning free markets would be desirable.

b. Balkanization and Self-Insulation

The hypothesized system would have another problem: It would allow people to screen out ideas, facts, or accounts of facts that they find disturbing. In the current system, people are often confronted with ideas and facts that they find uncongenial. This is an important democratic good; it promotes education and discussion. A well-functioning system of free expression is one in which people are exposed to ideas that compete with their own, so that they can test their own views and understand other perspectives even when they disagree. This process can produce a capacity for empathy and understanding, so that other people are not dehumanized even across sharp differences in judgment and perspective. Important forms of commonality and respect might emerge simply by virtue of presenting the perspectives of others from others' points of view.

***1787** A system of individually designed communications options could, by contrast, result in a high degree of balkanization, in which people are not presented with new or contrary perspectives. Such a nation could not easily satisfy democratic and deliberative goals. In such a nation, communication among people with different perspectives might be far more difficult than it now is; mutual intelligibility may become difficult or even impossible. In such a nation, there may be little commonality among people with diverse commitments, as one group caricatures another or understands it by means of simple slogans that debase reality and eliminate mutual understanding.

These suggestions are far from hypothetical. They capture a significant part of the reality of current communications in America. They create serious political risks.

3. A Caution About Responses

It is far from clear how government can or should overcome these various problems. Certainly government should not be permitted to censor citizen efforts to communicate with representatives, even if such communications carry risks to deliberative ideals. It does seem clear, however, that government should be cautious about spurring on its own the use of new technologies to promote immediate, massive public reactions to popular issues. Government by referendum is at best a mixed blessing, with possible unfortunate consequences wherever it is tried. [FN127] The electronic media should not be used to create a form of government by referendum. Regulatory efforts to facilitate communication need not be transformed into an effort to abandon republican goals.

Rather than spurring referenda in cyberspace, or referenda by soundbite, government should seek to promote deliberation and reflection as part of the process of eliciting popular opinion. [FN128] Any such efforts might well be made part of a general strategy for turning new communications technologies to constitutional ends. As we have seen, electronic mail has considerable promise on this score.

B. Some Policy Dilemmas

A large question for both constitutional law and public policy has yet to receive a full democratic or a judicial answer: To what extent, if any, do Madisonian ideals have a place in the world of new technologies, or in cyberspace? Some people think that the absence of scarcity eliminates the ***1788** argument for governmental regulation, at least if it is designed to promote attention to public issues, to increase diversity, or to raise the quality of public debate. [FN129] If outlets are unlimited, why is regulation of any value? In the future, people will be able to listen to whatever they want, perhaps to speak to whomever they choose. Ought this not to be a constitutional ideal?

The question is meant to answer itself, but perhaps enough has been said to show that it hardly does that. Recall first that structural regulation, assigning property rights and making agreements possible, is a precondition for well-functioning markets. Laissez-faire is a hopeless misdescription of free markets. A large government role, with coercive features, is required to maintain markets. Part of the role also requires steps to prevent monopoly and monopolistic practices.

Moreover, Madisonian goals need not be thought anachronistic in a period of infinite outlets. In a system of infinite outlets, the goal of consumer sovereignty may well be adequately promoted. That goal has a distinguished place in both law and public policy. But it should not be identified with the Constitution's free speech guarantee. The Constitution does not require consumer sovereignty; for the most part, the decision whether to qualify or replace that goal with Madisonian aspirations should be made democratically rather than judicially. A democratic citizenry armed with a constitutional guarantee of free speech need not see consumer sovereignty as its fundamental aspiration. [FN130] Certainly it may choose consumer sovereignty if it likes. But it may seek instead to ensure high-quality fare for children, even if this approach departs from

consumer satisfaction. It may seek more generally to promote educational and public-affairs programming.

The choice between these alternatives should be made through the political branches rather than as a matter of constitutional law. In this Section, I try to support this basic conclusion, and to do so in a way that is attuned to many of the pathologies of "command-and-control" regulation. The goal for the future is to incorporate Madisonian aspirations in a regulatory framework that is alert to the difficulty of anticipating future tastes and developments, that sees that incentives are better than commands, and that attempts to structure future change rather than to dictate its content.

***1789** 1. Advertising

It is commonly thought that viewers and listeners purchase a communications product, and that their purchase decisions should be respected; but this picture is not altogether right. The decisions of viewers and listeners are different from most consumption decisions, in the sense that viewers and listeners often pay nothing for programming, and often they are, in a sense, the product that is being sold. For much commercial programming, a key source of revenues is advertisers, and programmers deliver viewers to advertisers in return for money. For this reason the broadcasting market is not a conventional one in which people purchase their preferred products. People's viewing and listening time is bought and sold.

There is an important consequence for the substantive content of broadcasting: What is provided in a communications market is not the same as what viewers would like to see. Advertisers have some power over the content of communication, for they may withdraw their support from disfavored programming. They may withdraw their support not simply because the programming does not attract viewers, but also because (a) the programming is critical of the particular advertisers, (b) it is critical of commerce is general, (c) it stirs up a controversial reaction from some part of the audience, or (d) it is "depressing" or creates "an unfavorable buying atmosphere." There is a great deal of evidence that advertiser control does affect the content of programming. [FN131] Controversial programs have been punished; presentations of contested issues, such as abortion, have been affected by advertisers' goals. [FN132]

In an era of numerous options, the influence of advertising over programming content should be less troublesome, since controversial points of view should find an outlet. Certainly there is no such problem on the Internet. But there will nonetheless continue to be a structural problem in broadcasting markets, since viewers' demand for programs will not be fully responsible for the programs that are actually provided. Many imaginable proposals could help counter this problem. Such proposals should not be found unconstitutional even if consumer sovereignty is the overriding policy goal. [FN133]

2. "Choice" and Culture

If we put the questions raised by advertisers to one side, we might urge that there is a decisive argument in favor of the marketplace model and against Madisonianism. The marketplace ideal values "choice," whereas the ***1790** Madisonian alternative can be seen to reflect a form of dangerous paternalism, or disrespect for people's diverse judgments about entertainment options. [FN134] Perhaps Madisonianism is illiberal insofar as it does not respect the widely divergent conceptions of the good that are reflected in consumption choices.

The argument is certainly plausible. In most arenas, consumers are allowed to choose as they wish, and governmental interference requires special justification. But in this context, at least, the argument from choice is quite unconvincing, for it wrongly takes people's consumption choices as definitive or exhaustive of "choice." In fact the notion of "choice" is a complex one that admits of no such simple understanding. [FN135] In a democratic society, people make choices as citizens too. They make choices in democratic arenas as well as in stores and before their computers. What those choices are depends on the context in which they are made.

For this reason, the insistence on respect for "choice," as a defense of the marketplace model, sets up the legal problem in a question-begging way. People do make choices as consumers, and these choices should perhaps be respected. But those choices are heavily geared to the particular setting in which they are made-programming consumption. They do not represent some acontextual entity called "choice." In fact there is no such acontextual entity. [FN136]

The question is not whether or not to respect "choice," but what sorts of choices to respect. More particularly, the question is whether to allow democratic choices to make inroads on consumption choices. In a free society, consumption choices should usually be respected. But the Constitution does not require this result, and in some settings democratic judgments contrary to consumption choices are legitimate. For example, a requirement that broadcasters provide free media time for candidates might well receive broad public support, even if viewers would, at the relevant time, opt for commercial programming. [FN137] There should be no constitutional barrier to such a requirement.

The central point is that in their capacity as citizens assessing the speech market, people may well make choices, or offer considered judgments, that diverge from their choices as consumers. [FN138] Acting through their elected representatives, the public may well seek to promote (for example) educational ***1791** programming, attention to public issues, and diverse views. Perhaps the public-or a majority acting in its democratic capacity-believes that education and discussion of public issues are both individual and collective goods. Any system of expression has cultural consequences; it helps create and sustain a certain kind of culture. Perhaps the public wants to ensure a culture of a certain sort, notwithstanding consumption choices. [FN139] Perhaps it seeks to protect children and adolescents, and sees regulation of broadcasting as a way of accomplishing that goal. Perhaps people believe that their own consumption choices are less than ideal, and that for justice-regarding or altruistic reasons, or because of their basic commitments and judgments, regulations should force broadcasters or cable operators to improve on existing low-quality fare.

Perhaps people seek and hence choose to ensure something like a political community, not in the sense of a place where everyone believes the same thing, but in the sense of a polity in which people are generally aware of the issues that are important to the future of the polity. Perhaps people think that the broadcasting media should have a degree of continuity with the educational system, in the sense that broad dissemination of knowledge and exposure to different views are part of what citizens in a democratic polity deserve. Perhaps people believe that many citizens do not value certain high-quality programming partly because they have not been exposed to it, and perhaps experiments are designed to see if tastes for such programming can be fueled through exposure. [FN140]

Would measures stimulated by such thoughts be objectionable, illegitimate, or even unconstitutional? Would they interfere in an impermissible way with something called "choice"? I do not believe so. Surely any such efforts should be policed by courts, so as to ensure that government is not discriminating against or in favor of certain viewpoints. The mere fact that the democratic majority seeks to overcome consumption choices is not legitimating by itself; the democratic judgment may be unacceptable if it involves viewpoint discrimination or content discrimination suggestive of viewpoint bias. But rightly conceived, our constitutional heritage does not disable the public, acting through the constitutional channels, from improving the operation of the speech market in the ways that I have suggested. Whether it should do so is a question to be answered democratically rather than judicially.

***1792** 3. Analogies

An important issue for the future involves the use of old analogies in novel settings. The new technologies will greatly increase the opportunities for intrusive, fraudulent, harassing, threatening, libelous, or obscene speech. [FN141] With a few brief touches of a finger, a speaker is now be able to communicate to thousands or even millions of people-or to pinpoint a message, perhaps a commercial, harassing, threatening invasive message, to a particular person. A libelous message, or grotesque invasions of privacy, can be sent almost costlessly. Perhaps reputations and lives will be easily ruined or at least damaged. There are difficult questions about the extent to which an owner of a computer service might be held liable for what appears on that service. [FN142]

At this stage, it remains unclear whether the conventional legal standards should be altered to meet such problems. For the most part, those standards generally seem an adequate start and must simply be adapted to new settings. For purposes of assessing cyberspace, there are often apt analogies on which to draw. In fact the legal culture has no way to think about the new problems except via analogies. The analogies are built into our very language: e-mail, electronic bulletin boards, cyberspace, cyberspaces, [FN143] and much more. [FN144]

Thus, for example, ordinary mail provides a promising foundation on which to build the assessment of legal issues associated with electronic mail. It is far from clear that the standards for libelous or fraudulent communication must shift with the new technologies. To be sure, there will be new and somewhat vexing occasions for evaluating the old standards. Judges may not

understand the novel situations, especially those involving the Internet. In particular, the low cost of sending and receiving electronic mail, and of sending it to thousands or millions of people, may produce some new developments and put high pressure on old categories. Certainly it is likely that new and unanticipated problems will arise and a degree of judicial caution is therefore desirable in invoking the First Amendment. But it is by no means clear that the basic principles will themselves have to be much changed.

4. Access

I have noted that the government has said that "universal access" is one of its goals for the information superhighway. The question of access has ***1793** several dimensions. To some extent it is designed to ensure access to broadcasting options for viewers and listeners-the central problem in Turner. Here a particular concern is that poor people should not be deprived of access to a valuable good. Currently the expense of Internet connections is prohibitively high for many families. This may entail a form of disenfranchisement and to some extent the problem is to ensure access for certain speakers who want to reach part of the viewing or listening public. In cyberspace, of course, people are both listeners and speakers.

Perhaps the goal of universal viewer or listener access should be viewed with skepticism. The government does not guarantee universal access to cars, or housing, or food, or even health care. It may seem puzzling to suggest that universal access to information technologies is an important social goal. But the suggestion can be shown to be less puzzling than it appears. Suppose, for example, that a certain network becomes a principal means by which people communicate with their elected representatives; suppose that such communications become a principal part of public deliberation and in that way ancillary to the right to vote. Suppose too that companies engage in a form of "electronic redlining," in which they bypass poorer areas, both rural and in the inner city. [FN145] We know that a poll tax is unconstitutional because of its harmful effects on political equality. [FN146] On a broadly similar principle, universal access to the network might be thought desirable. To be sure, such access would be most unlikely to be constitutionally mandated, since the right to vote is technically not involved. But universal access could be seen to be part of the goal of political equality. More generally, universal access might be necessary if the network is to serve its intended function of promoting broad discussion between citizens and representatives. It is notable that at least seven million Americans, most of whom are poor, lack telephones, and hence are without basic access. [FN147]

The point might be generalized. For any particular speaker, part of the advantage of having access to a certain means of communication is that everyone, or almost everyone, or a wide range of people, can be reached. The Postal Service, for example, is justified in part on the ground that a national system of mail is necessary or at least helpful for those who send mail; we can be assured that any letter can reach everyone. The claim is controversial. But perhaps a requirement of universal access can be justified not as an inefficient [FN148] effort to subsidize people who would be without service, but on the quite different ground that universal service is a way of promoting the ***1794** communicative interests of those who already have service. The

interests of the latter group may well be promoted by ensuring that they can reach everyone, or nearly everyone.

Arguments of this kind have been used throughout the history of telecommunications regulation. For most of the twentieth century, there have been cross-subsidies, as local companies with local monopolies have charged high prices to certain customers (usually businesses) with which they subsidized less profitable services. Perhaps a similar model would make sense for modern technologies. The issue is already receiving considerable public attention. [FN149]

There are, however, significant inefficiencies in this model of cross- subsidization, [FN150] and a system of open-ended competition may well be better than one based on universal access. It may be that open-ended competition will provide universal access in any case, or something very close to it. Or it may be that open-ended competition, combined with selective subsidies, would be better than the regulatory approach. This question cannot easily be answered in the abstract. Certainly debate over universal access should not be resolved by constitutional fiat. This is an area for public debate and a large degree of experimentation.

5. Incentives Rather than Command-and-Control

In general, any regulatory controls should take the form of flexible incentives rather than rigid commands. Command-and-control systems are usually ineffective in achieving their own goals; they tend to promote interest-group power, in which well-organized private groups are able to use governmental authority to redistribute wealth or opportunities in their favor; they also tend to be inefficient. [FN151]

I cannot discuss this issue in detail here, but the explosion of new technologies reinforces the point. It is predictable that owners of some services will attempt to obtain governmental aid to disadvantage actual or potential competitors. [FN152] Especially in an era of rapid and only partly foreseeable technological change, the government's basic duty is to provide a framework for competitive development, [FN153] rather than specification of end-states. Any ***1795** such specifications will likely prove counterproductive in light of developments that cannot now be predicted.

This is not to say that government regulation has no place, or even that government should restrict itself to the task of ensuring well-functioning markets. But even good Madisonians should insist that rigid dictates ought to be avoided. Regulation will do far better if it takes the form of incentives rather than mandates. Consider, as possible forerunners of future approaches, the FCC's use of auction systems accompanied by the grant of "points" toward licensing [FN154] for preferred licensees. Consider too the use of government subsidies to public broadcasting or to certain high-quality programs, or the transfer of resources from commercial broadcasters for the benefit of noncommercial, educational, or public-affairs programming. Initiatives of this sort would not mandate particular results but instead would create pressures to improve the speech market.

C. Law

The ultimate shape of constitutional constraints on regulation of the electronic media cannot be foreseen. Too many new possibilities will come into view. Too many distinctions will become relevant. Consider, for example, the fact that for many dozens of years, there has been a clear difference between two different kinds of communication. The first is ordinary broadcasting or publishing, in which an owner makes available a certain range of communications; offers that range of communications as an indivisible package for hundreds, thousands, or millions of subscribers; and sells advertising time for commercial interests. The second involves the mail, in which one person typically sends a message to another, or in which one person might send a message to a group of people; in any case mail involves highly differentiated, rather than indivisible, communication, in the sense that no single "package" is made available to wide ranges of people. Moreover, no advertisers need be involved. Many of the complexities in free speech law have arisen from this distinction, though the implications of the distinction are of course sharply contested.

New technologies may weaken or even undo the distinction between these two categories. In the long-term future, the "mail" analogy may become the more apposite one, as it becomes simpler and cheaper for a person to send communications to any particular person, or to a large group of people, on such terms as he chooses. Communications may decreasingly come in an indivisible package, and increasingly take the particular form that the particular actors choose. Perhaps in the future, "broadcasting" will increasingly have this ***1796** characteristic. Often the purchaser of the relevant information will pay for it without the intermediation of advertisers. [FN155] In such a future, the constitutional issues will take on different dimensions. A key question will be the extent to which the owner or manager of the "mail" may be held liable for injuries that occur as a result of use of some service. It will be plausible to say that just as the United States and Federal Express are not liable for harms caused by packages they carry, so too the owner of an electronic service ought not to pay damages for harms that owners cannot reasonably be expected to prevent or control. But it is far too soon to offer particular judgments on the issues that will arise.

It is nonetheless possible to describe certain categories of regulation and to set out some general guidelines about how they might be approached. I have suggested that existing law provides principles and analogies on which it makes sense to draw. An exploration of new problems confirms this suggestion. It shows that current categories can be invoked fairly straightforwardly to make sense of likely future dilemmas.

A large lesson may emerge from the discussion. Often participants in legal disputes, and especially in constitutional disputes, disagree sharply with respect to high-level, abstract issues; the debate between Madisonians and marketplace advocates is an obvious illustration. But sometimes such disputants can converge, or narrow their disagreement a great deal, by grappling with highly particular problems. In other words, debate over abstractions may conceal a potential for productive discussion and even agreement over particulars. [FN156] Perhaps this is a strategy through which we might make much progress in the next generation of free speech law.

1. Requiring Competition

Many actual and imaginable legislative efforts are designed to ensure competition in the new communications markets. There is no constitutional problem with such efforts. [FN157] The only qualification is that some such efforts might be seen as subterfuge for content regulation, disguised by a claimed need to promote monopoly; but this should be a relatively rare event. If government is genuinely attempting to prevent monopolistic practices, and to offer a structure in which competition can take place, there is no basis for constitutional complaint. Here First Amendment theorists of widely divergent views might be brought into agreement.

***1797** 2. Subsidizing New Media

It is predictable that government might seek to assist certain technologies that offer great promise for the future. Some such efforts may in fact be a result of interest-group pressure. But in general, there is no constitutional obstacle to government efforts to subsidize preferred communications sources. Perhaps government believes that some technological innovations are especially likely to do well, or that they could receive particularly valuable benefits from national assistance. At least so long as there is no reason to believe that government is favoring speech of a certain content, efforts of this kind are unobjectionable as a matter of law. [FN158] They may be objectionable as a matter of policy, since government may make bad judgments reflecting confusion or factional influence; but that is a different issue.

3. Subsidizing Particular Programming or Particular Broadcasters

In her dissenting opinion in Turner, Justice O'Connor suggested that the appropriate response to government desire for programming of a certain content is not regulation but instead subsidization. [FN159] This idea fits well with the basic model for campaign finance regulation, set out in Buckley v. Valeo. [FN160] It also fits with the idea, found in Rust v. Sullivan, [FN161] that the government is unconstrained in its power to subsidize such speech as it prefers. Hence there should be no constitutional objection to government efforts to fund public broadcasting, to pay for high-quality fare for children, or to support programming that deals with public affairs. [FN162] Perhaps government might do this for certain uses of the Internet.

To be sure, it is doubtful that Rust would be taken to its logical extreme. Could the government fund the Democratic Convention but not the Republican Convention? Could the government announce that it would fund only those public- affairs programs that spoke approvingly of current government policy? If we take the First Amendment to ban viewpoint discrimination, funding of this kind should be held to be improperly motivated. On the other hand, government subsidies of educational and public-affairs programming need not ***1798** raise serious risks of viewpoint discrimination. It therefore seems unexceptionable for government, short of viewpoint discrimination, to subsidize those broadcasters whose programming it prefers, even if any such preference embodies content discrimination. So too, government might promote "conversations" or fora on e-mail that involve issues of public importance, or that attempt to promote educational goals for children or even adults. [FN163]

4. Leaving Admittedly "Open" Channels Available to Others Who Would Not Otherwise Get Carriage

Suppose that a particular communications carrier has room for five hundred channels; suppose that four hundred channels are filled, but that one hundred are left open. Would it be legitimate for government to say that the one hundred must be filled by stations that would otherwise be unable be pay for carriage? Let us suppose that the stations would be chosen through a content-neutral system, such as a lottery. From the First Amendment point of view, this approach seems acceptable. The government would be attempting to ensure access for speakers who would otherwise be unable to reach the audience. It is possible that as a matter of policy, government should have to provide some payment to the carrier in return for the access requirement. But there does not seem to be a First Amendment problem.

5. Requiring Carriers To Be Common Carriers for a Certain Number of Stations, Filling Vacancies with a Lottery System or Timesharing

In her dissenting opinion in Turner, Justice O'Connor suggested the possibility that carriers could be required to set aside certain channels to be filled by a random method. [FN164] The advantage of this approach is that it would promote access for people who would otherwise be denied carriage, but without involving government in decisions about preferred content. This approach should raise no First Amendment difficulties.

6. Imposing Structural Regulation Designed Not To Prevent a Conventional Market Failure, But To Ensure Universal or Near-Universal Consumer Access to Networks

The protection of broadcasters in Turner was specifically designed to ensure continued viewer access to free programming. Notably, the Court permitted government to achieve this goal through regulation rather than ***1799** through subsidy. Of course subsidy is the simpler and ordinarily more efficient route. If government wants to make sure that all consumers have access to communications networks, why should government not be required to pay to allow such access, on a kind of analogue to the food stamp program? The ordinary response to a problem of access is not to fix prices but instead to subsidize people who would otherwise be without access. The Turner Court apparently believed that it is constitutionally acceptable for the government to ensure that industry (and subscribers), rather than taxpayers, provide the funding for those who would otherwise lack access.

The precise implications of this holding remain to be seen. It is impossible to foresee the range of structural regulations that might be proposed in an effort to ensure that all or almost all citizens have access to free programming or to some communications network, including any parts of the "informational superhighway." Some such regulations might in fact be based on other, more invidious motives, such as favoritism toward a particular set of suppliers; as we have seen, this may well be true of the measure in Turner itself. The Turner decision means that courts should review with some care any governmental claim that regulation is actually based on an effort to

promote free access. But the key point here is that if the claim can be made out on the facts, structural regulation should be found acceptable.

7. Protecting Against Obscene, Libelous, Violent, Commercial, or Harassing Broadcasting or Messages

New technologies have greatly expanded the opportunity to communicate obscene, libelous, violent, or harassing messages-perhaps to general groups via stations on (for example) cable television, perhaps to particular people via electronic mail. [FN165] Invasions of privacy are far more likely. The Internet poses special problems on these counts. As a general rule, any restrictions should be treated like those governing ordinary speech, with ordinary mail providing the best analogy. If restrictions are narrowly tailored, and supported by a sufficiently strong record, they should be upheld.

Consider in this regard the highly publicized case involving "cyberporn" at the University of Michigan. [FN166] A student is alleged to have distributed a fictional story involving a fellow student, explicitly named, who was, in the story, raped, tortured, and finally killed. The first question raised here is whether state or federal law provides a cause of action for conduct of this sort. Perhaps the story amounts to a threat, or a form of libel, or perhaps the most plausible state law claim would be based on intentional infliction of emotional ***1800** distress. The next question is whether, if a state law claim is available, the award of damages would violate the First Amendment. At first glance it seems that the question should be resolved in the same way as any case in which a writer uses a real person's name in fiction of this sort. And it certainly does not seem clear that the First Amendment should prohibit states from awarding damages for conduct of this kind, so long as no political issue is involved. [FN167] Perhaps the ease of massive distribution of such materials, which can be sent to much of the world with the touch of a button, argues in favor of loosening the constitutional constraints on compensatory damages.

What of a regulatory regime designed to prevent invasion of privacy, libel, unwanted commercial messages, and obscenity, [FN168] harassment, or infliction of emotional distress? Some such regulatory regime will ultimately make a great deal of sense. The principal obstacles are that the regulations should be both clear and narrow. It is easy to imagine a broad or vague regulation, one that would seize upon the sexually explicit or violent nature of communication to justify regulation that is far broader than necessary. Moreover, it is possible to imagine a situation in which liability was extended to any owner or operator who could have no knowledge of the particular materials being sent. [FN169] The underlying question, having to do with efficient risk allocation, involves the extent to which a carrier might be expected to find and to stop unlawful messages; that question depends upon the relevant technology.

Consider more particularly possible efforts to control the distribution of sexually explicit materials on the Internet. Insofar as the government seeks to ban materials that are technically obscene, and imposes civil or criminal liability on someone with specific intent to distribute such materials, there should be no constitutional problem. By hypothesis, these materials lack constitutional protection, and materials lacking constitutional protection can be banned in

cyberspace as everywhere else. On the other hand, many actual and imaginable bills would extend beyond the technically obscene, to include (for example) materials that are "indecent," or "lewd," or "filthy." [FN170] Terms of this sort create a serious risk of unconstitutional vagueness or overbreadth. [FN171] At least at first glance, they appear unconstitutional for that reason.

***1801** The best justification for expansive terms of this kind would be to protect children from harmful materials. It is true that the Internet contains pornography accessible to children, some of it coming from adults explicitly seeking sexual relations with children. There is in fact material on the Internet containing requests to children for their home addresses. [FN172] Solicitations to engage in unlawful activity are unprotected by the First Amendment, whether they occur on the Internet or anywhere else. For this reason, regulation designed to prevent these sorts of requests should not be held unconstitutional.

But when government goes beyond solicitation, and bans "indecent" or "filthy" material in general, the question is quite different. Here a central issue is whether the government has chosen the least restrictive means of preventing the relevant harms to children. In a case involving "dial-a-porn," for example, the Court struck down a ban on "indecent" materials on the ground that children could be protected in other ways. [FN173] On the Madisonian view, this outcome is questionable, since "dial-a-porn" ranks low on the First Amendment hierarchy. But under existing law, it seems clear that in order to support an extension beyond obscenity, Congress would have to show that less restrictive alternatives would be ineffectual. The question then becomes a factual one: What sorts of technological options exist by which parents or others can provide the relevant protection? To answer this question, it would be necessary to explore the possibility of creating "locks" within the Internet, for use by parents, or perhaps for use by those who write certain sorts of materials. [FN174]

Different questions would be raised by the imposition of civil or criminal liability not on the distributors having specific intent to distribute, but on carriers who have no knowledge of the specific materials at issue, and could not obtain such knowledge without considerable difficulty and expense. It might be thought that the carrier should be treated like a publisher, and a publisher can of course be held liable for obscene or libelous materials even if the publisher has no specific knowledge of the offending material. But in light of the relatively low costs of search in the world of magazine and book publishing, it is reasonable to think that a publisher should be charged with having control over the content of its publications. Perhaps the same cannot be said for the owner of an electronic mail service. Here the proper analogy might instead be the carriage of mail, in which owners of services are not held criminally or civilly liable for obscene or libelous materials. The underlying theory is that it would be unreasonable to expect such owners to inspect all the materials they transport, and the imposition of criminal liability, at least, would have an unacceptably harmful effect upon a desirable service involving the ***1802** distribution of a great deal of protected speech. If carriers were held liable for distributing unprotected speech, there would inevitably be an adverse effect on the dissemination of protected speech too. In other words, the problem with carrier liability, in this context, is that it would interfere with protected as well as unprotected speech.

How do these points bear on the First Amendment issue with respect to the Internet? Some of the services that provide access to the Internet should not themselves be treated as speakers; they are providers of speech, but their own speech is not at issue. This point is closely related to the debate in Turner about the speech status of cable carriers. But whether or not a carrier or provider is a speaker, a harmful effect on speech would raise First Amendment issues. We can see this point with an analogy. Certainly it would not be constitutional to say that truck owners will be criminally liable for carrying newspapers containing articles critical of the President. Such a measure would be unconstitutional in its purposes and in its effects, even if the truck owners are not speakers. From this we can see that a criminal penalty on carriers of material that is independently protected by the First Amendment should be unconstitutional. Thus a criminal penalty could not be imposed for providing "filthy" speech, at least if "filthy" speech is otherwise protected.

But a penalty imposed on otherwise unprotected materials raises a different question. Suppose that the government imposes criminal liability on carriers or providers of admittedly obscene material on the Internet. The adverse effect on unprotected speech should not by itself be found to offend the Constitution, even if there would be a harmful economic effect, and even unfairness, for the provider of the service. Instead the constitutional question should turn on the extent of the adverse effects on the dissemination of materials that are protected by the Constitution. If, for example, the imposition of criminal liability for the distribution of unprotected speech had serious harmful effects for the distribution of protected speech, the First Amendment issue would be quite severe. But that question cannot be answered in the abstract; it depends on what the relevant record shows with respect to any such adverse effects.

To answer that question, we need to know whether carrier liability, for unprotected speech, has a significant adverse effect on protected speech as well. We need to know, in short, whether the proper analogy is to a publisher or instead to a carrier of mail. It is therefore important to know whether a carrier could, at relatively low expense, filter out constitutionally unprotected material, or whether, on the contrary, the imposition of criminal liability for unprotected material would drive legitimate carriers out of business, or force them to try to undertake impossible or unrealistically expensive "searches." The answer to this question will depend in large part on the state of technology.

***1803** 8. Imposing Content-Based Regulation Designed To Ensure Public-Affairs and Educational Programming

It can readily be imagined that Congress might seek to promote education via regulation or subsidy of new media. It might try to ensure attention to public affairs. Suppose, for example, that Congress sets aside a number of channels for public-affairs and educational programming, on the theory that the marketplace provides too much commercial programming. This notion has in fact been under active consideration in Congress. Thus a recent bill would have required all telecommunications carriers to provide access at preferential rates to educational and health care institutions, state and local governments, public broadcast stations, libraries and other public entities, community newspapers, and broadcasters in the smallest markets. [FN175]

Turner certainly does not stand for the proposition that such efforts are constitutional. By hypothesis, any such regulation would be content-based. It would therefore meet with a high level of judicial skepticism. On the other hand, Turner does not authoritatively suggest that such efforts are unconstitutional. The Court did not itself say whether it would accept content discrimination designed to promote Madisonian goals. Certainly the opinion suggests that the government's burden would be a significant one. But it does not resolve the question.

It is notable that Justice O'Connor's opinion appears quite sensible on this point, and she leaves the issue open. [FN176] As I have noted, her principal argument is that the "must-carry" rules are too crude. Certainly crudely tailored measures give reason to believe that interest-group pressures, rather than a legitimate effort to improve educational and public-affairs programming, are at work. But if the relevant measures actually promote Madisonian goals, they should be upheld. There is of course reason to fear that any such measures have less legitimate purposes and functions, and hence a degree of judicial skepticism is appropriate. But narrow measures, actually promoting those purposes, are constitutionally legitimate.

VI. MADISON IN CYBERSPACE?

Do Madisonian ideals have an enduring role in American thought about freedom of speech? The Supreme Court has not said for certain; its signals are quite mixed; and the existence of new technologies makes the question different and far more complex than it once was. It is conceivable that in a world of newly emerging and countless options, the market will prove literally ***1804** unstoppable, as novel possibilities outstrip even well-motivated government controls.

If so, this result should not be entirely lamented. It would be an understatement to say that a world in which consumers can choose from limitless choices has many advantages, not least from the Madisonian point of view. If choices are limitless, people interested in politics can see and listen to politics; perhaps they can even participate in politics, and in ways that were impossible just a decade ago. But that world would be far from perfect. It may increase social balkanization. It may not promote deliberation, but foster instead a series of referenda in cyberspace that betray constitutional goals.

My central point here has been that the system of free expression is not an aimless abstraction. Far from being an outgrowth of neoclassical economics, the First Amendment has independent and identifiable purposes. Free speech doctrine, with its proliferating tests, distinctions, and subparts, should not lose touch with those purposes. Rooted in a remarkable conception of political sovereignty, the goals of the First Amendment are closely connected with the founding commitment to a particular kind of polity: a deliberative democracy among informed citizens who are political equals. It follows that instead of allowing new technologies to use democratic processes for their own purposes, constitutional law should be concerned with harnessing those technologies for democratic ends-including the founding aspirations to public deliberation, citizenship, political equality, and even a certain kind of virtue. If the new technologies offer risks on these scores, they hold out enormous promise as well. I have argued here that whether that

promise will be realized depends in significant part on judgments of law, including judgments about the point of the First Amendment.

Endnotes

FN#. Karl N. Llewellyn Distinguished Service Professor of Jurisprudence, Law School and Department of Political Science, University of Chicago. I am grateful to Elena Kagan, Larry Lessig, Geoffrey Stone, David Strauss, and Eugene Volokh for helpful comments, and to Sophie Clark for research assistance and valuable discussions. An overlapping but much shorter essay, The Future of the First Amendment, appears as an afterword to CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (2d ed. 1995).

FN1. James Madison, Remarks to the Virginia Convention (June 20, 1788), in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 536-37 (photo. reprint 1987) (Jonathan Elliot ed., 2d ed. 1836).

FN2. James Madison, Report on the Virginia Resolutions, Feb. 7, 1777, in 6 WRITINGS OF JAMES MADISON 341, 397 (Gaillard Hunt ed., 1906) In his report, Madison objects to the Sedition Act on First Amendment grounds.

FN3. Bernard D. Nossiter, Licenses To Coin Money: The F.C.C.'s Big Giveaway Show, 240 NATION 402 (1985) (quoting Mark Fowler, former FCC Chair).

FN4. Administration Policy Statement, 58 Fed. Reg. 49,026 (1993).

FN5. Id.

FN6. See HOWARD RHEINGOLD, THE VIRTUAL COMMUNITY 38-64 (1993). The area thus fortifies the analysis in ROBERT C. ELLICKSON, ORDER WITHOUT LAW (1991), of how social norms can develop lawlike constraints in the absence of actual law.

FN7. LEXIS Counsel Connect has posted a statement of recommended online etiquette, which, following customary usage, it calls "netiquette." LEXIS Counsel Connect, Netiquette, Aug. 13, 1994, available online at LEXIS Counsel Connect, Discuss Menu, Browse: About the Discussion Groups Forum.

FN8. The distinction is elided in the best general treatment, HARRY KALVEN JR., A WORTHY TRADITION (1992).

FN9. Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

FN10. 418 U.S. 241 (1974).

FN11. Syracuse Peace Council v. Television Station WTVH, 2 F.C.C.R. 5043, 5054-5

5
(1987).

FN12. See CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH at xvi- xvii (1993).

FN13. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

FN14. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

FN15. 376 U.S. 254 (1964).

FN16. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

FN17. 418 U.S. 241 (1978).

FN18. See Syracuse Peace Council v. Television Station WTVH, 2 F.C.C.R. 5043, 5055 (1987).

FN19. See id.

FN20. Nossiter, supra note 3, at 402.

FN21. See Thomas G. Krattenmaker & L.A. Powe, Jr., Converging First Amendment Principles for Converging Communications Media, 104 YALE L.J. 1719 (1995).

FN22. Thus wrote the greatest critic of socialism in the 20th century:

It is regrettable, though not difficult to explain, that in the past much less attention has been given to the positive requirements of a successful working of the competitive system than to these [previously discussed] negative points. The functioning of a competition not only requires adequate organization of certain institutions like money, markets, and channels of information-some of which can never be adequately provided by private enterprise-but it depends, above all, on the existence of an appropriate legal system, a legal system designed both to preserve competition and to make it operate as beneficially as possible* * *

* * *

In no system that could be rationally defended would the state just do nothing. An effective competitive system needs an intelligently designed and continuously adjusted legal framework as much as any other.

FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 38-39 (1944).

FN23. See Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Miller v. California, 413 U.S. 15 (1973).

FN24. See infra part V.C.7.

FN25. See, e.g., Syracuse Peace Council v. Television Station WTVH, 2 F.C.C.R. 5043 (1987); THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 277 (1994); Krattenmaker & Powe, supra note 21.

FN26. See BRUCE M. OWEN & STEVEN S. WILDMAN, VIDEO ECONOMICS (1992).

FN27. Of course, significant numbers of Americans do not have cable television- now about 38% of households that have television-and many citizens are without access to the Internet. NRTC Executive: DirecTv a Big Hit in the Country, MULTICHANNEL NEWS, Dec. 15, 1994, at 32 [hereinafter DirecTv a Big Hit]; see infra text accompanying notes 145-51.

FN28. See MEIKLEJOHN, supra note 14.

FN29. See the futuristic picture in Eugene Volokh, Cheap Speech and What It Will Do, 104 YALE L.J. 1805 (1995), on the risks posed by such a system.

FN30. I try to do this in SUNSTEIN, supra note 12.

FN31. Id. at xvii.

FN32. See JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN, 136-38 (1994).

FN33. See supra text accompanying notes 1-2.

FN34. See the discussion of the fair value of political liberties in JOHN RAWLS, POLITICAL LIBERALISM 356-63 (1993).

FN35. See generally KRATTENMAKER & POWE, supra note 25.

FN36. Note in this regard The Wall Street Journal's recently released Personal Journal, which is available online. Each subscriber receives only the portion of the Journal that is "relevant" to him, which includes major headlines and news stories on the 10 corporations he has chosen to follow. See Michael Putzel, A Personal Journal from Dow Jones, BOSTON GLOBE, Feb. 6, 1995, at 19; Morning Edition: "Personal Journal" Delivers News Based on Need (NPR radio broadcast, Mar. 11, 1995).

FN37. See C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS 44-70 (1994).

FN38. Robert Hughes, Why Watch It, Anyway?, N.Y. REV. BOOKS, Feb. 16, 1995, at 38.

FN39. See infra part V.B.2.

FN40. 114 S. Ct. 2445 (1994).

FN41. 47 U.S.C. §§ 534-535 (Supp. V 1993).

FN42. See the outline in Turner, 114 S. Ct. at 2452-53.

FN43. See S. REP. NO. 92, 102d Cong., 1st Sess. 3-4 (1991), reprinted in 1992 U.S.C.C.A.N. 1133, 1135-36.

FN44. 114 S. Ct. at 2451.

FN45. 47 U.S.C. § 534 (Supp. V 1993)

FN46. Id. § 534(b)(1).

FN47. Id. § 534(b)(1)(A)-(B).

FN48. Id. § 535.

FN49. Id. § 535(l)(1)(B).

FN50. Id. § 535(l)(1)(A)(ii).

FN51. Id. § 535(b)(1).

FN52. Id. § 535(b)(3).

FN53. Id. § 535(b)(2).

FN54. This is a simple insight of public choice theory. See generally DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE (1991).

FN55. See Turner Broadcasting Sys., Inc. v. FCC, 819 F. Supp. 32, 65 (D.D.C. 1993) (Williams, J., dissenting) (treating interest-group feature of case as relevant to constitutional issue), vacated and remanded, 114 S. Ct. 2445 (1994).

FN56. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2456-58 (1994).

FN57. It is also quite vulnerable. All goods are scarce, in a sense, and hence the scarcity rationale has never been a secure one. See Ronald H. Coase, The Federal

Communications Commission, 2 J.L. & ECON. 1, 14, 20 (1959). Perhaps market failures of a certain sort justified special controls on local broadcasting. See OWEN & WILDMAN, supra note 26, at 275-76. But if this is true, the question becomes whether there are market failures, and of what sorts, rather than whether there is "scarcity." Hence the Court's crisp distinction between scarce sources and nonscarce sources is quite crude.

FN58. 114 S. Ct. at 2460.

FN59. Id.

FN60. Id. at 2461-62.

FN61. It is questionable because it is content-discriminatory. In the end, content discrimination of this sort might be legitimate, see infra text accompanying notes 77-82 (discussing Justice O'Connor's analysis), but there is of course a presumption against it.

FN62. 114 S. Ct. at 2455.

FN63. Id.

FN64. Id. at 2464.

FN65. Id. at 2468.

FN66. See, e.g., United States v. O'Brien, 391 U.S. 367 (1968) (requiring that speech regulation serve important government interest and be narrowly tailored to achieve that interest).

FN67. 114 S. Ct. at 2469.

FN68. See, e.g., O'Brien, 391 U.S. at 377.

FN69. 114 S. Ct. at 2469.

FN70. Id. at 2470.

FN71. Id. at 2466.

FN72. Id.

FN73. Id.

FN74. Id. at 2472.

FN75. Id. at 2471. This was Justice Stevens' major point; he would have affirmed rather than remanded for this reason. See id. at 2473.

FN76. Id. at 2471.

FN77. Id. at 2479.

FN78. Id. at 2478.

FN79. Id.

FN80. Id.

FN81. Id. at 2479.

FN82. Id.

FN83. Id. at 2469-70.

FN84. Id. at 2479.

FN85. See infra text accompanying notes 86-87.

FN86. See Monroe E. Price & Donald W. Hawthorne, Saving Public Television: The Remand of Turner Broadcasting and the Future of Cable Regulation, 17 HASTINGS COMM. & ENT. L.J. 65, 91-95 (1994), for an argument that on remand, the district court should uphold section 5 even if it finds section 4 unconstitutional.

FN87. Thus it could be imagined that a serious question would be raised if Congress said that a humor magazine had to educate too, or that speakers on a comedy show had to have serious bits as well.

FN88. See SUNSTEIN, supra note 12, at 77-81 (noting that several European high courts have found that governments were not merely permitted to promote diversity in the media, but were constitutionally obliged to do so); see also ELI NOAM, TELECOMMUNICATIONS IN EUROPE (1992).

FN89. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2466 (1994).

FN90. Id.

FN91. Id.

FN92. Id. at 2469.

FN93. Cf. Metro Broadcasting v. FCC, 497 U.S. 547 (1990) (upholding affirmative action for minority owners on theory that this indirect, content-neutral approach would provide broadcasting of certain content-even though nondiscriminatory alternative, pursuing that very same goal directly, would probably be unconstitutional).

FN94. We might even see the outcome as an incompletely theorized agreement, a distinctive kind of judicial judgment. See Cass R. Sunstein, Incompletely Theorized Agreements, 108 HARV. L. REV. (forthcoming May 1995).

FN95. See the valuable analysis in Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine (unpublished manuscript, on file with author), on which I draw for this and the preceding paragraph.

FN96. See Krattenmaker & Powe, supra note 21.

FN97. See the introduction to Part III supra.

FN98. There is of course a large and insufficiently analyzed problem: defining the relevant market. Perhaps those interested in Madisonian goals should focus on the entirety of the free speech market, seeing magazines, broadcasting, and even books as aspects of a single market, to be taken as a whole. I cannot address this issue here.

FN99. See Nossiter, supra note 3.

FN100. See supra text accompanying note 1.

FN101. See KRATTENMAKER & POWE, supra note 25 (stressing this problem).

FN102. See In 2050, Computers May Be Collegian's "Campus", CHI. TRIB., Nov. 7, 1994, at 4. It is revealing that many of the footnotes in this Essay come from newspapers and weekly news magazines. With respect to communications technologies, development is occurring so rapidly that other sources are often obsolete upon publication.

FN103. See DirecTv a Big Hit, supra note 27.

FN104. Id.

FN105. Revised downward based on 1990 census.

FN106. On-Line Computer Services Had Another Boom Year, Survey Says, L.A.TIMES, Jan. 14, 1995, at D2.

FN107. This chart was compiled on the basis of data in John Flinn, The Line on On-Line Services, S.F. EXAMINER, Mar. 1, 1995, at B1, and Philip Elmer-DeWitt, Welcome to

Cyberspace, TIME, Spring 1995 (Special Issue), at 9. In some countries the number of Internet users has grown more than 1000% in the past three years. Id.

FN108. The qualification is necessary because of threats posed by the new technologies to the possibility of commonly shared experience and to exposure to positions contrary to one's own. See infra text accompanying notes 121-28.

FN109. See Barrett Seaman, The Future Is Already Here, TIME, Spring 1995 (Special Issue), at 30-33.

FN110. See generally RHEINGOLD, supra note 6.

FN111. See David S. Jackson, Extra! Readers Talk Back!, TIME, Spring 1995 (Special Issue), at 60.

FN112. Peter H. Lewis, Voters and Candidates Meet on Information Superhighway, N.Y. TIMES, Nov. 6, 1994, at 30.

FN113. Id.

FN114. See Howard Fineman with Stephen A. Tuttle, The Brave New World of Cybertribes, NEWSWEEK, Feb. 27, 1995, at 30-33.

FN115. See id. at 30.

FN116. See THE FEDERALIST No. 70 (Alexander Hamilton).

FN117. See Lewis, supra note 112.

FN118. Thus Madison listed "establishing a political equality among all" as the first means of combatting the "evil" of parties. See James Madison, Parties, NAT'L GAZETTE, Jan. 23, 1792, reprinted in 14 THE PAPERS OF JAMES MADISON 197- 98 (Robert A. Rutland et al. eds., 1983). On the risks of government by referendum, see DAVID B. MAGLEBY, DIRECT LEGISLATION (1984).

FN119. See the discussion of Vice President Gore's proposals in RHEINGOLD, supra note 6, at 304, which calls for avoiding "information haves" and "have- nots."

FN120. Elmer-DeWitt, supra note 107, at 4, 9-10. A special advantage of the Internet is its grassroots, "bottom-up" quality. In contrast to the mass media, in which a large broadcaster speaks to millions, the Internet allows individual citizens to spread news or commentary to one person, or to hundreds, or to thousands, or to millions. The problem of access to the media is in this respect greatly reduced. A decentralized system has the distinct virtue of promoting Jeffersonian aspirations to citizenship.

FN121. See THE FEDERALIST No. 10 (James Madison); see also JOSEPH M. BESSETTE, THE MILD VOICE OF REASON (1994).

FN122. THE FEDERALIST No. 10 (James Madison).

FN123. See supra text accompanying note 120 (discussing LEXIS Counsel Connect); see also RHEINGOLD, supra note 6.

FN124. See generally SHANTO IYENGAR, IS ANYONE RESPONSIBLE? (1992); SHANTO IYENGAR & DONALD R. KINDER, NEWS THAT MATTERS (1987); PHYLLIS KANISS, MAKING LOCAL NEWS (1989). See also STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE 33-51 (1993).

FN125. For a description of the possibility of such a system, see Volokh, supra note 29.

FN126. On the issue of choice, see infra part V.B.2.

FN127. See generally MAGLEBY, supra note 118.

FN128. See the discussion of the deliberative opinion poll in JAMES S. FISHKIN, DEMOCRACY AND DELIBERATION 1-2, 84 (1991).

FN129. See KRATTENMAKER & POWE, supra note 25.

FN130. It is revealing in this regard that many European nations do not identify their free speech principle with consumer sovereignty. See SUNSTEIN, supra note 12, at 77-81. The experience of the Bundesverfassungsgericht (German Constitutional Court) is of special interest, for the Court has self- consciously decided that democratic aspirations require the government to regulate the broadcast media to create a forum for speakers with a broad range of interests and opinions. See DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 227-33 (1994); CASS R. SUNSTEIN, supra note 12, at 77-79 (discussing recent Bundesverfassungsgericht cases).

FN131. See the extensive discussion in BAKER, supra note 37, at 44-70; see also SUNSTEIN, supra note 12, at 62-66.

FN132. See BAKER, supra note 37, at 55-65.

FN133. See id. at 83-117.

FN134. See, e.g., Syracuse Peace Council v. Television Station WTVH, 2 F.C.C.R. 5043, 5052 (1987); KRATTENMAKER & POWE, supra note 25.

FN135. See ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 190-216 (1993).

FN136. See Richard H. Pildes & Cass R. Sunstein, Reinventing the Regulatory State, 62 U. CHI. L. REV. 1, 78-79 (1995); Amartya Sen, Internal Consistency of Choice, 61 ECONOMETRICA 495 (1993).

FN137. Of course it is possible that any regulatory requirements would be futile, since people might simply change the channel, or cease watching at all. This may be a good objection, as a matter of policy, to any particular initiative. The important point is that it is an objection of policy, not of constitutional law.

FN138. See HOWARD MARGOLIS, SELFISHNESS, ALTRUISM, AND RATIONALITY (1987); Cass R. Sunstein, Preferences and Politics, 20 PHIL. & PUB. AFF. 3 (1991).

FN139. Compare the discussion of the right to free speech in RAZ, supra note 32, at 131-54.

If I were to choose between living in a society which enjoys freedom of expression, but not having the right myself, or enjoying the right in a society which does not have it, I would have no hesitation in judging that my own personal interest is better served by the first option.

Id. at 39.

FN140. Cf. JON ELSTER, SOUR GRAPES (1983) (discussing adaptive preferences); Sushil Bikhchandani et al., A Theory of Fads Fashion, Custom and Culture Change as Informational Cascades, 100 J. POL. ECON. 992 (1992) (theorizing that because decisions based upon limited information are fragile, relatively unimportant new information may radically shift social equilibria).

FN141. See, e.g., Anne Wells Branscomb, Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces, 104 YALE L.J. 1639 (1995); Lawrence Lessig, The Path of Cyberlaw, 104 YALE L.J. 1743 (1995); Volokh, supra note 29.

FN142. See infra note 169, discussing S. 314, the proposed Communications Decency Act of 1995.

FN143. See Branscomb, supra note 141.

FN144. See Lessig, supra note 141, at 1744; see also Cass R. Sunstein, On Analogical Reasoning, 106 HARV. L. REV. 741 (1993); Cass R. Sunstein, Political Conflict and Legal Judgment, 1996 THE TANNER LECTURES IN HUMAN VALUES (forthcoming).

FN145. Suneel Ratan, A New Divide Between Haves and Have-Nots?, TIME, Spring 1995 (Special Issue), at 25, 26.

FN146. See Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666 (1966).

FN147. See Ratan, supra note 145, at 26.

FN148. It is likely to be inefficient when compared with subsidies for people who are unable to afford access.

FN149. See Vice President Gore's suggestions, outlined in RHEINGOLD, supra note 6, at 11.

FN150. See STEPHEN BREYER, REGULATION AND ITS REFORM (1982).

FN151. See generally Bruce A. Ackerman & Richard B. Stewart, Reforming Environmental Law, 13 COLUM. J. ENVTL. L. 171 (1988). A vigorous popular treatment is PHILIP K. HOWARD, THE DEATH OF COMMON SENSE (1994). FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY (1960), can well be read as a sustained attack on command-and-control regulation, and what Hayek says bears directly on efforts to regulate emerging technologies.

FN152. See, e.g., The Cable Act, 47 U.S.C. §§ 534-535 (Supp. V 1993); supra text accompanying notes 54-55.

FN153. This is a Hayekian point connected with the difficulty of foreseeing the future. See HAYEK, supra note 151.

FN154. Consider the FCC's quite promising auction system, in which points are granted to minority and women applicants. See John McMillan, Selling Spectrum Rights, J. ECON. PERSP., Summer 1994, at 145.

FN155. It is now impossible to know exactly what sorts of communications packages will be provided.

FN156. See Sunstein, supra note 94.

FN157. See also KRATTENMAKER & POWE, supra note 25 (favoring legal efforts to encourage competition).

FN158. This follows from Rust v. Sullivan, 500 U.S. 173 (1991).

FN159. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2478 (1994) (O'Connor, J., dissenting).

FN160. 424 U.S. 1 (1976).

FN161. 500 U.S. 173 (1991).

FN162. There is a question of policy in the background, made highly visible by controversy over government funding of the Corporation for Public Broadcasting and the National Endowment for the Humanities. In principle, such funding is justified in light of the "public good" features of the relevant products and in light of the possibility that the funded sources can increase opportunities for preference formation by providing greater exposure to high-quality material. See ANDERSON, supra note 135, at 149. But the ultimate value of funding depends on a range of more practical and empirical issues that cannot be decided a priori, including the actual products that result, the opportunities to provide private funding instead, and the alternative use of government money.

FN163. See supra text accompanying notes 112-15 (discussing role of new technologies in connection with elections).

FN164. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2480 (O'Connor, J., dissenting).

FN165. See Branscomb, supra note 141.

FN166. See Stephen Levy, TechnoMania, NEWSWEEK, Feb. 27, 1995, at 24, 29; Peter H. Lewis, Writer Arrested After Sending Violent Fiction over Internet, N.Y. TIMES, Feb. 11, 1995, at A10.

FN167. See Hustler v. Falwell, 485 U.S. 46, 51-52 (1988).

FN168. See S. 314, 104th Cong., 1st Sess. § 2(a) (1995), which would have extended liability to telecommunications providers of obscene materials.

FN169. In January 1995, for example, Senator Jim Exon (D-Neb.) introduced S. 314, the Communications Decency Act of 1995, in the U.S. Senate. In an effort to control digital pornography, it originally would have made all telecommunications providers doing business in the United States (from the telephone companies, all the way down to offices that use local area networks) liable for the content of anything sent over their networks. As it emerged from committee, S. 314 exempted carriers from liability. Id.; see also Peter H. Lewis, Despite a New Plan for Cooling It Off, Cybersex Stays Hot, N.Y. TIMES, Mar. 26, 1995, at 1, 34 (discussing S. 314 and its potential unconstitutionality)

FN170. See, e.g., S. 314, 104th Cong., 1st Sess. (1995).

FN171. Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126- 31 (1989); Action for Children's Television v. FCC, 11 F.3d 170 (D.C. Cir. 1993); Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 1281 (1992).

FN172. James Coates, Access to Answers, CHI. TRIB., Mar. 27, 1995, § 4, at 1, 4.

FN173. Sable Communications, 492 U.S. at 128-31.

FN174. See Jerry Berman & Daniel J. Weitzner, Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media, 104 YALE L.J. 1619, 1632-34 (1995).

FN175. S. 1822, 103d Cong., 2d Sess. § 103(a) (1994) (Communications Act of 1994).

FN176. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2478 (O'Connor, J., dissenting).

II. Free Speech in Cyberspace

B. The First Amendment
4. ..& Anonymous Speech

TALLEY V. CALIFORNIA
80 S.Ct. 536
4L.Ed.2d559
(Cite as: 362 U.S. 60, 80 S.Ct. 536)

Manuel D. TALLEY, Petitioner,
v.
STATE OF CALIFORNIA.

No. 154.

Argued Jan. 13, 14, 1960.
Decided March 7, 1960.

Mr. Justice BLACK delivered the opinion of the Court.

The question presented here is whether the provisions of a Los Angeles City ordinance restricting the distribution of handbills 'abridge the freedom of speech and of the press secured against state invasion by the Fourteenth Amendment of the Constitution.' * * * * * * The Appellate Department of the Superior***62** Court of the County of Los Angeles affirmed the conviction, rejecting petitioner's contention, timely made in both state courts, that the ordinance invaded his freedom of speech and press in violation of the Fourteenth and First Amendments to the Federal Constitution. * * * 172 Cal.App.2d Supp. 797, 332 P.2d 447. Since this was the highest state court available to petitioner, we granted certiorari to consider this constitutional contention. 360 U.S. 928, 79 S.Ct. 1457, 3 L.Ed.2d 1543.

In Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949, we held void on its face an ordinance that comprehensively forbade any distribution of literature at any time or place in Griffin, Georgia, without a license. Pamphlets and leaflects it was pointed out, 'have been historic weapons in the defense of liberty' * * * and enforcement of the Griffin ordinance 'would restore the system of license and censorship in its baldest form.' Id., 303 U.S. at page 452, 58 S.Ct. at page 669* * *

The broad ordinance now before us, barring distribution of 'any hand- bill in any place under any circumstances,' * * * falls precisely under the ban of our prior cases unless this ordinance is saved by the qualification that handbills can be distributed if they have printed on them the names and addresses of the persons who prepared, distributed ***64** or sponsored them. For, as in Griffin, the ordinance here is not limited to handbills whose

content is 'obscene or offensive to public morals or that advocates unlawful conduct.' * * * Counsel has urged that this ordinance is aimed at providing a way to identify those responsible for fraud, false advertising and libel. Yet the ordinance is in no manner so limited, nor have we been referred to any legislative history indicating such a purpose. Therefore we do not pass on the validity of an ordinance limited to prevent these or any other supposed evils. This ordinance simply bars all handbills under all circumstances anywhere that do not have the names and addresses printed on them in the place the ordinance requires.

There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' Lovell v. City of Griffin, 303 U.S. at page 452, 58 S.Ct. at page 669.

Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths ****539** to which government had to go to find out who was responsible for books that were obnoxious ***65** to the rulers. John Lilburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books. * * * Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. * * * Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.

We have recently had occasion to hold in two cases that there are times and circumstances when States may not compel members of groups engaged in the

dissemination of ideas to be publicly identified. Bates v. City of Little Rock, 361 U.S. 516, 80 S.Ct. 412; N.A.A.C.P. v. State of Alabama, 357 U.S. 449, 462, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488. The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. This broad Los Angeles ordinance is subject to the same infirmity. We hold that it, like the Griffin, Georgia, ordinance, is void on its face.

***66** The judgment of the Appellate Department of the Superior Court of the State of California is reversed and the cause is remanded to it for further proceedings not inconsistent with this opinion.

It is so ordered.

Judgment reversed and cause remanded with directions.

* * *

Mr. Justice CLARK, whom Mr. Justice FRANKFURTER and Mr. Justice WHITTAKER join, dissenting.

To me, Los Angeles' ordinance cannot be read as being void on its face. Certainly a fair reading of it does not permit a conclusion that it prohibits the distribution of handbills 'of any kind at any time, at any place, and in any manner,' Lovell v. City of Griffin, 1938, 303 U.S. 444, 451, 58 S.Ct. 666, 669, 82 L.Ed. 949, as the Court seems to conclude. In Griffin, the ordinance completely prohibited the unlicensed distribution of any handbills. As I read it, the ordinance here merely prohibits the distribution of a handbill which does not carry the identification of the name of the person who 'printed, wrote, compiled * * * manufactured (or) * * * caused' the distribution of it. There could well be a compelling reason for such a requirement. The Court implies as much when it observes that Los Angeles has not 'referred ***68** to any legislative history indicating' that the ordinance was adopted for the purpose of preventing 'fraud, false advertising and libel.' But even as to its legislative background there is pertinent material which the Court overlooks. At oral argument, the City's chief law enforcement officer stated that the ordinance was originally suggested in 1931 by the Los Angeles Chamber of Commerce in a complaint to the City Council urging it to 'do something about these handbills and advertising matters which were false and misleading.' Upon inquiry by the Council, he said, the matter was referred to his office, and the Council was advised that such an ordinance as the present one would be valid. He further stated that this ordinance, relating to the original inquiry of the Chamber of

Commerce, was thereafter drafted and submitted to the Council. It was adopted in 1932. In the face of this and the presumption of validity that the ordinance enjoys, the Court nevertheless strikes it down, stating that it 'falls precisely under the ban of our prior cases.' This cannot follow, for in each of the three cases cited, the ordinances either 'forbade any distribution of literature * * * without a license,' Lovell v. City of Griffin, supra, or forbade, without exception, any distribution of handbills on the streets, Jamison ****541** v. State of Texas, 1943, 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 869; or, as in Schneider v. State of New Jersey, 1939, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155, which covered different ordinances in four cities, they were either outright bans or prior restraints upon the distribution of handbills. I, therefore, cannot see how the Court can conclude that the Los Angeles ordinance here 'falls precisely' under any of these cases. On the contrary, to my mind, they neither control this case nor are apposite to it. In fact, in Schneider, depended upon by the Court, it was held, through Mr. Justice Roberts, that, 'In every case * * * where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation * * *weigh ***69** the circumstances and * * * appraise the substantiality of the reasons advanced * * *.' Id., 308 U.S. at page 161, 60 S.Ct. at page 151. The Court here, however, makes no appraisal of the circumstances, or the substantiality of the claims of the litigants, but strikes down the ordinance as being 'void on its face.' I cannot be a party to using such a device as an escape from the requirements of our cases, the latest of which was handed down only last month. Bates v. City of Little Rock, 361 U.S. 516, 80 S.Ct. 412. [FN1]

> FN1. 'When it is shown that state action threatens significantly to impinge upon constitutionally protected freedom it becomes the duty of this Court to determine whether the action bears a reasonable relationship to the achievement of the government purpose asserted as its justification.' 361 U.S. at page 525, 80 S.Ct. at page 417.

Therefore, before passing upon the validity of the ordinance, I would weigh the interests of the public in its enforcement against the claimed right of Talley. The record is barren of any claim, much less proof, that he will suffer any injury whatever by identifying the handbill with his name. Unlike N.A.A.C.P. v. State of Alabama, 1958, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488, which is relied upon, there is neither allegation nor proof that Talley or any group sponsoring him would suffer 'economic reprisal, loss of employment, threat of physical coercion (or) other manifestations of public hostility.' Id. 357 U.S. at page 462, 78 S.Ct. at page 1172. Talley makes no showing whatever to support his contention that a restraint upon his freedom of speech will result from the enforcement of the ordinance. The existence of such a restraint is necessary before we can strike the ordinance down.

But even if the State had this burden, which it does not, the substantiality of Los Angeles' interest in the enforcement of the ordinance sustains its validity. Its chief law enforcement officer says that the enforcement of the ordinance prevents 'fraud, deceit, false advertising, negligent use of words, obscenity, and libel,' and, as we have said, that such was its purpose. In the absence of ***70** any showing to the contrary by Talley, this appears to me entirely sufficient.

I stand second to none in supporting Talley's right of free speech--but not his freedom of anonymith. The Constitution say nothing about freedom of anonymous speech. In fact, this Court has approved laws requiring no less than Los Angeles' ordinance. I submit that they control this case and require its approval under the attack made here. First, Lewis Publishing Co. v. Morgan, 1913, 229 U.S. 288, 33 S.Ct. 867, 57 L.Ed. 1190, upheld an Act of Congress requiring any newspaper using the second-class mails to publish the names of its editor, publisher, owner, and stockholders. 39 U.S.C. s 233, 39 U.S.C.A. s 233. Second, in the Federal Regulation of Lobbying Act, 2 U.S.C. s 267, 2 U.S.C.A. s 267, Congress requires those engaged in lobbying to divulge their identities and give 'a modicum of information' to Congress. United States v. Harriss, 1954, 347 U.S. 612, 625, 74 S.Ct. 808, 816, 98 L.Ed. 989. ****542** Third, the several States have corrupt practices acts outlawing, inter alia, the distribution of anonymous publications with reference to political candidates. [FN2] While these statutes are leveled at political campaign and election practices, the underlying ground sustaining their validity applies with equal force here.

> FN2. Thirty-six States have statutes prohibiting the anonymous distribution of materials relating to elections. E.g.: Kan.G.S.1949, s 25--1714; M.S.A. s 211.08; Page's Ohio R.C. s 3599.09; Purdon's Pa.Stat.Ann., Title 25, s 3546.

No civil right has a greater claim to constitutional protection or calls for more rigorous safeguarding than voting rights. In this area the danger of coercion and reprisals--economic and otherwise--is a matter of common knowledge. Yet these statutes, disallowing anonymity in promoting one's views in election campaigns, have expressed the overwhelming public policy of the Nation. Nevertheless the Court is silent about this impressive authority relevant to the disposition of this case.

***71** All three of the types of statutes mentioned are designed to prevent the same abuses--libel, slander, false accusations, etc. The fact that some of these statutes are aimed at elections, lobbying, and the mails makes their restraint no more palatable, nor the abuses they prevent less deleterious to the public interest, than the present ordinance.

All that Los Angeles requires is that one who exercises his right of free speech through writing or distributing handbills identify himself just as does one who speaks from the

platform. The ordinance makes for the responsibility in writing that is present in public utterance. When and if the application of such an ordinance in a given case encroaches on First Amendment freedoms, then will be soom enough to strike that application down. But no such restraint has been shown here. After all, the public has some rights against which the enforcement of freedom of speech would be 'harsh and arbitrary in itself.' Kovacs v. Cooper, 1949, 336 U.S. 77, 88, 69 S.Ct. 448, 454, 93 L.Ed. 513. We have upheld complete proscription of uninvited door-to-door canvassing as an invasion of privacy. Breard v. City of Alexandria, 1951, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233. Is this less restrictive than complete freedom of distribution--regardless of content--of a signed handbill? And commercial handbills may be declared verboten, Valentine v. Chrestensen, 1942, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262, regardless of content or identification. Is Talley's anonymous handbill, designed to destroy the business of a commercial establishment, passed out at its very front door, and attacking its then lawful commercial practices, more comportable with First Amendment freedoms? I think not. Before we may expect international responsibility among nations, might not it be well to require individual responsibility at home.? Los Angeles' ordinance does no more.

Contrary to petitioner's contention, the ordinance as applied does not arbitrarily deprive him of equal protection ***72** of the law. He complains that handbills are singled out, while other printed media--books, magazines, and newspapers--remain unrestrained. However, '(t)he problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. * * * Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. * * * The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. (I) cannot say that that point has been reached here.' Williamson v. Lee Optical, 1955, 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563.

I dissent.

MCINTYRE V. OHIO
115 S.Ct. 1511
131L.Ed.2d426, 63USLW4279, 23MediaL.Rep.1577
(Cite as: 115 S.Ct. 1511)

Joseph McINTYRE, Executor of Estate of Margaret McIntyre, Deceased, Petitioner,
v.
OHIO ELECTIONS COMMISSION.

No. 93-986.

Argued Oct. 12, 1994.
Decided April 19, 1995.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. GINSBURG, J., filed a concurring opinion. THOMAS, J., filed an opinion concurring in the judgment. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C.J., joined.

***1514** Justice STEVENS delivered the opinion of the Court.

[1] The question presented is whether an Ohio statute that prohibits the distribution of anonymous campaign literature is a "law ... abridging the freedom of speech" within the meaning of the First Amendment.

I

On April 27, 1988, Margaret McIntyre distributed leaflets to persons attending a public meeting at the Blendon Middle School in Westerville, Ohio. At this meeting, the superintendent of schools planned to discuss an imminent referendum on a proposed school tax levy. The leaflets expressed Mrs. McIntyre's opposition to the levy. There is no suggestion that the text of her message was false, misleading, or libelous. She had composed and printed it on her home computer and had paid a professional printer to make additional copies. Some of the handbills identified her as the author; others merely purported to express the views of "CONCERNED PARENTS AND TAX PAYERS." Except for the help provided by her son and a friend, who placed some of the leaflets on car windshields in the school parking lot, Mrs. McIntyre acted independently.

* * *

The proposed school levy was defeated at the next two elections, but it finally passed on its third try in November 1988. Five months later, the same school official filed a complaint with the Ohio Elections Commission charging that Mrs. McIntyre's distribution of unsigned leaflets violated § 3599.09(A) of the Ohio Code. The Commission agreed and imposed a fine of $100.

* * *

***1515** The Ohio Court of Appeals, by a divided vote, reinstated the fine. Notwithstanding doubts about the continuing validity of a 1922 decision of the Ohio Supreme Court upholding the statutory predecessor of § 3599.09(A), the majority considered itself bound by that precedent. Id., at A-20 to A-21, citing State v. Babst, 104 Ohio St. 167, 135 N.E. 525 (1922). The dissenting judge thought that our intervening decision in Talley v. California, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960), in which we invalidated a city ordinance prohibiting all anonymous leafletting, compelled the Ohio court to adopt a narrowing construction of the statute to save its constitutionality. App. to Pet. for Cert. A-30 to A-31.

The Ohio Supreme Court affirmed by a divided vote. The majority distinguished Mrs. McIntyre's case from Talley on the ground that § 3599.09(A) "has as its purpose the identification of persons who distribute materials containing false statements." 67 Ohio St.3d 391, 394, 618 N.E.2d 152, 154 (1993). The Ohio court believed that such a law should be upheld if the burdens imposed on the First Amendment rights of voters are "reasonable" and "nondiscriminatory." Id., at 396, 618 N.E.2d, at 155, quoting Anderson v. Celebrezze, 460 U.S. 780, 788, 103 S.Ct. 1564, 1570, 75 L.Ed.2d 547 (1983). Under that standard, the majority concluded that the statute was plainly valid:

> "The minor requirement imposed by R.C. 3599.09 that those persons producing campaign literature identify themselves as the source thereof neither impacts the content of their message nor significantly burdens their ability to have it disseminated. This burden is more than counterbalanced by the state interest in providing the voters to whom the message is directed with a mechanism by which they may better evaluate its validity. Moreover, the law serves to identify those who engage in fraud, libel or false advertising. Not only are such interests sufficient to overcome the minor burden placed upon such persons, these interests were specifically acknowledged in [First National Bank of Boston v.] Bellotti [, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978),] to be regulations of the sort which would survive constitutional scrutiny." 67 Ohio St.3d, at 396, 618 N.E.2d, at 155-156.

***1516** In dissent, Justice Wright argued that the statute should be tested under a more severe standard because of its significant effect "on the ability of individual citizens to freely express their views in writing on political issues." Id., at 398, 618 N.E.2d, at 156-157. He concluded that § 3599.09(A) "is not narrowly tailored to serve a compelling state interest and is, therefore, unconstitutional as applied to McIntyre." Id., at 401, 618 N.E.2d, at 159.

* * *

II

Ohio maintains that the statute under review is a reasonable regulation of the electoral process. The State does not suggest that all anonymous publications are pernicious or that a statute totally excluding them from the marketplace of ideas would be valid. This is a wise (albeit implicit) concession, for the anonymity of an author is not ordinarily a sufficient reason to exclude her work product from the protections of the First Amendment.

"Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." Talley v. California, 362 U.S. 60, 64, 80 S.Ct. 536, 538, 4 L.Ed.2d 559 (1960). Great works of literature have frequently been produced by authors writing under assumed names. Despite readers' curiosity and the public's interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose her true identity.

* * *

The freedom to publish anonymously extends beyond the literary realm. In Talley, the Court held that the First Amendment protects the distribution of unsigned handbills urging readers to boycott certain Los Angeles merchants who were allegedly engaging in discriminatory employment practices. 362 U.S. 60, 80 S.Ct. 536. Writing for the Court, Justice Black noted that "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." Id., at 64, 80 S.Ct., at 538. Justice Black recalled England's abusive ***1517** press licensing laws and seditious libel prosecutions, and he reminded us that even the arguments favoring the ratification of the Constitution advanced in the Federalist Papers were published under fictitious names. Id., at 64-65, 80 S.Ct., at 538-539. On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of political rhetoric, where "the identity of the speaker is an important component of many attempts to persuade," City of Ladue v. Gilleo, 512 U.S. ----, ----, 114 S.Ct. 2038, 2046, 129 L.Ed.2d 36 (1994), the most effective advocates have sometimes opted for anonymity. The specific holding in Talley related to advocacy of an economic boycott, but the Court's reasoning embraced a respected tradition of anonymity in the advocacy of political causes. * * * This tradition is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation.

Ohio's statute does, however, contain a different limitation: It applies only to unsigned documents designed to influence voters in an election. In contrast, the Los Angeles ordinance prohibited all anonymous handbilling "in any place under any circumstances." Id., at 60-61, 80 S.Ct., at 536-537. For that reason, Ohio correctly argues that Talley does not necessarily control the disposition of this case. We must, therefore, decide ***1518** whether and to what extent the First Amendment's protection of anonymity encompasses documents intended to influence the electoral process.

* * *

The "ordinary litigation" test does not apply here. Unlike the statutory provisions challenged in Storer and Anderson, § 3599.09(A) of the Ohio Code does not control the mechanics of the electoral process. It is a regulation of pure speech. Moreover, even though this provision applies evenhandedly to advocates of differing viewpoints, * * * it is a direct regulation of the content of speech. Every written document covered by the statute must contain "the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor." Ohio Rev.Code Ann. § 3599.09(A) (1988). Furthermore, the category of covered documents is defined by their content--only those publications containing speech designed to influence the voters in an election need bear the required markings. * * * Ibid. Consequently, we are not faced with an ordinary election restriction; this case "involves a limitation on political expression subject to exacting scrutiny." Meyer v. Grant, 486 U.S. 414, 420, 108 S.Ct. 1886, 1891, 100 L.Ed.2d 425 (1988). * * *

Indeed, as we have explained on many prior occasions, the category of speech regulated by the Ohio statute occupies the core of the protection afforded by the First Amendment:

> "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange***1519** of ideas for the bringing about of political and social changes desired by the people.' Roth v. United States, 354 U.S. 476, 484 [77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498] (1957). Although First Amendment protections are not confined to 'the exposition of ideas,' Winters v. New York, 333 U.S. 507, 510 [68 S.Ct. 665, 667, 92 L.Ed. 840] (1948), 'there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, ... of course includ[ing] discussions of

candidates* * *' Mills v. Alabama, 384 U.S. 214, 218 [86 S.Ct. 1434, 1437, 16 L.Ed.2d 484] (1966). This no more than reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide- open,' New York Times Co. v. Sullivan, 376 U.S. 254, 270 [84 S.Ct. 710, 721, 11 L.Ed.2d 686] (1964). In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 [91 S.Ct. 621, 625, 28 L.Ed.2d 35] (1971), 'it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.' " Buckley v. Valeo, 424 U.S. 1, 14-15, 96 S.Ct. 612, 632, 46 L.Ed.2d 659 (1976).

* * *

VI

[12] Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. See generally J.S. Mill, On Liberty, in On Liberty and Considerations on Representative Government 1, 3-4 (R. McCallum ed. 1947). It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation--and their ideas from suppression--at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse. See Abrams v. United States, 250 U.S. 616, 630-631, 40 S.Ct. 17, 22, 63 L.Ed. 1173 (1919) (Holmes, J., dissenting). Ohio has not shown that its interest in preventing the misuse of anonymous election-related speech justifies a prohibition of all uses of that speech. The State may, and does, punish fraud directly. But it cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented. One would be hard pressed to think of a better example of the pitfalls of Ohio's blunderbuss approach than the facts of the case before us.

The judgment of the Ohio Supreme Court is reversed.

It is so ordered.

Justice GINSBURG, concurring.

* * *

In for a calf is not always in for a cow. The Court's decision finds unnecessary, overintrusive, and inconsistent with American ideals the State's imposition of a fine on an individual leafleteer who, within her local community, spoke her mind, but sometimes not her name. We do not thereby hold that the State may not in other, larger circumstances, require the speaker to disclose its interest by disclosing its identity. Appropriately leaving open matters not presented by McIntyre's handbills, the Court recognizes that a State's interest in protecting an election process "might justify a more limited identification requirement." Ante, at 1522. But the Court has convincingly explained ***1525** why Ohio lacks "cause for inhibiting the leafletting at issue here." Ibid.

Justice THOMAS, concurring in the judgment.

I agree with the majority's conclusion that Ohio's election law, Ohio Rev.Code Ann. § 3599.09(A), is inconsistent with the First Amendment. I would apply, however, a different methodology to this case. Instead of asking whether "an honorable tradition" of anonymous speech has existed throughout American history, or what the "value" of anonymous speech might be, we should determine whether the phrase "freedom of speech, or of the press," as originally understood, protected anonymous political leafletting. I believe that it did.

I

The First Amendment states that the government "shall make no law ... abridging the freedom of speech, or of the press." U.S. Const., Amdt. 1. When interpreting the Free Speech and Press Clauses, we must be guided by their original meaning, for "[t]he Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now." South Carolina v. United States, 199 U.S. 437, 448, 26 S.Ct. 110, 111, 50 L.Ed. 261 (1905). We have long recognized that the meaning of the Constitution "must necessarily depend on the words of the constitution [and] the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions ... in the several states." Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721, 9 L.Ed. 1233 (1838). See also INS v. Chadha, 462 U.S. 919, 959, 103 S.Ct. 2764, 2788, 77 L.Ed.2d 317 (1983). We should seek the original understanding when we interpret the Speech and Press Clauses, just as we do when we read the Religion Clauses of the First Amendment. When the Framers did not discuss the precise question at issue, we have turned to "what history reveals was the contemporaneous understanding of [the Establishment Clause's] guarantees." Lynch v. Donnelly, 465 U.S. 668, 673, 104 S.Ct. 1355, 1359, 79 L.Ed.2d 604 (1984). "[T]he line we must draw between the permissible and the impermissible is one which accords with

history and faithfully reflects the understanding of the Founding Fathers." Abington School Dist. v. Schempp, 374 U.S. 203, 294, 83 S.Ct. 1560, 1609, 10 L.Ed.2d 844 (1963) (BRENNAN, J., concurring); see also Lee v. Weisman, 505 U.S. ----, ---- - ----, 112 S.Ct. 2649, 2679, 120 L.Ed.2d 467 (1992) (SCALIA, J., dissenting).

II

Unfortunately, we have no record of discussions of anonymous political expression either in the First Congress, which drafted the Bill of Rights, or in the state ratifying conventions. Thus, our analysis must focus on the practices and beliefs held by the Founders concerning anonymous political articles and pamphlets. As an initial matter, we can safely maintain that the leaflets at issue in this case implicate the freedom of the press. When the Framers thought of the press, they did not envision the large, corporate newspaper and television establishments of our modern world. Instead, they employed the term "the press" to refer to the many independent printers who circulated small newspapers or published a writer's pamphlets for a fee. ...

There is little doubt that the Framers engaged in anonymous political writing. The essays in the Federalist Papers, published ***1526** under the pseudonym of "Publius," are only the most famous example of the outpouring of anonymous political writing that occurred during the ratification of the Constitution. Of course, the simple fact that the Framers engaged in certain conduct does not necessarily prove that they forbade its prohibition by the government. See post, at 1532 (SCALIA, J., dissenting). In this case, however, the historical evidence indicates that Founding-era Americans opposed attempts to require that anonymous authors reveal their identities on the ground that forced disclosure violated the "freedom of the press."

For example, the earliest and most famous American experience with freedom of the press, the 1735 Zenger trial, centered around anonymous political pamphlets. The case involved a printer, John Peter Zenger, who refused to reveal the anonymous authors of published attacks on the Crown governor of New York. When the governor and his council could not discover the identity of the authors, they prosecuted Zenger himself for seditious libel. See J. Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger 9-19 (S. Katz ed. 1972). Although the case set the colonies afire for its example of a jury refusing to convict a defendant of seditious libel against Crown authorities, it also signified at an early moment the extent to which anonymity and the freedom of the press were intertwined in the early American mind.

* * *

Ill

* * *

The large quantity of newspapers and pamphlets the Framers produced during the various crises of their generation show the remarkable extent to which the Framers relied upon anonymity. During the break with Great Britain, the revolutionaries employed pseudonyms both to conceal their identity from Crown authorities and to impart a message. * * *

IV

This evidence leads me to agree with the majority's result, but not its reasoning. The majority fails to seek the original understanding of the First Amendment, and instead attempts to answer the question in this case by resorting to three approaches. First, the majority recalls the historical practice of anonymous writing from Shakespeare's works to the Federalist Papers to Mark Twain. Ante, at 1516, 1524. Second, it finds that anonymous speech has an expressive value both to the speaker and to society that outweighs public interest in disclosure. Third, it finds that § 3599.09(A) cannot survive strict scrutiny because it is a "content-based" restriction on speech.

I cannot join the majority's analysis because it deviates from our settled approach to interpreting the Constitution and because it superimposes its modern theories concerning expression upon the constitutional text. Whether "great works of literature"--by Voltaire or George Eliot have been published anonymously should be irrelevant to our analysis, because it sheds no light on what the phrases "free speech" or "free press" meant to the people who drafted and ratified the First Amendment. Similarly, whether certain types of expression have "value" today has little significance; what is important is whether the Framers in 1791 believed anonymous speech sufficiently valuable to deserve the protection of the Bill of Rights. And although the majority faithfully follows our approach to "content-based" speech regulations, we need not undertake this analysis when the original understanding provides the answer.

While, like Justice SCALIA, I am loath to overturn a century of practice shared by almost all of the States, I believe the historical evidence from the framing outweighs recent tradition. When interpreting other provisions of the Constitution, this Court has believed itself bound by the text of the Constitution and by the intent of those who drafted and ratified it. It should hold itself to no less a standard when interpreting the Speech and Press Clauses. After reviewing the weight of the historical evidence, it seems that the Framers understood the First Amendment to protect an author's right to express his thoughts on political candidates or issues in an anonymous fashion. Because the majority has adopted an analysis that is largely

unconnected to the Constitution's text and history, I concur only in the judgment.

Justice SCALIA, with whom THE CHIEF JUSTICE joins, dissenting.

* * *

* * * A governmental practice that has become general throughout the United States, and particularly one that has the validation of long, accepted usage, bears a strong presumption of constitutionality. And that is what we have before us here. Section 3599.09(A) was enacted by the General Assembly of the State of Ohio almost 80 years ago. See Act of May 27, 1915, 1915 Ohio Leg. Acts 350. Even at the time of its ***1533** adoption, there was nothing unique or extraordinary about it. The earliest statute of this sort was adopted by Massachusetts in 1890, little more than 20 years after the Fourteenth Amendment was ratified. No less than 24 States had similar laws by the end of World War I, [FN1] and today every State of the Union except California has one, [FN2] as does the District of Columbia, see D.C.Code Ann. § 1-1420 (1992), and as does the Federal Government where advertising relating to candidates for federal office is concerned, see 2 U.S.C. § 441d(a). Such a universal [FN3] and long established American legislative practice must be given precedence, I think, over historical and academic speculation regarding a restriction that assuredly does not go to the heart of free speech.

* * *

* * * The law at issue here, by contrast, forbids the expression of no idea, but merely requires identification of the speaker when the idea is uttered in the electoral context. It is at the periphery of the First Amendment, like the law at issue in Burson, where we took guidance from tradition in upholding against constitutional attack restrictions upon electioneering in the vicinity of polling places, see 504 U.S., at 204-206, 112 S.Ct., at 1853-1856 (plurality opinion); id., at 214-216, 112 S.Ct., at 1859-1861 (SCALIA, J., concurring in judgment).

II

The foregoing analysis suffices to decide this case for me. Where the meaning of a constitutional text (such as "the freedom of speech") is unclear, the widespread and long-accepted practices of the American people are the best indication of what fundamental beliefs it was intended to enshrine. Even if I were to close my eyes to practice, however, and were to be guided exclusively by deductive analysis from our case law, I would reach the same result.

Three basic questions must be answered to decide this case. Two of them are readily answered by our precedents; the

third is readily answered by common sense and by a decent regard for the practical judgment of those more familiar with elections than we are. The first question is whether protection of the election process justifies limitations upon speech that cannot constitutionally be imposed generally. (If not, Talley v. California, which invalidated a flat ban on all anonymous leafletting, controls the decision here.) Our cases plainly answer that question in the affirmative--indeed, they suggest that no justification for regulation is more compelling than protection of the electoral process* * *

The second question relevant to our decision is whether a "right to anonymity" is such a prominent value in our constitutional system that even protection of the electoral process cannot be purchased at its expense. The answer, again, is clear: no. Several of our cases have held that in peculiar circumstances the compelled disclosure of a person's identity would unconstitutionally deter the exercise of First Amendment associational rights* * *

* * *

The third and last question relevant to our decision is whether the prohibition of anonymous campaigning is effective in protecting and enhancing democratic elections. In answering this question no, the Justices of the majority set their own views--on a practical matter that bears closely upon the real-life experience of elected politicians and not upon that of unelected judges--up against the views of 49 (and perhaps all 50, see n. 4, supra) state legislatures and the federal Congress. We might also add to the list on the other side the legislatures of foreign democracies: Australia, Canada, and England, for example, all have prohibitions upon anonymous campaigning. See, e.g., Commonwealth Electoral Act 1918, § 328 (Australia); Canada Elections Act, R.S.C., ch. E-2, § 261 ***1536** (1985); Representation of the People Act, 1983, § 110 (England). How is it, one must wonder, that all of these elected legislators, from around the country and around the world, could not see what six Justices of this Court see so clearly that they are willing to require the entire Nation to act upon it: that requiring identification of the source of campaign literature does not improve the quality of the campaign?

* * *

But the usefulness of a signing requirement lies not only in promoting observance of the law against campaign falsehoods (though that alone is enough to sustain it). It lies also in promoting a civil and dignified level of campaign debate--which the State has no power to command, but ample power to encourage by such undemanding measures as a signature requirement. Observers of the past few national elections have expressed concern about the increase of

character assassination--"mudslinging" is the colloquial term--engaged in by political candidates and their supporters to the detriment of the democratic process. Not all of this, in fact not much of it, consists of actionable untruth; most is innuendo, or demeaning characterization, or mere disclosure of items of personal life that have no bearing upon suitability for office. Imagine how much all of this would increase if it could be done anonymously. The principal impediment against it is the reluctance of most individuals and organizations to be publicly associated with uncharitable and uncivil expression. Consider, moreover, the increased potential for "dirty tricks." It is not unheard-of for campaign operatives to circulate material over the name of their opponents or their opponents' supporters (a violation of election laws) in order to attract or alienate certain interest groups. See, e.g., B. Felknor, Political Mischief: Smear, Sabotage, and Reform in U.S. Elections 111-112 (1992) (fake United Mine Workers' newspaper assembled by the National Republican Congressional Committee); New York v. Duryea, 76 Misc.2d 948, 351 N.Y.S.2d 978 (Sup.1974) (letters purporting to be from the "Action Committee for the Liberal Party" sent by Republicans). How much easier--and sanction-free!--it would be to circulate anonymous material (for example, a really tasteless, though not actionably false, attack upon one's own candidate) with the hope and expectation that it will be attributed to, and held against, the other side.

The Court contends that demanding the disclosure of the pamphleteer's identity is no different from requiring the disclosure of any other information that may reduce the persuasiveness of the pamphlet's message. See ante, at 1519- 1520. It cites Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), which held it unconstitutional to require a newspaper that had published an editorial critical of a particular candidate to furnish space for that candidate to reply. But it is not usual for a speaker to put forward the best arguments against himself, and it is a great imposition upon free speech to make him do so. Whereas it is quite usual--it is expected--for a speaker to identify himself, and requiring that is (at least when there are no special circumstances present) virtually no imposition at all.

We have approved much more onerous disclosure requirements in the name of fair elections. In Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), we upheld provisions of the Federal Election Campaign Act that required private individuals to report ***1537** to the Federal Election Commission independent expenditures made for communications advocating the election or defeat of a candidate for federal office. Id., at 80, 96 S.Ct., at 664. Our primary rationale for upholding this provision was that it served an "informational interest" by "increas[ing] the fund of information concerning those who support the candidates," id., at 81, 96 S.Ct., at 664. The provision before us here serves the same informational interest, as well as more important interests, which I have discussed above*

* *

* * *

I respectfully dissent.

END OF DOCUMENT

Joshua Quittner, "Unmasked on the Net," Time, Monday, March 6, 1995

Johan Helsingius' personal computer may be the most loathed machine in cyberspace. Cranks routinely E-mail bomb it, trying to level the IBM clone with millions of pages of gibberish. Hot-headed hackers dispatch bit-eating "worm" programs to Helsinki to search for and destroy the computer's precious electronic cargo. A few vengeful folks have even threatened Helsingius himself, for what would the machine be without the man?

But for hundreds of thousands of people on the Internet, Helsingius' computer-and the service it provides-is a glorious haven. Known technically as an anonymous remailer, it is the network equivalent of a Swiss bank: a conduit by which users can ship data around the world in complete anonymity. Dozens of anonymous remailers have sprouted up in recent years-many of them in Scandinavia -but none is as popular or as trusted as Helsingius' service, known as Penet. For the past three years, networkers around the world have used his node on the Internet as a transfer point for the most sensitive and explosive information, secure in the assurance that it could never be traced back to them.

Three weeks ago, all that changed when the Finnish police, who were acting on a complaint from the Church of Scientology in Los Angeles, served a search-and-seize warrant on Helsingius, demanding that he turn over the real name of one of his users. Caught by surprise, Helsingius gave them what they asked for. It was either that, he said, or give them his entire computer.

That rip in the curtain of privacy is certain to send a chill through cyberspace: Helsingius has become the keeper of the Who's Who of the computer underground. Stored in his 200-megabyte data base is a master list of the names and E-mail addresses of everybody who has ever sought the shelter of his service: pornographers and political exiles; software pirates and corporate whistle blowers; the sexually abused and their abusers.

The need for anonymous remailers stems from the design of the Internet, which tags every packet of data with an electronic address so it can be returned or re-sent if something goes wrong in transit. The system works, but it offers no comfort to those who want to preserve their privacy. Remailers ensure anonymity by separating messages from their

return addresses. It's simple: say Peter wants to send an anonymous message to Paul. Instead of mailing it directly, he sends the message to Helsingius' machine, putting Paul's address on the first line of text. Helsingius' computer automatically strips off Peter's name and return address, replaces them with a new, randomly assigned address, and forwards the message to Paul. When he gets the message, Paul has no way of telling who sent it, though he can correspond with the secret sender by sending a reply in care of Helsingius' Penet.

It's a service Helsingius, 33, happily provides, and since 1992 he has offered it free to anyone on the Internet, subsidizing it with income from his daytime job-providing Internet access to paying customers. Born to Swedish parents in Finland, where Swedes make up only 6% of the population, Helsingius knows what it feels like to be an outsider. Growing up near the former Soviet Union also gave him a taste of repression. Helsingius remembers learning as a child that people who owned typewriters or copiers in Russia had to register their machines and provide type samples to the government "for identification purposes." He came to fear that the online world could evolve into a Soviet police state, where every utterance is traceable.

Services like Penet have fast become a popular outlet for people with secrets to share. All sorts of people, it turns out, have an urge to communicate incognito. The Usenet newsgroup called alt.sex.bondage, for example, where people are encouraged to discuss some of the more esoteric sexual practices, is filled with messages sent through remailers.

But while anonymity can be liberating, it can also abet illicit activity. Penet has been used to send all sorts of contraband, from copyrighted articles to stolen software to hard-core pornography. Helsingius, who opposes thievery, put a limit on the size of the files that could be transmitted-killing two digital birds at once, since pornographic images are now too large to transport through Penet.

But text messages can be just as controversial as pictures. The Scientologists went to police after learning that someone had broken into one of their in-house computers, then anonymously posted a stolen file on alt.religion.scientology, a Usenet group where contentious current and ex-Scientologists spar.

The raid left Helsingius-and the people who have used his service-shaken. "They treated my computer and hard drive as if it were a gun," he said. It was, as far as he knows, the first time the wall of anonymity provided by the remailers had been breached. Can anybody be sure that the police, armed with search warrants from other aggrieved parties, won't be back? "I would hate to get caught up in the frenzy if and when investigators start

anonymous witch hunts," a user wrote, requesting his removal from the data base. For now, Helsingius is staying online, bolstered by E-mail from hundreds of supporters. Most of these messages are signed.

Joshua Quittner, “Requiem for a Go-Between,” Time, Monday, September 16, 1996

The news echoed dully across Usenet last week, like the sound of a body being dropped to the floor. It traveled first from Finland across the Net and then bounced instantly to wired people everywhere in the world. If you like, you can experience that doomed moment yourself--it's still frozen there on the newsgroups that convene to comfort people in troubled times. On alt.sex.abuse.recovery, for instance, you'll find a discussion that begins with the subject line "The End of Penet.fi."

Penet.fi needs no translation for most of the people on that newsgroup. The name is shorthand for an E-mail address--anon.penet.fi--where a garden-variety 486-chipped PC lived for nearly four years. This modest machine performed a lofty task: it allowed people effortlessly to send and receive E-mail or post messages to newsgroups, anonymously.

A person trying to recover from sex abuse might use it; so might a rehabilitating sex offender. Alcoholics and whistle-blowers relied on anon.penet.fi all the time, as did software engineers afraid to ask "stupid" questions, political refugees, gay teenagers and anyone else who feared personal retaliation. And so we mark its passing with some sadness.

Johan Helsingius, a Finn who lives near Helsinki, had run anon.penet.fi as a hobby since November 1993, mainly because he loves the idea of truly free speech. There are now a dozen of these so-called anonymous remailers around the world, but Helsingius' is the oldest, best known and largest, having served more than half a million people. Anon.penet.fi and its owner are also the most notorious; together they survived E-mail "bombings" that threatened to bury the computer under millions of pages of garbage, death threats and even a recent scurrilous report in the London Observer that linked the service to child-porn traffickers--an accusation that Finnish authorities said was groundless. But in the end, it was the lawyers who caused Helsingius to sever anon.penet.fi from the Net.

Late last month a Finnish court ruled that Helsingius must divulge the true E-mail address of a penet.fi user who posted to a newsgroup what the Church of Scientology claims are copyrighted secrets. He has 30 days in which to comply or appeal, and his lawyers are optimistic. But for now, and perhaps forever, anon.penet.fi is unplugged because, as Helsingius puts it, "there's no real protection for free speech on the Internet in Finland."

The shutdown naturally distresses a great many people who now must bury old personas and migrate to new remailers. "There's a freedom to speak when you're anonymous," says a 39-year-old woman, a frequent poster to alt.sex.recovery who had used Helsingius' service since its inception. For years her deepest confidants knew her as an145396@anon.penet.fi. That cloak of anonymity allowed her to communicate honestly with people for what she says was the first time in her life. Anon.penet.fi allowed lots of

people to be heard. Doubtless, some of them will now revert to silence, waiting for the courts to figure out that the Net deserves protection of the right to speak freely.

II. Free Speech in Cyberspace

C. Case Study: The Communications Decency Act Part 2

ACLU V. RENO (3 JUDGE PANEL)

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION,: CIVIL ACTION NO. 96-963 et al. :

:

v. :

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JANET RENO, Attorney General of:
the United States :

AMERICAN LIBRARY ASSOC., : CIVIL ACTION NO. 96-1458 INC., et al.
:

:

v. :

:

UNITED STATES DEP'T OF :
JUSTICE, et al. :

Before: Sloviter, Chief Judge, United States Court of Appeals for the Third Circuit; Buckwalter and Dalzell, Judges, United States District Court for the Eastern District of Pennsylvania

June 11, 1996

ADJUDICATION ON MOTIONS FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

Procedural Background

Before us are motions for a preliminary injunction filed by plaintiffs who challenge on constitutional grounds provisions of the Communications Decency Act of 1996 (CDA or "the Act"), which constitutes Title V of the Telecommunications Act of 1996, signed into law by the President on February 8, 1996.1 Telecommunications Act of 1996, Pub. L. No. 104-104, Sec. 502, 110 Stat. 56, 133-35. Plaintiffs include various organizations and individuals who, inter alia, are associated with the computer and/or communications industries, or who publish or post materials on the Internet, or belong to various citizen groups. See ACLU Complaint (Paras. 7-26), ALA First Amended Complaint (Paras. 3, 12-33).

The defendants in these actions are Janet Reno, the Attorney General of the United States, and the United States Department of Justice. For convenience, we will refer to these defendants as the Government. Plaintiffs contend that the two challenged provisions of the CDA ttat are directed to communications over the Internet which might be deemed "indecent" or "patently offensive" for minors, defined as persons under the age of eighteen, infringe upon rights protected by the First Amendment and the Due Process Clause of the Fifth Amendment.

Plaintiffs in Civil Action Number 96-963, in which the lead plaintiff is the American Civil Liberties Union (the ACLU),2 filed their action in the United States District Court for the Eastern District of Pennsylvania on the day the Act was signed, and moved for a temporary restraining order to enjoin enforcement of these two provisions of the CDA. On February 15, 1996, following an evidentiary hearing, Judge Ronald L. Buckwalter, to whom the case had been assigned, granted a limited temporary restraining order, finding in a Memorandum that 47 U.S.C. Sec. 223(a)(1)(B) ("the indecency provision" of the CDA) was unconstitutionally vague. On the same day, Chief Judge Dolores K. Sloviter, Chief Judge of the United States Court of Appeals for the Third Circuit, having been requested by the parties and the district court to convene a three-judge court, pursuant to Sec. 561(a) of the CDA, appointed such a court consisting of, in addition to Judge Buckwalter, Judge Stewart Dalzell of the same district, and herself, as the circuit judge required by 28 U.S.C. Sec. 2284.

After a conference with the court, the parties entered into a stipulation, which the court approved on February 26, 1996, wherein the Attorney General agreed that: she will not initiate any investigations or prosecutions for violations of 47 U.S.C. Sec. 223(d) for conduct occurring after enactment of this provision until the three-judge court hears Plaintiffs' Motion for Preliminary Injunction . . . and has decided the motion.
The Attorney General's commitment was qualified to the extent that: her full authority to investigate or prosecute any violation of Sec. 223(a)(1)(B), as amended, and Sec. 223(d) as to conduct which occurs or occurred during any period of time after enactment of these provisions (including for the period of time to which this stipulation applies) should the Court deny
plaintiffs' motion or, if the motion is granted, should these provisions ultimately be upheld.

Stipulation, Para. 4, in C.A. No. 96-963.

Shortly thereafter, the American Library
Association, Inc. (the ALA) and others3 filed a similar action at C.A. No. 96-1458. On February 27, 1996, Chief Judge Sloviter, again pursuant to Sec. 561(a) of the CDA and

upon request, convened the same three-judge court pursuant to 28 U.S.C. Sec. 2284. The actions were consolidated pursuant to Fed. R. Civ. P. 42(a), "for all matters relating to the disposition of motions for
preliminary injunction in these cases, including the hearing on such motions."

The parties were afforded expedited discovery in connection with the motions for preliminary injunction, and they cooperated with Judge Dalzell, who had been assigned the case management aspects of the litigation. While the discovery was proceeding, and with the agreement of the parties, the court began receiving evidence at the consolidated hearings which were conducted on March 21 and 22, and April 1, 12 and 15, 1996. In order to expedite the proceedings, the parties worked closely with Judge Dalzell and arranged to stipulate to many of the underlying facts and to place much of their cases in chief before the court by sworn declarations, so that the hearings were largely devoted to cross-examination of certain of the witnesses whose declarations had been filed. The parties submitted
proposed findings of fact and post-hearing memoranda on April 29, and the court heard extensive oral argument on May 10, 1996.4
Statutory Provisions at Issue

Plaintiffs focus their challenge on two
provisions of section 502 of the CDA which amend 47 U.S.C. Secs. 223(a) and 223(d).

Section 223(a)(1)(B) provides in part that any person in interstate or foreign communications who, "by means of a telecommunications device,"5 "knowingly . . . makes, creates, or solicits" and "initiates the transmission" of "any comment, request, suggestion, proposal, image or other communication which is obscene or indecent, knowing that the recipient of the
communication is under 18 years of age," "shall be criminally fined or imprisoned." (emphasis added).

Section 223(d)(1) ("the patently offensive provision"), makes it a crime to use an "interactive computer service"6 to "send" or "display in a manner available" to a person under age 18, "any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by
contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication."

Plaintiffs also challenge on the same grounds the provisions in Sec. 223(a)(2) and Sec. 223(d)(2), which make it a crime for anyone to "knowingly permit[] any telecommunications facility under [his or her] control to be used for any activity prohibited" in Secs. 223(a)(1)(B) and 223(d)(1). The challenged provisions impose a punishment of a fine, up to two years
imprisonment, or both for each offense.

Plaintiffs make clear that they do not quarrel with the statute to the extent that it covers obscenity or child pornography, which were already proscribed before the CDA's adoption. See 18 U.S.C. Secs. 1464-65 (criminalizing obscene material); id. Secs. 2251-52 (criminalizing child pornography); see also New York v. Ferber, 458 U.S. 747 (1982); Miller v.
California, 413 U.S. 15 (1973).

Plaintiffs in the ACLU action also challenge the provision of the CDA that criminalizes speech over the Internet that transmits information about abortions or abortifacient drugs and devices, through its amendment of 18 U.S.C. Sec. 1462(c). That section now prohibits the sending and receiving of information over the Internet by any means regarding "where, how, or of whom, or by what means any [drug, medicine, article, or thing designed, adapted, or intended for producing abortion] may be obtained or made". The Government has stated that it does not contest plaintiffs' challenge to the enforceability of the provision of the CDA as it relates to 18 U.S.C. Sec. 1462(c).7

As part of its argument that the CDA passes constitutional muster, the Government cites the CDA's "safe harbor" defenses in new Sec. 223(e) of 47 U.S.C., which provides: (e) Defenses

In addition to any other defenses available by law:

(1) No person shall be held to have violated subsection (a) or (d) of this section solely for providing access or connection to or from a facility, system, or network not under that person's control, including transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or connection that does not include the creation of the content of the communication.

(2) The defenses provided by paragraph (1) of this subsection shall not be applicable to a person who is a conspirator with an entity actively involved in the creation or knowing distribution of communications that violate this section, or who knowingly advertises the availability of such communications.

(3) The defenses provided in paragraph (1) of this subsection shall not be applicable to a person who provides access or connection to a facility, system, or network engaged in the violation of this section that is owned or controlled by such person.

(4) No employer shall be held liable under this section for the actions of an employee or agent unless the employee's or agent's conduct is within the scope of his or her employment or agency and the employer (A) having knowledge of such conduct, authorizes or ratifies such conduct, or (B)
recklessly disregards such conduct.

(5) It is a defense to a prosecution under subsection (a)(1)(B) or (d) of this section, or under subsection (a)(2) of this section with respect to the use of a facility for an activity under subsection (a)(1)(B) that a person --

(A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or

(B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.

(6) The [Federal Communications] Commission may describe measures which are reasonable, effective, and appropriate to restrict access to prohibited communications under subsection (d) of this section. Nothing in this section authorizes the Commission to enforce, or is intended to provide the Commission with the authority to approve, sanction, or permit, the use of such measures. The Commission shall have no enforcement authority over the failure to utilize such measures. . . .

II. FINDINGS OF FACT

All parties agree that in order to apprehend the legal questions at issue in these cases, it is necessary to have a clear understanding of the exponentially growing, worldwide medium that is the Internet, which presents unique issues relating to the application of First Amendment jurisprudence and due process requirements to this new and evolving method of communication. For this reason all parties insisted on having extensive evidentiary hearings before the three-judge court. The court's Findings of fact are made pursuant to Fed. R. Civ. P. 52(a). The history and basic technology of this medium

are not in dispute, and the first forty-eight paragraphs of the following Findings of fact are derived from the like-numbered paragraphs of a stipulation8 the parties filed with the court.9 The Nature of Cyberspace The Creation of the Internet and the Development of Cyberspace

The Internet is not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks. It is thus a network of networks. This is best understood if one considers what a linked group of computers -- referred to here as a "network" -- is, and what it does. Small networks are now ubiquitous (and are often called "local area networks"). For example, in many United States Courthouses, computers are linked to each other for the purpose of exchanging files and messages (and to share equipment such as printers). These are networks.

Some networks are "closed" networks, not linked to other computers or networks. Many networks, however, are connected to other networks, which are in turn connected to other networks in a manner which permits each computer in any network to communicate with computers on any other network in the system. This global Web of linked networks and computers is referred to as the Internet.

The nature of the Internet is such that it is very difficult, if not impossible, to determine its size at a given moment. It is indisputable, however, that the Internet has experienced extraordinary growth in recent years. In 1981, fewer than 300 computers were linked to the Internet, and by 1989, the number stood at fewer than 90,000 computers. By 1993, over 1,000,000 computers were linked. Today, over 9,400,000 host computers worldwide, of which approximately 60 percent located within the United States, are estimated to be linked to the Internet. This count does not include the personal computers people use to access the Internet using modems. In all, reasonable estimates are that as many as 40 million people around the world can and do access the enormously flexible communication Internet medium. That figure is expected to grow to 200 million Internet users by the year 1999.

Some of the computers and computer networks that make up the Internet are owned by governmental and public institutions, some are owned by non-profit organizations, and some are privately owned. The resulting whole is a decentralized, global medium of communications -- or "cyberspace" -- that links people, institutions, corporations, and governments around the world. The Internet is an international system. This communications medium allows any of the literally tens of millions of people with access to the Internet to exchange information. These communications can occur almost instantaneously, and can be directed either to specific individuals, to a broader group of people interested in a particular subject, or to the world as a whole.

The Internet had its origins in 1969 as an experimental project of the Advanced Research Project Agency ("ARPA"), and was called ARPANET. This network linked computers and computer networks owned by the military, defense contractors, and university laboratories conducting defense-related research. The network later allowed researchers across the country to access directly and to use extremely powerful supercomputers located at a few key universities and laboratories. As it evolved far beyond its research origins in the United States to encompass universities, corporations, and people around the world, the ARPANET came to be called the "DARPA Internet," and finally just the "Internet."

From its inception, the network was designed to be a decentralized, self-maintaining series of redundant links between computers and computer networks, capable of rapidly transmitting communications without direct human involvement or control, and with the automatic ability to re-route communications if one or more individual links were damaged or otherwise unavailable. Among other goals, this redundant system of linked computers was designed to allow vital research and communications to continue even if portions of the network were damaged, say, in a war.

To achieve this resilient nationwide (and ultimately global) communications medium, the ARPANET encouraged the creation of multiple links to and from each computer (or computer network) on the network. Thus, a computer located in Washington, D.C., might be linked (usually using dedicated telephone lines) to other computers in neighboring states or on the Eastern seaboard. Each of those computers could in turn be linked to other computers, which themselves would be linked to other computers.

A communication sent over this redundant series of linked computers could travel any of a number of routes to its destination. Thus, a message sent from a computer in Washington, D.C., to a computer in Palo Alto, California, might first be sent to a computer in Philadelphia, and then be forwarded to a computer in Pittsburgh, and then to Chicago, Denver, and Salt Lake City, before finally reaching Palo Alto. If the message could not travel along that path (because of military attack, simple technical malfunction, or other reason), the message would automatically (without human intervention or even knowledge) be re-routed, perhaps, from Washington, D.C. to Richmond, and then to Atlanta, New Orleans, Dallas, Albuquerque, Los Angeles, and finally to Palo Alto. This type of transmission, and re-routing, would likely occur in a matter of seconds.

9. Messages between computers on the Internet do not necessarily travel entirely along the same path. The Internet uses "packet switching" communication

protocols that allow individual messages to be subdivided into smaller "packets" that are then sent independently to the destination, and are then automatically reassembled by the receiving computer. While all packets of a given message often travel along the same path to the destination, if computers along the route become overloaded, then packets can be re-routed to less loaded computers.

10. At the same time that ARPANET was maturing (it subsequently ceased to exist), similar networks developed to link universities, research facilities, businesses, and individuals around the world. These other formal or loose networks included BITNET, CSNET, FIDONET, and USENET. Eventually, each of these networks (many of which overlapped) were themselves linked together, allowing users of any computers linked to any one of the networks to transmit communications to users of computers on other networks. It is this series of linked networks (themselves linking computers and computer networks) that is today commonly known as the Internet.

11. No single entity -- academic, corporate, governmental, or non-profit -- administers the Internet. It exists and functions as a result of the fact that hundreds of thousands of separate operators of computers and computer networks independently decided to use common data transfer protocols to exchange communications and information with other computers (which in turn exchange communications and information with still other computers). There is no centralized storage location, control point, or communications channel for the Internet, and it would not be technically feasible for a single entity to control all of the information conveyed on the Internet.

How Individuals Access the Internet

12. Individuals have a wide variety of avenues to access cyberspace in general, and the Internet in particular. In terms of physical access, there are two common methods to establish an actual link to the Internet. First, one can use a computer or computer terminal that is directly (and usually permanently) connected to a computer network that is itself directly or indirectly connected to the Internet. Second, one can use a "personal computer" with a "modem" to connect over a telephone line to a larger computer or computer network that is itself directly or indirectly connected to the Internet. As detailed below, both direct and modem connections are made available to people by a wide variety of academic, governmental, or commercial entities.

13. Students, faculty, researchers, and others affiliated with the vast majority of colleges and universities in the United States can access the Internet through their educational institutions. Such access is often via direct connection using computers

located in campus libraries, offices, or computer centers, or may be through telephone access using a modem from a student's or professor's campus or off-campus location. Some colleges and universities install "ports" or outlets for direct network connections in each dormitory room or provide access via computers located in common areas in dormitories. Such access enables students and professors to use information and content provided by the college or university itself, and to use the vast amount of research resources and other information available on the Internet worldwide.

14. Similarly, Internet resources and access are sufficiently important to many corporations and other employers that those employers link their office computer networks to the Internet and provide employees with direct or modem access to the office network (and thus to the Internet). Such access might be used by, for example, a corporation involved in scientific or medical research or manufacturing to enable corporate employees to exchange information and ideas with academic researchers in their fields.

15. Those who lack access to the Internet through their schools or employers still have a variety of ways they can access the Internet. Many communities across the country have established "free-nets" or community networks to provide their citizens with a local link to the Internet (and to provide local-oriented content and discussion groups). The first such community network, the Cleveland Free-Net Community Computer System, was established in 1986, and free-nets now exist in scores of communities as diverse as Richmond, Virginia, Tallahassee, Florida, Seattle, Washington, and San Diego, California. Individuals typically can access free-nets at little or no cost via modem connection or by using computers available in community buildings. Free-nets are often operated by a local library, educational institution, or non-profit community group.

16. Individuals can also access the Internet through many local libraries. Libraries often offer patrons use of computers that are linked to the Internet. In addition, some libraries offer telephone modem access to the libraries' computers, which are themselves connected to the Internet. Increasingly, patrons now use library services and resources without ever physically entering the library itself. Libraries typically provide such direct or modem access at no cost to the individual user.

17. Individuals can also access the Internet by patronizing an increasing number of storefront "computer coffee shops," where customers -- while they drink their coffee -- can use computers provided by the shop to access the Internet. Such Internet access is typically provided by the shop for a small hourly fee.

18. Individuals can also access the Internet through commercial and non-commercial "Internet service providers" that typically offer modem telephone access to

a computer or computer network linked to the Internet. Many such providers -- including the members of plaintiff Commercial Internet Exchange Association -- are commercial entities offering Internet access for a monthly or hourly fee. Some Internet service providers, however, are non-profit organizations that offer free or very low cost access to the Internet. For example, the International Internet Association offers free modem access to the Internet upon request. Also, a number of trade or other non-profit associations offer Internet access as a service to members.

19. Another common way for individuals to access the Internet is through one of the major national commercial "online services" such as America Online, CompuServe, the Microsoft Network, or Prodigy. These online services offer nationwide computer networks (so that subscribers can dial-in to a local telephone number), and the services provide extensive and well organized content within their own proprietary computer networks. In addition to allowing access to the extensive content available within each online service, the services also allow subscribers to link to the much larger resources of the Internet. Full access to the online service (including access to the Internet) can be obtained for modest monthly or hourly fees. The major commercial online services have almost twelve million individual subscribers across the United States.

20. In addition to using the national commercial online services, individuals can also access the Internet using some (but not all) of the thousands of local dial-in computer services, often called "bulletin board systems" or "BBSs." With an investment of as little as $2,000.00 and the cost of a telephone line, individuals, non-profit organizations, advocacy groups, and businesses can offer their own dial-in computer "bulletin board" service where friends, members, subscribers, or customers can exchange ideas and information. BBSs range from single computers with only one telephone line into the computer (allowing only one user at a time), to single computers with many telephone lines into the computer (allowing multiple simultaneous users), to multiple linked computers each servicing multiple dial-in telephone lines (allowing multiple simultaneous users). Some (but not all) of these BBS systems offer direct or indirect links to the Internet. Some BBS systems charge users a nominal fee for access, while many others are free to the individual users.

21. Although commercial access to the Internet is growing rapidly, many users of the Internet -- such as college students and staff -- do not individually pay for access (except to the extent, for example, that the cost of computer services is a component of college tuition). These and other Internet users can access the Internet without paying for such access with a credit card or other form of payment.

Methods to Communicate Over the Internet

22. Once one has access to the Internet, there are a wide variety of different methods of communication and information exchange over the network. These many methods of communication and information retrieval are constantly evolving and are therefore difficult to categorize concisely. The most common methods of communications on the Internet (as well as within the major online services) can be roughly grouped into six categories:

(1) one-to-one messaging (such as "e-mail"),

(2) one-to-many messaging (such as "listserv"),
(3) distributed message databases (such as "USENET newsgroups"),

(4) real time communication (such as "Internet Relay Chat"),
(5) real time remote computer utilization (such as "telnet"), and

(6) remote information retrieval (such as "ftp," "gopher," and the "World Wide Web").

Most of these methods of communication can be used to transmit text, data, computer programs, sound, visual images (i.e., pictures), and moving video images.

23. One-to-one messaging. One method of communication on the Internet is via electronic mail, or "e-mail," comparable in principle to sending a first class letter. One can address and transmit a message to one or more other people. E-mail on the Internet is not routed through a central control point, and can take many and varying paths to the recipients. Unlike postal mail, simple e-mail generally is not "sealed" or secure, and can be accessed or viewed on intermediate computers between the sender and recipient (unless the message is encrypted).

24. One-to-many messaging. The Internet also contains automatic mailing list services (such as "listservs"), [also referred to by witnesses as "mail exploders"] that allow communications about particular subjects of interest to a group of people. For example, people can subscribe to a "listserv" mailing list on a particular topic of interest to them. The subscriber can submit messages on the topic to the listserv that are forwarded (via e-mail), either automatically or through a human moderator overseeing the listserv, to anyone who has subscribed to the mailing list. A recipient of such a message can reply to the message and have the reply also distributed to everyone on the mailing list. This service provides the capability to keep abreast of developments or events in a particular subject area. Most listserv-type mailing lists automatically forward all incoming messages

to all mailing list subscribers. There are thousands of such mailing list services on the Internet, collectively with hundreds of thousands of subscribers. Users of "open" listservs typically can add or remove their names from the mailing list automatically, with no direct human involvement. Listservs may also be "closed," i.e., only allowing for one's acceptance into the listserv by a human moderator.

25. Distributed message databases. Similar in function to listservs -- but quite different in how communications are transmitted -- are distributed message databases such as "USENET newsgroups." User-sponsored newsgroups are among the most popular and widespread applications of Internet services, and cover all imaginable topics of interest to users. Like listservs, newsgroups are open discussions and exchanges on particular topics. Users, however, need not subscribe to the discussion mailing list in advance, but can instead access the database at any time. Some USENET newsgroups are "moderated" but most are open access. For the moderated newsgroups,10 all messages to the newsgroup are forwarded to one person who can screen them for relevance to the topics under discussion. USENET newsgroups are disseminated using ad hoc, peer to peer connections between approximately 200,000 computers (called USENET "servers") around the world. For unmoderated newsgroups, when an individual user with access to a USENET server posts a message to a newsgroup, the message is automatically forwarded to all adjacent USENET servers that furnish access to the newsgroup, and it is then propagated to the servers adjacent to those servers, etc. The messages are temporarily stored on each receiving server, where they are available for review and response by individual users. The messages are automatically and periodically purged from each system after a time to make room for new messages. Responses to messages, like the original messages, are automatically distributed to all other computers receiving the newsgroup or forwarded to a moderator in the case of a moderated newsgroup. The dissemination of messages to USENET servers around the world is an automated process that does not require direct human intervention or review.

26. There are newsgroups on more than fifteen thousand different subjects. In 1994, approximately 70,000 messages were posted to newsgroups each day, and those messages were distributed to the approximately 190,000 computers or computer networks that participate in the USENET newsgroup system. Once the messages reach the approximately 190,000 receiving computers or computer networks, they are available to individual users of those computers or computer networks. Collectively, almost 100,000 new messages (or "articles") are posted to newsgroups each day.

27. Real time communication. In addition to transmitting messages that can be later read or accessed, individuals on the Internet can engage in an immediate dialog, in

"real time", with other people on the Internet. In its simplest forms, "talk" allows one-to-one communications and "Internet Relay Chat" (or IRC) allows two or more to type messages to each other that almost immediately appear on the others' computer screens. IRC is analogous to a telephone party line, using a computer and keyboard rather than a telephone. With IRC, however, at any one time there are thousands of different party lines available, in which collectively tens of thousands of users are engaging in conversations on a huge range of subjects. Moreover, one can create a new party line to discuss a different topic at any time. Some IRC conversations are "moderated" or include "channel operators."

28. In addition, commercial online services such as America Online, CompuServe, the Microsoft Network, and Prodigy have their own "chat" systems allowing their members to converse.

29. Real time remote computer utilization. Another method to use information on the Internet is to access and control remote computers in "real time" using "telnet." For example, using telnet, a researcher at a university would be able to use the computing power of a supercomputer located at a different university. A student can use telnet to connect to a remote library to access the library's online card catalog program.

30. Remote information retrieval. The final major category of communication may be the most well known use of the Internet -- the search for and retrieval of information located on remote computers. There are three primary methods to locate and retrieve information on the Internet.

31. A simple method uses "ftp" (or file transfer protocol) to list the names of computer files available on a remote computer, and to transfer one or more of those files to an individual's local computer.

32. Another approach uses a program and format named "gopher" to guide an individual's search through the resources available on a remote computer.

The World Wide Web

33. A third approach, and fast becoming the most well-known on the Internet, is the "World Wide Web." The Web utilizes a "hypertext" formatting language called hypertext markup language (HTML), and programs that "browse" the Web can display HTML documents containing text, images, sound, animation and moving video. Any HTML document can include links to other types of information or resources, so that while viewing an HTML document that, for example, describes resources available on the Internet, one

can "click" using a computer mouse on the description of the resource and be immediately connected to the resource itself. Such "hyperlinks" allow information to be accessed and organized in very flexible ways, and allow people to locate and efficiently view related information even if the information is stored on numerous computers all around the world.

34. Purpose. The World Wide Web (W3C) was created to serve as the platform for a global, online store of knowledge, containing information from a diversity of sources and accessible to Internet users around the world. Though information on the Web is contained in individual computers, the fact that each of these computers is connected to the Internet through W3C protocols allows all of the information to become part of a single body of knowledge. It is currently the most advanced information system developed on the Internet, and embraces within its data model most information in previous networked information systems such as ftp, gopher, wais, and Usenet.

35. History. W3C was originally developed at CERN, the European Particle Physics Laboratory, and was initially used to allow information sharing within internationally dispersed teams of researchers and engineers. Originally aimed at the High Energy Physics community, it has spread to other areas and attracted much interest in user support, resource recovery, and many other areas which depend on collaborative and information sharing. The Web has extended beyond the scientific and academic community to include communications by individuals, non-profit organizations, and businesses.

36. Basic Operation. The World Wide Web is a series of documents stored in different computers all over the Internet. Documents contain information stored in a variety of formats, including text, still images, sounds, and video. An essential element of the Web is that any document has an address (rather like a telephone number). Most Web documents contain "links." These are short sections of text or image which refer to another document. Typically the linked text is blue or underlined when displayed, and when selected by the user, the referenced document is automatically displayed, wherever in the world it actually is stored. Links for example are used to lead from overview documents to more detailed documents, from tables of contents to particular pages, but also as cross-references, footnotes, and new forms of information structure.

37. Many organizations now have "home pages" on the Web. These are documents which provide a set of links designed to represent the organization, and through links from the home page, guide the user directly or indirectly to information about or relevant to that organization.

38. As an example of the use of links, if these Findings were to be put on a World Wide Web site, its home page might contain links such as those: *THE NATURE OF CYBERSPACE *CREATION OF THE INTERNET AND THE DEVELOPMENT OF CYBERSPACE *HOW PEOPLE ACCESS THE INTERNET *METHODS TO COMMUNICATE OVER THE INTERNET

39. Each of these links takes the user of the site from the beginning of the Findings to the appropriate section within this Adjudication. Links may also take the user from the original Web site to another Web site on another computer connected to the Internet. These links from one computer to another, from one document to another across the Internet, are what unify the Web into a single body of knowledge, and what makes the Web unique. The Web was designed with a maximum target time to follow a link of one tenth of a second.

40. Publishing. The World Wide Web exists fundamentally as a platform through which people and organizations can communicate through shared information. When information is made available, it is said to be "published" on the Web. Publishing on the Web simply requires that the "publisher" has a computer connected to the Internet and that the computer is running W3C server software. The computer can be as simple as a small personal computer costing less than $1500 dollars or as complex as a multi-million dollar mainframe computer. Many Web publishers choose instead to lease disk storage space from someone else who has the necessary computer facilities, eliminating the need for actually owning any equipment oneself.

41. The Web, as a universe of network accessible information, contains a variety of documents prepared with quite varying degrees of care, from the hastily typed idea, to the professionally executed corporate profile. The power of the Web stems from the ability of a link to point to any document, regardless of its status or physical location.

42. Information to be published on the Web must also be formatted according to the rules of the Web standards. These standardized formats assure that all Web users who want to read the material will be able to view it. Web standards are sophisticated and flexible enough that they have grown to meet the publishing needs of many large corporations, banks, brokerage houses, newspapers and magazines which now publish "online" editions of their material, as well as government agencies, and even courts, which use the Web to disseminate information to the public. At the same time, Web publishing is simple enough that thousands of individual users and small community organizations are using the Web to publish their own personal "home pages," the equivalent of individualized newsletters about that person or organization, which are available to everyone on the Web.

43. Web publishers have a choice to make their Web sites open to the general pool of all Internet users, or close them, thus making the information accessible only to those with advance authorization. Many publishers choose to keep their sites open to all in order to give their information the widest potential audience. In the event that the publishers choose to maintain restrictions on access, this may be accomplished by assigning specific user names and passwords as a prerequisite to access to the site. Or, in the case of Web sites maintained for internal use of one organization, access will only be allowed from other computers within that organization's local network.11

44. Searching the Web. A variety of systems have developed that allow users of the Web to search particular information among all of the public sites that are part of the Web. Services such as Yahoo, Magellan, Altavista, Webcrawler, and Lycos are all services known as "search engines" which allow users to search for Web sites that contain certain categories of information, or to search for key words. For example, a Web user looking for the text of Supreme Court opinions would type the words "Supreme Court" into a search engine, and then be presented with a list of World Wide Web sites that contain Supreme Court information. This list would actually be a series of links to those sites. Having searched out a number of sites that might contain the desired information, the user would then follow individual links, browsing through the information on each site, until the desired material is found. For many content providers on the Web, the ability to be found by these search engines is very important.

45. Common standards. The Web links together disparate information on an ever-growing number of Internet-linked computers by setting common information storage formats (HTML) and a common language for the exchange of Web documents (HTTP). Although the information itself may be in many different formats, and stored on computers which are not otherwise compatible, the basic Web standards provide a basic set of standards which allow communication and exchange of information. Despite the fact that many types of computers are used on the Web, and the fact that many of these machines are otherwise incompatible, those who "publish" information on the Web are able to communicate with those who seek to access information with little difficulty because of these basic technical standards.

46. A distributed system with no centralized control. Running on tens of thousands of individual computers on the Internet, the Web is what is known as a distributed system. The Web was designed so that organizations with computers containing information can become part of the Web simply by attaching their computers to the Internet and running appropriate World Wide Web software. No single organization controls any membership in the Web, nor is there any single centralized point from which individual Web sites or services can be blocked from the Web. From a user's perspective,

it may appear to be a single, integrated system, but in reality it has no centralized control point.

47. Contrast to closed databases. The Web's open, distributed, decentralized nature stands in sharp contrast to most information systems that have come before it. Private information services such as Westlaw, Lexis/Nexis, and Dialog, have contained large storehouses of knowledge, and can be accessed from the Internet with the appropriate passwords and access software. However, these databases are not linked together into a single whole, as is the World Wide Web.

48. Success of the Web in research, education, and political activities. The World Wide Web has become so popular because of its open, distributed, and easy-to-use nature. Rather than requiring those who seek information to purchase new software or hardware, and to learn a new kind of system for each new database of information they seek to access, the Web environment makes it easy for users to jump from one set of information to another. By the same token, the open nature of the Web makes it easy for publishers to reach their intended audiences without having to know in advance what kind of computer each potential reader has, and what kind of software they will be using.

Restricting Access to Unwanted On-Line Material12

PICS

49. With the rapid growth of the Internet, the increasing popularity of the Web, and the existence of material online that some parents may consider inappropriate for their children, various entities have begun to build systems intended to enable parents to control the material which comes into their homes and may be accessible to their children. The World Wide Web Consortium launched the PICS ("Platform for Internet Content Selection") program in order to develop technical standards that would support parents' ability to filter and screen material that their children see on the Web.

50. The Consortium intends that PICS will provide the ability for third parties, as well as individual content providers, to rate content on the Internet in a variety of ways. When fully implemented, PICS-compatible World Wide Web browsers, Usenet News Group readers, and other Internet applications, will provide parents the ability to choose from a variety of rating services, or a combination of services.

51. PICS working group [PICS-WG] participants include many of the major online services providers, commercial internet access providers, hardware and software

companies, major internet content providers, and consumer organizations. Among active participants in the PICS effort are:

Adobe Systems, Inc.
Apple Computer
America Online
AT&T
Center for Democracy and Technology
CompuServe
Delphi Internet Services
Digital Equipment Corporation
IBM
First floor
First Virtual Holdings Incorporated
France Telecom
FTP Software
Industrial Technology Research Institute of Taiwan
Information Technology Association of America
Institut National de Recherche en Informatique et en Automatique (INRIA)
Interactive Services Association
MCI
Microsoft
MIT/LCS/World Wide Web Consortium
NCD
NEC
Netscape Communications Corporation
NewView
O'Reilly and Associates
Open Market
Prodigy Services Company
Progressive Networks
Providence Systems/Parental Guidance Recreational Software Advisory Council SafeSurf
SoftQuad, Inc.
Songline Studios
Spyglass
SurfWatch Software
Telequip Corp.
Time Warner Pathfinder

Viacom Nickelodeon13

52. Membership in the PICS-WG includes a broad cross-section of companies from the computer, communications, and content industries, as well as trade associations and public interest groups. PICS technical specifications have been agreed to, allowing the Internet community to begin to deploy products and services based on the PICS-standards.

53. Until a majority of sites on the Internet have been rated by a PICS rating service, PICS will initially function as a "positive" ratings system in which only those sites that have been rated will be displayed using PICS compatible software. In other words, PICS will initially function as a site inclusion list rather than a site exclusion list. The default configuration for a PICS compatible Internet application will be to block access to all sites which have not been rated by a PICS rating service, while allowing access to sites which have a PICS rating for appropriate content.14

Software

54. For over a year, various companies have marketed stand alone software that is intended to enable parents and other adults to limit the Internet access of children. Examples of such software include: Cyber Patrol, CYBERsitter, The Internet Filter, Net Nanny, Parental Guidance, SurfWatch, Netscape Proxy Server, and WebTrack. The market for this type of software is growing, and there is increasing competition among software providers to provide products.

Cyber Patrol

55. As more people, particularly children, began to use the Internet, Microsystems Software, Inc. decided to develop and market Internet software intended to empower parents to exercise individual choice over what material their children could access. Microsystems' stated intent is to develop a product which would give parents comfort that their children can reap the benefits of the Internet while shielding them from objectionable or otherwise inappropriate materials based on the parents' own particular tastes and values. Microsystems' product, Cyber Patrol, was developed to address this need.

56. Cyber Patrol was first introduced in August 1995, and is currently available in Windows and Macintosh versions. Cyber Patrol works with both direct Internet Access providers (ISPs, e.g., Netcom, PSI, UUnet), and Commercial Online Service Providers (e.g., America Online, Compuserv, Prodigy, Microsoft). Cyber Patrol is also compatible

with all major World Wide Web browsers on the market (e.g., Netscape, Navigator, Mosaic, Prodigy's Legacy and Skimmer browsers, America Online, Netcom's NetCruiser, etc.). Cyber Patrol was the first parental empowerment application to be compatible with the PICS standard. In February of 1996, Microsystems put the first PICS ratings server on the Internet.

57. The CyberNOT list contains approximately 7000 sites in twelve categories. The software is designed to enable parents to selectively block access to any or all of the twelve CyberNOT categories simply by checking boxes in the Cyber Patrol Headquarters (the Cyber Patrol program manager). These categories are: Violence/Profanity: Extreme cruelty, physical or emotional acts against any animal or person which are primarily intended to hurt or inflict pain. Obscene words, phrases, and profanity defined as text that uses George Carlin's seven censored words more often than once every fifty messages or pages.
Partial Nudity: Full or partial exposure of the human anatomy except when exposing genitalia.

Nudity: Any exposure of the human genitalia.

Sexual Acts (graphic or text): Pictures or text exposing anyone or anything involved in explicit sexual acts and lewd and lascivious behavior, including masturbation, copulation, pedophilia, intimacy and involving nude or partially nude people in heterosexual, bisexual, lesbian or homosexual encounters. Also includes phone sex ads, dating services, adult personals, CD-ROM and videos.

Gross Depictions (graphic or text): Pictures or descriptive text of anyone or anything which are crudely vulgar, deficient in civility or behavior, or showing scatological impropriety. Includes such depictions as maiming, bloody figures, indecent depiction of bodily functions.
Racism/Ethnic Impropriety: Prejudice or discrimination against any race or ethnic culture. Ethnic or racist jokes and slurs. Any text that elevates one race over another.

Satanic/Cult: Worship of the devil; affinity for evil, wickedness. Sects or groups that potentially coerce individuals to grow, and keep, membership.

Drugs/Drug Culture: Topics dealing with the use of illegal drugs for entertainment. This would exclude current illegal drugs used for medicinal purposes (e.g., drugs used to treat

victims of AIDS). Includes substances used for other than their primary purpose to alter the individual's state of mind such as glue sniffing.

Militant/Extremist: Extremely aggressive and combative behaviors, radicalism, advocacy of extreme political measures. Topics include extreme political groups that advocate violence as a means to achieve their goal.

Gambling: Of or relating to lotteries, casinos, betting, numbers games, on-line sports or financial betting including non-monetary dares.
Questionable/Illegal: Material or activities of a dubious nature which may be illegal in any or all jurisdictions, such as illegal business schemes, chain letters, software piracy, and copyright infringement.
Alcohol, Beer & Wine: Material pertaining to the sale or consumption of alcoholic beverages. Also includes sites and information relating to tobacco products.

58. Microsystems employs people to search the Internet for sites containing material in these categories. Since new sites are constantly coming online, Microsystems updates the CyberNOT list on a weekly basis. Once installed on the home PC, the copy of Cyber Patrol receives automatic updates to the CyberNOT list over the Internet every seven days.

59. In February of 1996, Microsystems signed a licensing arrangement with CompuServe, one of the leading commercial online services with over 4.3 million subscribers. CompuServe provides Cyber Patrol free of charge to its subscribers. Microsystems the same month signed a licensing arrangement with Prodigy, another leading commercial online service with over 1.4 million subscribers. Prodigy will provide Cyber Patrol free of charge of its subscribers.

60. Cyber Patrol is also available directly from Microsystems for $49.95, which includes a six month subscription to the CyberNOT blocked sites list (updated automatically once every seven days). After six months, parents can receive six months of additional updates for $19.95, or twelve months for $29.95. Cyber Patrol Home Edition, a limited version of Cyber Patrol, is available free of charge on the Internet. To obtain either version, parents download a seven day demonstration version of the full Cyber Patrol product from the Microsystems Internet World Wide Web Server. At the end of the seven day trial period, users are offered the opportunity to purchase the complete version of Cyber Patrol or provide Microsystems some basic demographic information in exchange for unlimited use of the Home Edition. The demographic information is used for marketing and research purposes. Since January of 1996, over 10,000 demonstration copies of Cyber Patrol have been downloaded from Microsystems' Web site.

61. Cyber Patrol is also available from Retail outlets as NetBlocker Plus. NetBlocker Plus sells for $19.95, which includes five weeks of updates to the CyberNOT list.

62. Microsystems also sells Cyber Patrol into a growing market in schools. As more classrooms become connected to the Internet, many teachers want to ensure that their students can receive the benefit of the Internet without encountering material they deem educationally inappropriate.

63. Microsystems is working with the Recreational Software Advisory Council (RSAC), a non-profit corporation which developed rating systems for video games, to implement the RSAC rating system for the Internet.

64. The next release of Cyber Patrol, expected in second quarter of this year, will give parents the ability to use any PICS rating service, including the RSAC rating service, in addition to the Microsystems CyberNOT list.

65. In order to speed the implementation of PICS and encourage the development of PICS-compatible Internet applications, Microsystems maintains a server on the Internet which contains its CyberNOT list. The server provides software developers with access to a PICS rating service, and allows software developers to test their products' ability to interpret standard PICS labels. Microsystems is also offering its PICS client test program for Windows free of charge. The client program can be used by developers of PICS rating services to test their services and products.

SurfWatch

66. Another software product, SurfWatch, is also designed to allow parents and other concerned users to filter unwanted material on the Internet. SurfWatch is available for both Apple Macintosh, Microsoft Windows, and Microsoft Windows 95 Operating Systems, and works with direct Internet Access Providers (e.g., Netcom, PSI, UUnet, AT&T, and more than 1000 other Internet Service Providers).

67. The suggested retail price of SurfWatch Software is $49.95, with a street price of between $20.00 and $25.00. The product is also available as part of CompuServe/Spry Inc.'s Internet in a Box for Kids, which includes access to Spry's Kids only Internet service and a copy of SurfWatch. Internet in a Box for Kids retails for approximately $30.00. The subscription service, which updates the SurfWatch blocked site list automatically with new sites each month, is available for $5.95 per month or $60.00

per year. The subscription is included as part of the Internet in a Box for Kids program, and is also provided as a low-cost option from Internet Service Providers.

68. SurfWatch is available at over 12,000 retail locations, including National stores such as Comp USA, Egghead Software, Computer City, and several national mail order outlets. SurfWatch can also be ordered directly from its own site on the World Wide Web, and through the Internet Shopping Network.

69. Plaintiffs America Online (AOL), Microsoft Network, and Prodigy all offer parental control options free of charge to their members. AOL has established an online area designed specifically for children. The "Kids Only" parental control feature allows parents to establish an AOL account for their children that accesses only the Kids Only channel on America Online.15

70. AOL plans to incorporate PICS-compatible capability into its standard Web browser software, and to make available to subscribers other PICS-compatible Web browsers, such as the Netscape software.

71. Plaintiffs CompuServe and Prodigy give their subscribers the option of blocking all access to the Internet, or to particular media within their proprietary online content, such as bulletin boards and chat rooms.

72. Although parental control software currently can screen for certain suggestive words or for known sexually explicit sites, it cannot now screen for sexually explicit images unaccompanied by suggestive text unless those who configure the software are aware of the particular site.

73. Despite its limitations, currently available user-based software suggests that a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be widely available.

Content on the Internet

74. The types of content now on the Internet defy easy classification. The entire card catalogue of the Carnegie Library is on-line, together with journals, journal abstracts, popular magazines, and titles of compact discs. The director of the Carnegie Library, Robert Croneberger, testified that on-line services are the emerging trend in libraries generally. Plaintiff Hotwired Ventures LLC organizes its Web site into information

regarding travel, news and commentary, arts and entertainment, politics, and types of drinks. Plaintiff America Online, Inc., not only creates chat rooms for a broad variety of topics, but also allows members to create their own chat rooms to suit their own tastes. The ACLU uses an America Online chat room as an unmoderated forum for people to debate civil liberties issues. Plaintiffs' expert, Scott Bradner,16 estimated that 15,000 newsgroups exist today, and he described his own interest in a newsgroup devoted solely to Formula 1 racing cars. America Online makes 15,000 bulletin boards available to its subscribers, who post between 200,000 and 250,000 messages each day. Another plaintiffs' expert, Harold Rheingold, participates in "virtual communities" that simulate social interaction. It is no exaggeration to conclude that the content on the Internet is as diverse as human thought.

75. The Internet is not exclusively, or even primarily, a means of commercial communication. Many commercial entities maintain Web sites to inform potential consumers about their goods and services, or to solicit purchases, but many other Web sites exist solely for the dissemination of non-commercial information. The other forms of Internet communication -- e-mail, bulletin boards, newsgroups, and chat rooms -- frequently have non-commercial goals. For the economic and technical reasons set forth in the following paragraphs, the Internet is an especially attractive means for not-for-profit entities or public interest groups to reach their desired audiences. There are examples in the parties' stipulation of some of the non-commercial uses that the Internet serves. Plaintiff Human Rights Watch, Inc., offers information on its Internet site regarding reported human rights abuses around the world. Plaintiff National Writers Union provides a forum for writers on issues of concern to them. Plaintiff Stop Prisoner Rape, Inc., posts text, graphics, and statistics regarding the incidence and prevention of rape in prisons. Plaintiff Critical Path AIDS Project, Inc., offers information on safer sex, the transmission of HIV, and the treatment of AIDS.

76. Such diversity of content on the Internet is possible because the Internet provides an easy and inexpensive way for a speaker to reach a large audience, potentially of millions. The start-up and operating costs entailed by communication on the Internet are significantly lower than those associated with use of other forms of mass communication, such as television, radio, newspapers, and magazines. This enables operation of their own Web sites not only by large companies, such as Microsoft and Time Warner, but also by small, not-for-profit groups, such as Stop Prisoner Rape and Critical Path AIDS Project. The Government's expert, Dr. Dan R. Olsen,17 agreed that creation of a Web site would cost between $1,000 and $15,000, with monthly operating costs depending on one's goals and the Web site's traffic. Commercial online services such as America Online allow subscribers to create Web pages free of charge. Any Internet user can communicate by posting a message to one of the thousands of newsgroups and bulletin boards or by

engaging in an on-line "chat", and thereby reach an audience worldwide that shares an interest in a particular topic.

77. The ease of communication through the Internet is facilitated by the use of hypertext markup language (HTML), which allows for the creation of "hyperlinks" or "links". HTML enables a user to jump from one source to other related sources by clicking on the link. A link might take the user from Web site to Web site, or to other files within a particular Web site. Similarly, by typing a request into a search engine, a user can retrieve many different sources of content related to the search that the creators of the engine have collected.

78. Because of the technology underlying the Internet, the statutory term "content provider,"18 which is equivalent to the traditional "speaker," may actually be a hybrid of speakers. Through the use of HTML, for example, Critical Path and Stop Prisoner Rape link their Web sites to several related databases, and a user can immediately jump from the home pages of these organizations to the related databases simply by clicking on a link. America Online creates chat rooms for particular discussions but also allows subscribers to create their own chat rooms. Similarly, a newsgroup gathers postings on a particular topic and distributes them to the newsgroup's subscribers. Users of the Carnegie Library can read on-line versions of Vanity Fair and Playboy, and America Online's subscribers can peruse the New York Times, Boating, and other periodicals. Critical Path, Stop Prisoner Rape, America Online and the Carnegie Library all make available content of other speakers over whom they have little or no editorial control.

79. Because of the different forms of Internet communication, a user of the Internet may speak or listen
interchangeably, blurring the distinction between "speakers" and "listeners" on the Internet. Chat rooms, e-mail, and newsgroups are interactive forms of communication, providing the user with the opportunity both to speak and to listen.

80. It follows that unlike traditional media, the barriers to entry as a speaker on the Internet do not differ significantly from the barriers to entry as a listener. Once one has entered cyberspace, one may engage in the dialogue that occurs there. In the argot of the medium, the receiver can and does become the content provider, and vice-versa.

81. The Internet is therefore a unique and wholly new medium of worldwide human communication. Sexually Explicit Material On the Internet

82. The parties agree that sexually explicit material exists on the Internet. Such material includes text, pictures, and chat, and includes bulletin boards, newsgroups, and

the other forms of Internet communication, and extends from the modestly titillating to the hardest-core.

83. There is no evidence that sexually-oriented material is the primary type of content on this new medium. Purveyors of such material take advantage of the same ease of access available to all users of the Internet, including establishment of a Web site.

84. Sexually explicit material is created, named, and posted in the same manner as material that is not sexually explicit. It is possible that a search engine can accidentally retrieve material of a sexual nature through an imprecise search, as demonstrated at the hearing. Imprecise searches may also retrieve irrelevant material that is not of a sexual nature. The accidental retrieval of sexually explicit material is one manifestation of the larger phenomenon of irrelevant search results.

85. Once a provider posts content on the Internet, it is available to all other Internet users worldwide. Similarly, once a user posts a message to a newsgroup or bulletin board, that message becomes available to all subscribers to that newsgroup or bulletin board. For example, when the UCR/California Museum of Photography posts to its Web site nudes by Edward Weston and Robert Mapplethorpe to announce that its new exhibit will travel to Baltimore and New York City, those images are available not only in Los Angeles, Baltimore, and New York City, but also in Cincinnati, Mobile, or Beijing -- wherever Internet users live. Similarly, the safer sex instructions that Critical Path posts to its Web site, written in street language so that the teenage receiver can understand them, are available not just in Philadelphia, but also in Provo and Prague. A chat room organized by the ACLU to discuss the United States Supreme Court's decision in FCC v. Pacifica Foundation would transmit George Carlin's seven dirty words to anyone who enters. Messages posted to a newsgroup dedicated to the Oklahoma City bombing travel to all subscribers to that newsgroup.

86. Once a provider posts its content on the Internet, it cannot prevent that content from entering any community. Unlike the newspaper, broadcast station, or cable system, Internet technology necessarily gives a speaker a potential worldwide audience. Because the Internet is a network of networks (as described above in Findings 1 through 4), any network connected to the Internet has the capacity to send and receive information to any other network. Hotwired Ventures, for example, cannot prevent its materials on mixology from entering communities that have no interest in that topic.

87. Demonstrations at the preliminary injunction hearings showed that it takes several steps to enter cyberspace. At the most fundamental level, a user must have access to a computer with the ability to reach the Internet (typically by way of a modem). A

user must then direct the computer to connect with the access provider, enter a password, and enter the appropriate commands to find particular data. On the World Wide Web, a user must normally use a search engine or enter an appropriate address. Similarly, accessing newsgroups, bulletin boards, and chat rooms requires several steps.

88. Communications over the Internet do not "invade" an individual's home or appear on one's computer screen unbidden. Users seldom encounter content "by accident." A document's title or a description of the document will usually appear before the document itself takes the step needed to view it, and in many cases the user will receive detailed information about a site's content before he or she need take the step to access the document. Almost all sexually explicit images are preceded by warnings as to the content. Even the Government's witness, Agent Howard Schmidt, Director of the Air Force Office of Special Investigation, testified that the "odds are slim" that a user would come across a sexually explicit site by accident.

89. Evidence adduced at the hearing showed significant differences between Internet communications and communications received by radio or television. Although content on the Internet is just a few clicks of a mouse away from the user, the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended.

Obstacles to Age Verification on the Internet

90. There is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups or chat rooms. An e-mail address provides no authoritative information about the addressee, who may use an e-mail "alias" or an anonymous remailer. There is also no universal or reliable listing of e-mail addresses and corresponding names or telephone numbers, and any such listing would be or rapidly become incomplete. For these reasons, there is no reliable way in many instances for a sender to know if the e-mail recipient is an adult or a minor. The difficulty of e-mail age verification is compounded for mail exploders such as listservs, which automatically send information to all e-mail addresses on a sender's list. Government expert Dr. Olsen agreed that no current technology could give a speaker assurance that only adults were listed in a particular mail exploder's mailing list.

91. Because of similar technological difficulties, individuals posting a message to a newsgroup or engaging in chat room discussions cannot ensure that all readers are adults, and Dr. Olsen agreed. Although some newsgroups are moderated, the

moderator's control is limited to what is posted and the moderator cannot control who receives the messages.

92. The Government offered no evidence that there is a reliable way to ensure that recipients and participants in such fora can be screened for age. The Government presented no evidence demonstrating the feasibility of its suggestion that chat rooms, newsgroups and other fora that contain material deemed indecent could be effectively segregated to "adult" or "moderated" areas of cyberspace.

93. Even if it were technologically feasible to block minors' access to newsgroups and similar fora, there is no method by which the creators of newsgroups which contain discussions of art, politics or any other subject that could potentially elicit "indecent" contributions could limit the blocking of access by minors to such "indecent" material and still allow them access to the remaining content, even if the overwhelming majority of that content was not indecent.

94. Likewise, participants in MUDs (Multi-User Dungeons) and MUSEs (Multi-User Simulation Environments) do not know whether the other participants are adults or minors. Although MUDs and MUSEs require a password for permanent participants, they need not give their real name nor verify their age, and there is no current technology to enable the administrator of these fantasy worlds to know if the participant is an adult or a minor.

95. Unlike other forms of communication on the Internet, there is technology by which an operator of a World Wide Web server may interrogate a user of a Web site. An HTML document can include a fill-in-the-blank "form" to request information from a visitor to a Web site, and this information can be transmitted back to the Web server and be processed by a computer program, usually a Common Gateway Interface (cgi) script. The Web server could then grant or deny access to the information sought. The cgi script is the means by which a Web site can process a fill-in form and thereby screen visitors by requesting a credit card number or adult password.

96. Content providers who publish on the World Wide Web via one of the large commercial online services, such as America Online or CompuServe, could not use an online age verification system that requires cgi script because the server software of these online services available to subscribers cannot process cgi scripts. There is no method currently available for Web page publishers who lack access to cgi scripts to screen recipients online for age.

The Practicalities of the Proffered Defenses

Note: The Government contends the CDA makes available three potential defenses to all content providers on the Internet: credit card verification, adult verification by password or adult identification number, and "tagging".

Credit Card Verification

97. Verification19 of a credit card number over the Internet is not now technically possible. Witnesses testified that neither Visa nor Mastercard considers the Internet to be sufficiently secure under the current technology to process transactions in that manner. Although users can and do purchase products over the Internet by transmitting their credit card number, the seller must then process the transaction with Visa or Mastercard off-line using phone lines in the traditional way. There was testimony by several witnesses that Visa and Mastercard are in the process of developing means of credit card verification over the Internet.

98. Verification by credit card, if and when operational, will remain economically and practically unavailable for many of the non-commercial plaintiffs in these actions. The Government's expert "suspect[ed]" that verification agencies would decline to process a card unless it accompanied a commercial transaction. There was no evidence to the contrary.

99. There was evidence that the fee charged by verification agencies to process a card, whether for a purchase or not, will preclude use of the credit-card verification defense by many non-profit, non-commercial Web sites, and there was no evidence to the contrary. Plaintiffs' witness Patricia Nell Warren, an author whose free Web site allows users to purchase gay and lesbian literature, testified that she must pay $1 per verification to a verification agency. Her Web site can absorb this cost because it arises in connection with the sale of books available there.

100. Using credit card possession as a surrogate for age, and requiring use of a credit card to enter a site, would impose a significant economic cost on non-commercial entities. Critical Path, for example, received 3,300 hits daily from February 4 through March 4, 1996. If Critical Path must pay a fee every time a user initially enters its site, then, to provide free access to its non-commercial site, it would incur a monthly cost far beyond its modest resources. The ACLU's Barry Steinhardt testified that maintenance of a credit card verification system for all visitors to the ACLU's Web site would require it to shut down its Web site because the projected cost would exceed its budget.

101. Credit card verification would significantly delay the retrieval of information on the Internet. Dr. Olsen, the expert testifying for the Government, agreed that even "a

minute is [an] absolutely unreasonable [delay] . . . [P]eople will not put up with a minute." Plaintiffs' expert Donna Hoffman similarly testified that excessive delay disrupts the "flow" on the Internet and stifles both "hedonistic" and "goal-directed" browsing.

102. Imposition of a credit card requirement would completely bar adults who do not have a credit card and lack the resources to obtain one from accessing any blocked material. At this time, credit card verification is effectively unavailable to a substantial number of Internet content providers as a potential defense to the CDA.

Adult Verification by Password

103. The Government offered very limited evidence regarding the operation of existing age verification systems, and the evidence offered was not based on personal knowledge. AdultCheck and Verify, existing systems which appear to be used for accessing commercial pornographic sites, charge users for their services. Dr. Olsen admitted that his knowledge of these services was derived primarily from reading the advertisements on their Web pages. He had not interviewed any employees of these entities, had not personally used these systems, had no idea how many people are registered with them, and could not testify to the reliability of their attempt at age verification.

104. At least some, if not almost all, non-commercial organizations, such as the ACLU, Stop Prisoner Rape or Critical Path AIDS Project, regard charging listeners to access their speech as contrary to their goals of making their materials available to a wide audience free of charge.

105. It would not be feasible for many non-commercial organizations to design their own adult access code screening systems because the administrative burden of creating and maintaining a screening system and the ongoing costs involved is beyond their reach. There was testimony that the costs would be prohibitive even for a commercial entity such as HotWired, the online version of Wired magazine.

106. There is evidence suggesting that adult users, particularly casual Web browsers, would be discouraged from retrieving information that required use of a credit card or password. Andrew Anker testified that HotWired has received many complaints from its members about HotWired's registration system, which requires only that a member supply a name, e-mail address and self-created password. There is concern by commercial content providers that age verification requirements would decrease advertising and revenue because advertisers depend on a demonstration that the sites are widely available and frequently visited.

107. Even if credit card verification or adult password verification were implemented, the Government presented no testimony as to how such systems could ensure that the user of the password or credit card is in fact over 18. The burdens imposed by credit card verification and adult password verification systems make them effectively unavailable to a substantial number of Internet content providers.

The Government's "Tagging" Proposal

108. The feasibility and effectiveness of "tagging" to restrict children from accessing "indecent" speech, as proposed by the Government has not been established. "Tagging" would require content providers to label all of their "indecent" or "patently offensive" material by imbedding a string of characters, such as "XXX," in either the URL or HTML. If a user could install software on his or her computer to recognize the "XXX" tag, the user could screen out any content with that tag. Dr. Olsen proposed a "-L18" tag, an idea he developed for this hearing in response to Mr. Bradner's earlier testimony that certain tagging would not be feasible.

109. The parties appear to agree that it is technologically feasible -- "trivial", in the words of plaintiffs' expert -- to imbed tags in URLs and HTML, and the technology of tagging underlies both plaintiffs' PICS proposal and the Government's "-L18" proposal.

110. The Government's tagging proposal would require all content providers that post arguably "indecent" material to review all of their online content, a task that would be extremely burdensome for organizations that provide large amounts of material online which cannot afford to pay a large staff to review all of that material. The Carnegie Library would be required to hire numerous additional employees to review its on-line files at an extremely high cost to its limited budget. The cost and effort would be substantial for the Library and frequently prohibitive for others. Witness Kiroshi Kuromiya testified that it would be impossible for his organization, Critical Path, to review all of its material because it has only one full and one part-time employee.

111. The task of screening and tagging cannot be done simply by using software which screens for certain words, as Dr. Olsen acknowledged, and we find that determinations as to what is indecent require human judgment.

112. In lieu of reviewing each file individually, a content provider could tag its entire site but this would prevent minors from accessing much material that is not "indecent" under the CDA.

113. To be effective, a scheme such as the -L18 proposal would require a worldwide consensus among speakers to use the same tag to label "indecent" material. There is currently no such consensus, and no Internet speaker currently labels its speech with the -L18 code or with any other widely-recognized label.

114. Tagging also assumes the existence of software that recognizes the tags and takes appropriate action when it notes tagged speech. Neither commercial Web browsers nor user-based screening software is currently configured to block a -L18 code. Until such software exists, all speech on the Internet will continue to travel to whomever requests it, without hindrance. Labelling speech has no effect in itself on the transmission (or not) of that speech. Neither plaintiffs nor the Government suggest that tagging alone would shield minors from speech or insulate a speaker from criminal liability under the CDA. It follows that all speech on any topic that is available to adults will also be available to children using the Internet (unless it is blocked by screening software running on the computer the child is using).

115. There is no way that a speaker can use current technology to know if a listener is using screening software.

116. Tags can not currently activate or deactivate themselves depending on the age or location of the receiver. Critical Path, which posts on-line safer sex instructions, would be unable to imbed tags that block its speech only in communities where it may be regarded as indecent. Critical Path, for example, must choose either to tag its site (blocking its speech in all communities) or not to tag, blocking its speech in none.

The Problems of Offshore Content and Caching

117. A large percentage, perhaps 40% or more, of content on the Internet originates outside the United States. At the hearing, a witness demonstrated how an Internet user could access a Web site of London (which presumably is on a server in England), and then link to other sites of interest in England. A user can sometimes discern from a URL that content is coming from overseas, since InterNIC allows a content provider to imbed a country code in a domain name.20 Foreign content is otherwise indistinguishable from domestic content (as long as it is in English), since foreign speech is created, named, and posted in the same manner as domestic speech. There is no requirement that foreign speech contain a country code in its URL. It is undisputed that some foreign speech that travels over the Internet is sexually explicit.

118. The use of "caching" makes it difficult to determine whether the material originated from foreign or domestic sources. Because of the high cost of using the

trans-Atlantic and trans-Pacific cables, and because the high demand on those cables leads to bottleneck delays, content is often "cached", or temporarily stored, on servers in the United States. Material from a foreign source in Europe can travel over the trans-Atlantic cable to the receiver in the United States, and pass through a domestic caching server which then stores a copy for subsequent retrieval. This domestic caching server, rather than the original foreign server, will send the material from the cache to the subsequent receivers, without placing a demand on the trans-oceanic cables. This shortcut effectively eliminates most of the distance for both the request and the information and, hence, most of the delay. The caching server discards the stored information according to its configuration (e.g., after a certain time or as the demand for the information diminishes). Caching therefore advances core Internet values: the cheap and speedy retrieval of information.

119. Caching is not merely an international phenomenon. Domestic content providers store popular domestic material on their caching servers to avoid the delay of successive searches for the same material and to decrease the demand on their Internet connection. America Online can cache the home page of the New York Times on its servers when a subscriber first requests it, so that subsequent subscribers who make the same request will receive the same home page, but from America Online's caching service rather than from the New York Times's server.21

120. Put simply, to follow the example in the prior paragraph, America Online has no control over the content that the New York Times posts to its Web site, and the New York Times has no control over America Online's distribution of that content from a caching server.

Anonymity

121. Anonymity is important to Internet users who seek to access sensitive information, such as users of the Critical Path AIDS Project's Web site, the users, particularly gay youth, of Queer Resources Directory, and users of Stop Prisoner Rape (SPR). Many members of SPR's mailing list have asked to remain anonymous due to the stigma of prisoner rape.

Plaintiffs' Choices Under the CDA

122. Many speakers who display arguably indecent content on the Internet must choose between silence and the risk of prosecution. The CDA's defenses -- credit card verification, adult access codes, and adult personal identification numbers -- are effectively unavailable for non-commercial, not-for-profit entities.

123. The plaintiffs in this action are businesses, libraries, non-commercial and not-for-profit organizations, and educational societies and consortia. Although some of the material that plaintiffs post online -- such as information regarding protection from AIDS, birth control or prison rape -- is sexually explicit and may be considered "indecent" or "patently offensive" in some communities, none of the plaintiffs is a commercial purveyor of what is commonly termed "pornography."

III.

CONCLUSIONS OF LAW

Plaintiffs have established a reasonable probability of eventual success in the litigation by demonstrating that Secs. 223(a)(1)(B) and 223(a)(2) of the CDA are unconstitutional on their face to the extent that they reach indecency. Sections 223(d)(1) and 223(d)(2) of the CDA are unconstitutional on their face. Accordingly, plaintiffs have shown irreparable injury, no party has any interest in the enforcement of an unconstitutional law, and therefore the public interest will be served by granting the preliminary injunction. Elrod v. Burns, 427 U.S. 347, 373-74 (1976); Hohe v. Casey, 868 F.2d 69, 72 (3d Cir.), cert. denied, 493 U.S. 848 (1989); Acierno v. New Castle County, 40 F.3d 645, 653 (3d Cir. 1994). The motions for preliminary injunction will therefore be granted.

The views of the members of the Court in support of these conclusions follow.

SLOVITER, Chief Judge, Court of Appeals for the Third Circuit:
A. Statutory Provisions

As noted in Part I, Introduction, the plaintiffs' motion for a preliminary injunction is confined to portions of two provisions of the Communications Decency Act of 1996, Sec. 223(a) and Sec. 223(d), which they contend violate their First Amendment free speech and Fifth Amendment due process rights. To facilitate reference, I set forth those provisions in full. Section 223(a), the "indecency" provision, subjects to criminal penalties of imprisonment of no more than two years or a fine or both anyone who:

1) in interstate or foreign communications . . .

(B) by means of a telecommunications device
knowingly --

(i) makes, creates, or solicits, and

(ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication; . . . (2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity.

(emphasis added).

The term "telecommunications device" is specifically defined not to include "the use of an interactive computer service," as that is covered by section 223(d)(1).

Section 223(d), the "patently offensive" provision, subjects to criminal penalties anyone who: (1) in interstate or foreign communications knowingly--

(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

(B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the use of such service placed the call or initiated the communication; or

(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity.

(emphasis added).

Two aspects of these provisions stand out. First, we are dealing with criminal provisions, subjecting violators to substantial penalties. Second, the provisions on indecent and patently offensive communications are not parallel.

The government uses the term "indecent" interchangeably with "patently offensive" and advises that it so construes the statute in light of the legislative history and the Supreme Court's analysis of the word "indecent" in FCC v. Pacifica Foundation, 438 U.S. 726 (1978). However, the CDA does not define "indecent." Notwithstanding Congress'

familiarity with Pacifica, it enacted Sec. 223(a), covering "indecent" communications, without any language confining "indecent" to descriptions or depictions of "sexual or excretory activities or organs," language it included in the reference to "patently offensive" in Sec. 223(d)(1)(B). Nor does Sec. 223(a) contain the phrase "in context," which the government believes is relevant.

The failure to define "indecent" in Sec. 223(a) is thus arguably a negative pregnant and subject to "the rule of construction that an express statutory requirement here, contrasted with statutory silence there, shows an intent to confine the requirement to the specified instance." Field v. Mans, 116 S.Ct. 437, 442 (1995). See also Gozlon-Peretz v. United States, 498 U.S. 395, 404 (1991) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'") (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

Plaintiffs note the difference but do not press this as a basis for distinguishing between the two sections in their preliminary injunction arguments and therefore I will also use the words interchangeably for this purpose, leaving open the issue for consideration at the final judgment stage if it becomes relevant.

B. Preliminary Injunction Standard

To obtain a preliminary injunction, plaintiffs must establish that they are likely to prevail on the merits and that they will suffer irreparable harm if injunctive relief is not granted. We also must consider whether the potential harm to the defendant from issuance of a temporary restraining order outweighs possible harm to the plaintiffs if such relief is denied, and whether the granting of injunctive relief is in the public interest. See Campbell Soup Co. v. ConAgra, Inc., 977 F.2d 86, 90-91 (3d Cir. 1992); Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1175 (3d Cir. 1990).

In a case in which the injury alleged is a threat to First Amendment interests, the finding of irreparable injury is often tied to the likelihood of success on the merits. In Elrod v. Burns, 427 U.S. 347 (1976), the Supreme Court emphasized that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Id. at 373 (citing New York Times Co. v. United States, 403 U.S. 713 (1971)).

Subjecting speakers to criminal penalties for speech that is constitutionally protected in itself raises the spectre of irreparable harm. Even if a court were unwilling to draw that conclusion from the language of the statute itself, plaintiffs have introduced ample evidence

that the challenged provisions, if not enjoined, will have a chilling effect on their free expression. Thus, this is not a case in which we are dealing with a mere incidental inhibition on speech, see Hohe v. Casey, 868 F.2d 69, 73 (3d Cir.), cert. denied, 493 U.S. 848 (1989), but with a regulation that directly penalizes speech.

Nor could there be any dispute about the public interest factor which must be taken into account before a court grants a preliminary injunction. No long string of citations is necessary to find that the public interest weighs in favor of having access to a free flow of constitutionally protected speech. See, e.g., Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445, 2458 (1994); Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 763-65 (1976).

Thus, if plaintiffs have shown a likelihood of success on the merits, they will have shown the irreparable injury needed to entitle them to a preliminary injunction.

C. Applicable Standard of Review

The CDA is patently a government-imposed content-based restriction on speech, and the speech at issue, whether denominated "indecent" or "patently offensive," is entitled to constitutional protection. See Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989). As such, the regulation is subject to strict scrutiny, and will only be upheld if it is justified by a compelling government interest and if it is narrowly tailored to effectuate that interest. Sable, 492 U.S. at 126; see also Turner Broadcasting, 114 S. Ct. at 2459 (1994). "[T]he benefit gained [by a content-based restriction] must outweigh the loss of constitutionally protected rights." Elrod v. Burns, 427 U.S. at 363.

The government's position on the applicable standard has been less than pellucid but, despite some references to a somewhat lesser burden employed in broadcasting cases, it now appears to have conceded that it has the burden of proof to show both a compelling interest and that the statute regulates least restrictively. Tr. of Preliminary Injunction Hearing at 121 (May 10, 1996). In any event, the evidence and our Findings of Fact based thereon show that Internet communication, while unique, is more akin to telephone communication, at issue in Sable, than to broadcasting, at issue in Pacifica, because, as with the telephone, an Internet user must act affirmatively and deliberately to retrieve specific information online. Even if a broad search will, on occasion, retrieve unwanted materials, the user virtually always receives some warning of its content, significantly reducing the element of surprise or "assault" involved in broadcasting. Therefore, it is highly unlikely that a very young child will be randomly "surfing" the Web and come across "indecent" or "patently offensive" material.

Judge Dalzell's separate opinion fully explores the reasons for the differential treatment of radio and television broadcasting for First Amendment purposes from that accorded other means of communication. It follows that to the extent the Court employed a less than strict scrutiny standard of review in Pacifica and other broadcasting cases, see, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), there is no reason to employ a less than strict scrutiny standard of review in this case. D. The Nature of the Government's Interest

The government asserts that shielding minors from access to indecent materials is the compelling interest supporting the CDA. It cites in support the statements of the Supreme Court that "[i]t is evident beyond the need for elaboration that a State's interest in `safeguarding the physical and psychological well-being of a minor' is `compelling,'" New York v. Ferber, 458 U.S. 747, 757 (1982)(quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)), and "there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards." Sable, 492 U.S at 126. It also cites the similar quotation appearing in Fabulous Assoc., Inc. v. Pennsylvania Public Utility Comm'n, 896 F.2d 780, 787 (3d Cir. 1990).

Those statements were made in cases where the potential harm to children from the material was evident. Ferber involved the constitutionality of a statute which prohibited persons from knowingly promoting sexual performances by children under 16 and distributing material depicting such performances. Sable and Fabulous involved the FCC's ban on "dial-a-porn" (dealing by definition with pornographic telephone messages). In contrast to the material at issue in those cases, at least some of the material subject to coverage under the "indecent" and "patently offensive" provisions of the CDA may contain valuable literary, artistic or educational information of value to older minors as well as adults. The Supreme Court has held that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." Erznoznik v. City of Jacksonville, 422 U.S. 205, 212-213 (1975)(citations omitted).

In Erznoznik, the Court rejected an argument that an ordinance prohibiting the display of films containing nudity at drive-in movie theatres served a compelling interest in protecting minor passersby from the influence of such films. The Court held that the prohibition was unduly broad, and explained that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." 422 U.S. at 213-14. As Justice Scalia noted in Sable, "[t]he more pornographic what is embraced within the . . . category of `indecency,' the more reasonable it becomes to insist

upon greater assurance of insulation from minors." Sable, 492 U.S. at 132 (Scalia, J., concurring). It follows that where non-pornographic, albeit sexually explicit, material also falls within the sweep of the statute, the interest will not be as compelling.

In part, our consideration of the government's showing of a "compelling interest" trenches upon the vagueness issue, discussed in detail in Judge Buckwalter's opinion but equally pertinent to First Amendment analysis. Material routinely acceptable according to the standards of New York City, such as the Broadway play Angels in America which concerns homosexuality and AIDS portrayed in graphic language, may be far less acceptable in smaller, less cosmopolitan communities of the United States. Yet the play garnered two Tony Awards and a Pulitzer prize for its author, and some uninhibited parents and teachers might deem it to be material to be read or assigned to eleventh and twelfth graders. If available on the Internet through some libraries, the text of the play would likely be accessed in that manner by at least some students, and it would also arguably fall within the scope of the CDA.

There has been recent public interest in the female genital mutilation routinely practiced and officially condoned in some countries. News articles have been descriptive, and it is not stretching to assume that this is a subject that occupies news groups and chat rooms on the Internet. We have no assurance that these discussions, of obvious interest and relevance to older teenage girls, will not be viewed as patently offensive - even in context - in some communities.

Other illustrations abound of non-obscene material likely to be available on the Internet but subject to the CDA's criminal provisions. Photographs appearing in National Geographic or a travel magazine of the sculptures in India of couples copulating in numerous positions, a written description of a brutal prison rape, or Francesco Clemente's painting "Labirinth," see Def. Exh. 125, all might be considered to "depict or describe, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." 47 U.S.C. Sec. 223(d)(1). But the government has made no showing that it has a compelling interest in preventing a seventeen-year-old minor from accessing such images.

By contrast, plaintiffs presented testimony that material that could be considered indecent, such as that offered by Stop Prisoner Rape or Critical Path AIDS project, may be critically important for certain older minors. For example, there was testimony that one quarter of all new HIV infections in the United States is estimated to occur in young people between the ages of 13 and 20, an estimate the government made no effort to rebut. The witnesses believed that graphic material that their organizations post on the Internet could help save lives, but were concerned about the CDA's effect on their right to do so.

The government counters that this court should defer to legislative conclusions about this matter. However, where First Amendment rights are at stake, "[d]eference to a

legislative finding cannot limit judicial inquiry." Sable, 492 U.S. at 129 (quoting Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978)). "[W]hatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law." Id.

Moreover, it appears that the legislative "findings" the government cites concern primarily testimony and statements by legislators about the prevalence of obscenity, child pornography, and sexual solicitation of children on the Internet. Similarly, at the hearings before us the government introduced exhibits of sexually explicit material through the testimony of Agent Howard Schmidt, which consisted primarily of the same type of hard-core pornographic materials (even if not technically obscene) which concerned Congress and which fill the shelves of "adult" book and magazine stores. Plaintiffs emphasize that they do not challenge the Act's restrictions on speech not protected by the First Amendment, such as obscenity, child pornography or harassment of children. Their suit is based on their assertion, fully supported by their evidence and our findings, that the CDA reaches much farther.

I am far less confident than the government that its quotations from earlier cases in the Supreme Court signify that it has shown a compelling interest in regulating the vast range of online material covered or potentially covered by the CDA. Nonetheless, I acknowledge that there is certainly a compelling government interest to shield a substantial number of minors from some of the online material that motivated Congress to enact the CDA, and do not rest my decision on the inadequacy of the government's showing in this regard.

E. The Reach of the Statute

Whatever the strength of the interest the government has demonstrated in preventing minors from accessing "indecent" and "patently offensive" material online, if the means it has chosen sweeps more broadly than necessary and thereby chills the expression of adults, it has overstepped onto rights protected by the First Amendment. Sable, 492 U.S. at 131.

The plaintiffs argue that the CDA violates the First Amendment because it effectively bans a substantial category of protected speech from most parts of the Internet. The government responds that the Act does not on its face or in effect ban indecent material that is constitutionally protected for adults. Thus one of the factual issues before us was the likely effect of the CDA on the free availability of constitutionally protected material. A wealth of persuasive evidence, referred to in detail in the Findings of Fact, proved that it is either technologically impossible or economically prohibitive for many of the plaintiffs to

comply with the CDA without seriously impeding their posting of online material which adults have a constitutional right to access.

With the possible exception of an e-mail to a known recipient, most content providers cannot determine the identity and age of every user accessing their material. Considering separately content providers that fall roughly into two categories, we have found that no technology exists which allows those posting on the category of newsgroups, mail exploders or chat rooms to screen for age. Speakers using those forms of communication cannot control who receives the communication, and in most instances are not aware of the identity of the recipients. If it is not feasible for speakers who communicate via these forms of communication to conduct age screening, they would have to reduce the level of communication to that which is appropriate for children in order to be protected under the statute. This would effect a complete ban even for adults of some expression, albeit "indecent," to which they are constitutionally entitled, and thus would be unconstitutional under the holding in Sable, 492 U.S. at 131.

Even as to content providers in the other broad category, such as the World Wide Web, where efforts at age verification are technically feasible through the use of Common Gateway Interface (cgi) scripts (which enable creation of a document that can process information provided by a Web visitor), the Findings of Fact show that as a practical matter, non-commercial organizations and even many commercial organizations using the Web would find it prohibitively expensive and burdensome to engage in the methods of age verification proposed by the government, and that even if they could attempt to age verify, there is little assurance that they could successfully filter out minors.

The government attempts to circumvent this problem by seeking to limit the scope of the statute to those content providers who are commercial pornographers, and urges that we do likewise in our obligation to save a congressional enactment from facial unconstitutionality wherever possible. But in light of its plain language and its legislative history, the CDA cannot reasonably be read as limited to commercial pornographers. A court may not impose a narrowing construction on a statute unless it is "readily susceptible" to such a construction. Virginia v. American Booksellers Ass'n, 484 U.S. 383, 397 (1988). The court may not "rewrite a . . . law to conform it to constitutional requirements." Id. Although we may prefer an interpretation of a statute that will preserve the constitutionality of the statutory scheme, United State v. Clark, 445 U.S. 23, 27 (1980), we do not have license to rewrite a statute to "create distinctions where none were intended." American Tobacco Co. v. Patterson, 456 U.S. 63, 72 n.6 (1982); see also Consumer Party v. Davis, 778 F.2d 140, 147 (3d Cir. 1985). The Court has often stated that "absent a clearly expressed legislative intention to the contrary, [statutory] language

must ordinarily be regarded as conclusive." Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 772 (1984)(quoting North Dakota v. United States, 460 U.S. 300, 312 (1983)).

It is clear from the face of the CDA and from its legislative history that Congress did not intend to limit its application to commercial purveyors of pornography. Congress unquestionably knew how to limit the statute to such entities if that was its intent, and in fact it did so in provisions relating to dial-a-porn services. See 47 U.S.C. Sec. 223(b)(2)(A) (criminalizing making any indecent telephone communication "for commercial purposes"). It placed no similar limitation in the CDA. Moreover, the Conference Report makes clear that Congress did not intend to limit the application of the statute to content providers such as those which make available the commercial material contained in the government's exhibits, and confirms that Congress intended "content regulation of both commercial and non-commercial providers." Conf. Rep. at 191. See also, 141 Cong. Rec. S8089 (daily ed. June 9, 1995) (Statement of Senator Exon).

The scope of the CDA is not confined to material that has a prurient interest or appeal, one of the hallmarks of obscenity, because Congress sought to reach farther. Nor did Congress include language that would define "patently offensive" or "indecent" to exclude material of serious value. It follows that to narrow the statute in the manner the government urges would be an impermissible exercise of our limited judicial function, which is to review the statute as written for its compliance with constitutional mandates.

I conclude inexorably from the foregoing that the CDA reaches speech subject to the full protection of the First Amendment, at least for adults.22 In questions of the witnesses and in colloquy with the government attorneys, it became evident that even if "indecent" is read as parallel to "patently offensive," the terms would cover a broad range of material from contemporary films, plays and books showing or describing sexual activities (e.g., Leaving Las Vegas) to controversial contemporary art and photographs showing sexual organs in positions that the government conceded would be patently offensive in some communities (e.g., a Robert Mapplethorpe photograph depicting a man with an erect penis).

We have also found that there is no effective way for many Internet content providers to limit the effective reach of the CDA to adults because there is no realistic way for many providers to ascertain the age of those accessing their materials. As a consequence, we have found that "[m]any speakers who display arguably indecent content on the Internet must choose between silence and the risk of prosecution." Such a choice, forced by

sections 223(a) and (d) of the CDA, strikes at the heart of speech of adults as well as minors.

F. Whether CDA is Narrowly Tailored

In the face of such a patent intrusion on a substantial category of protected speech for adults, there is some irony in considering whether the statute is narrowly tailored or, as sometimes put, whether Congress has used the least restrictive means to achieve a compelling government interest. See Sable, 492 U.S. at 126. It would appear that the extent of the abridgement of the protected speech of adults that it has been shown the CDA would effect is too intrusive to be outweighed by the government's asserted interest, whatever its strength, in protecting minors from access to indecent material. Nonetheless, the formulation of the inquiry requires that we consider the government's assertion that the statute is narrowly drafted, and I proceed to do so.

In this case, the government relies on the statutory defenses for its argument of narrow tailoring. There are a number of reasons why I am not persuaded that the statutory defenses can save the CDA from a conclusion of facial unconstitutionality.

First, it is difficult to characterize a criminal statute that hovers over each content provider, like the proverbial sword of Damocles, as a narrow tailoring. Criminal prosecution, which carries with it the risk of public obloquy as well as the expense of court preparation and attorneys' fees, could itself cause incalculable harm. No provider, whether an individual, non-profit corporation, or even large publicly held corporation, is likely to willingly subject itself to prosecution for a miscalculation of the prevalent community standards or for an error in judgment as to what is indecent. A successful defense to a criminal prosecution would be small solace indeed.

Credit card and adult verification services are explicitly referred to as defenses in Sec. 223(e)(5)(B) of the CDA. As is set forth fully in the detailed Findings of Fact, these defenses are not technologically or economically feasible for most providers.

The government then falls back on the affirmative defense to prosecution provided in Sec. 223(e)(5)(A) for a person who "has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections . . . including any method which is feasible under available technology." The government emphasizes that "effective" does not require 100% restriction, and that this defense is "open-ended" and requires only reasonable efforts based on current technology.

But, as the evidence made clear, there is no such technology at this time. The government proffered as one option that would constitute a valid affirmative defense under Sec. 223(e)(5)(A) a "tagging" scheme conceived by Dr. Olsen in response to this lawsuit whereby a string of characters would be imbedded in all arguably indecent or patently offensive material. Our Findings of Fact set forth fully the reasons why we found that the feasibility and effectiveness of tagging in the manner proposed by the government has not been established. All parties agree that tagging alone does nothing to prevent children from accessing potentially indecent material, because it depends upon the cooperation of third parties to block the material on which the tags are embedded. Yet these third parties, over which the content providers have no control, are not subject to the CDA. I do not believe a statute is narrowly tailored when it subjects to potential criminal penalties those who must depend upon third parties for the effective operation of a statutory defense.

Most important, the government's "tagging" proposal is purely hypothetical and offers no currently operative defense to Internet content providers. At this time, there is no agreed-upon "tag" in existence, and no web browsers or user-based screening systems are now configured to block tagged material. Nor, significantly, has the government stipulated that a content provider could avoid liability simply by tagging its material.

Third, even if the technology catches up, as the government confidently predicts, there will still be a not insignificant burden attached to effecting a tagging defense, a burden one should not have to bear in order to transmit information protected under the constitution. For example, to effect tagging content providers must review all of their material currently published online, as well as all new material they post in the future, to determine if it could be considered "patently offensive" in any community nationwide. This would be burdensome for all providers, but for the many not-for-profit entities which currently post thousands of Web pages, this burden would be one impossible to sustain.

Finally, the viability of the defenses is intricately tied to the clarity of the CDA's scope. Because, like Judge Buckwalter, and for many of the reasons he gives, I believe that "indecent" and "patently offensive" are inherently vague, particularly in light of the government's inability to identify the relevant community by whose standards the material will be judged, I am not persuaded by the government that the statutory defenses in Sec. 223(e) provide effective protection from the unconstitutional reach of the statute.

Minors would not be left without any protection from exposure to patently unsuitable material on the Internet should the challenged provisions of the CDA be preliminarily enjoined. Vigorous enforcement of current obscenity and child pornography laws should suffice to address the problem the government identified in court and which concerned Congress. When the CDA was under consideration by Congress, the Justice Department itself communicated its view that it was not necessary because it was prosecuting online

obscenity, child pornography and child solicitation under existing laws, and would continue to do so.23 It follows that the CDA is not narrowly tailored, and the government's attempt to defend it on that ground must fail. G. Preliminary Injunction

When Congress decided that material unsuitable for minors was available on the Internet, it could have chosen to assist and support the development of technology that would enable parents, schools, and libraries to screen such material from their end. It did not do so, and thus did not follow the example available in the print media where non-obscene but indecent and patently offensive books and magazines abound. Those responsible for minors undertake the primary obligation to prevent their exposure to such material. Instead, in the CDA Congress chose to place on the speakers the obligation of screening the material that would possibly offend some communities.

Whether Congress' decision was a wise one is not at issue here. It was unquestionably a decision that placed the CDA in serious conflict with our most cherished protection - the right to choose the material to which we would have access.

The government makes what I view as an extraordinary argument in its brief. It argues that blocking technology needed for effective parental control is not yet widespread but that it "will imminently be in place." Government's Post-hearing Memorandum at 66. It then states that if we uphold the CDA, it "will likely unleash the 'creative genius' of the Internet community to find a myriad of possible solutions." I can imagine few arguments less likely to persuade a court to uphold a criminal statute than one that depends on future technology to cabin the reach of the statute within constitutional bounds.

The government makes yet another argument that troubles me. It suggests that the concerns expressed by the plaintiffs and the questions posed by the court reflect an exaggerated supposition of how it would apply the law, and that we should, in effect, trust the Department of Justice to limit the CDA's application in a reasonable fashion that would avoid prosecution for placing on the Internet works of serious literary or artistic merit. That would require a broad trust indeed from a generation of judges not far removed from the attacks on James Joyce's Ulysses as obscene. See United States v. One Book Entitled Ulysses, 72 F.2d 705 (2d Cir. 1934); see also Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass., 383 U.S. 413 (1966). Even if we were to place confidence in the reasonable judgment of the representatives of the Department of Justice who appeared before us, the Department is not a monolithic structure, and individual U.S. Attorneys in the various districts of the country have or appear to exercise some independence, as reflected by the Department's tolerance of duplicative challenges in this very case.

But the bottom line is that the First Amendment should not be interpreted to require us to entrust the protection it affords to the judgment of prosecutors. Prosecutors come and go. Even federal judges are limited to life tenure. The First Amendment remains to give protection to future generations as well. I have no hesitancy in concluding that it is likely that plaintiffs will prevail on the merits of their argument that the challenged provisions of the CDA are facially invalid under both the First and Fifth Amendments.

BUCKWALTER, District Judge

A.

I believe that plaintiffs should prevail in this litigation.

My conclusion differs in part from my original memorandum filed in conjunction with the request for a Temporary Restraining Order. As part of the expedited review (per Sec. 561 of the CDA), and in contrast to the limited documentation available to me at the time of the T.R.O. hearing, we have now gathered voluminous evidence presented by way of sworn declarations, live testimony, demonstrative evidence, and other exhibits.24 Based upon our findings of fact derived from careful consideration of that evidence, I now conclude that this statute is overbroad and does not meet the strict scrutiny standard in Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989).

More specifically, I now find that current technology is inadequate to provide a safe harbor to most speakers on the Internet. On this issue, I concur in Chief Judge Sloviter's opinion. In addition, I continue to believe that the word "indecent" is unconstitutionally vague, and I find that the terms "in context" and "patently offensive" also are so vague as to violate the First and Fifth Amendments.

It is, of course, correct that statutes that attempt to regulate the content of speech presumptively violate the First Amendment. See e.g. R.A.V. v. City of Saint Paul, 505 U.S. 377, 381 (1992). That is as it should be. The prohibition against Government's regulation of speech cannot be set forth any clearer than in the language of the First Amendment itself. I suspect, however, that it may come as a surprise to many people who have not followed the evolution of constitutional law that, by implication at least, the First Amendment provides that Congress shall make no law abridging the freedom of speech unless that law advances a compelling governmental interest.25 Our cherished freedom of speech does not cover as broad a spectrum as one may have gleaned from a simple reading of the Amendment.26

First Amendment jurisprudence has developed into a study of intertwining standards and applications, perhaps as a necessary response to our ever-evolving culture and modes of communication.27

Essentially, my concerns are these: above all, I believe that the challenged provisions are so vague as to violate both the First and Fifth Amendments, and in particular that Congress' reliance on Pacifica is misplaced. In addition, I believe that technology as it currently exists -- and it bears repeating that we are at the preliminary injunction phase only -- cannot provide a safe harbor for most speakers on the Internet, thus rendering the statute unconstitutional under a strict scrutiny analysis. I refer to Chief Judge Sloviter's more detailed analysis of this issue.

While I believe that our findings of fact clearly show that as yet no defense is technologically feasible, and while I also have found the present Act to be unconstitutionally vague, I believe it is too early in the development of this new medium to conclude that other attempts to regulate protected speech within the medium will fail a challenge. That is to say that I specifically do not find that any and all statutory regulation of protected speech on the Internet could not survive constitutional scrutiny. Prior cases have established that government regulation to prevent access by minors to speech protected for adults, even in media considered the vanguard of our First Amendment protections, like print, may withstand a constitutional challenge. See e.g. Ginsberg v. New York, 390 U.S. 629, 635 (1968) ("`Material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children.'") (quoting Bookcase Inc. v. Broderick, 18 N.Y.2d 71, 75, 271 N.Y.S.2d 947, 952, 218 N.E.2d 668, 671 (1966), appeal dismissed, sub nom Bookcase, Inc. v. Leary, 385 U.S. 12 (1966)). It should be noted that those restrictions that have been found constitutional were sensitive to the unique qualities of the medium at which the restriction was aimed.

B.

This statute, all parties agree, deals with protected speech, the preservation of which has been extolled by court after court in case after case as the keystone, the bulwark, the very heart of our democracy. What is more, the CDA attempts to regulate protected speech through criminal sanctions, thus implicating not only the First but also the Fifth Amendment of our Constitution. The concept of due process is every bit as important to our form of government as is free speech. If free speech is at the heart of our democracy, then surely due process is the very lifeblood of our body politic; for without it, democracy could not survive. Distilled to its essence, due process is, of course, nothing more and nothing less than fair play. If our citizens cannot rely on fair play in their relationship with their government, the stature of our government as a shining example of democracy would

be greatly diminished. I believe that an exacting or strict scrutiny of a statute which attempts to criminalize protected speech requires a word by word look at that statute to be sure that it clearly sets forth as precisely as possible what constitutes a violation of the statute.

The reason for such an examination is obvious. If the Government is going to intrude upon the sacred ground of the First Amendment and tell its citizens that their exercise of protected speech could land them in jail, the law imposing such a penalty must clearly define the prohibited speech not only for the potential offender but also for the potential enforcer. Kolender, 461 U.S. 352; Hoffman Estates, 455 U.S. 489; Smith v. Goguen, 415 U.S. 566 (1974); Grayned v. City of Rockford, 408 U.S. 104 (1972); Winters v. New York, 333 U.S. 507 (1948).

In dealing with issues of vagueness and due process over the years, the Supreme Court has enunciated many notable principles. One concern with vague laws relates to the issue of notice. The older cases have used phrases such as "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law," Connally v. General Const. Co., 269 U.S. 385, 391 (1926) (citations omitted); "it will not do to hold an average man to the peril of indictment for the unwise exercise of his . . . knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result," Cline v. Frink Dairy Co., 274 U.S. 445, 465 (1927); and "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids," Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). Second, the Court has said that laws must provide precise standards for those who apply them to prevent arbitrary and discriminatory enforcement, because "[w]hen the legislature fails to provide such minimal guidelines, a criminal statute may permit `a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" Kolender, 461 U.S. at 358 (citing Goguen, 415 U.S. at 575). Finally, when First Amendment concerns have been implicated, a stricter standard of examination for vagueness is imperative. "[T]his court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." Smith v. California, 361 U.S. 147, 151 (1959). See also Hoffman Estates, 455 U.S. at 499 ("[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech . . . , a more stringent vagueness test should apply.") (citations omitted).

A case which sums up vagueness as it relates to due process as succinctly as any other is Grayned v. City of Rockford. Here the court said: It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." Grayned, 408 U.S. at 108-109 (citations omitted).

At the same time, in considering the vagueness issue, as the Government correctly points out, "[C]ondemned to the use of words, we can never expect mathematical certainty from our language." Grayned, 408 U.S. at 110. See also Hoffman Estates, 455 U.S. 489; Hynes v. Mayor & Council of Oradell, 425 U.S. 610 (1976); Goguen, 415 U.S. 566. In addition, it will always be true that the fertile legal "imagination can conjure hypothetical cases in which the meaning of [disputed] terms will be in nice question." American Communications Assn. v. Douds, 339 U.S. 382, 412 (1950). Thus, as I considered the vagueness issue I have kept in mind the observation of Justice Holmes, denying a challenge to vagueness in Nash v. United States, 229 U.S. 373 (1913). To Justice Holmes, "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment . . ., he may incur the penalty of death." Nash, 229 U.S. at 377. Even more recently the court has stated that "due process does not require `impossible standards' of clarity." Kolender, 461 U.S. at 361, (quoting United States v. Petrillo, 332 U.S. 1, 7-8 (1947)). It is with all of these principles in mind, as they interplay with the unique features of the Internet, that I have reached my conclusion.

The fundamental constitutional principle that concerns me is one of simple fairness, and that is absent in the CDA. The Government initially argues that "indecent" in this statute is the same as "patently offensive." I do not agree that a facial reading of this statute supports that conclusion. The CDA does not define the term "indecent," and the FCC has not promulgated regulations defining indecency in the medium of cyberspace. If "indecent" and "patently offensive" were intended to have the same meaning, surely section (a) could have mirrored section (d)'s language.28 Indecent in this statute is an undefined word which, standing alone, offers no guidelines whatsoever as to its

parameters. Interestingly, another federal crime gives a definition to indecent entirely different from that proposed in the present case.29 While not applicable here, this example shows the indeterminate nature of the word and the need for clear definition, particularly in a statute which infringes upon protected speech. Although the use of different terms in Sec. 223(a) and (d) suggests that Congress intended that the terms have different meanings, the Conference Report indicates an intention to treat Sec. 223(a) as containing the same language as Sec. 223(d). Conf. Rep. at 188-89 ("The conferees intend that the term indecency . . . has the same meaning as established in FCC v. Pacifica Foundation, 438 U.S. 726 (1978) and [Sable] and "New section 223(d)(1) codifies the definition of indecency from [Pacifica] . . . . The precise contours of the definition of indecency have varied . . . . The essence of the phrase -- patently offensive descriptions of sexual and excretory activities -- has remained constant, however."). Therefore, I will acknowledge that the term indecency is "reasonably susceptible" to the definition offered in the Conference Report and might therefore adopt such a narrowing construction if it would thereby preserve the constitutionality of the statute. See Virginia v. American Booksellers Association, 484 U.S. 383, 397 (1988); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975). Accepting these terms as synonymous, however, provides no greater help to a speaker attempting to comply with the CDA. Contrary to the Government's suggestion, Pacifica does not answer the question of whether the terms pass constitutional muster in the present case. In Pacifica, the Court did not consider a vagueness challenge to the term "indecent," but considered only whether the Government had the authority to regulate the particular broadcast at issue -- George Carlin's Monologue entitled "Filthy Words." In finding in the affirmative, the Court emphasized that its narrow holding applied only to broadcasting, which is "uniquely accessible to children, even those too young to read." 438 U.S. at 749. Thus, while the Court sanctioned the FCC's time restrictions on a radio program that repeatedly used vulgar language, the Supreme Court did not hold that use of the term "indecent" in a statute applied to other media, particularly a criminal statute, would be on safe constitutional ground.

The Supreme Court more recently had occasion to consider a statute banning "indecent" material in the dial-a-porn context in Sable, 492 U.S. 115, and found that a complete ban on such programming violated the First Amendment because it was not narrowly tailored to serve the purpose of limiting children's access to commercial pornographic telephone messages. Once again, the Court did not consider a challenge to the term "indecent" on vagueness grounds, and indeed has never directly ruled on this issue.

Several other courts have, however, upheld the use of the term in statutes regulating different media. For example, in Information Providers' Coalition v. FCC, 928 F.2d 866 (9th Cir. 1991), the Ninth Circuit Court of Appeals considered whether the term "indecent"

in the 1989 Amendment to the Communications Act regulating access to telephone dial-a-porn services and the FCC's implementing regulations was void for vagueness. The FCC had defined "indecent" as "the description or depiction of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the telephone medium." 928 F.2d at 874. Although recognizing that the Supreme Court had never explicitly ruled on a vagueness challenge to the term, the court read Sable and Pacifica as having implicitly accepted the use of this definition of "indecent." The court further stated that the FCC's definition of "indecent" was no less imprecise than was the definition of "obscenity" as announced in Miller v. California, 413 U.S. 15, 25 (1973), and thus concluded that "indecent" as pertained to dial-a-porn regulations must survive a vagueness challenge. See also Dial Information Services v. Thornburgh, 938 F.2d 1535 (2d Cir. 1991), (upholding the use of "indecent" in the same amendment to the Communications Act and FCC regulations.); Action for Children's Television v. FCC, 932 F.2d 1504, 1508 (D.C.Cir. 1991) (rejecting vagueness challenge to "indecency" provision in broadcast television regulations).30

Notably, however, in these telephone and cable television cases the FCC had defined indecent as patently offensive by reference to contemporary community standards for that particular medium. See, e.g., Pacifica, 438 U.S. at 732 (defining "indecent" by reference to terms "patently offensive as measured by contemporary community standards for the broadcast medium"); Dial Information Services, 938 F.2d at 1540 (defining indecency by reference to contemporary community standards for the telephone medium). Here, the provision is not so limited. In fact, there is no effort to conform the restricting terms to the medium of cyberspace, as is required under Pacifica and its progeny.

The Government attempts to save the "indecency" and "patently offensive" provisions by claiming that the provisions would only be used to prosecute pornographic works which, when considered "in context" as the statute requires, would be considered "indecent" or "patently offensive" in any community. The Government thus contends that plaintiffs' fears of prosecution for publishing material about matters of health, art, literature or civil liberties are exaggerated and unjustified. The Government's argument raises two issues: first is the question of which "community standards" apply in cyberspace, under the CDA; and second is the proposition that citizens should simply rely upon prosecutors to apply the statute constitutionally.

Are the contemporary community standards to be applied those of the vast world of cyberspace, in accordance with the Act's apparent intent to establish a uniform national standard of content regulation? The Government offered no evidence of any such national standard or nationwide consensus as to what would be considered "patently offensive". On the contrary, in supporting the use of the term "indecent" in the CDA, the Government

suggests that, in part, this term was chosen as a means of insulating children from material not restricted under current obscenity laws. This additional term is necessary, the Government states, because "whether something rises to the level of obscene is a legal conclusion that, by definition, may vary from community to community." Govt. Brief at 31. In support of its argument, the Government points to the Second Circuit's decision in United States v. Various Articles of Obscene Merchandise, Schedule No. 2102, 709 F.2d 132, 134, 137 (2d Cir. 1983), which upheld the district court's conclusion that "detailed portrayals of genitalia, sexual intercourse, fellatio, and masturbation" including the film "Deep Throat" and other pornographic films and magazines, are not obscene in light of the community standards prevailing in New York City." What this argument indicates is that as interpretations of obscenity ebb and flow throughout various communities, restrictions on indecent material are meant to cover a greater or lesser quantity of material not reached by each community's obscenity standard. It follows that to do this, what constitutes indecency must be as open to fluctuation as the obscenity standard and cannot be rigidly constructed as a single national standard if it is meant to function as the Government has suggested. As Justice Scalia stated, "[t]he more narrow the understanding of what is `obscene,' . . . the more pornographic what is embraced within the residual category of `indecency.'" Sable, 492 U.S. at 132 (Scalia, J. concurring). This understanding is consistent with the case law, in which the Supreme Court has explained that the relevant community is the one where the information is accessed and where the local jury sits. See Sable, 492 U.S. at 125; Hamling v. United States, 418 U.S. 87 (1974); Miller, 413 U.S. at 30 ("[O]ur nation is simply too big and too diverse for this Court to reasonably expect that such standards [of what is patently offensive] could be articulated for all 50 states in a single formulation."). However, the Conference Report with regard to the CDA states that the Act is "intended to establish a uniform national standard of content regulation." Conf. Rep. at 191. This conflict inevitably leaves the reader of the CDA unable to discern the relevant "community standard," and will undoubtedly cause Internet users to "steer far wider of the unlawful zone" than if the community standard to be applied were clearly defined. The chilling effect on the Internet users' exercise of free speech is obvious. See Baggett v. Bullitt, 377 U.S. 360, 372 (1964). This is precisely the vice of vagueness.

In addition, the Government's argument that the challenged provisions will be applied only to "pornographic" materials, and will not be applied to works with serious value is without support in the CDA itself. Unlike in the obscenity context, indecency has not been defined to exclude works of serious literary, artistic, political or scientific value, and therefore the Government's suggestion that it will not be used to prosecute publishers of such material is without foundation in the law itself. The Government's claim that the work must be considered patently offensive "in context" does nothing to clarify the provision, for it fails to explain which context is relevant. "Context" may refer to, among other things, the

nature of the communication as a whole, the time of day it was conveyed, the medium used, the identity of the speaker, or whether or not it is accompanied by appropriate warnings. See e.g., Pacifica, 438 U.S. at 741 n.16, n.17 (referring to "the context of the whole book," and to the unique interpretation of the First Amendment "in the broadcasting context").

The thrust of the Government's argument is that the court should trust prosecutors to prosecute only a small segment of those speakers subject to the CDA's restrictions, and whose works would reasonably be considered "patently offensive" in every community. Such unfettered discretion to prosecutors, however, is precisely what due process does not allow. "It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful . . . prosecution for some of the activities seemingly embraced within the sweeping statutory definitions. The hazard of being prosecuted . . . nevertheless remains . . . . Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." Baggett, 377 U.S. at 373-74; see also Keyishian v. Board of Regents, 385 U.S. 589, 599 (1967)("[i]t is no answer" to a vague law for the Government "to say that the statute would not be applied in such a case."). And we cannot overlook the vagaries of politics. What may be, figuratively speaking, one administration's pen may be another's sword.

The evidence and arguments presented by the Government illustrate the possibility of arbitrary enforcement of the Act. For example, one Government expert opined that any of the so-called "seven dirty words" used in the Carlin monologue would be subject to the CDA and therefore should be "tagged," as should paintings of nudes displayed on a museum's web site. The Government has suggested in its brief, however, that the Act should not be so applied. See Govt. Brief at 37 (suggesting that "seven dirty words" if used "in the context of serious discussions" would not be subject to the Act). Even Government counsel was unable to define "indecency" with specificity. The Justice Department attorney could not respond to numerous questions from the court regarding whether, for example, artistic photographs of a nude man with an erect penis, depictions of Indian statues portraying different methods of copulation, or the transcript of a scene from a contemporary play about AIDS could be considered "indecent" under the Act.

Plaintiffs also argue that section 223(e)(5)(A) of the CDA, offering a defense for speakers who take "good faith, reasonable, effective and appropriate actions under the circumstances to restrict or prevent access by minors to a communication" covered by the Act, is unconstitutionally vague because it fails to specify what would constitute an effective defense to prosecution. The plain language of the safe harbor provision indicates an effort to ensure that the statute limits speech in the least restrictive means possible by taking into

account emerging technologies in allowing for any and all "reasonable, effective and appropriate" approaches to restricting minors' access to the proscribed material. But, the statute itself does not contain any description of what, other than credit card verification and adult identification codes -- which we have established remain unavailable to most content providers -- will protect a speaker from prosecution. Significantly, although the FCC is authorized to specify measures that might satisfy this defense, the FCC's views will not be definitive but will only "be admitted as evidence of good faith efforts" that the defendant has met the requirements of the defense. 47 U.S.C. Sec. 223(e)(6). Thus, individuals attempting to comply with the statute presently have no clear indication of what actions will ensure that they will be insulated from criminal sanctions under the CDA.

C.

The consequences of posting indecent content are severe.31 I recognize that people must make judgments each and every day, many times in the most intimate of relationships and that an error in judgment can have serious consequences. It is also true that where those consequences involve penal sanctions, a criminal law or statute has more often than not carefully defined the proscribed conduct. It is not so much that the accused needs these precise definitions, as it has been said he or she rarely reads the law in advance. What is more important is that the enforcer of statutes must be guided by clear and precise standards. In statutes that break into relatively new areas, such as this one, the need for definition of terms is greater, because even commonly understood terms may have different connotations or parameters in this new context.32 Words cannot define conduct with mathematical certainty, and lawyers, like the bright and intelligent ones now before us, will most certainly continue to devise ways by which to challenge them. This rationale, however, can neither support a finding of constitutionality nor relieve legislators from the very difficult task of carefully drafting legislation tailored to its goal and sensitive to the unique characteristics of, in this instance, cyberspace.

DALZELL, District Judge

A. Introduction

I begin with first principles: As a general rule, the Constitution forbids the Government from silencing speakers because of their particular message. R.A.V. v. City of Saint Paul, 112 S. Ct. 2538, 2542 (1992). "Our political system and cultural life rest upon this ideal." Turner Broadcasting Sys. v. FCC, 114 S. Ct. 2445, 2458 (1994). This general rule is subject only to "narrow and well-understood exceptions". Id. A law that, as here, regulates speech on the basis of its content, is "presumptively invalid". R.A.V., 112 S. Ct. at 2542.

Two of the exceptions to this general rule deal with obscenity (commonly understood to include so-called hardcore pornography), Miller v. California, 413 U.S. 15 (1973), and child pornography, New York v. Ferber, 458 U.S. 747 (1982). The Government can and does punish with criminal sanction people who engage in these forms of speech. 18 U.S.C. Secs. 1464-65 (criminalizing obscene material); id. Secs. 2251-52 (criminalizing child pornography). Indeed, the Government could punish these forms of speech on the Internet even without the CDA. E.g., United States v. Thomas, 74 F.3d 701, 704-05 (6th Cir. 1995) (affirming obscenity convictions for the operation of a computer bulletin board).

The Government could also completely ban obscenity and child pornography from the Internet. No Internet speaker has a right to engage in these forms of speech, and no Internet listener has a right to receive them. Child pornography and obscenity have "no constitutional protection, and the government may ban [them] outright in certain media, or in all." Alliance for Community Media v. FCC, 56 F.3d 105, 112 (D.C. Cir. 1995) (citing R.A.V., 112 S. Ct. at 2545), cert. granted sub nom. Denver Area Educ. Telecommunications Consortium, 116 S. Ct. 471 (1996); see also Ferber, 458 U.S. at 756. As R.A.V. notes, "'the freedom of speech' referred to by the First Amendment does not include a freedom to disregard these traditional limitations." R.A.V., 112 S. Ct. at 2543.

The cases before us, however, are not about obscenity or child pornography. Plaintiffs in these actions claim no right to engage in these forms of speech in the future, nor does the Government intimate that plaintiffs have engaged in these forms of speech in the past.

This case is about "indecency", as that word has come to be understood since the Supreme Court's decisions in FCC v. Pacifica Foundation, 438 U.S. 726 (1976), and Sable Communications v. FCC, 492 U.S. 115 (1989). The legal difficulties in these actions arise because of the special place that indecency occupies in the Supreme Court's First Amendment jurisprudence. While adults have a First Amendment right to engage in indecent speech, Sable, 492 U.S. at 126; see also Pacifica, 438 U.S. at 747-48, the Supreme Court has also held that the Government may, consistent with the Constitution, regulate indecency on radio and television, and in the "dial-a-porn" context, as long as the regulation does not operate as a complete ban. Thus, any regulation of indecency in these areas must give adults access to indecent speech, which is their right.

The Government may only regulate indecent speech for a compelling reason, and in the least restrictive manner. Sable, 492 U.S. at 126. "It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." Id. This "most exacting scrutiny", Turner, 114 S. Ct. at 2459, requires the Government to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." United

States v. National Treasury Employees Union, 115 S. Ct. 1003, 1017 (1995) (citing Turner, 114 S. Ct. at 1017). Thus, although our analysis here must balance ends and means, the scales tip at the outset in plaintiffs' favor. This is so because "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 502 U.S. 105, 116 (1991) (citation omitted).

The Government argues that this case is really about pornography on the Internet. Apart from hardcore and child pornography, however, the word pornography does not have a fixed legal meaning. When I use the word pornography in my analysis below, I refer to for-profit purveyors of sexually explicit, "adult" material similar to that at issue in Sable. See 492 U.S. at 118. Pornography is normally either obscene or indecent, as Justice Scalia noted in his concurrence in Sable. Id. at 132. I would avoid using such an imprecise (and overbroad) word, but I feel compelled to do so here, since Congress undoubtedly had such material in mind when it passed the CDA. See S. Rep. No. 230, 104th Cong., 2d Sess. 187-91 (1996), reprinted in 1996 U.S.C.C.A.N. 10, 200-05 [hereinafter Senate Report]. Moreover, the Government has defended the Act before this court by arguing that the Act could be constitutionally applied to such material.

Plaintiffs have, as noted, moved for a preliminary injunction. The standards for such relief are well-settled. Plaintiffs seeking preliminary injunctive relief must show (1) "[a] reasonable probability of eventual success in the litigation" and (2) "irreparabl[e] injur[y] pendente lite" if relief is not granted. Acierno v. New Castle County, 40 F.2d 645, 653 (3d Cir. 1994). We must also consider, if appropriate, (3) "the possibility of harm to other interested persons from the grant or denial of the injunction", and (4) "the public interest". Id.; see also Opticians Ass'n v. Independent Opticians, 920 F.2d 187, 192 (3d Cir. 1990).

In a First Amendment challenge, a plaintiff who meets the first prong of the test for a preliminary injunction will almost certainly meet the second, since irreparable injury normally arises out of the deprivation of speech rights, "for even minimal periods of time". Elrod v. Burns, 427 U.S. 347, 373-74 (1976); Hohe v. Casey, 868 F.2d 69, 72 (3d Cir.), cert. denied, 493 U.S. 848 (1989). Of course, neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law. Thus, I focus my legal analysis today primarily on whether plaintiffs have shown a likelihood of success on their claim that the CDA is unconstitutional. The issues of irreparable harm to plaintiffs, harm to third parties, and the public interest all flow from that determination.33

Plaintiffs' challenge here is a "facial" one. A law that regulates the content of speech is facially invalid if it does not pass the "most exacting scrutiny" that we have described

above, or if it would "penalize a substantial amount of speech that is constitutionally protected". Forsyth County v. Nationalist Movement, 112 S. Ct. 2395, 2401 (1992). This is so even if some applications would be "constitutionally unobjectionable". Id.; see also National Treasury Employees Union v. United States, 990 F.2d 1271, 1279-80 (D.C. Cir. 1993) (Randolph, J., concurring), aff'd, 115 S. Ct. 1003 (1995). Sometimes facial challenges require an inquiry into a party's "standing" (i.e., whether a party may properly challenge a law as facially invalid). See, e.g., Ferber, 458 U.S. at 767-79. At other times a facial challenge requires only an inquiry into the law's reach. See, e.g., R.A.V., 112 S. Ct. at 2547.34 As I describe it in part C below, I have no question that plaintiffs here have standing to challenge the validity of the CDA, and, indeed, the Government has not seriously challenged plaintiffs' standing to do so. See, e.g., Virginia v. American Booksellers Assoc., 484 U.S. 383, 392 (1988). Thus, the focus is squarely on the merits of plaintiffs' facial challenge.35

I divide my legal analysis below into three parts. In Part B, I examine the traditional definition of indecency and relate it to the provisions of the CDA at issue in this action. From this analysis I conclude that Sec. 223(a) and Sec. 223(d) of the CDA reach the same kind of speech. My analysis also convinces me that plaintiffs are unlikely to succeed in their claim that the CDA is unconstitutionally vague. In Part C, I address the Government's argument that plaintiffs are not the CDA's target, nor would they likely face prosecution under the Act. Here, I conclude that plaintiffs could reasonably fear prosecution under the Act, even if some of their fears border on the farfetched. In Part D, I consider the legal implications of the special attributes of Internet communication, as well as the effect that the CDA would have on these attributes. In this Part I conclude that the disruptive effect of the CDA on Internet communication, as well as the CDA's broad reach into protected speech, not only render the Act unconstitutional but also would render unconstitutional any regulation of protected speech on this new medium.

B. Defining Indecency

Although no court of appeals has ever to my knowledge upheld a vagueness challenge to the meaning of "indecency", several recent cases have grappled with the elusive meaning of that word in the context of cable television and "dial-a-porn". Alliance for Community Media v. FCC, 56 F.3d 105 (D.C. Cir. 1995), cert. granted, 116 S. Ct. 471 (1996); Dial Information Serv. Corp. v. Thornburgh, 938 F.2d 1535 (2d Cir. 1991), cert. denied, 502 U.S. 1072 (1992); Information Providers Coalition for Defense of the First Amendment v. FCC, 928 F.2d 866 (9th Cir. 1991).

In Alliance for Community Media, 56 F.3d at 123-25, for example, the District of Columbia Court of Appeals addressed prohibitions on indecent programming on certain

cable television channels. That court noted that the FCC has codified the meaning of "'indecent' programming" on cable television as "programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." Id. at 112 (citing what is now 47 C.F.R. Sec. 76.701(g)).

The FCC took a similar approach to the definition of "indecency" in the "dial-a-porn" medium.36 In Dial Information Services, 938 F.2d at 1540, the Second Circuit quoted the FCC's definition of indecent telephone communications in that context: [I]n the dial-a-porn context, we believe it is appropriate to define indecency as the description or depiction of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the telephone medium. Id. at 1540 (citation omitted); see also Information Providers' Coalition for Defense of the First Amendment v. FCC, 928 F.2d 866, 876 (9th Cir. 1991).

These three cases recognize that the FCC did not define "indecency" for cable and dial-a-porn in a vacuum. Rather, it borrowed from the Supreme Court's decision in FCC v. Pacifica Foundation, 438 U.S. 726 (1978). In that case (which I describe in greater detail below), the Supreme Court established the rough outline from which the FCC fashioned its three-part definition. For the first two parts of the test, the Supreme Court emphasized the "importance of context" in examining arguably indecent material. Id. at 747 n.25. "Context" in the Pacifica opinion includes consideration of both the particular medium from which the material originates and the particular community that receives the material. Id. at 746 (assuming that the Carlin monologue "would be protected in other contexts"); id. at 748-51 (discussing the attributes of broadcast); see also Information Providers' Coalition, 928 F.2d at 876 (discussing the "content/context dichotomy"). Second, the opinion limits its discussion to "patently offensive sexual and excretory language", Pacifica, 438 U.S. at 747, and this type of content has remained the FCC's touchstone. See, e.g., Alliance for Community Media, 56 F.3d at 112.37

We have quoted from the CDA extensively above and I will only briefly rehearse that discussion here. Section 223(a) of the CDA criminalizes "indecent" speech on the Internet. This is the "indecency" provision. Section 223(d) of the CDA addresses speech that, "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs". This is the "patently offensive" provision. The foregoing discussion leads me to conclude that these two provisions describe the same kind of speech. That is, the use of "indecent" in Sec. 223(a) is shorthand for the longer description in Sec. 223(d). Conversely, the longer description in Sec. 223(d) is itself the definition of "indecent" speech. I believe Congress

could have used the word "indecent" in both Sec. 223(a) and Sec. 223(d), or it could have used the "patently offensive" description of Sec. 223(d) in Sec. 223(a), without a change in the meaning of the Act. I do not believe that Congress intended that this distinction alone would change the reach of either section of the CDA.38

The CDA's legislative history confirms this conclusion. There, the conference committee explicitly noted that Sec. 223(d) "codifies the definition of indecency from FCC v. Pacifica Foundation, 438 U.S. 726 (1978). . . . The conferees intend that the term indecency (and the rendition of the definition of that term in new section 502) has the same meaning as established in FCC v. Pacifica Foundation, 438 U.S. 726 (1978) and Sable Communications of California, Inc. v. FCC, 492 U.S. 115 (1989)." Senate Report at 188, reprinted in 1996 U.S.C.C.A.N. at 201-02. The legislative history makes clear that Congress did not intend to create a distinction in meaning when it used the generic term "indecency" in Sec. 223(a) and the definition of that term in Sec. 223(d).39

There is no doubt that the CDA requires the most stringent review for vagueness, since it is a criminal statute that "threatens to inhibit the exercise of constitutionally protected rights". Colautti v. Franklin, 439 U.S 379, 391 (1979); see also Kolender v. Lawson, 461 U.S. 352, 358 n.8 (1983); Grayned, 408 U.S. at 108-09. My analysis here nevertheless leads ineluctably to the conclusion that the definition of indecency is not unconstitutionally vague. The Miller definition of obscenity has survived such challenges, see, e.g., Hamling v. United States, 418 U.S. 87, 118-19 (1974); Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 57 (1989), and the definition of indecency contains a subset of the elements of obscenity. If the Miller test "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly", Grayned v. City of Rockford, 408 U.S. 104, 108 (1972), the omission of parts of that test does not warrant a contrary conclusion. See Dial Information Services, 938 F.2d at 1541-42. Similarly, since the definition of indecency arose from the Supreme Court itself in Pacifica, we may fairly imply that the Court did not believe its own interpretation to invite "arbitrary and discriminatory enforcement" or "abut upon sensitive areas of basic First Amendment freedoms". Grayned, 408 U.S. at 108-109 (citations and alterations omitted). Sable, while not explicitly addressing the issue of vagueness, reinforces this conclusion. See Information Providers' Coalition, 928 F.2d at 875-76 (citing Sable, 492 U.S. at 126-27). It follows, then, that plaintiffs' vagueness challenge is not likely to succeed on the merits and does not support preliminary injunctive relief.

The possible interpretations of the defenses in Sec. 223(e) do not alter this conclusion. As a matter of statutory construction, Sec. 223(e)(5)(B) could not be clearer. This section, which imports the dial-a-porn defenses into the CDA, creates "specific and objective" methods to avoid liability. See Roberts v. United States Jaycees, 468 U.S. 609, 629 (1984). Section 223(e)(5)(A) is more suspect, since it arguably "fail[s] to describe

with sufficient particularity what a suspect must do in order to satisfy" it. Kolender 461 U.S. at 361.40 Yet even though the defenses in both sections are unavailable to many Internet users, their unavailability does not render the liability provisions vague. Rather, their unavailability just transforms Sec. 223(a) and Sec. 223(d) into a total ban, in violation of Butler v. Michigan, 352 U.S. 380, 383 (1957), and Sable, 492 U.S. at 127, 131. I am sensitive to plaintiffs' arguments that the statute, as written, does not create safe harbors through which all Internet users may shield themselves from liability. Transcript of May 10, 1996, at 37-38. Here again, however, the absence of safe harbors relates to the (over)breadth of a statute, and not its vagueness. See Sable, 492 U.S. at 127, 131.

C. Plaintiffs' Likelihood of Prosecution Under the Act

The Government has consistently argued that the speech of many of the plaintiffs here is almost certainly not indecent. They point, for example, to the educational and political content of plaintiffs' speech, and they also suggest that the occasional curse word in a card catalogue will probably not result in prosecution. See Senate Report at 189, reprinted in 1996 U.S.C.C.A.N. at 203 ("Material with serious redeeming value is quite obviously intended to edify and educate, not to offend."). In this section I address that argument.

I agree with the Government that some of plaintiffs' claims are somewhat exaggerated, but hyperbolic claims do not in themselves weigh in the Government's favor. In recent First Amendment challenges, the Supreme Court has itself paid close attention to extreme applications of content-based laws.

In Simon & Schuster, Inc. v. Members of the New York State Crimes Victim Board, 502 U.S. 105 (1991), the Court addressed the constitutionality of a law that required criminals to turn over to their victims any income derived from books, movies, or other commercial exploitation of their crimes. Id. at 504-05. In its opinion, the Court evaluated the argument of an amicus curiae that the law's reach could include books such as The Autobiography of Malcolm X, Civil Disobedience, and Confessions of Saint Augustine, and authors such as Emma Goldman, Martin Luther King, Jr., Sir Walter Raleigh, Jesse Jackson, and Bertrand Russell. Id. at 121-22. The Court credited the argument even while recognizing that it was laced with "hyperbole": The argument that [the] statute . . . would prevent publication of all of these works is hyperbole -- some would have been written without compensation -- but the . . . law clearly reaches a wide range of literature that does not enable a criminal to profit from his crime while a victim remains uncompensated. Id. at 122. If a content-based law "can produce such an outcome", id. at 123 (emphasis added), then Simon & Schuster allows us to consider those outcomes in our analysis.

Even more recently, in United States v. National Treasury Employees Union, 115 S. Ct. 1003 (1995), the Court addressed the constitutionality of a law that banned federal employees from accepting honoraria for publications unrelated to their work. Id. at 1008. The Court noted that the law would reach "literary giants like Nathaniel Hawthorne and Herman Melville, . . . Walt Whitman, . . . and Bret Harte". Id. at 1012. This concern resurfaced later in the opinion, see id. at 1015 ("[W]e cannot ignore the risk that [the ban] might deprive us of the work of a future Melville or Hawthorne."), even though a footnote immediately renders this concern at least hyperbolic: These authors' familiar masterworks would survive the honoraria ban as currently administered. Besides exempting all books, the [regulations implementing the ban] protect fiction and poetry from the ban's coverage, although the statute's language is not so clear. But some great artists deal in fact as well as fiction, and some deal in both. Id. n.16 (citations omitted).

Here, even though it is perhaps unlikely that the Carnegie Library will ever stand in the dock for putting its card catalogue online, or that the Government will hale the ACLU into court for its online quiz of the seven dirty words, we cannot ignore that the Act could reach these activities. The definition of indecency, like the definition of obscenity, is not a rigid formula. Rather, it confers a large degree of autonomy to individual communities to set the bounds of decency for themselves. Cf. Sable, 492 U.S. at 125-26. This is as it should be, since this flexibility recognizes that ours is a country with diverse cultural and historical roots. See, e.g., Hamling, 418 U.S. at 104 ("A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law.").

Putting aside hyperbolic application, I also have little doubt that some communities could well consider plaintiffs' speech indecent, and these plaintiffs could -- perhaps should -- have a legitimate fear of prosecution. In Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995), the District of Columbia Court of Appeals summarized three broadcasts that the FCC found indecent in the late 1980s: The offending morning broadcast . . . contained "explicit references to masturbation, ejaculation, breast size, penis size, sexual intercourse, nudity, urination, oral-genital contact, erections, sodomy, bestiality, menstruation and testicles." The remaining two were similarly objectionable. Id. at 657 (citing In re Infinity Broadcasting Corp., 3 FCC R. 930, 932 (1987)). In Infinity Broadcasting, one of the broadcasts that the FCC found indecent was an excerpt of a play about AIDS, finding that the excerpts "contained the concentrated and repeated use of vulgar and shocking language to portray graphic and lewd depictions of excretion, anal intercourse, ejaculation, masturbation, and oral-genital sex". 3 FCC R. at 934.41 To the FCC, even broadcasts with "public value . . . addressing the serious problems posed by

AIDS" can be indecent if "that material is presented in a manner that is patently offensive". Id. (emphasis in original).42

Yet, this is precisely the kind of speech that occurs, for example, on Critical Path AIDS Project's Web site, which includes safer sex instructions written in street language for easy comprehension. The Web site also describes the risk of HIV transmission for particular sexual practices. The FCC's implication in In the Matter of King Broadcasting Co., 5 FCC R. 2971 (1990), that a "candid discussion[] of sexual topics" on television was decent in part because it was "not presented in a pandering, titillating or vulgar manner" would be unavailing to Critical Path, other plaintiffs, and some amici. These organizations want to pander and titillate on their Web sites, at least to a degree, to attract a teen audience and deliver their message in an engaging and coherent way.43

In In re letter to Merrell Hansen, 6 FCC R. 3689 (1990), the FCC found indecent a morning discussion between two announcers regarding Jim Bakker's alleged rape of Jessica Hahn. Id. Here, too, the FCC recognized that the broadcast had public value. Id. (noting that the broadcast concerned "an incident that was at the time 'in the news'"). Yet, under the FCC's interpretation of Pacifica, "the merit of a work is 'simply one of the many variables' that make up a work's context". Id. (citation omitted).

One of the plaintiffs here, Stop Prisoner Rape, Inc., has as its core purpose the issue of prison rape. The organization creates chat rooms in which members can discuss their experiences. Some amici have also organized Web sites dedicated to survivors of rape, incest, and other sexual abuse. These Web sites provide fora for the discussion and contemplation of shared experiences. The operators of these sites, and their participants, could legitimately fear prosecution under the CDA.

With respect to vulgarity, the Government is in a similarly weak position. In Pacifica, the Supreme Court held that multiple repetition of expletives could be indecent. Pacifica, 438 U.S. at 750. Although the FCC did not follow this rationale with respect to a broadcast of "a bona fide news story" on National Public Radio, Letter to Mr. Peter Branton, 6 FCC R. 610 (1991), aff'd on other grounds sub nom. Branton v. FCC, 993 F.2d 906, 908 (D.C. Cir. 1993), the ACLU, a plaintiff here, could take little comfort from that administrative decision. It would need to discern, for example, whether a chat room that it organized to discuss the meaning of the word fuck was more like the Carlin monologue or more like a National Public Radio broadcast.44 Plaintiffs' expert would have found expletives indecent in a community consisting only of himself,45 and his views undoubtedly -- and reasonably -- reflect the view of many people.

In sum, I am less confident than the Government that societal mores have changed so drastically since Pacifica that an online equivalent of the Carlin monologue, or the Carlin monologue itself online, would pass muster under the CDA. Under existing precedent, plaintiffs' fear of prosecution under the Act is legitimate, even though they are not the pornographers Congress had in mind when it passed the CDA.46 Cf. City of Houston v. Hill, 482 U.S. 451, 459 (1987). My discussion of the effect and reach of the CDA, therefore, applies both to plaintiffs' hyperbolic concerns and to their very real ones. D. A Medium-Specific Analysis

The Internet is a new medium of mass communication.47 As such, the Supreme Court's First Amendment jurisprudence compels us to consider the special qualities of this new medium in determining whether the CDA is a constitutional exercise of governmental power. Relying on these special qualities, which we have described at length in our Findings of fact above, I conclude that the CDA is unconstitutional and that the First Amendment denies Congress the power to regulate protected speech on the Internet. This analysis and conclusions are consistent with Congress's intent to avoid tortuous and piecemeal review of the CDA by authorizing expedited, direct review in the Supreme Court "as a matter of right" of interlocutory, and not merely final, orders upholding facial challenges to the Act. See Sec. 561(b) of the Telecommunications Act of 1996.48

1. The Differential Treatment of Mass Communication Media

Nearly fifty years ago, Justice Jackson recognized that "[t]he moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each . . . is a law unto itself". Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring). The Supreme Court has expressed this sentiment time and again since that date, and differential treatment of the mass media has become established First Amendment doctrine. See, e.g., Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2456 (1994) ("It is true that our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media."); Pacifica, 438 U.S. at 748 ("We have long recognized that each medium of expression presents special First Amendment problems."); City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1974) ("Different communications media are treated differently for First Amendment purposes.") (Blackmun, J., concurring); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 500-01 (1981) (plurality opinion) ("This Court has often faced the problem of applying the broad principles of the First Amendment to unique forums of expression."). Thus, the Supreme Court has established different rules for print, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), broadcast radio and television, see, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), cable television, Turner, 114 S. Ct. at 2456-57, and even billboards,

Metromedia, 453 U.S. at 501, and drive-in movie theaters, Erzoznik v. City of Jacksonville, 422 U.S. 205 (1975).

This medium-specific approach to mass communication examines the underlying technology of the communication to find the proper fit between First Amendment values and competing interests. In print media, for example, the proper fit generally forbids governmental regulation of content, however minimal. Tornillo, 418 U.S. at 258. In other media (billboards, for example), the proper fit may allow for some regulation of both content and of the underlying technology (such as it is) of the communication. Metromedia, 453 U.S. at 502.

Radio and television broadcasting present the most expansive approach to medium-specific regulation of mass communication. As a result of the scarcity of band widths on the electromagnetic spectrum, the Government holds broad authority both to parcel out the frequencies and to prohibit others from speaking on the same frequency: As a general matter, there are more would-be broadcasters than frequencies available in the electromagnetic spectrum. And if two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another's signals, so that neither could be heard at all. The scarcity of broadcast frequencies thus required the establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters. Turner, 114 S. Ct. at 2456 (citing FCC v. League of Women Voters, 468 U.S. 364 (1984)).

This scarcity also allows the Government to regulate content even after it assigns a license: In addition, the inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees. Id. at 2457 (citing Red Lion, 395 U.S. at 390-95; National Broadcasting Co. v. United States, 319 U.S. 190 (1943)).

The broadcasting cases firmly establish that the Government may force a licensee to offer content to the public that the licensee would otherwise not offer, thereby assuring that radio and television audiences have a diversity of content. In broadcasting, "[i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial". Red Lion, 395 U.S. at 390; see also CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981) ("A licensed broadcaster is 'granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.'") (citation omitted); Columbia Broadcasting

Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 110-11 (1973). These content restrictions include punishing licensees who broadcast inappropriate but protected speech at an impermissible time. Pacifica, 438 U.S. at 750-51.

In this case, the Government relies on the Pacifica decision in arguing that the CDA is a constitutional exercise of governmental power. Since the CDA regulates indecent speech, and since Pacifica authorizes governmental regulation of indecent speech (so the Government's argument goes), it must follow that the CDA is a valid exercise of governmental power. That argument, however, ignores Pacifica's roots as a decision addressing the proper fit between broadcasting and the First Amendment. The argument also assumes that what is good for broadcasting is good for the Internet.

2. The Scope of the Pacifica Decision

In FCC v. Pacifica Foundation, 438 U.S. 726 (1978), the Supreme Court first decided whether the Government had the power to regulate indecent speech. Id. at 729. In Pacifica, a radio listener complained about the broadcast of George Carlin's "Filthy Words" monologue at 2:00 p.m. on a Tuesday afternoon. Id. at 729-30. The Carlin monologue was replete with "the words you couldn't say on the public . . . airwaves . . . , ever", and the listener had tuned in while driving with his young son in New York. Id. The FCC issued a declaratory order, holding that it could have subjected the Pacifica Foundation (owner of the radio station) to an administrative sanction. Id. at 730. In its order the FCC also described the standards that it would use in the future to regulate indecency in the broadcast medium. Id. at 731. The Supreme Court upheld the FCC's decision and confirmed the power of that agency to regulate indecent speech. Id. at 750-51.

The rationale of Pacifica rested on three overlapping considerations. First, using as its example the Carlin monologue before it, the Court weighed the value of indecent speech and concluded that such speech "lie[s] at the periphery of First Amendment concerns." Id. at 743. Although the Court recognized that the FCC had threatened to punish Pacifica based on the content of the Carlin monologue, id. at 742, it found that the punishment would have been permissible because four-letter words "offend for the same reasons that obscenity offends." Id. at 746 (footnote omitted). The Court then described the place of four-letter words "in the hierarchy of first amendment values": Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Id. at 746 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

Second, the Court recognized that "broadcasting . . . has received the most limited First Amendment protection." Id. at 748. The Government may regulate broadcast consistent with the Constitution, even though the same regulation would run afoul of the First Amendment in the print medium. Id. (comparing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) with Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)). This is so because broadcasting has a "uniquely pervasive presence in the lives of all Americans" and "is uniquely accessible to children, even those too young to read." Pacifica, 438 U.S. at 748-49.

Third, the Court found the FCC's sanction -- an administrative sanction -- to be an appropriate means of regulating indecent speech. At the outset of the opinion, the Court disclaimed that its holding was a "consider[ation of] any question relating to the possible application of Sec. 1464 as a criminal statute." Id. at 739 n.13. Later in the opinion, the Court "emphasize[d] the narrowness of [its] holding", and explicitly recognized that it had not held that the Carlin monologue would justify a criminal prosecution. Id. at 750. Instead, the Court allowed the FCC to regulate indecent speech with administrative penalties under a "nuisance" rationale -- "like a pig in the parlor instead of the barnyard." Id. at 750 (citation omitted).

Time has not been kind to the Pacifica decision. Later cases have eroded its reach, and the Supreme Court has repeatedly instructed against overreading the rationale of its holding.

First, in Bolger v. Young Drug Products Corp., 463 U.S. 60 (1983), the Supreme Court refused to extend Pacifica to a law unrelated to broadcasting. In that case, a federal law prohibited the unsolicited mailing of contraceptive advertisements. Id. at 61. The Government defended the law by claiming an interest in protecting children from the advertisements. The Court rejected this argument as overbroad: In [Pacifica], this Court did recognize that the Government's interest in protecting the young justified special treatment of an afternoon broadcast heard by adults as well as children. At the same time, the majority "emphasize[d] the narrowness of our holding", explaining that broadcasting is "uniquely pervasive" and that it is "uniquely accessible to children, even those too young to read." The receipt of mail is far less intrusive and uncontrollable. Our decisions have recognized that the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication. Id. at 74 (citations and footnotes omitted) (emphasis in original) see also id. at 72 ("[T]he 'short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned.'") (citation omitted) (alterations in original).

Second, in Sable Communications v. FCC, 492 U.S. 115 (1989), the Supreme Court again limited Pacifica. In that case, the Court considered the validity of a ban on indecent "dial-a-porn" communications. Id. at 117-18.49 As in Bolger, the Government argued that Pacifica justified a complete ban of that form of speech. The Supreme Court disagreed, holding instead that Pacifica's "emphatically narrow" holding arose out of the "unique attributes of broadcasting". Id. at 127. The Court held that the ban was unconstitutional. Id. at 131.

Sable narrowed Pacifica in two ways. First, the Court implicitly rejected Pacifica's nuisance rationale for dial-a-porn, holding instead that the Government could only regulate the medium "by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms". Id. at 126 (citation omitted). Under this strict scrutiny, "[i]t is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." Id.; see also Fabulous Assoc. v. Pennsylvania Pub. Util. Comm., 896 F.2d 780, 784-85 (3d Cir. 1990).

Second, the Court concluded that the law, like a law it had struck down in 1957, "denied adults their free speech rights by allowing them to read only what was acceptable for children". Sable, 492 U.S. at 126 (citing Butler v. Michigan, 352 U.S. 380 (1957)). Thus, any regulation of dial-a-porn would have to give adults the opportunity to partake of that medium. Id. This conclusion echoes Bolger. See Bolger, 463 U.S. at 74 ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.").50

Finally, in Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445 (1994), the Supreme Court implicitly limited Pacifica once again when it declined to adopt the broadcast rationale for the medium of cable television. The Court concluded that the rules for broadcast were "inapt" for cable because of the "fundamental technological differences between broadcast and cable transmission". Id. at 2457.

The legal significance to this case of Turner's refusal to apply the broadcast rules to cable television cannot be overstated. Turner's holding confirms beyond doubt that the holding in Pacifica arose out of the scarcity rationale unique to the underlying technology of broadcasting, and not out of the end product that the viewer watches. That is, cable television has no less of a "uniquely pervasive presence" than broadcast television, nor is cable television more "uniquely accessible to children" than broadcast. See Pacifica, 438 U.S. at 748-49. From the viewer's perspective, cable and broadcast television are identical: moving pictures with sound from a box in the home. Whether one receives a signal through an antenna or through a dedicated wire, the end result is just television in either case. In declining to extend broadcast's scarcity rationale for cable, the Supreme

Court also implicitly limited Pacifica, the holding of which flows directly from that rationale.51

Turner thus confirms that the analysis of a particular medium of mass communication must focus on the underlying technology that brings the information to the user. In broadcast, courts focus on the limited number of band widths and the risk of interference with those frequencies. See, e.g., Turner, 114 S. Ct. at 2456-57. In cable, courts focus on the number of channels, the different kinds of cable operators, and the cost to the consumer. Id. at 2452.

I draw two conclusions from the foregoing analysis. First, from the Supreme Court's many decisions regulating different media differently, I conclude that we cannot simply assume that the Government has the power to regulate protected speech over the Internet, devoting our attention solely to the issue of whether the CDA is a constitutional exercise of that power. Rather, we must also decide the validity of the underlying assumption as well, to wit, whether the Government has the power to regulate protected speech at all. That decision must take into account the underlying technology, and the actual and potential reach, of that medium. Second, I conclude that Pacifica's holding is not persuasive authority here, since plaintiffs and the Government agree that Internet communication is an abundant and growing resource. Nor is Sable persuasive authority, since the Supreme Court's holding in that case addressed only one particular type of communication (dial-a-porn), and reached no conclusions about the proper fit between the First Amendment and telephone communications generally. Again, plaintiffs and the Government here agree that the Internet provides content as broad as the imagination.

3. The Effect of the CDA and the Novel Characteristics of Internet Communication

Over the course of five days of hearings and many hundreds of pages of declarations, deposition transcripts, and exhibits, we have learned about the special attributes of Internet communication. Our Findings of fact -- many of them undisputed -- express our understanding of the Internet. These Findings lead to the conclusion that Congress may not regulate indecency on the Internet at all.

Four related characteristics of Internet communication have a transcendent importance to our shared holding that the CDA is unconstitutional on its face. We explain these characteristics in our Findings of fact above, and I only rehearse them briefly here. First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides

significant access to all who wish to speak in the medium, and even creates a relative parity among speakers.

To understand how disruptive the CDA is to Internet communication, it must be remembered that the Internet evolved free of content-based considerations. Before the CDA, it only mattered how, and how quickly, a particular packet of data travelled from one point on the Internet to another. In its earliest incarnation as the ARPANET, the Internet was for many years a private means of access among the military, defense contractors, and defense-related researchers. The developers of the technology focused on creating a medium designed for the rapid transmittal of the information through overlapping and redundant connections, and without direct human involvement. Out of these considerations evolved the common transfer protocols, packet switching, and the other technology in which today's Internet users flourish. The content of the data was, before the CDA, an irrelevant consideration.

It is fair, then, to conclude that the benefits of the Internet to private speakers arose out of the serendipitous development of its underlying technology. As more networks joined the "network of networks" that is the Internet, private speakers have begun to take advantage of the medium. This should not be surprising, since participation in the medium requires only that networks (and the individual users associated with them) agree to use the common data transfer protocols and other medium-specific technology. Participation does not require, and has never required, approval of a user's or network's content.

After the CDA, however, the content of a user's speech will determine the extent of participation in the new medium. If a speaker's content is even arguably indecent in some communities, he must assess, inter alia, the risk of prosecution and the cost of compliance with the CDA. Because the creation and posting of a Web site allows users anywhere in the country to see that site, many speakers will no doubt censor their speech so that it is palatable in every community. Other speakers will decline to enter the medium at all. Unlike other media, there is no technologically feasible way for an Internet speaker to limit the geographical scope of his speech (even if he wanted to), or to "implement[] a system for screening the locale of incoming" requests. Sable 492 U.S. at 125.

The CDA will, without doubt, undermine the substantive, speech-enhancing benefits that have flowed from the Internet. Barriers to entry to those speakers affected by the Act would skyrocket, especially for non-commercial and not-for-profit information providers. Such costs include those attributable to age or credit card verification (if possible), tagging (if tagging is even a defense under the Act52), and monitoring or review of one's content.

The diversity of the content will necessarily diminish as a result. The economic costs associated with compliance with the Act will drive from the Internet speakers whose

content falls within the zone of possible prosecution. Many Web sites, newsgroups, and chat rooms will shut down, since users cannot discern the age of other participants. In this respect, the Internet would ultimately come to mirror broadcasting and print, with messages tailored to a mainstream society from speakers who could be sure that their message was likely decent in every community in the country.

The CDA will also skew the relative parity among speakers that currently exists on the Internet. Commercial entities who can afford the costs of verification, or who would charge a user to enter their sites, or whose content has mass appeal, will remain unaffected by the Act. Other users, such as Critical Path or Stop Prisoner Rape, or even the ACLU, whose Web sites before the CDA were as equally accessible as the most popular Web sites, will be profoundly affected by the Act. This change would result in an Internet that mirrors broadcasting and print, where economic power has become relatively coterminous with influence.

Perversely, commercial pornographers would remain relatively unaffected by the Act, since we learned that most of them already use credit card or adult verification anyway. Commercial pornographers normally provide a few free pictures to entice a user into proceeding further into the Web site. To proceed beyond these teasers, users must provide a credit card number or adult verification number. The CDA will force these businesses to remove the teasers (or cover the most salacious content with cgi scripts), but the core, commercial product of these businesses will remain in place.

The CDA's wholesale disruption on the Internet will necessarily affect adult participation in the medium. As some speakers leave or refuse to enter the medium, and others bowdlerize their speech or erect the barriers that the Act envisions, and still others remove bulletin boards, Web sites, and newsgroups, adults will face a shrinking ability to participate in the medium. Since much of the communication on the Internet is participatory, i.e., is a form of dialogue, a decrease in the number of speakers, speech fora, and permissible topics will diminish the worldwide dialogue that is the strength and signal achievement of the medium.

It is no answer to say that the defenses and exclusions of Sec. 223(e) mitigate the disruptive forces of the Act. We have already found as facts that the defenses either are not available to plaintiffs here or would impose excessive costs on them. These defenses are also unavailable to participants in specific forms of Internet communication.

I am equally dubious that the exclusions of Sec. 223(e) would provide significant relief from the Act. The "common carrier" exclusion of Sec. 223(e)(1), for example, would not insulate America Online from liability for the content it provides to its subscribers. It is also a tricky question whether an America Online chat room devoted to, say, women's

reproductive health, is or is not speech of the service itself, since America Online, at least to some extent, "creat[es] the content of the communication" simply by making the room available and assigning it a topic. Even if America Online has no liability under this example, the service might legitimately choose not to provide fora that led to the prosecution of its subscribers. Similarly, it is unclear whether many caching servers are devoted "solely" to the task of "intermediate storage". The "vicarious liability" exclusion of Sec. 223(e)(4) would not, for example, insulate either a college professor or her employer from liability for posting an indecent online reading assignment for her freshman sociology class.

We must of course give appropriate deference to the legislative judgments of Congress. See Sable, 492 U.S. at 129; Turner, 114 S. Ct. at 2472-73 (Blackmun, J., concurring). After hearing the parties' testimony and reviewing the exhibits, declarations, and transcripts, we simply cannot in my view defer to Congress's judgment that the CDA will have only a minimal impact on the technology of the Internet, or on adult participation in the medium. As in Sable, "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." Sable, 492 U.S. at 129 (citation omitted). Indeed, the Government has not revealed Congress's "extensive record" in addressing this issue, Turner, 114 S. Ct. at 2472 (Blackmun, J., concurring), or otherwise convinced me that the record here is somehow factually deficient to the record before Congress when it passed the Act.

4. Diversity and Access on the Internet

Nearly eighty years ago, Justice Holmes, in dissent, wrote of the ultimate constitutional importance of the "free trade in ideas": [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

For nearly as long, critics have attacked this much-maligned "marketplace" theory of First Amendment jurisprudence as inconsistent with economic and practical reality. Most marketplaces of mass speech, they charge, are dominated by a few wealthy voices. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 248-50 (1974). These voices dominate -- and to an extent, create -- the national debate. Id. Individual citizens' participation is, for the most part, passive. Id. at 251. Because most people lack the money and time to buy a broadcast station or create a newspaper, they are limited to the role of listeners, i.e., as watchers of television or subscribers to newspapers. Id.

Economic realities limit the number of speakers even further. Newspapers competing with each other and with (free) broadcast tend toward extinction, as fixed costs drive competitors either to consolidate or leave the marketplace. Id. at 249-50. As a result, people receive information from relatively few sources: The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper's being owned by the same interests which own a television station and a radio station, are important components of this trend toward concentration of control of outlets to inform the public.

The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion. Id. at 249.

The Supreme Court has also recognized that the advent of cable television has not offered significant relief from this problem. Although the number of cable channels is exponentially greater than broadcast, Turner, 114 S. Ct. at 2452, cable imposes relatively high entry costs, id. at 2451-52 (noting that the creation of a cable system requires "[t]he construction of [a] physical infrastructure").

Nevertheless, the Supreme Court has resisted governmental efforts to alleviate these market dysfunctions. In Tornillo, the Supreme Court held that market failure simply could not justify the regulation of print, 418 U.S. at 258, regardless of the validity of the criticisms of that medium, id. at 251. Tornillo invalidated a state "right-of-reply" statute, which required a newspaper critical of a political candidate to give that candidate equal time to reply to the charges. Id. at 244. The Court held that the statute would be invalid even if it imposed no cost on a newspaper, because of the statute's intrusion into editorial discretion: A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials -- whether fair or unfair -- constitute the exercise of editorial control and judgment. Id. at 258.

Similarly, in Turner, the Supreme Court rejected the Government's argument that market dysfunction justified deferential review of speech regulations for cable television. Even recognizing that the cable market "suffers certain structural impediments", Turner, 114 S. Ct. at 2457, the Court could not accept the Government's conclusion that this dysfunction justified broadcast-type standards of review, since "the mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from the First Amendment standards applicable to nonbroadcast media." Id. at 2458. "[L]aws that single out the press, or certain elements thereof, for special treatment 'pose a particular danger of abuse by the State,' and so are always subject to at least

some degree of heightened First Amendment scrutiny." Id. (citation omitted).53 The Court then eloquently reiterated that government-imposed, content-based speech regulations are generally inconsistent with "[o]ur political system and cultural life": At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal. Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. These restrictions "rais[e] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." Id. (citation omitted).

Both Tornillo and Turner recognize, in essence, that the cure for market dysfunction (government-imposed, content-based speech restrictions) will almost always be worse than the disease. Here, however, I am hard-pressed even to identify the disease. It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country -- and indeed the world -- has yet seen. The plaintiffs in these actions correctly describe the "democratizing" effects of Internet communication: individual citizens of limited means can speak to a worldwide audience on issues of concern to them. Federalists and Anti-Federalists may debate the structure of their government nightly, but these debates occur in newsgroups or chat rooms rather than in pamphlets. Modern-day Luthers still post their theses, but to electronic bulletin boards rather than the door of the Wittenberg Schlosskirche. More mundane (but from a constitutional perspective, equally important) dialogue occurs between aspiring artists, or French cooks, or dog lovers, or fly fishermen.

Indeed, the Government's asserted "failure" of the Internet rests on the implicit premise that too much speech occurs in that medium, and that speech there is too available to the participants. This is exactly the benefit of Internet communication, however. The Government, therefore, implicitly asks this court to limit both the amount of speech on the Internet and the availability of that speech. This argument is profoundly repugnant to First Amendment principles.

My examination of the special characteristics of Internet communication, and review of the Supreme Court's medium-specific First Amendment jurisprudence, lead me to conclude that the Internet deserves the broadest possible protection from government-imposed, content-based regulation. If "the First Amendment erects a virtually insurmountable barrier between government and the print media", Tornillo, 418 U.S. at 259

(White, J., concurring), even though the print medium fails to achieve the hoped-for diversity in the marketplace of ideas, then that "insurmountable barrier" must also exist for a medium that succeeds in achieving that diversity. If our Constitution "prefer[s] 'the power of reason as applied through public discussion'", id. (citation omitted), "[r]egardless of how beneficent-sounding the purposes of controlling the press might be", id., even though "occasionally debate on vital matters will not be comprehensive and . . . all viewpoints may not be expressed", id. at 260, a medium that does capture comprehensive debate and does allow for the expression of all viewpoints should receive at least the same protection from intrusion.

Finally, if the goal of our First Amendment jurisprudence is the "individual dignity and choice" that arises from "putting the decision as to what views shall be voiced largely into the hands of each of us", Leathers v. Medlock, 499 U.S. 439, 448-49 (1991) (citing Cohen v. California, 403 U.S. 15, 24 (1971)), then we should be especially vigilant in preventing content-based regulation of a medium that every minute allows individual citizens actually to make those decisions. Any content-based regulation of the Internet, no matter how benign the purpose, could burn the global village to roast the pig. Cf. Butler, 352 U.S. at 383.

5. Protection of Children from Pornography

I accept without reservation that the Government has a compelling interest in protecting children from pornography. The proposition finds one of its clearest expressions in Mill, who recognized that his exposition regarding liberty itself "is meant to apply only to human beings in the maturity of their faculties": We are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others must be protected against their own actions as well as against external injury. John Stuart Mill, On Liberty 69 (Gertrude Himmelfarb ed., Penguin Books 1982) (1859), cited in Harry Kalven Jr., A Worthy Tradition 54 (Jamie Kalven ed. 1988).

This rationale, however, is as dangerous as it is compelling. Laws regulating speech for the protection of children have no limiting principle, and a well-intentioned law restricting protected speech on the basis of its content is, nevertheless, state-sponsored censorship. Regulations that "drive certain ideas or viewpoints from the marketplace" for children's benefit, Simon & Schuster, 502 U.S. at 116, risk destroying the very "political system and cultural life", Turner, 114 S. Ct. at 2458, that they will inherit when they come of age. I therefore have no doubt that a Newspaper Decency Act, passed because Congress discovered that young girls had read a front page article in the New York Times on female genital mutilation in Africa, would be unconstitutional. Tornillo, 418 U.S. at 258. Nor would

a Novel Decency Act, adopted after legislators had seen too many pot-boilers in convenience store book racks, pass constitutional muster. Butler, 352 U.S. at 383. There is no question that a Village Green Decency Act, the fruit of a Senator's overhearing of a ribald conversation between two adolescent boys on a park bench, would be unconstitutional. Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). A Postal Decency Act, passed because of constituent complaints about unsolicited lingerie catalogues, would also be unconstitutional. Bolger, 463 U.S. at 73. In these forms of communication, regulations on the basis of decency simply would not survive First Amendment scrutiny.

The Internet is a far more speech-enhancing medium than print, the village green, or the mails. Because it would necessarily affect the Internet itself, the CDA would necessarily reduce the speech available for adults on the medium. This is a constitutionally intolerable result.

Some of the dialogue on the Internet surely tests the limits of conventional discourse. Speech on the Internet can be unfiltered, unpolished, and unconventional, even emotionally charged, sexually explicit, and vulgar -- in a word, "indecent" in many communities. But we should expect such speech to occur in a medium in which citizens from all walks of life have a voice. We should also protect the autonomy that such a medium confers to ordinary people as well as media magnates.

Moreover, the CDA will almost certainly fail to accomplish the Government's interest in shielding children from pornography on the Internet. Nearly half of Internet communications originate outside the United States, and some percentage of that figure represents pornography. Pornography from, say, Amsterdam will be no less appealing to a child on the Internet than pornography from New York City, and residents of Amsterdam have little incentive to comply with the CDA.54

My analysis does not deprive the Government of all means of protecting children from the dangers of Internet communication. The Government can continue to protect children from pornography on the Internet through vigorous enforcement of existing laws criminalizing obscenity and child pornography. See United States v. Thomas, 74 F.3d 701, 704-05 (6th Cir. 1995). As we learned at the hearing, there is also a compelling need for public education about the benefits and dangers of this new medium, and the Government can fill that role as well. In my view, our action today should only mean that the Government's permissible supervision of Internet content stops at the traditional line of unprotected speech.

Parents, too, have options available to them. As we learned at the hearing, parents can install blocking software on their home computers, or they can subscribe to commercial online services that provide parental controls. It is quite clear that powerful

market forces are at work to expand parental options to deal with these legitimate concerns. More fundamentally, parents can supervise their children's use of the Internet or deny their children the opportunity to participate in the medium until they reach an appropriate age. See Fabulous, 896 F.2d at 788-89 (noting that "our society has traditionally placed" these decisions "on the shoulders of the parent").

E. Conclusion

Cutting through the acronyms and argot that littered the hearing testimony, the Internet may fairly be regarded as a never-ending worldwide conversation. The Government may not, through the CDA, interrupt that conversation. As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion.

True it is that many find some of the speech on the Internet to be offensive, and amid the din of cyberspace many hear discordant voices that they regard as indecent. The absence of governmental regulation of Internet content has unquestionably produced a kind of chaos, but as one of plaintiffs' experts put it with such resonance at the hearing: What achieved success was the very chaos that the Internet is. The strength of the Internet is that chaos.55

Just as the strength of the Internet is chaos, so the strength of our liberty depends upon the chaos and cacophony of the unfettered speech the First Amendment protects.

For these reasons, I without hesitation hold that the CDA is unconstitutional on its face.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES UNION,: CIVIL ACTION NO. 96-963 et al. :
:
v. :
:
JANET RENO, Attorney General of:
the United States :

AMERICAN LIBRARY ASSOC., : CIVIL ACTION NO. 96-1458 INC., et al.
:
:
v. :
:
UNITED STATES DEP'T OF :
JUSTICE, et al. :

ORDER

AND NOW, this 11th day of June, 1996, upon consideration of plaintiffs' motions for preliminary injunction, and the memoranda of the parties and amici curiae in support and opposition thereto, and after hearing, and upon the findings of fact and conclusions of law set forth in the accompanying Adjudication, it is hereby ORDERED that:

1. The motions are GRANTED;

2. Defendant Attorney General Janet Reno, and all acting under her direction and control, are PRELIMINARILY ENJOINED from enforcing, prosecuting, investigating or reviewing any matter premised upon:

(a) Sections 223(a)(1)(B) and 223(a)(2) of the Communications Decency Act of 1996 ("the CDA"), Pub. L. No. 104-104, Sec. 502, 110 Stat. 133, 133-36, to the extent such enforcement, prosecution, investigation, or review are based upon allegations other than obscenity or child pornography; and

(b) Sections 223(d)(1) and 223(d)(2) of the CDA;

3. Pursuant to Fed. R. Civ. P. 65(c), plaintiffs need not post a bond for this injunction, see Temple Univ. v. White, 941 F.2d 201, 220 (3d Cir. 1991), cert. denied sub nom. Snider v. Temple Univ., 502 U.S. 1032 (1992); and

4. The parties shall advise the Court, in writing, as to their views regarding the need for further proceedings on the later of (a) thirty days from the date of this Order, or (b) ten days after final appellate review of this Order.

BY THE COURT:

_____ Dolores K. Sloviter, C.J.
U.S. Court of Appeals
For the Third Circuit

_____ Ronald L. Buckwalter, J.

_____ Stewart Dalzell, J.

1 The CDA will be codified at 47 U.S.C. Sec. 223(a) to (h). In the body of this Adjudication, we refer to the provisions of the CDA as they will ultimately be codified in the United States Code.

2 The plaintiffs in this action are the American Civil Liberties Union; Human Rights Watch; Electronic Privacy Information Center; Electronic Frontier Foundation; Journalism Education Association; Computer Professionals for Social Responsibility; National Writers Union; Clarinet Communications Corp.; Institute for Global Communications; Stop Prisoner Rape; AIDS Education Global Information System; Bibliobytes; Queer Resources Directory; Critical Path AIDS Project, Inc.; Wildcat Press, Inc.; Declan McCullagh dba Justice on Campus; Brock Meeks dba Cyberwire Dispatch; John Troyer dba The Safer Sex Page; Jonathan Wallace dba The Ethical Spectacle; and Planned Parenthood Federation of America, Inc. We refer to these plaintiffs collectively as the ACLU.

3 The plaintiffs in the second action, in addition to the ALA, are: American Online, Inc.; American Booksellers Association, Inc.; American Booksellers Foundation for Free Expression; American Society of Newspaper Editors; Apple Computer, Inc.; Association of American Publishers, Inc.; Association of Publishers, Editors and Writers; Citizens Internet Empowerment Coalition; Commercial Internet Exchange Association;

CompuServe Incorporated; Families Against Internet Censorship; Freedom to Read Foundation, Inc.; Health Sciences Libraries Consortium; Hotwired Ventures LLC; Interactive Digital Software Association; Interactive Services Association; Magazine Publishers of America; Microsoft Corporation; The Microsoft Network, L.L.C.; National Press Photographers Association; Netcom On-Line Communication Services, Inc.; Newspaper Association of America; Opnet, Inc.; Prodigy Services Company; Society of Professional Journalists; Wired Ventures, Ltd. We refer to these plaintiffs collectively as the ALA.

The eight counts of the amended complaint in this action focus on the CDA's amendment to 47 U.S.C. Sec. 223, and do not challenge the CDA's amendment of 18 U.S.C. Sec. 1462(c).

4 In addition, we have received briefs of amici curiae supporting and opposing plaintiffs' contentions. Arguing in favor of our granting the motions for preliminary injunction are Authors Guild, American Society of Journalists and Authors, Ed Carp, Coalition for Positive Sexuality, CONNECTnet, Creative Coalition on AOL, Tri Dang Do, Feminists for Free Expression, Margarita Lacabe, Maggie LaNoue, LoD Communications, Peter Ludlow, Palmer Museum of Art, Chuck More, Rod Morgan, PEN American Center, Philadelphia Magazine, PSINet, Inc., Eric S. Raymond, Reporters Committee for Freedom of the Press, Don Rittner, The Sexuality Information and Education Council of the United States, Lloyd K. Stires, Peter J. Swanson, Kirsti Thomas, Web Communications, and Miryam Ehrlich Williamson. Opposing the motion are the Family Life Project of the American Center for Law and Justice and a group consisting of The National Law Center for Children and Families, Family Research Council, "Enough Is Enough!" Campaign, National Coalition for the Protection of Children and Families, and Morality in Media.

5 The Act does not define "telecommunications device". By Order dated February 27, 1996, we asked the parties to address whether a modem is a "telecommunications device". Plaintiffs and the Government answered in the affirmative, and we agree that the plain meaning of the phrase and the legislative history of the Act strongly support their conclusion. "Telecommunications" under 47 U.S.C. Sec. 153(48) means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form of content of the information as sent and received." The plain meaning of "device" is "something that is formed or formulated by design and usu[ally] with consideration of possible alternatives, experiment, and testing." Webster's Third New International Dictionary, 618 (1986). Clearly, the sponsors of the CDA thought it would reach individual Internet users, many of whom still connect through modems. See,

e.g., 141 Cong. Rec. S8329-46 (daily ed. June 14, 1995) (statements of Sen. Exon and Sen. Coats).

The resolution of the tension between the scope of "telecommunications device" and the scope of "interactive computer service" as defined in 47 U.S.C. Sec. 230(a)(2), see infra note 6, must await another day. It is sufficient for us to conclude that the exclusion of Sec. 223(h)(1)(B) is probably a narrow one (as the Government has argued), insulating an interactive computer service from criminal liability under the CDA but not insulating users who traffic in indecent and patently offensive materials on the Internet through those services.

6 The statute at Sec. 509 amends 47 U.S.C. to add Sec. 230(e)(2), which defines such a service as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."

7 In the Government's Opposition to plaintiffs' motion for a temporary restraining order in C.A. No. 96-963, it notes "the Department has a longstanding policy that previous such provisions are unconstitutional and will not be enforced", and that both President Clinton and General Reno "have made th[e] point clear" that no one will be prosecuted under "the abortion-related provision of newly-amended 18 U.S.C. Sec. 1462(c)." Opposition at 19, n.11 (February 14, 1996). In view of this "longstanding policy", the Government contends there is no realistic fear of prosecution and, so the argument goes, no need for equitable relief. Id. In their post-hearing brief, the ACLU plaintiffs inform us that in view of the Government's statement, "they do not seek a preliminary injunction against the enforcement of Sec. 1462(c)." Post-Trial Brief of ACLU Plaintiffs at 2 n.2.

8 The court again expresses its appreciation to the parties for their cooperative attitude in evolving the stipulation.

9 The Government has not by motion challenged the standing of any plaintiff in either case, and we harbor no doubts of our own on that point, notwithstanding the Government's suggestion in a footnote of its post-hearing brief. See Defendants' Post-Hearing Memorandum at 37 n.46 ("Plaintiffs' assertions as to the speech at issue are so off-point as to raise standing concerns."). Descriptions of these plaintiffs, as well as of the nature and content of the speech they contend is or may be affected by the CDA, are set forth in paragraphs 70 through 356 at pages 30 through 103 of the parties' stipulation filed in these actions. These paragraphs will not be reproduced here, but will be deemed adopted as Findings of the court.

10 It became clear from the testimony that moderated newsgroups are the exception and unmoderated newsgroups are the rule.

11 The evidence adduced at the hearings provided detail to this paragraph of the parties' stipulation. See Findings 95 to 107.

12 Testimony adduced at the hearing suggests that market forces exist to limit the availability of material on-line that parents consider inappropriate for their children. Although the parties sharply dispute the efficacy of so-called "parental empowerment" software, there is a sufficiently wide zone of agreement on what is available to restrict access to unwanted sites that the parties were able to enter into twenty-one paragraphs of stipulated facts on the subject, which form the basis of paragraphs 49 through 69 of our Findings of fact. Because of the rapidity of developments in this field, some of the technological facts we have found may become partially obsolete by the time of publication of these Findings.

13 This membership is constantly growing, according to the testimony of Albert Vezza, Chairman of the World Wide Web Consortium. See also Defendants' Ex. D-167.

14 See also Defendants' Ex. D-174 and the testimony of Mr. Vezza.

15 From this point, our Findings are, unless noted, no longer based upon the parties' stipulation, but upon the record adduced at the hearings.

16 Mr. Bradner is a member of the Internet Engineering Task Force, the group primarily responsible for Internet technical standards, as well as other Internet-related associations responsible for, among other things, the prevailing Internet Protocols. He is also associated with Harvard University.

17 Dr. Olsen chairs the Computer Science Department at Brigham Young University in Provo, Utah, and is the recently-appointed Director of the Human Computer Interaction Institute at Carnegie-Mellon University in Pittsburgh, Pennsylvania.

18 The term "information content provider" is defined in Sec. 509 of the CDA, at the new 47 U.S.C. Sec. 230(e)(3), as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."

19 By "verification", we mean the method by which a user types in his or her credit card number, and the Web site ensures that the credit card is valid before it allows the user to enter the site.

20 InterNIC is a naming organization, not a regulator of content. InterNIC and two other European organizations maintain a master list of domain names to ensure that no

duplication occurs. Creators of Web sites must register their domain name with InterNIC, and the agency will instruct the creator to choose another name if the new Web site has the name of an already-existing site. InterNIC has no control over content on a site after registration.

21 This paragraph and the preceding paragraph also illustrate that a content provider might store its own material or someone else's on a caching server. The goal -- saving money and time -- is the same in both cases.

22 It also probably covers speech protected by the First Amendment for some minors a well, because it fails to limit its reach to that which is harmful for minors, an issue which it is not necessary to decide in light of the other conclusions reached.

23 See 141 Cong. Rec. S8342 (daily ed. June 14, 1995) (letter from Kent Markus, Acting Assistant Attorney General, U.S. Department of Justice, to Senator Leahy).

24 If by virtue of the statute's authorization of expedited review of its constitutionality, "on its face," 47 U.S.C. Sec.561(a), we were strictly limited to looking at the words of the statute, I would stand by my T.R.O. opinion. However, in light of the procedures which are required by 47 U.S.C. Sec. 561(a) and 28 U.S.C. Sec. 2284, and were followed by this court in establishing an extensive record in this case, to ignore the evidence presented would be to ignore what an action for injunctive relief is all about.

Section 561 reads as follows:

Sec. 561. EXPEDITED REVIEW.

(a) THREE-JUDGE DISTRICT COURT HEARING -- Notwithstanding any other provision of law, any civil action challenging the constitutionality, on its face, of this title or any amendment made by this title, or any provision thereof, shall be heard by a district court of 3 judges convened pursuant to the provisions of section 2284 of title 28, United States Code.

Section 2284 states, in relevant part:

Sec. 2284. Three-judge court; when required; composition; procedure

(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows: . . . (3) A single judge may conduct all proceedings except the trial . . . . He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damages will result if the order is not granted, which

order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. . . .

25 Justice Kennedy argues in his opinion in Simon & Schuster v. New York Crime Victims Bd., 502 U.S. 105, 120 (1991), that "[t]he regulated content has the full protection of the First Amendment and this, I submit, is itself a full and sufficient reason for holding the statute unconstitutional. In my view it is both unnecessary and incorrect to ask whether the state can show that the statute 'is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.'" In the present case, there is no disagreement that indecent and patently offensive speech have the full protection of the First Amendment.

26 Not only has speech been divided up and given values -- with some types of speech given little or no protection (obscenity, fighting words, possibly commercial speech) -- but also, by court decisions over the years, it has been decided that the content of speech can indeed be regulated provided that the regulation will directly and materially advance a compelling government interest, and that it is narrowly tailored to accomplish that interest in the least restrictive manner. However, any content-based restriction must survive this most exacting scrutiny. Sable, 492 U.S. 115; Texas v. Johnson, 491 U.S. 397 (1989).

27 The plaintiffs have made facial challenges to the disputed provisions of the CDA on grounds of both vagueness and overbreadth. The approach taken and language used in evaluating a statute under each of these doctrines commingles, and frequently is treated as a single approach. "We have traditionally viewed vagueness and overbreadth as logically related and similar doctrines." Kolender v. Lawson, 461 U.S. 352, 358 n.8 (1983) (citing Keyishian v. Board of Regents, 385 U.S. 589, 609, (1967); NAACP v. Button, 371 U.S. 415, 433 (1963)). Even in cases where the court attempts to distinguish these two doctrines, it acknowledges some interplay between them. See e.g. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494, and n. 6 (1982).

In addition, when discussing overbreadth, one cannot avoid reference to the same language used to describe and apply the strict scrutiny standard to constitutionally protected activities. See e.g. Sable, 492 U.S. at 131; Roberts v. Jaycees, 468 U.S. 609, 623 (1984). While there are occasional attempts to argue for clear distinctions among these doctrines, see e.g. Kolender, 461 U.S. at 369 (White, J., Rehnquist, J. dissenting), such bright lines simply have not been, and most likely cannot be, drawn in this area.

28 Comparing a different portion of each of these two provisions suggests that different terms are not to be read to mean the same thing. As written, section (a) pertains to telecommunications devices, and section (d) to interactive computer services. While we have not entirely resolved the tension between these definitions at this stage, it has been established that these terms are not synonymous, but are in fact intended to denote different technologies. This, together with the rule of statutory construction set forth in Chief Judge Sloviter's opinion, seems to suggest on the face of the statute that indecent and patently offensive also are not to be read as synonymous.

29 18 U.S.C. Sec.1461 states, "The term `indecent' as used in this section includes matter of a character tending to incite arson, murder or assassination."

30 Although the Supreme Court may rule on the vagueness question in the context of cable television regulation in Alliance for Community Media v. FCC, 56 F.3d 105 (D.C. Cir. 1995), currently pending on certiorari before the Court, we will not defer adjudication of this issue as the constitutionality of the term in the cable context may not be determinative of its use in cyberspace.

31 Each intentional act of posting indecent content for display shall be considered a separate violation of this subsection and carries with it a fine, a prison term of up to two years, or both. 47 U.S.C. Sec. 223(a),(d) and Conf. Rep. at 189.

32 As I have noted, the unique nature of the medium cannot be overemphasized in discussing and determining the vagueness issue. This is not to suggest that new technology should drive constitutional law. To the contrary, I remain of the belief that our fundamental constitutional principles can accommodate any technological achievements, even those which, presently seem to many to be in the nature of a miracle such as the Internet.

33 By Order dated March 13, 1996, we asked the parties to submit their views on questions regarding allocation of the burdens of proof in these cases. Since I believe that the outcome of these cases is clear regardless of the allocation of proof between the parties, none of my conclusions in this opinion requires me to choose between the arguments that the parties have presented to us.

34 Although I do not believe the statue is unconstitutionally vague, I agree with Judge Buckwalter that the Government's promise not to enforce the plain reach of the law cannot salvage its overbreadth. Even accepting the Government's argument that prosecution of non-obscene pornography would be a "legitimate application" of the CDA, City of Houston v. Hill, 482 U.S. 451, 459 (1987), it is

clear that the Act would "make unlawful a substantial amount of constitutionally protected conduct", id. As in Hill, the Government's circular reasoning -- that the law is constitutional because prosecutors would only apply it to those against whom it could constitutionally be applied -- must fail. See id. at 464-67.

35 Plaintiffs have argued that we may consider their challenge under the standards governing both "facial" and "as-applied" challenges. That is, they suggest that we may pass judgment on the decency of the plaintiffs' speech, even if we are unable to conclude that the act is facially unconstitutional. Surely this procedural confusion arises out of the three opinions of the D.C. Circuit in National Treasury Employees Union v. United States, 990 F.3d 1271, 1279-80 (D.C. Cir. 1993), aff'd, 115 S. Ct. 1003.

I doubt that we could undertake an as-applied inquiry, since we do not know the exact content of plaintiffs' speech. Indeed, it is impossible to know the exact content of some plaintiffs' speech, since plaintiffs themselves cannot know that content. America Online, for example, cannot know what its subscribers will spontaneously say in chat rooms or post to bulletin boards. In any event, I need not address this issue, in the light of our disposition today.

36 "Dial-a-porn" is a shorthand description of "sexually oriented prerecorded telephone messages". Sable, 492 U.S. at 117-18.

37 In turn, Pacifica's definition of indecency has its roots in the Supreme Court's obscenity jurisprudence. Indecency includes some but not all of the elements of obscenity. See, e.g., Alliance for Community Media, 56 F.3d at 113-14 n.4.

38 The reach of the two provisions is not coterminous, however. As we explain in the introduction to this Adjudication, Sec. 223(a) reaches the making, creation, transmission, and initiation of indecent speech. Section 223(d) arguably reaches more broadly to the "display" of indecent speech. I conclude here only that both sections refer to the identical type of proscribed speech.

39 At oral argument, counsel for the Government candidly recognized that "there's nothing quite like this statute before", and that the CDA's novelty raised some "legislative craftsmanship problem[s]". Transcript of May 10, 1996, at 81-82. I believe that my analysis here makes sense in the light of the legislative history and the jurisprudence on which Congress relied in enacting the CDA. See Senate Report at 188, reprinted in 1996 U.S.C.C.A.N. at 201-02.

40 The counterargument is that Sec. 223(e)(5)(A), when read together with Sec. 223(e)(6), merely confers jurisdiction on the FCC to prescribe the "reasonable, effective,

and appropriate actions" that count as defenses. Congress employed a similar scheme for dial-a-porn. See Dial Information Servs., 938 F.2d at 1539 (citing 47 U.S.C. Sec. 223(b)(3)); Information Providers' Coalition, 928 F.2d at 871.

41 The play was "critically acclaimed and long-running in Los Angeles area theaters". Infinity Broadcasting, 3 FCC R. at 932.

42 Analytically, it makes sense that indecent speech has public value. After all, indecent speech is nevertheless protected speech, see, e.g., Sable, 492 U.S. at 126, and it must therefore have some public value that underlies the need for protection. Obscenity, by contrast, has no public value, id. at 124, and thus has no protection from proscription.

43 Internet technology undercuts the Government's argument that the "in context" element of Secs. 223(a) and 223(d) would insulate plaintiffs such as Critical Path from liability. See, e.g., Transcript of May 10, 1996, at 89-91. A user who clicks on a link in the Critical Path database (see Findings 33, 77-78) might travel to a highly graphic page in a larger HTML document. The social value of that page, in context, might be debatable, but the use of links effectively excerpts that document by eliminating content unrelated to the link.

44 Moreover, because of the technology of Internet relay chat, it would need to make this determination before it organized the chat room, since it could not pre-screen the discussion among the participants. Thus, it would need to predict, in advance, what the participants were likely to say. The participants would need to make a similar determination, unaided (I expect) by First Amendment lawyers.

45 Testimony of April 12, 1996, at 235-36.

46 In this section I do not imply that the FCC has jurisdiction to process Internet complaints in the same manner as it does for broadcast. The extent of the FCC's jurisdiction under the CDA is a sticky question not relevant here. See Senate Report at 190-91, reprinted in 1996 U.S.C.C.A.N. at 204. Because the administrative decisions cited above arose out of citizens' complaints to the FCC, however, they provide a kind of surrogate insight into the kinds of speech that citizens have charged as indecent in the past.

47 See Finding of fact 81. See also Symposium, Emerging Media: Technology and the First Amendment, 104 Yale L.J. 1613 (1995).

48 A narrow holding for this new medium also will not eliminate the chill to plaintiffs, who could well stifle the extent of their participation in this new medium while awaiting a future iteration of the CDA. Such a holding would also lead Congress to believe that a rewritten CDA (using, for example, a "harmful to minors" standard, see Senate Report at 189, reprinted in 1996 U.S.C.C.A.N. at 202) would pass constitutional muster. In my view,

a holding consistent with the novel qualities of this medium provides Congress with prompt and clear answers to the questions that the CDA asks.

49 The history of dial-a-porn regulation both before and after Sable is tortuous, and involves the intervention of all three branches of government. I will not rehearse that history here, deferring instead to the other courts that have recounted it. See, e.g., Sable, 492 U.S. at 118-23; Dial Information Serv., 938 F.2d at 1537-40; Information Providers Coalition, 928 F.2d at 870-73.

50 Sable is arguably not a decision about mass communication. Unlike Red Lion, Tornillo, or Turner, the Court in Sable reached no conclusions about the proper fit between the First Amendment and governmental regulation of the telephone. The case also includes no discussion of the technology of the telephone generally. The plaintiff in that case, a purveyor of dial-a-porn, challenged the statute only with respect to that type of content. Sable, 492 U.S. at 117-18. Thus, the Court's opinion discussed only the "dial-in services". Id. at 128. Since every telephone call at issue was, by definition, dial-a-porn, every telephone call was, by definition, either obscene or indecent. Id. at 132 (Scalia, J., concurring).

Here, however, plaintiffs represent forty-seven different speakers (including educational associations and consortia) who provide content to the Internet on a broad range of topics. The limited reach of the Sable holding renders it inapt to the Internet communications of the plaintiffs in these actions.

51 I note here, too, that we have found as a fact that operation of a computer is not as simple as turning on a television, and that the assaultive nature of television, see Pacifica, 438 U.S. at 748-49, is quite absent in Internet use. See Findings 87-89. The use of warnings and headings, for example, will normally shield users from immediate entry into a sexually explicit Web site or newsgroup message. See Finding 88. The Government may well be right that sexually explicit content is just a few clicks of a mouse away from the user, but there is an immense legal significance to those few clicks.

52 In a May 3, 1996 letter to a three-judge court in the Southern District of New York, John C. Keeney, Acting Assistant Attorney General in the Criminal Division of the Department of Justice, has advised that tagging would be "substantial evidence" in support of a Sec. 223(e)(5)(A) defense:

Under present technology, non-commercial content providers can take steps to list their site[s] in URL registries of covered sites, register their site[s] with the marketplace of

browsers and blocking software (including listing an IP address), place their material in a directory blocked by screening software, or take other similarly effective affirmative steps to make their site[s] known to the world to allow the site[s] to be blocked. Under present technology, it is the position of the Department of Justice that, absent extraordinary circumstances, such efforts would constitute substantial evidence that a content provider had taken good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to the covered material. The same would be true for tagging by content providers coupled with evidence that the tag would be screened by the marketplace of browsers and blocking software.

Letter of May 3, 1996 from Acting Assistant Attorney General John C. Keeney to Hons. Denise L. Cote, Leonard B. Sand, and Jose A. Cabranes, attached to Defendants' Motion for Leave to File Supplemental Statement. On May 8, 1996, the Government moved to file the Kenney letter in this action, and we granted the motion as unopposed the next day.

The letter certainly raises more questions than it answers. I wonder, for example, whether it is consistent with the plain language of the Act simply for content providers to "make their site[s] known to the world" and thereby "to allow [them] to be blocked", even though this form of notice alone would not reduce the availability of indecent content. Cf. Senate Report at 178, 1996 U.S.C.C.A.N. at 201 (noting that Sec. 223(d) "applies to content providers who post indecent material for online display without taking precautions that shield that material from minors"). It is also an unanswered question whether the Keeney letter would eliminate any of the CDA's chill, since the Government acknowledged that the letter would not prohibit a United States Attorney from taking a contrary position in a particular prosecution. See Defendants' May 9, 1996 Response to the May 8, 1996 Order of Court. The letter also fails to mention how users who participate in chat rooms, newsgroups, listservs, and e-mail might take advantage of Sec. 223(e)(5)(A). Finally, it is undisputed that neither PICS nor the hypothetical "-L18" tag are available to speakers using the World Wide Web today, whom the Government has explicitly reserved its right to prosecute should the CDA ultimately be found constitutional. See Stipulation and Order of February 26, 1996, quoted supra.

53 Turner examined certain "must-carry" provisions under an intermediate scrutiny, since those laws imposed incidental burdens on speech but did not directly regulate content. Turner, 114 S. Ct. at 2469. The Court remanded the case to the district court without passing on the constitutionality of the must-carry provisions. Id. at 2472.

54 Arguably, a valid CDA would create an incentive for overseas pornographers not to label their speech. If we upheld the CDA, foreign pornographers could reap the benefit of unfettered access to American audiences. A valid CDA might also encourage

American pornographers to relocate in foreign countries or at least use anonymous remailers from foreign servers.

55 Testimony of March 22, 1996, at 167.

Statement by President Clinton in reaction to Court Decision
THE WHITE HOUSE, Office of the Press Secretary, June 12, 1996

STATEMENT BY THE PRESIDENT

The Justice Department is reviewing today's three judge panel court decision on the Communications Decency Act. The opinion just came down today, and the statute says we have twenty days to make an appeal. I remain convinced, as I was when I signed the bill, that our Constitution allows us to help parents by enforcing this Act to prevent children from being exposed to objectionable material transmitted though computer networks. I will continue to do everything I can in my Administration to give families every available tool to protect their children from these materials. For example, we vigorously support the development and widespread availability of products that allow both parents and schools to block objectionable materials from reaching computers that children use. And we also support the industry's accelerating efforts to rate Internet sites so that they are compatible with these blocking techniques.

United States Law Week Section 3: Supreme Court Proceedings

CASES DOCKETED

Subject Matter Summary Of Cases Recently Filed

October 22, 1996

Telecommunications: 96-511 RENO V. AMERICAN CIVIL LIBERTIES UNION

Ruling below (DC EPa, 929 F.Supp. 824, 64 LW 2794):

Provisions of 1996 Communications Decency Act that criminalize use or allowing use of telecommunications device for knowing transmission of .. indecent" communications to minor, and use or allowing use of ..interactive computer service" to display communication to minor depicting or describing sexual activities in ..patently offensive" manner, violate First Amendment.

Questions presented:

(1) Is federal criminal prohibition against use of .. telecommunications device" to ..knowingly . . . make[], create[], or solicit [], and . . . initiate[] transmission of" any material ..which is obscene or indecent, knowing that recipient of communications is under 18 years of age," 47 USC 223 (a)(1)(B), unconstitutional on its face?

(2) Is federal criminal prohibition against ..knowingly" using ..interactive computer service" to send to ..specific person or persons under 18 years of age," any material ..that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," 47 USC 223(d)(1)(A), unconstitutional on its face?

(3) Is federal criminal prohibition against ..knowingly" using ..interactive computer service" to .. display in manner available to person under 18 years of age," any material .. that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," 47 USC 223(d)(1)(B), unconstitutional on its face?

(4) Are federal criminal provisions that forbid person from knowingly permitting use of telecommunications device under such person's control to be used to violate any of three preceding prohibitions, 47 USC 223(a)(2) and (d) (2), unconstitutional on their face?

Appeal filed 9/30/96, by Walter Dellinger, Acting Sol. Gen., Frank W. Hunger, Asst. Atty. Gen., Edwin S. Kneedler, Dpty. Sol. Gen., Irving L.Gornstein, Asst. to Sol. Gen., and Barbara L. Herwig and Jacob M. Lewis, Dept.of Justice attorneys.

Un-RENO v. ACLU

Before the Supreme Un-Court of the United States

Janet Reno, Attorney General of the United States, and the United States Department of Justice
v.
American Civil Liberties Union et al.
Docket No. 96-511
Argument Date: March 19, 1997

This case involves a First Amendment challenge to certain provisions of the Communications Decency Act of 1996 (the "CDA" or the "Act"). 47 U.S.C. §;§; 223(a)(1)(B), 223(a)(2), 223(d)(1), and 223(d)(2) (Supp. I, May 1996). The Act seeks, in part, to regulate indecent material that might be made available to minors.

JUSTICE Un-SOUTER announced the judgment of the Court and delivered the opinion of the Courtwith respect to Part I, III & IV and an opinion with respect to Part II in which JUSTICES Un-BREYER, Un-O'CONNOR and Un-STEVENS joined.
JUSTICE Un-KENNEDY Delivered an opinion, concurring in part dissenting in part, in which JUSTICE Un-GINSBURG joined.
JUSTICE Un-SCALIA Delivered a dissentingopinion in which JUSTICE Un-REHNQUIST and JUSTICE Un-THOMAS joined.

JUSTICE Un-SOUTER delivered the Opinion of the Court
OPINIONBY Un-SOUTER
This case presents First Amendment challenges to two statutory provisions that seek to regulate the transmission of indecent or sexually explicit material to or from an interactive computer service or by means of a telecommunications device. 47 U.S.C. §;§; 223(a), (d). Thus, in a number of ways this statute clearly implicates -- and was intended to implicate -- the transmission of indecent, but constitutionally protected speech over the Internet. Neither the ACLU nor the ALA challenge the power of the Federal government to criminalize obscenity or child pornography, both of which were already criminalized before the passage of the CDA. See 18 U.S.C. §;§; 1464-65 (criminalizing obscene material); id. §;§; 2251-52 (criminalizing child pornography); *see also New York v. Ferber*, 458 U.S. 747 (1982); *Miller v. California*, 413 U.S. 15 (1973). The challenge here is solely to the government's authority to regulate "indecent"/ "patently offensive" constitutionally protected speech.

The three judge panel below has given us a lengthy and detailed factual record (*American Civil Liberties Union v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996)) -- albeit one that arouses the ire of our Brother Un-SCALIA. Admittedly, this Court has an "obligation to test challenged judgments

against the guarantees of the First and Fourteenth Amendments, . . . [and thus] this Court cannot avoid making an independent constitutional judgment on the facts of the case." *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964) (Justice BRENNAN). On the other hand, this Court is not required to pretend superior knowledge of technical facts on which the lower courts enjoyed the benefit of detailed expert testimony. Thus we have drawn liberally on the factual findings below.

The Plaintiff Appellees focus their challenge on two provisions of §; 502 of the CDA, amending 47 U.S.C. §;§; 223(a) and 223(d).

Section 223(a)(1)(B) provides that any person in interstate or foreign communications who, "by means of a telecommunications device,"(1)"knowingly . . . makes, creates, or solicits" and "initiates the transmission" of "any comment, request, suggestion, proposal, image or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age," "shall be criminally fined or imprisoned." (emphasis added)

Section 223(d)(1) makes it a crime to use an "interactive computer service" to "send" or "display in a manner available" to a person under age 18, "any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication."

Plaintiffs also challenge on the same grounds the provisions in §; 223(a)(2) and §; 223(d)(2), which make it a crime for anyone to "knowingly permit[] any telecommunications facility under [his or her] control to be used for any activity
prohibited" in §;§; 223(a)(1)(B) and 223(d)(1). The challenged provisions impose a punishment of a fine, up to two years imprisonment, or both for each offense.

Plaintiffs in the ACLU action also challenged the so-called Comstock provisions of the CDA criminalizing speech over the Internet that transmits information about abortions or abortifacient drugs and devices, through its amendment of 18 U.S.C. §; 1462(c). However, since the government has stipulated a "long standing policy" that such prohibitions are unconstitutional and will not be enforced, the ACLU plaintiffs did not seek a preliminary injunction against the enforcement of §; 1462(c).

The key to the government's claims that the CDA is in fact constitutional is provided by the various CDA's "safe harbor" defenses contained in new §; 223(e) of 47 U.S.C., which provides:

(e) Defenses

In addition to any other defenses available by law:

(1) No person shall be held to have violated subsection (a) or (d) of this section solely for providing access or connection to or from a facility, system, or network not under that person's control, including transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or connection that does not include the creation of the content of the communication.

(2) The defenses provided by paragraph (1) of this subsection shall not be applicable to a person who is a conspirator with an entity actively involved in the creation or knowing distribution of communications that violate this section, or who knowingly advertises the availability of such communications.

(3) The defenses provided in paragraph (1) of this subsection shall not be applicable to a person who provides access or connection to a facility, system, or network engaged in the violation of this section that is owned or controlled by such person.

(4) No employer shall be held liable under this section for the actions of an employee or agent unless the employee's or agent's conduct is within the scope of his or her employment or agency and the employer (A) having knowledge of such conduct, authorizes or ratifies such conduct, or (B) recklessly disregards such conduct.

(5) It is a defense to a prosecution under subsection (a)(1)(B) or (d) of this section, or under subsection (a)(2) of this section with respect to the use of a facility for an activity under subsection (a)(1)(B) that a person --

(A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or

(B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.

(6) The [Federal Communications] Commission may describe measures which are reasonable, effective, and appropriate to restrict access to prohibited communications under subsection (d) of this section. Nothing in this section authorizes the Commission to enforce, or is intended to provide the Commission with the authority to approve, sanction, or permit, the use of such measures. The Commission shall have no enforcement authority over the failure to utilize such measures. . . .

_____

I
Standard of Review

A.) Content Neutrality:

The first question presented is the appropriate level of review. This court has repeatedly held that content based regulations are to be analyzed under "strict scrutiny" unless the medium in question allows for a more relaxed standard of review. This decision springs from our fundamental hostility to the state meddling with the content of our national civic debate. As Justice KENNEDY said in *Denver Area* "In the realm of speech and expression, the First Amendment envisions the citizen shaping the government, not the reverse." ___ U.S. ___, 116 S.Ct. 2374, 2405 (1996). Consequently, "Content-based regulations are presumptively invalid" *R.A.V. v. St. Paul*, 505 U.S. 377, 382, 120 L. Ed. 2d 305, 112 S.Ct. 2538, 2542 (1992), and we apply to them the "most exacting scrutiny." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. , 114 S.Ct. 2445, 2459 (1994). The normal rule, then is that the Government may only "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Sable Communications v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836, 106 L. Ed. 2d 93 (1989).

We find that this regulation is clearly content-based and that the standard of review announced in *Sable* should be applied, absent some reason why the communications medium of the Internet allows some more relaxed standard of review. The Communications Decency Act subjects those who send, or make available certain kinds of speech or image to prosecution, potential fines, and/or imprisonment, precisely because of the Congressional judgement that their "speech" is harmful. That judgement may be well-founded; the Congressional goal may be a worthy one, the regulations themselves may pass constitutional scrutiny -- though here we find they do not -- but these are indubitably content based regulations.

Our brethren Un-SCALIA, Un-THOMAS and Un-REHNQUIST bring forth the ingenious argument that the CDA does not violate the principle of content *neutrality*because it applies to all indecent speech regardless of the views that speech puts forward. The DISSENT, in other words, focuses on parity of treatment. Mr. Carlin's monologue about the seven (actually 10) dirty words -- a monologue which expressed ironically profane amazement at the illogic in our country's scatological etymology -- would presumably be treated no differently than a simple and un-reflective "flame war" of four letter words in a Usenet newsgroup, an erotic story, or one of the harrowing tales of brutal personal violation recounted on the pages of Petitioner "Stop Prisoner Rape."

Since the liberal purveyor of indecency would be treated as harshly as the fascist, the Catholic as harshly as the Muslim and the satirist as harshly as the boor, the DISSENT concludes that the statute is in fact content-neutral. To this end, they draw on some of our prior cases, most notably *Young v. American Mini-Theaters,* 427 U.S. 50, 70, 96 S.Ct. 2440, 2452 (1976).

"For the regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message a film may be intended to communicate; whether a motion picture ridicules or characterizes one point of view or another, the effect of the ordinances is exactly the same."

But the DISSENT'S argument proves too much. One might as well say that a law which criminalized speech by registered Democrats was content-neutral since it would punish the words of the Reverend Jesse Jackson no less severely than those of the Dixiecrats who fought to preserve Southern segregation, that it would lock both the defenders and the supporters of the North American Free Trade Agreement in the same jail cell, provided only they were Democrats. The point is, of course, that *any* regulation of speech could be described as content neutral under this standard. This is simply a matter of playing with the generality of the categories in question; all properly applied speech regulation will treat *some* kinds of speech equally, or neutrally -- namely they will subject to equal punishment the very class of speech they forbid. But if this is the meaning of "neutrality," the First Amendment has truly lost its teeth. We do not believe this to be so; to the extent that some of our prior cases indicate otherwise, they were in error.

b.) Character of the Medium:

There is a second prong to the inquiry about the appropriate level of review; it is the question of the character of the medium being regulated. One of the key questions in today's First Amendment Jurisprudence is not whether the statute under review is content-based, but whether it is appropriately *context-based*. As Justice SOUTER pointed out in *Denver Area*, "Our indecency cases since *Pacifica* have likewise turned as much on the context or medium of the speech as on its content." 116 S.Ct. at 2401. Throughout this Court's First Amendment jurisprudence, varying levels of review have been applied to statutory schemes that regulate speech in different media of communication. Each medium of expression carries with it special First Amendment characteristics that must be addressed uniquely.[(2)]

For example, restrictions on protected, albeit indecent, speech in the broadcast medium have been upheld by this Court. *See FCC v. Pacifica*, 438 U.S. 726, 748-50 (1978). By contrast, we have invalidated statutes completely banning indecent, but protected, sexual expression by phone, in part because the medium requires a listener to take affirmative steps to receive an indecent message. *See Sable*, 492 U.S. at 127-28 (1989) (applying strict scrutiny). The Court has granted the greatest degree of protection to the print medium. We long ago established that the press should be a forum for 'uninhibited, robust, and wide-open' debate on national issues. *See New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). This commitment to the sanctity of free expression within the print medium has been used to strike down a statute compelling a right to reply in a newspaper. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). On the other hand, a similar state-imposed right-of-reply was upheld in a broadcast context. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 23 L. Ed. 2d 371, 89 S.Ct. 1794 (1969) (employing "highly flexible standard" of review premised in part on the problem of bandwidth

scarcity.) In the context of cable TV regulations we warned against "judicial formulae so rigid that they become a straitjacket that disables Government from responding to serious problems," and applied a scrutiny that was not "strict" but was "close." Compare *Denver Area*, 116 S.Ct. at 2385 (test for constitutional content based statute regulating cable based TV stations is that it "properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech") with *Sable* (requiring compelling state interest and least restrictive means). The Court has even established different levels of protection for billboards, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501, 101 S.Ct. 2882, 2889 (1981) and drive-in movie theaters, *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268 (1975).

In sum, different levels of review as well as different levels of substantive protection are accorded for speech in different media; with the print medium enjoying the most protection and the broadcast medium enjoying the least. This case demands that we decide just where the Internet fits in the hierarchy of speech technologies. The government has argued that -- at least in the context of statutes such as the CDA which regulate indecency -- we should view the Internet as akin to the broadcast medium and as subject to that medium's more "relaxed" standard of review. This argument was rejected by the three judge panel below, partly because of that court's extensive findings of fact about the technological characteristics of the Internet. Though the three judge panel provided a richly detailed record, our institutional responsibility in a case of this kind is to review both findings of "constitutional fact" and the law based upon them. *Bose Corp. v. Consumer's Union of United States*, 466 U.S. 465, 508,104 S.Ct. 1949, 1964 (1984). In such a situation a return to first principles is not only salutary, but constitutionally mandated.

There has been some confusion surrounding the reasons this court has articulated for subjecting the broadcast media to a different standard of review than print technologies. In *Red Lion* the imposition of a right of reply was granted on the basis of spectrum scarcity, a scarcity that tilted the balance of First Amendment freedoms -- as well as the appropriate standard of review -- away from the rights of the broadcaster-speaker; "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Id.*, 395 U.S. at 388, 89 S.Ct. at 1806. (In *Miami Herald* this court was unmoved by the argument that geographical and economic monopolies of the print medium -- particularly in a single newspaper town -- might produce the same result, a fact that is of some significance for the Internet.)

In *Pacifica* on the other hand, the issue was not a compulsory "right-of-reply" but rather the constitutional limits on the FCC's power to prohibit broadcasters from airing indecent material at a time when it might be heard or seen by children. The *Pacifica* court offered an opinion narrowly confined to its own facts -- and to the context of an administrative rather than a criminal penalty -- which has nonetheless launched a thousand legal theories.

Essentially, the *Pacifica* court focused on two characteristics of the broadcast medium -- pervasiveness and accessibility to children.

Pervasiveness:

First, broadcasts have a "uniquely pervasive presence in the lives of all Americans." 438 U.S. at 748, 98 S.Ct. at 3040. The court stressed that "patently offensive, indecent [broadcast] material ... confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Id.* at 748, 98 S.Ct. at 3040. Apart from being a medium that "enters the home" -- a characteristic, which as the DISSENT points out, broadcast shares with the Internet -- the *Pacifica* court stressed the inability of the audience to pre-screen the potentially offensive material. "Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow." *Id.* at 748-749, 98 S.Ct. at 3040.

Accessibility to Children:

Both Pacifica and the CDA lay great stress on this factor. "Broadcasting is uniquely accessible to children, even those too young to read. Although Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant."*Id.* at 749, 98 S.Ct. at 3040.

The court below found the government's comparison of the broadcast medium to the Internet to be misplaced. *ACLU v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996). We agree.

True, messages, images and sounds sent over the Net, or downloaded from some remote site, will often be received inside the home, just as in the case of broadcast medium. But a key aspect of the *Pacifica* opinion was its focus on the assaultive, unexpected quality of broadcast programming. In comparison, most of the forms of communication lumped together under the name of the "Internet" allow users to *choose* the content they receive before receiving it. These, after all are not broadcast media, in which content is distributed from a single source to all receivers tuned in at that moment. As the findings of fact of the court below make clear, most of the Internet -- and the World Wide Web in particular -- is a so-called "pull" medium, in which the user selects the material he or she wishes to receive. A person using the World Wide Web will almost always have some notice of the type of file they are about to be sent. Most search services carry brief descriptions of the content they retrieve in response to a search, links from other documents usually contain strong intimations as to the character of the linked site and the titles and "URL's" of the sites themselves generally offer some clues.

The three judge panel below intimated a better analogy would be to the telephone, because both the telephone and the Internet require the user to take affirmative steps to retrieve specific information. *ACLU v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996). In fact, during fact-finding the government conceded that it is unlikely an Internet user would inadvertently encounter a sexually explicit site on the Internet, *id.*, in a fashion similar to a radio listener encountering an indecent

broadcast on the radio. The DISSENT makes much of the fact that the Web is not the entire Internet; they point out that e-mail and the new "push" technologies have the potential to assault a viewer with an unwanted indecent messages or image. The constitutional classification of media cannot turn on this sort of hypothetical technological potential. We find that the Internet as a medium does not assault and surprise a user in the manner this Court found offensive in *Pacifica*. This point is strengthened if one considers the intended beneficiaries of the CDA -- minors. It is important to note that, in general, accessing indecent material on the Internet requires a great deal more sophistication on the part of the child than does television or radio. In this respect, the Internet is closer to the print medium and the telephone; at least some ability to read is required as well as a series of affirmative acts by the user that are more complicated than turning a dial. Clearly then, the Internet should be accorded at least as high a level of First Amendment review as that accorded the telephone medium in *Sable*.

II

Classifying the Internet

Our Brethren Un-KENNEDY and Un-GINSBURG would go further. They suggest that the Internet is most closely related to the print medium, and should enjoy the same, if not greater, protection from government regulation. Their argument is the same as that raised in the court below; the Internet actually has more of the "press-like" factors that compel First Amendment protection than does the press itself -- a press controlled by relatively few powerful media companies, a press which imposes heavy burdens on those who wish to get access to its pages and which is frequently -- on the local level -- a *de facto* monopoly. As Judge Dalzellput it,

"If 'the First Amendment erects a virtually insurmountable barrier between government and the print media,' *Tornillo*, 418 U.S. at 259 (White, J., concurring), even though the print medium fails to achieve the hoped-for diversity in the marketplace of ideas, then that 'insurmountable barrier' must also exist for a medium that succeeds in achieving that diversity." 929 F. Supp. at 881.

In part, we agree. Of all forms of communication, the Internet has achieved "the most participatory marketplace of mass speech" ever known *ACLU*, 929 F. Supp. at 881, and should be protected as such. The Internet has had a "democratizing" effect; an individual citizen can speak on an issue of concern to potentially a global audience at very little cost and be assured of a relative degree of parity in his message relative to other messages. The result has been a "diversity in the marketplace of ideas" hitherto unimaginable. In fact, it could be argued that the demand for speech restrictions on the Internet has been produced in part by the very success of the medium in achieving both wide diversity and wide availability of speech. Nevertheless, while we believe that it is precisely this type of diverse exchange in ideas our Constitution was intended to protect, we are reluctant to take the dramatic step of according to the Internet the same level of protection as that of the traditional print medium.

As I argued in *Denver Area,*
"[W]e have to accept the likelihood that the media of communication will become less categorical and more protean...[B]ecause we know that changes in these regulated technologies will enormously alter the structure of regulation itself, we should be shy about saying the final word today about what will be accepted as reasonable tomorrow. In my own ignorance I have to accept the real possibility that "if we had to decide today . . . just what the First Amendment should mean in cyberspace, . . . we would get it fundamentally wrong." 116 U.S. at 2402. Justice SOUTER concurring (quoting Lessig, The Path of Cyberlaw, 104 Yale L. J. 1743, 1745 (1995)).
One year has done nothing to change the essentially protean quality of the technologies that we face, nor has it erased our level of uncertainty about the appropriate level of protection. If anything both have increased. We will rest here with the conclusion that the Internet is not subject to the broadcast medium's relaxed standard o review, leaving it to time and technology to make clearer what more permanent place the Internet will be given in our First Amendment jurisprudence.
Thus, since this is a content-based regulation and the medium is not subject to the more relaxed standard of review accorded to television and radio, the Communications Decency Act must be scrutinized under the strict scrutiny standard laid down in *Sable*.

III

Least Restrictive Means

The government may only "regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Sable* 492 U.S. 115, 109 S.Ct. 2829. In meeting that heavy burden, the Government must "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *United States v. National Treasury Employees Union*, 115 S.Ct. 1003, 1017 (1995) (citing *Turner*, 114 S.Ct. at 1017).
The first part of the analysis is simple. We have repeatedly held that "there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards." *Sable Communications v. FCC*. *See also* __ __. The key question however is whether the CDA itself is the least restrictive means to shield children from indecent but constitutionally protected speech. An imperfectly understood corollary is that we must ask whether the regulation will actually *work*; the least restrictive means test obviously cannot be met by a statute that significantly restricts the constitutionally protected speech of adults without materially alleviating the harm of indecent material available to children. First Amendment freedoms may only be sacrificed for compelling goals that are demonstrably achievable by the means employed; they may not be sacrificed on the altar of "good intentions," or election year posturing, without discernible result. In crude terms the CDA is unconstitutional if it reaches too broadly, or if it would not actually work.
The court below held that the CDA failed at least the first part of this test and probably the second. "Whatever the strength of the interest the government has demonstrated in preventing minors from

accessing 'indecent' and 'patently offensive' material online, if the means it has chosen sweeps more broadly than necessary and thereby chills the expression of adults, it has overstepped onto rights protected by the First Amendment." (Citations omitted) Despite its recognition of the compelling interest in protecting children, this court has held that regulations cannot achieve that goal by "limiting the content of adult [communication] to that which is suitable for children." 492 U.S. 115, 131 (1989). The court has invalidated complete bans on indecent -- but constitutionally protected -- speech, arguing that these "burn up the house to roast the pig." *See Butler v. Michigan*, 352 U.S. 380, 383 (1957). In another decision cited by appellees, the court struck down a ban on mail advertisements for contraceptives, declaring that "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." *Bolger v. Young's Drug Products Corp.*, 463 U.S. 60, 74 (1983).

In *Pacifica* the radio station could reschedule Mr. Carlin's monologue for a time of day when children would be unlikely to be listening. On the Internet, time segregation is impossible. In its place, the CDA offers a variety of technological and other mechanisms to age-segregate the audience for Internet speech. If speakers on the Net use these mechanisms they are offered a safe-harbor from the reach of the Act. Thus the practicability of the defenses is the key to the constitutionality of the Act. If these defenses are in fact impractical or unduly onerous, the CDA would amount either to a complete ban on indecent speech, or a proscription of indecent speech which sweeps so widely that it chills protected adult communication in its attempts to protect children. Our precedents indicate, and we hereby affirm, that neither of these alternatives is constitutionally acceptable.

The most important defenses in this regard are those provided in §; 223(e) 5.

(5) It is a defense to a prosecution under subsection (a)(1)(B) or (d) of this section, or under subsection (a)(2) of this section with respect to the use of a facility for an activity under subsection (a)(1)(B) that a person --

(A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or

(B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.

The three judge panel below found that subsection 5. B) would be of little use in the attempt to screen out minors for most speakers on the Internet. We would go further. If anything, the court laid insufficient stress on the fact that these mechanisms would be *completely unavailable* to a substantial portion of the traffic of the Net. A sender of e-mail *may* have some sense about the age of its recipient, but even this vague hope cannot be offered for users of e-mail Listserv "mail

exploders" or Usenet newsgroups, who would never be able to tell who might read their messages.

Even in the context of the World Wide Web, the provisions of section 5. B.) offer an impractical safe-harbor. Because credit card companies would be unwilling to "verify" unless payment was made for the service or a commercial transaction involved, "verification by credit card... remain economically and practically unavailable for many of the non-commercial plaintiffs in these actions." *ACLU v. Reno* Finding 99. Requiring credit card verification would also impose unacceptable delay and would also have the unconscionable effect of barring adults who did not have the resources to qualify for a credit card. So-called "cgi script" services are technologically more complex, are not available on most servers and would still require methods of verification. Adult verification by password or identification number would have similar problems. The administrative effort to implement such a scheme would be high while "[s]ome, if not almost all, non-commercial organizations, such as the ACLU, Stop Prisoner Rape or Critical Path AIDS Project, regard charging listeners to access their speech as contrary to their goals of making their materials available to a wide audience free of charge." ACLU Finding 104. Finally, to repeat, these methods simply would not work for the greater part of the traffic on the Internet, namely e-mail.

Thus, the entire weight of the government's argument rests on subsection 5. A.) The principal method offered by the government was that of tagging. The government's expert, Dr. Olsen testified that an "-L18" tag could be affixed to all indecent material on the World Wide Web. The -L18 tag is the name of an hypothetical blocking scheme of Dr. Olsen's, a scheme which apparently exists nowhere beyond the pages of the Federal Reporter. Owners of pages on the World Wide Web could tag any page containing indecent material with the prefix or suffix -L18. A more sophisticated version of the same technology -- PICS -- was described by the appellees, though to very different effect.

The Program for Internet Content Selection or 'PICS" has been developed by a consortium centered at MIT. When fully implemented, this program would permit the generation of both first party (speaker based) and third party (intermediary based) tagging schemes. The tags would be embedded in the so-called "Metafile" information which, as its name suggests -- provides a Web browser with information about the file it is about to download. Thus in a PICS compliant Web, a content provider would have the ability to rate its material on any rating scale it chose -- for violence, sensuality, profanity, anti-religious themes, cruelty to animals, sexism, adherence to the manifest truths of Zoroastriansim or what-have-you. These rating scales would presumably be developed by third party rating services, which could also rate the offerings themselves independently, regardless of whether they had been rated by the content provider. A "PICS enabled browser" or Internet navigation program configured to recognize and read these tags, would block any files in a disfavored group, either by simply reading the tag on the particular file

or by retrieving all of its files through the server of the filtering organization and having the content-filtering performed at the server level.

All of this detail was provided by the ACLU and ALA appellees as a way of demonstrating that the CDA is *not* the least restrictive means to achieve the compelling interest in protecting children from indecency. In fact, they argue, there are many less restrictive technological methods for parents to achieve the same level of protection, without state intervention. Apart from PICS, there are blocking or filtering programs such as Cybersitter and SafeSurf that reside on the user's computer and automatically block access to proscribed sites. Some sites are listed within the program itself, others identified as undesirable because the sites contain forbidden words or phrases. Given all of these resources available to parents, argue the appellees, the CDA is clearly not the least restrictive means to achieve the compelling interest.

The PICS argument almost proves too much. There is a certain irony to the fact that PICS, developed as a technology to prove that the CDA was unnecessary (and therefore unconstitutional) comes closer than the government's hypothetical -L18 technology to providing an acceptable safe harbor for speakers who wish to evade criminal prosecution yet also wish to keep the level of their discourse above that of the sandbox. Does PICS, then, save the CDA?

We hold that it does not. While much has been made of the *technological*ease of adding PICS or other tags to the files on a Web site, three factors militate against the conclusion that PICS-like systems provide a sufficient safe-harbor. First, it is not the labor of adding the tag but the labor of rating the changing contents of a Web site that imposes an intolerable burden on speakers, many of whom would be forced from the marketplace of ideas if they had to function constantly as both speakers and reviewers of their own speech. Second, as we pointed out before, solutions like PICS are primarily useful on the Web; they have little effect on the Internet's other methods of transmission, such as e-mail. This is not a wide enough safe harbor to save the statutory scheme. Finally, these tagging and ratings schemes -- while promising -- are at least in constitutional terms, still "vaporware." Only a few sites are actually rated on the PICS scale, the browser that dominates the market is not yet PICS compliant and a great deal of technological, economic and content rating activity has to transpire before this promising line of censorware becomes more reality than manifesto. What's more, most of this activity would be outside of the control of the actual speakers on the Net. This court has done many things in the free speech area. It has not however premised the *actual*constitutionality of a criminal statute on the *possible* development of hypothetical blocking schemes *by non-interested third parties.* It is not about to start now.

The CDA fails the least restrictive means test for another reason. As the court below pointed out.

117. A large percentage, perhaps 40% or more, of content on the Internet originates outside the United States. .. A user can sometimes discern from a URL that content is coming from overseas,

since InterNIC allows a content provider to embed a country code in a domain name. Foreign content is otherwise indistinguishable from domestic content (as long as it is in English), since foreign speech is created, named, and posted in the same manner as domestic speech. There is no requirement that foreign speech contain a country code in its URL. It is undisputed that some foreign speech that travels over the Internet is sexually explicit.
ACLU at ___.

If more than one third of the Internet's content comes from outside the United States, it is hard to see how the CDA can be presented as a "regulation [that] will in fact alleviate these harms in a direct and material way." *United States v. National Treasury Employees Union*, 115 S.Ct. 1003, 1017 (1995) (citing *Turner*, 114 S.Ct. at 1017) There is no reason to suppose that the CDA will -- or should -- be successful in extraterritorial attempts to control all indecency on a global net. Thus we are faced with a regulation that is overbroad, that sweeps protected speech within its ambit, and yet that does not adequately achieve its stated goal. We therefore find the challenged provisions of the CDA to be unconstitutional as overbroad, and in general, find that the CDA's provisions are not the least restrictive means to achieve the result sought. We do not hold today, as our Brethren Un-KENNEDY and UN-GINSBURG would have us hold, that practically *no* regulation of indecent speech on the Internet could pass constitutional muster. But we also decline to lay out the framework of a permissible statute. In this context case-by-case adjudication is to be preferred. When Congress revisits this issue, as surely they will, come election-time, we will be happy to tell them whether they have failed once more.

IV

Vagueness

"Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood v. Casey*, 112 S. Ct. 2791. JUSTICE O"CONNOR. As Justice O'Connor pointed out in the very different context of *Casey*, uncertainty about the law is inimical to the very liberty that law is supposed to protect. Where a law fails to provide adequate warning of what behavior is in fact criminal, it violates the Due Process Clause of the Fifth Amendment. *SeeGrayned v. City of Rockford*, 408 U.S. 104, 108-09, 33 L. Ed. 2d 222, 92 S.Ct. 2294 (1972). In addition, if that law regulates freedom of expression and is sufficiently vague that it fails to convey to persons of ordinary intelligence which conduct is prohibited and which allowed, it will violate the First Amendment. The freedom of speech is one of the most cherished freedoms contained in the Bill of Rights and is not to be infringed by murky rules that invite cautious private self-censorship and arbitrary public enforcement. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes,"' and this is particularly true of laws "`having a potentially inhibiting effect on speech . . . .'" *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939), and *Smith v. California*, 361 U.S. 147, 151 (1959)).

Is this law void for vagueness? The initial difficulty is posed by the statute's use of two terms indecent and patently offensive. The government insists and the court below accepted that these two terms, used in two different sections, are in fact meant to cover the same material. We accept this argument with some trepidation as counter to the basic rules of statutory construction, but apparently acceptable here. Thus we will limit our discussion to §; 223 (d) in the belief that this is intended to be the general definition of proscribed indecent material.

47 U.S.C. §; 223(d), prohibits the sending or display of material that, "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." The definition is drawn -- all but the added phrase "in context" -- directly from the FCC decision upheld in *Pacifica.*

At first blush, it would seem hard to find such a definition void for vagueness. As another three judge panel scrutinizing the CDA put it "The definition of material regulated by this section is a familiar one, repeatedly upheld against vagueness challenges in a line of jurisprudence concerning television and radio broadcasting, cable programming, and commercial telephone services." *Shea v. Reno* at __. In our recent *Denver Area*decision, various members of the court gave strong, if Delphic, support to the validity of the *Pacifica* definition of indecency. The lower courts have also assumed that very similar definitions of indecency can withstand constitutional scrutiny. "If acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge is not implicit in *Pacifica*, we have misunderstood Higher Authority and welcome correction." *ACT I*, 852 F.2d at 1339-40.

We do not retreat from those holdings today. In the context of the media in which it was upheld, the *Pacifica* definition of indecency still stands. This case and this medium are different. First, we find that community standards *for protected speech* cannot be precisely defined for the Net and thus that any definition of indecency which relies on community standards is void for vagueness.

Community Standards

Defining community standards has proven vexing for this court in the past, and the CDA's criminalization of indecent communications found in §; 223, proves most problematic when applied to the electronic community. Because the Internet reaches to all jurisdictions of the world, including ones outside our reach, the question of whether electronic content falls within the auspices of the CDA requires scrutiny different from this Court's past assertions. We have changed our methods of determining indecency as our country has grown, and must recognize today that the Internet pushes such analysis to, perhaps, its final apex.

The early discussions of community standard come in the analysis of obscenity rather than indecency. Many early U.S. courts defined community standards based on the Hicklin Test which allowed material to be judged solely on the judgment of individual susceptible persons judging the most isolated excerpt from a given source. *Regina v. Hicklin*, L.R. 3 Q.B. 360 (1868). Noting this

standard as overly restrictive to the freedoms of press and speech, the Court replaced this standard with "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." *Roth v. United States*, 354 U.S. 476, 489, 77 S.Ct. 1304, 1311. We further conditioned our guidelines in Miller v. California applying a three part test which required the trier of fact to determine "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value." 413 U.S.15, 24, 93 S.Ct. 2607, 2615.

While we have worked to develop acceptable standards for determining obscenity, each instance of such application has been based on geographic application of community standards. For example, in Miller, we supported the use of the state of California as determinative of community. *Miller*413 U.S. at 30-31. Other courts have followed our lead.[(3)]What's more obscenity is unprotected speech. When we transpose our holdings on community definitions of obscenity to the realm of protected, albeit indecent, speech, even greater care is called for.
The community standards of the electronic medium under attack cannot be defined in geographic terms. Information transferred via the Internet may move throughout every jurisdiction of our nation as well as the world. Because the Internet is composed of individual users sending information into this world-wide electronic infrastructure the geographic community standard we have relied on has lost its practical applicability. By applying such a standard, we would force each individual using the Internet to conform each data transmission to the standards of the most restrictive community affording Internet access. Such a geographic standard would chill speech protected in some jurisdictions at the service of locations with more stringent standards of speech and would adversely affect the free-market of ideas supported by members of this Court in the past.[(4)]
The *mores* of one community may not mesh with the *mores*of another. Similarly the needs of communities differ. By applying the CDA's requirements, we actually *destroy* the ability of communities to effectively govern what is proper and what is needed locally by creating a national standard defining patently offensive from the viewpoint of the most conservative of locales. We have rejected this in the past and have recognized that applying such a standard would prove untenable. Justice Warren discussed the problem of a national obscenity standard in *Jacobellis v. Ohio* stating, "It is my belief that when the Court said in Roth that obscenity is to be defined by reference to 'community standards,' it meant community standards--not [a] 'national standard[]' ... this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one." 378 U.S. 184, 200, 84 S.Ct. 1676, 1685. Similarly, this Court questioned the utility of applying such a standard. "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. *Miller*, supra at 32.

Numerous Amici have expressed their realistic fears of the chilling of information under the rule of the CDA. By applying the community standards of the most restrictive communities of our country, we certainly would deny access of information on subjects such as AIDS education, human rights, prenatal care, abortion, contraception and rape to cities and states who favor access to such materials. Various news organizations have also suggested that the CDA would quell the free flow of information which they provide on-line.

A further problem exists in light of our inability to prosecute those outside the reach of United States law. The Internet is global in nature. While placing restraints on Internet users within the United States may diminish the level of materials deemed improper by certain communities, it will not eradicate what such individuals will find to be offensive nor will it stop access to forums patently illegal under our laws. Attempting to apply community standards to such a medium will prove impracticable and will only foster off-shore movement of entities who desire to make their information available. Indeed, "thirty percent of the sexually explicit material currently available on the Internet originates in foreign countries." *Shea v. Reno*, 930 F. Supp 916, 931 (S.D.N.Y. 1996).

It is true, as the DISSENT reminds us, that this court has already held "[t]here is no constitutional barrier under Miller to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others," *Sable Communications v. FCC*, 492 U.S. 115, 125-26, 109 S.Ct. 2829, 2836. But this argument misses the point. We (implicitly) premised our reasoning in Sable on the ability of the defendant, a provider of adult telephone messages, to screen the area-code origin of incoming calls through caller ID. While -- technically -- feasible in the telephone medium, such an approach will not work on the Internet. The Internet works on a different dynamic, one which allows any user to place or retrieve information within its realm. Because no individual can control with absolute assurance who will access information placed on the Internet based on location, the reasoning this Court fashioned in Sable to allow the application of individual community standards would be so vague as to chill speech irremediably.

We do not hold today that the *Miller* community standard definition of obscenity is void for vagueness. Obscenity is unprotected speech and thus less of a danger may be posed by vagueness -- at least on the margins. In addition the *Miller* test contains additional qualifications -- artistic merit and so on -- on which a defendant prosecuted under the CDA could not rely. These may function to add the necessary element of constitutional starch to *Miller* in cyberspace. But as to indecency on the Net, the community standards test is simply too vague.

Criminal Sanctions and Prosecutorial Indecision

Three other factors compel us to find this definition void. First, this is a criminal prosecution, not an administrative hearing as in *Pacifica,*nor the granting of a permission to a private party to

screen for content as in *Denver Area.* Our scrutiny for vagueness will be correspondingly more rigorous. Second, we have the best possible evidence for the vagueness of the statute. The government -- to say nothing of the sponsors of the Bill itself -- cannot agree on its meaning. In this case the government has insisted that the CDA encompasses only commercial pornography, a term with no legal meaning. To define one imprecise but nevertheless familiar statutory term with another undefined term does not induce confidence in the clarity of the language at issue. At times, it has almost seemed that the government would only interpret the CDA to criminalize obscenity -- which was of course already criminalized on-line. Yet the government's expert witnesses also opined that a magazine cover featuring a naked Demi Moore would be obscene. This hardly fits under the definition of commercial pornography. *See* Gov't Brief at 34-35. As appellees ACLU point out, the confusion runs deeper,

The conference report stated that the CDA is intended to have "the same meaning as established in *FCC v. Pacifica* and *Sable Communications of California*." Conf. Rep. at 188 (citations omitted). But some of these same members of Congress now assert as *amici* that "[o]nline indecency was not intended and should not be held to have the same scope as broadcast indecency," and that the two standards "differ markedly." Brief of *Amici* Senators Dan Coats, James Exon, et al., at 7 (Cong. Brief). The executive branch has not clarified the legislative branch's confusion, and the Court is left to decide if prior indecency cases are even relevant. [ACLU brief at __]

In the face of such murky, inconsistent statements and in the context of a global distributed packet switched network, this court will not pretend that we -- or we suspect -- the government or the citizenry, would have the slightest idea what counts as indecent. We find the definition of indecency in the Act void for vagueness.

JUSTICE Un- KENNEDY delivered an Opinion in which JUSTICE Un-GINSBURG joined, concurring in the Judgement and in Parts I, III & IV of the Opinion of the Court and Dissenting with respect to Part II.

CONCUR BY JUSTICE Un-KENNEDY

I

The Internet Should be More Protected than the Print Medium

The court is of course correct to find that the CDA is content based restraint on speech, subject to but incapable of meeting strict scrutiny; in particular the CDA is not the least restrictive means to achieve the compelling interest sought, its proscriptions are unconstitutionally overbroad and void for vagueness. All of this is apparent, even to an untutored eye, on first reading. The more interesting questions remain.

Historically, the advent of novel communications technology has led us to consider that technology's impact on First Amendment rights of free speech and free press.(5) My Brethren say we are facing another novel communications development in the form of the Internet, with ramifications that must be considered in light of the First Amendment.

If I understood the majority correctly to mean that we must find a place for the Internet in the strange morass of partially disabled constitutional protections that we offer to the post-print media, then I disagree.

While I wholeheartedly join with my Un-Brethren in concluding that the Internet must enjoy a higher standard of protection than the "relaxed standard of review applied to the broadcast media, I feel that this is only half of the question. What level of protection, then, should the Internet enjoy? Sadly, the majority has deferred the opportunity to establish clearly a legal standard that would abandon our previous halting attempts at analogy and recognize instead the unique and unprecedented features of the Internet as a medium for speech. By according the Internet a level of First Amendment protection superior even to that heretofore granted to traditional print media, this Court might have advanced the development of the legal framework which must be in place for the Internet to fulfill its truth-seeking and democratizing potential. That an individual may discuss any matter of public concern without prior restraint is a fundamental principle of American law.(6) In its current state the Internet functions as a "people's press" where individuals can discuss with a worldwide audience "supposed grievance and proposed remedies."(7)

As this Court has traditionally viewed it, the First Amendment's guarantees of freedom of expression serve two fundamental goals. The first of these is to maintain an uninhibited marketplace of ideas where, in the clash of divergent perspectives, the truth may eventually prevail. *Red Lion*at 390. The second, closely related, aim is to foster participatory democracy by providing an opportunity to participate in public and political discourse to those members of society who would otherwise be excluded. In a free society, "however pernicious an opinion may seem, we depend for its correction not on the consciences of judges or juries [or, I might add, of legislators] but on the competition of other ideas." *Gertz*, 418 U.S. at 339-40. The seeker after truth and even decency ultimately has nothing to fear from the marketplace of ideas. On the contrary, "[t]he steady habit of correcting and completing his own opinion by collating it with those of others, so far from causing doubt and hesitation in carrying it into practice, is the only stable foundation for a just reliance on it...." J. S. Mill, *On Liberty*

The print media are traditionally viewed as the purest incarnation of this marketplace, and enjoy the fullest protections of the First Amendment. Indeed, it is a commonplace that the intellectual vigor and the diversity of creative expression exhibited in print in America owe a cardinal debt to "the virtually insurmountable barrier between government and the print media" erected by the First Amendment. *Tornillo*, 418 U.S. at 259 (WHITE, J. dissenting). Yet in reality, the print media too

often are susceptible to the same criticisms leveled at broadcast or other media. Practical obstacles limit meaningful access to print markets, with the result that economic power can equal a disproportionate presence -- a select few voices have the means to communicate their ideas to the public.

The Internet takes a step toward tearing down those restraints and enabling us to realize our Founding Fathers' goals. "Those who won our independence ...believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth... "[(8)] As Judge Dalzell of the three-judge panel below noted, if we place a premium on protecting speech in print--how much more should we devote ourselves to protecting a medium like the Internet, which succeeds where print fails to create an approximation of the "ideal market" for ideas, and furthers the goals of the First Amendment more than the print media in every significant respect?

The Internet is the most speech-enhancing communications medium ever devised. The practical and economic barriers to entering the medium are, as the panel below found, far lower than for print. The capacity of this new medium to disseminate ideas and to inform is virtually unlimited by geographic or temporal considerations. It creates an unprecedented democratic equality among an incredibly diverse chorus of voices. Moreover, the Internet is by its very nature a participatory and interactive medium, where the distinction between speakers and listeners in discussion and debate is collapsed in a manner foreign to print media.

Admittedly this will be hard step for some of us, and I include myself, to take. We are changing a venerable tradition. After all the First Amendment does not speak of freedom of the newsgroup or the Web page, but the freedom of the *press*. Thus far, the press has functioned as the primary conduit for information that helps us on our voyage of self discovery and self defined truths. Yet we must look beyond the idealized image to the reality of media conglomerates and mediocre intellectual orthodoxies. When we do so, we will find that we have no basis for denying the Internet its rightful place at the pinnacle of speech technologies. Individuals face the reality that many communities have one newspaper, that the corporations whom own much of the newspaper industry also control television, radio, and cable stations. Owners, as is their right, exercise control over what is printed. We do not allow the State to require that the newspaper publish opposing views.[(9)] To regulate what the press must publish would be to strike at the heart of the First Amendment. Paradoxically, the result is that a community is exposed to limited viewpoints and limited participation.[(10)]

However, with the advent of the Internet, speakers, listeners, debaters who were previously constrained, have a place to communicate with others of like and unlike mind. The Internet as it stands now functions in the best American tradition by providing a forum for "free trade of ideas"[(11)]to those heretofore silenced by practical realities. Not only do speakers have a forum,

but those who would learn have access to an infinite font of information. The "netizen" is no longer limited to information seen through the glasses of a few entities. As such in the best American tradition, we should accord the "people's press" all the protection the First Amendment allows to the "hard copy" press.

In the brave new world of the information society, the Internet, rather than the public papers, will serve as the "expeditious messenger[] of intelligence to the most remote inhabitants of the Union." Alexander Hamilton, Federalist 84. If my Brethren truly grasped the import of this, I feel certain that they would join with me in declaring that the Internet has earned, and will continue to earn, the right to succeed the print media atop the pedestal of First Amendment jurisprudence. After doing so they would realize that there is a third reason why the CDA is unconstitutional. Congress simply lacks the constitutional authority to regulate indecency on the Internet *at all.*

II

Congress and the President Violated their Constitutional Responsibilities

I turn now to a more disturbing aspect of the case before us. The adoption of the CDA was accompanied by unusually close attention from all quarters--the press, the academic and professional legal communities, civil libertarians and sundry advocacy groups. Much of this public attention was focused upon the potential conflict between constitutional protections on speech and the criminal indecency provisions of the Act.[(12)] The legislative history of the CDA reveals that Congress was aware that it was treading on dangerous First Amendment ground.[(13)] Those members of Congress who drafted and supported the passage of the CDA, as well as the President, who signed it into law, enacted a piece of legislation that they ought to have realized -- and, I suspect, did in fact realize -- was in numerous respects at variance with the Constitution. Indeed statements to this effect were entered into the public record.[(14)]

This being so, I cannot refrain from reminding the executive and legislative branches that the Judiciary, and particularly this tribunal, is not alone in bearing an obligation to construe the Constitution in the course of its work. Welsh v. United States, 398 U.S. 333, 370 (1970) (White, J., dissenting). The notion that the several branches of the federal government are under a civic duty to scrutinize their own official acts in the light of the Constitution has extended throughout our nation's political history.[(15)]

Referring to the legislative branch, James Madison remarked that "[I]t is incontrovertibly of as much importance to this branch of the Government as to any other that the Constitution should be preserved entire. It is our duty, so far as it depends on us, to take care that the powers of the Constitution be preserved entire to every department of Government." 1 Annals of Cong. 500 (Joseph Gales ed., 1789). While acknowledging that the central responsibility for constitutional construction devolved upon the judicial branch, Madison deplored the notion of a legislature that would abjure its duty of judgment and merely defer to the Judiciary.

Abraham Lincoln similarly exhorted the political branches not to suspend their own critical faculties in matters of constitutional discernment. In the wake of this Court's ignominious decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), Lincoln observed: "[I]f the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court,the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." III The Collected Works of Abraham Lincoln 255 (Basler ed., 1953).

True, from time to time, (as, for example, as during the Reconstruction era) Congress has lapsed into a more or less sustained disregard for constitutional limitations, and passed laws clearly unconstitutional. *Screws v. United States*, 325 U.S. 91, 140 (Roberts, Frankfurter and Jackson, JJ., dissenting). Such is, strictly speaking, its right. Nevertheless, I am disheartened that Congress and the President chose to send a statute with constitutional infirmities as manifest as the CDA's on a collision course with the courts, when a modicum of willingness to reach (and act upon) independent constitutional conclusions might have avoided the confrontation altogether, and thereby better served the public. As I wrote recently in connection with another ill-fated federal statute, the Gun-Free School Zones Act, "it would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitutionis their own in the first and primary instance." *United States v. Lopez*, ____ U.S. ____, 115 S. Ct.1639 (1995) (Kennedy, J., concurring).

Perhaps the deepest mischief that results when the political branches shirk their obligation to evaluate in good faith the constitutionality of their own acts is that the citizenry is deceived. If Congress and the President, for reasons of political expediency or otherwise, purposely enact laws which they know will not pass Constitutional muster in the courts, they have evaded their own responsibility and -- perhaps -- deceived a citizenry less well informed or advised as to the details of the Constitutional jurisprudence. The accountability of the executive and legislative branches is thereby diminished--simply put, the public will not know whom to blame. It ill befits a representative government to invite such an obfuscation of the lines of political responsibility. In fact, this Court has already reached an analogous conclusion in *New York v. United States*, 505 U.S. 144, 168-69 (1992), where we observed that requiring States to legislate federally mandated measures unacceptably insulates federal officials from electoral accountability. In this case it is the courts rather than the state governments that bear the blame. The principle, however, is the same. Thus the legislative branch wastes its time producing materials it knows to be null and void, rather than attempting to solve the urgent problems that confront our nation, while the courts have to spend time and precious legitimacy striking at laws that should never have been passed. If this colossal waste of public time and money were not scandal enough, the public is told that "the judges" won't let the people have their way. Convinced -- by those who occupy the public limelight -- that this is the case, they begin to lose their faith in the judiciary, who -- by constitutional design -- cannot resort to press releases and attack faxes to defend themselves. The problem is one of

genuine import. When the next *Brown v. Board of Education* comes before us, will the courts have left the necessary legitimacy to carry the republic forward? If the Congress continues to use us as the preferred means of disposal for its sillier vote-getting devices, the legislative toxic waste dump, the answer, I think, is 'no.'

JUSTICE Un-SCALIA delivered a Dissenting Opinion in which JUSTICE Un-Rehnquist and Un-THOMAS joined.

DISSENTBY Un-SCALIA
The Court continues to amaze me. I had thought that *Planned Parenthood v. Casey*, 112 S. Ct. 2791. marked the nadir in this institution's flighty tendency to shirk its duties whenever those duties conflicted with the complacent political certainties of the chattering classes. I find today that I had underestimated both my Un-BRETHREN and the knowledge class they apparently believe themselves tasked to represent. The worst was yet to come.

The Court today finds that a content-neutral provision, *Young v. American Mini-Theaters,* meeting an *admitted* compelling state interest, *Pacifica,* using the very words of a test we have repeatedly upheld, *Pacifica, Sable, Denver Area* is unconstitutionally vague -- though not as vague as the majority's own words -- and is *facially*overbroad. It does this despite the fact that we *may not* find a statute unconstitutional unless it has *no* interpretation that would be constitutional, despite the fact that the government actually offers a redeeming statutory interpretation -- one we we are bound to accept -- and despite the conclusive contrary evidence offered within the otherwise tendentious factual findings of the three judge panel below. The majority accomplishes this sleight of hand while failing to mention that we have upheld more restrictive regulatory schemes in the context of less invasive media *c.f. Sable* or that we have struck down other statutes because they did not consider means of content segregation -- such as the V-chip -- that are actually much more restrictive than the blocking and filtering technologies considered in the CDA. *Denver Area.* The court thus sets itself up over the will of the democratically elected representatives of the United States people, frustrating their attempt to meet an admitted and pressing problem; moreover, it does so without any basis in precedent, constitutional intent or social tradition. I dissent.

Close attention shows that majority gets every single question wrong; The CDA is not in fact content-based and therefore the applicable standard of review is an intermediate one; are the means to meet the *substantial*government interest *sufficiently* narrowly tailored? Under this standard, I find the provisions pass constitutional muster. If the CDA were to be found a content-based restriction, it is still clearly aimed at an invasive, child-imperilling medium, the Internet, which must be judged under the relaxed standard of review contemplated for the broadcast media. *Pacifica*. Finally, even if both of these points were ignored and the CDA were to be judged under strict scrutiny, it is clear that it would meet that standard. The rules in question

are in fact the least restrictive means of meeting the compelling government interest in protecting minors from indecent and patently offensive material.

I

The CDA is a Content-Neutral Method of 'Channeling' Speech

In determining if regulation is "content-based" or "content-neutral," the Court should inquire whether, through the law in question, the Government is regulating speech "based on hostility -- or favoritism -- towards the underlying message expressed." *Turner Broadcasting System, Inc. v. FCC*, 114 S.Ct.2445, 2458 (1994), quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); citing to *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 385 (1992). As we stated in *Turner*, laws are generally considered "content-based" if their terms distinguish "favored speech from disfavored speech on the basis of the ideas or views expressed." *Id.*, citing to *Burson v. Freeman*, 112 S.Ct. 1846,1850 (1992) (slip op. at 5); *Boos v. Barry*, 485 U.S. 312, 318-19 (1988) (plurality opinion).

On the other hand, if laws "confer benefits or impose burdens on speech without reference to the *ideas or views expressed*",they are generally considered "content-neutral" regulations. *Id.* (emphasis added.) The Turner Court found that the 'must-carry rule," a regulation which required all cable operators to carry broadcast TV, was content-neutral because, by its terms, the rule imposed burdens and benefits not according to any particular the favoritism towards any type of speech. Rather, the rule was non-selective and applied to *all* cable operators. The Court rejected the argument the rule was content-based and that it favored "broadcast speech," holding that the rule did not regulate the "message" of the speech, but only the "manner." *Turner* at 2460.

Applying the *Turner* standard to the case before the Court today, I find that the challenged regulations of the CDA do not favor or disfavor the idea or the message of some example of speech by prohibiting of dissemination "indecent" or "patently offensive" material to minors. These rules merely impose burdens *without* reference to the particular ideas or points of view expressed. Moreover, they impose these burdens equally on *all* who disseminate such material.

Twenty years ago, in *Young v. American Mini Theatres, Inc.*, we dealt with this issue explicitly, even raising -- in a way that seems prescient today -- the issue of protecting children from sexually explicit material.

"In *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L. Ed.2d 195, the Court upheld a conviction for selling to a minor magazines which were concededly not "obscene" if shown to adults. Indeed, the Members of the Court who would accord the greatest protection to such materials have repeatedly indicated that the State could prohibit the distribution or exhibition of

such materials to juveniles and unconsenting adults.[(16)]Surely the First Amendment does not foreclose such a prohibition; yet it is equally clear that any such prohibition must rest squarely on an appraisal of the content of material otherwise within a constitutionally protected area,. [s]uch a line may be drawn on the basis of content without violating the government's paramount obligation of neutrality in its regulation of protected communication. For the regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message a film may be intended to communicate; whether a motion picture ridicules or characterizes one point of view or another, the effect of the ordinances is exactly the same." *Young* at ___.

This is the very heart of the CDA. The CDA -- with the possible exception of its provisions on abortion speech -- takes absolutely no position with respect to the underlying message expressed. A professorial spoof of an erotic story, a profitably detailed confession of prior carnal sins by a televangelist, a profane political manifesto full of pungent sexual imagery -- all would be treated equally by the CDA's regime. Our First Amendment is designed, above all, to make sure that government does not put a thumb on one side of the scales when opinions are being weighed. This was the problem in *RAV.* The CDA loads up both sides of the scales equally; it can hardly be called content based. The CDA certainly does not make the mistake we addressed in *RAV*, that of failing to restrict *enough*speech and thus of implicitly favoring one side of the debate. Its proscriptions are more than broad enough to achieve content-neutrality; It bans *all*indecency that might be available to minors. To call this "content-based" is to say that a statute prohibiting extortion is content based because it seeks, on the basis of disfavored content, to prevent the extortionist from making his demand to the potential victim. In sum, the CDA is merely a content-neutral measure which seeks to channel indecent speech away from juveniles. At most we should apply an intermediate standard of review.

II

As a Pervasive and Invasive Medium, the Internet Is Subject to a Relaxed Standard of Review

Assuming, *arguendo*, that the CDA is content-based, it is nevertheless subject only to a relaxed standard of review because it regulates a medium, the Internet, which shares the essential legal characteristics of the broadcast medium. While the millennial technophiliacs whose testimony has been entered into the record presented the Internet as an entirely new medium of expression, it is of course just another method of communication -- no different than a television or radio.

One of the most distressing aspects of the Un-Court's opinion, is that they have apparently been carried away by the enthusiastic burbling of the Internet's

defenders. In fact, of course, the Internet is a shallow and unreliable electronic repository of dirty pictures, inaccurate rumors, bad spelling and worse grammar, inhabited largely by people with no demonstrable social skills. To romanticize this medium -- as JUSTICE Un-SOUTER does -- is bad enough. The CONCURRENCE's starry-eyed images of Alexander Hamilton downloading the work of the anti-Federalists are simply embarrassing. The Internet is nothing new, and reading "Dilbert" on a computer screen is not a revolution in communications technology. In fact, to use the memorable definition of television offered by a prior chair of the FCC, the Internet is "just another appliance. It's a toaster with pictures."(17)

The extent to which the First Amendment does allow some, narrowly tailored, restrictions on speech is determined in large part by the medium, time and location of the affected speech. *See Talley v. California*, 362 U.S. 60 (1960) (Handbills as medium); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (Broadcast television as medium); *Young v. American Mini Theaters, Inc.*, 429 U.S. 873 (1976) (Theater as location); *FCC v. Pacifica Foundation*, 439 U.S. 883 (1978) (Radio as medium, private home as location and early afternoon as time); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989) (Telephone as medium with discussion time and place considerations); and, *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622 (1994)

True, this Court has recognized the importance of the special problems presented by various media of expression for First Amendment analysis. However, the same basic rules apply -- at least once one moves beyond the newspaper broadsheet. While, the amount of protection applicable to each medium has changed as technology develops, a foul word spoken or an indecent image displayed on a television screen via the airwaves, on cable TV or over the telephone, is not so very different than the same promulgated on the World Wide Web.(18)

More specifically, the Internet requires the same special consideration set forth in our decision in *Pacifica*: "1) child[ren] have access to radios [and computers] and in many cases are unsupervised by parents; 2) radio receivers [and computers] are in the home, a place where people's privacy interest is entitled to extra deference....; 3) unconsenting adults may tune in a station [or access a Internet site] without any warning that offensive language is being or will be broadcast."(19)

Appellees urge that *Pacifica* is limited to its facts because the Internet is a wholly different medium and should be evaluated by different standards. I am, and this Court should be, loath to cast away the First Amendment jurisprudence of the past two centuries by balkanizing each new technology, providing each with it own rules. This approach would destroy our First Amendment jurisprudence by requiring a degree of specificity for levels of protection which would be

unadministratable and, at the same time, easily circumvented. I throw the majority's facile catch phrase back at them; "Liberty finds no refuge in a jurisprudence of doubt." *Planned Parenthood v. Casey*, 112 S. Ct. 2791. JUSTICE O"CONNOR.
Worse still, if we take the majority's approach seriously, every technological change in communication and content-filtering technologies could trigger a corresponding change in the level of scrutiny to be applied and the constitutionality of present and past statutes; our laws would pop in and out of constitutional existence as technology marched forward. (Charles Nesson & David Marglin, *The Day the Internet Met the First Amendment: Time and the Communications Decency Act* 10 Harvard Journal of Law and Technology 113, 125-130 (1996).) Our approach must be a simpler one.

Is the Internet, like television and radio, an invasive medium with an impact on children, such that we must apply the lower standard of review applied to TV and radio? *Pacifica* specifically emphasizes, in oft-quoted language,[(20)] that television and radio could be regulated more strictly because of their "uniquely pervasive" nature and the fact that they are "uniquely accessible to children, even those too young to read." 438 U.S. at 748-49. Is the Internet as per- and in- vasive as the broadcast? The answer, I think, that it is already invasive and *is becoming more so.* As the lower court recognized in its findings, methods of communication over the Internet are "constantly evolving." Indeed, I would say that the lower court's decision has already been outstripped by the ongoing advancement of technology. Since the decision of the lower court, the computer industry and TV broadcasters agreed upon a common technology standard which will allow use of the Internet on television.[(21)] This makes the medium even more accessible to children[(22)] and reinforces the analogy between the Internet and the broadcast medium, *supra.*

The Internet pervades our lives both in type and frequency of use. While a broadcast television viewer may use television as her primary sources of both news and entertainment; she will generally not use it for personal communication, shopping(?), substantive education, job-searching, research, or any of a myriad of other pursuits which are now available on the Internet. While the ability to order a pizza (http://www.pizzahut.com:80/) online does not a pervasive technology make, it does help demonstrate the level to which the Internet has penetrated America's homes.[(23)]Though estimates vary widely, one estimate placed the number of Internet users in the United States in early 1995 at 30-40 million with extraordinary growth rates.

Significantly, the so-called "Push technology" which has been hailed as the "next generation" of software, actually sends materials directly to a user without the user even requesting it.[(24)]Nothing epitomizes the "unwilling" or "captive" audience more than the discovery of unwanted indecent or patently offensive material in one's e-mail, or finding such material suddenly displayed on one's television via the Internet. [(25)] As this Court stated in *Rowan v. Post Office Dept.*, "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only the public, but also in the privacy of the home, where the individual right to be left alone plainly outweighs the

First Amendment rights of an intruder. 397 U.S. 728 ( ). Even in the context of searches performed on the World Wide Web, the youthful user could be confronted with indecent material. Imagine, if you will, an Internet search by a fifth-grader on the book title *Of Human Bondage*, or *Little Women*. Such a search might produce indecent and patently offensive information of the kind that "enlarges] a child's vocabulary [or eyes] in an instant." *Pacifica* at 3040. Regarding the government's interest in protecting children, *seeGinsberg v. New York*, 390 U.S. 629 ( ); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 ( ); *Young v. American Mini Theatres, Inc.*, 96 S.Ct.2440 (1976).

It is significant that the tendentious findings of fact from the three judge panel below make much -- when it suits them -- of the fact that the Internet is not one medium but many. Yet the three judge panel and the Majority fall strangely silent when it comes to play this insight out. E-mail messages, Push and Cybercast technology on the World Wide Web, listservs and so on, can all confront their users with material that has not been requested and that is unidentifiable until read or viewed. This is the classic definition of an invasive, pervasive medium, yet strangely the court below scurries quickly back to a simple homologized and undifferentiated image of the traditional use of the World Wide Web to download images and pictures. But this, as the court below pointed out, is merely one use of the Internet, and not the most common even now. The majority cannot have its cake and eat it too. If it wishes to stress the technical differences between different uses of the Internet when the issue is the workability of blocking software, it cannot thereafter return to the image that the World Wide Web *is* the Internet.

The Internet enters the home and can confront the "most tender" viewer with content that is unsought and unwelcome. Thus it is protected only by the relaxed standard we have applied to the broadcast medium.

III

The CDA Passes Strict Scrutiny

In parts I and II of this dissent, it was established that the majority erred in its selection of the standard of First Amendment review. Nevertheless, even under the majority's choice of strict scrutiny, the CDA passes muster; it is the least restrictive means to achieve the compelling governmental interest in protecting minors from indecent material.

A.) Facial Challenges, Overbreadth and Vagueness

The majority seems to collapse the analysis of "least restrictive means" into a discussion of overbreadth and I will reluctantly follow suit. As the majority correctly notes, a statute is overbroad if, in addition to proscribing activities which may constitutionally be forbidden, it also sweeps within its coverage speech or conduct which is protected by "the freedom of speech." Using this

well established rule, the majority concludes that the Communications Decency Act (CDA) unconstitutionally pulls protected speech into ambit because: (1) the restrictions of the CDA violate the First Amendment right of adults to disseminate sexually explicit material to other adults; and (2) the safe harbor defenses offered by the CDA are insufficient to allow adults to engage in protected, indecent speech while channeling that speech away from children.

I find the majority's analysis to be glaringly incomplete and inapposite to the current state of technology on the Internet. First, the majority does not properly apply the law this court has established on facial challenges to criminal statutes. Second, the majority misunderstands the blocking and filtering technologies currently available on the Internet. These pivotal mistakes are the keys to the majority's erroneous overbreadth analysis.

i.) Facial Challenge

The present case involves a facial challenge of the Communications Decency Act. It is settled law that the Court has an obligation to interpret a statute in such a way as to make it constitutional, wherever possible. The majority today makes much of a supposed exception to this principle where First Amendment issues are at stake. It is true that this Court has on past occasion relaxed the rules of *standing* (and stretched the bounds of Article 3) so as to allow even those whose speech was unprotected to challenge a statute if its application would chill the (protected) speech of others not then before the court. *See Broadrick v. Oklahoma*, 413 U.S. 601, 611-614, 93 S.Ct. 2908, 2915-2917, 37 L. Ed.2d 830. But as we were careful to note in *Young v. American Mini-Theaters*, firm limits are placed on this "exception."

The exception is justified by the overriding importance of maintaining a free and open market for the interchange of ideas. Nevertheless, if the statute's deterrent effect on legitimate expression is not "both real and substantial," and if the statute is "readily subject to a narrowing construction by the state courts," *see Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216, 95 S.Ct. 2268, 2276, 45 L. Ed.2d 125, the litigant is not permitted to assert the rights of third parties.. As already noted, the only vagueness in the ordinances relates to the amount of sexually explicit activity that may be portrayed before the material can be said to "characterized by an emphasis" on such matter. For most films the question will be readily answerable; to the extent that an area of doubt exists, we see no reason why the ordinances are not "readily subject to a narrowing construction by the state courts." Since there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance, and since the limited amount of uncertainty in the ordinances is easily susceptible of a narrowing construction, we think this is an inappropriate case in which to adjudicate the hypothetical claims of persons not before the Court.

What goes for our duties to interpret statutes when the issue is standing to *bring* facial challenges, goes here, surely, for the question of whether this facial challenge *succeeds*. Without waiting to see if the CDA would in fact be interpreted and applied in an overbroad manner, in other words

without waiting to see whether the statute -- as reasonably interpreted -- would be the least restrictive means to address the compelling state interest, the majority declares it unconstitutional. "The limited amount of uncertainty in the [CDA] is easily susceptible to a narrowing construction."

ii.) Vagueness:

The same argument must surely be applied to the majority's analysis of the statute's vagueness. Yet the majority mysteriously claims that this statute -- a statute that carefully uses well-known standards repeatedly upheld by this court -- is *on its face* void for vagueness under the Fifth and First Amendment. Compare this to our holding in *Pacifica*

It is true that the Commission's order may lead some broadcasters to censor themselves. At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern. *Cf. Bates v. State Bar of Arizona*, 433 U.S. 350, 380-381, 97 S.Ct. 2691, 2707- 2708, 53 L. Ed.2d 810. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61, 96 S.Ct. 2440, 2448, 49 L. Ed.2d 310. The danger dismissed so summarily in *Red Lion*, in contrast, was that broadcasters would respond to the vagueness of the regulations by refusing to present programs dealing with important social and political controversies. Invalidating any rule on the basis of its hypothetical application to situations not before the Court is "strong medicine" to be applied "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830. We decline to administer that medicine to preserve the vigor of patently offensive sexual and excretory speech.

The only way, and I stress that it is the *only* way, that the majority can come to the conclusion they do is by abandoning a line of precedent on which lower courts have relied for decades ("If acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge is not implicit in *Pacifica*, we have misunderstood Higher Authority and welcome correction." *ACT I*, 852 F.2d at 1339-400) and -- worse still --by abdicating their own constitutional responsibility to interfere as little as possible with the work of the legislature.

It is our own constitutional and institutional duty that imposes on us the rule that statutes must be found unconstitutional only where they have no possible saving construction. For reasons that escape me, the court seems willing to consign this principle to the jurisprudential dustbin, (along with *Pacifica*, its progeny, and a variety of other well-settled constitutional doctrines.) I cannot agree. The CDA should stand until the government enforces the statute in an overbroad manner, or until it can be shown that the decisions of the courts and the pattern of enforcement have failed to give the necessary guidance to private parties about the extent of their rights. Until either of those events occur we are constitutionally forbidden from presuming that the state will overstep its bounds in enforcement or the lower courts fail their duties of interpretation.

Further, under the doctrine of narrow statutory interpretation, this Court need not even address any other constitutional issue once the CDA is found to be facially valid. This showing of facial validity has clearly been made by the government in this case. The CDA's indecency restrictions constitutionally advance the government's interests in protecting children while affording significant opportunities for adults to disseminate indecent material to other adults.

To sum up, we have repeatedly held that when the dissemination of indecency to adults poses a substantial risk that children will be exposed to the material, the government may regulate the indecent communications to minimize that exposure. *See FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (upholding an FCC decision that a radio station could be sanctioned for an afternoon broadcast of a comedy routine containing a stream of sexually explicit words because broadcast media have established a uniquely pervasive presence in the lives of all Americans). In *Pacifica*, this Court noted that "patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home." 438 U.S. at 748. Like the inadequacy of prior warnings on the radio, Internet addresses cannot completely protect the browser from unexpected program content uniquely accessible to children. Moreover, just as the FCC may channel indecent broadcasts "to times of day when children most likely would not be exposed to [them]," 438 U.S. at 732-33, Congress may use the CDA to channel indecent communications to places on the Internet where children are unlikely to obtain them.

Furthermore, the government may adopt reasonable channeling schemes to address the effects of sexually explicit communication. *See Young v. American Mini Theaters*, 427 U.S. 50 (1976) (upholding a zoning ordinance that prohibited movie theaters that showed sexually explicit movies from locating within 1000 feet of any similar establishment or within 500 feet of a residential area). In *Young*, a majority of this Court agreed that zoning restrictions on businesses that deal in sexually explicit material are constitutional when they are aimed at the secondary effects of such businesses and when they allow for reasonable alternative avenues of communication. 475 U.S. at 47-50. Just as the city of Detroit could direct adult theaters away from residential neighborhoods, Congress could direct distributors of indecent material away from areas of the Internet that are easily accessible to children.

Under these two principles, the CDA's specific child protection provisions are facially constitutional and neither overbroad nor vague.

B.) Least Restrictive Means: The PICS Irony

Even more important than the majority's incomplete facial challenge analysis, however, is the majority's misinformation regarding the blocking and filtering technologies currently available on the Internet. The majority finds that the commercial software currently available to screen out indecent information on the Internet is insufficient to address the First Amendment issue of protecting children from indecent or patently offensive sexually explicit material, while allowing adults to communicate freely. This contention is incorrect.

The Massachusetts Institute of Technology's World Wide Web Consortium has developed a Platform for Internet Content Selection (PICS). PICS is a technical platform that allows any individual, group, or organization to develop their own rating systems, distribute labels for Internet content, and create label-reading software and services that selectively controls access to Internet content. PICS is a values-neutral system for creating, attaching, and transmitting labels to information on the Internet. The function of PICS is to create the widest variety of rating systems and services, representing a diversity of viewpoints and PICS is currently available on the World Wide Web, free of charge, at http://www/w3.org/pub/WWW/PICS.

Note that PICS allows the generation of multiple rating systems, that it allows both first and third party rating and that it is "trivially" easy to implement -- essentially a matter of embedding the appropriate label or labels in the metafile information of an HTML document. Thus the adult speaker can easily label his speech as potentially indecent, or sexually explicit or what have you, and he is thereby immunized from liability under the CDA. What could be less restrictive? In our prior cases, *Sable*and *Denver Area*, we found statutes had failed to adopt the least restrictive means because they had not adopted available methods of blocking and filtering indecent content, instead resorting to an outright ban on indecent telephone services (*Sable)* or a channel segregation coupled with a requirement that the indecent channel be requested *in writing*(*Denver Area).* In Denver Area we actually mentioned the availability of other technologies such as the V-Chip -- technologies that are actually more restrictive than PICS -- and indicated that mandating these technologies might have been enough to save the statute.

"The law, as recently amended, requires cable operators to "scramble or . . . block" such programming on any (unleased) channel "primarily dedicated to sexually-oriented programming." Telecommunications Act of 1996, §; 05, 110 Stat. 136 (emphasis added). In addition, cable operators must honor a subscriber's request to block any, or all, programs on any channel to which he or she does not wish to subscribe. §; 04, ibid. And manufacturers, in the future, will have to make television sets with a so-called "V-chip"--a device that will be able automatically to identify and block sexually explicit or violent programs. §; 551, id., at 139-142. Although we cannot, and do not, decide whether the new provisions are themselves lawful (a matter not before us), we note that they are significantly less restrictive than the provision here at issue. *Denver Area* at __.

In short, the CDA is not overbroad, nor does it fail the "least restrictive means test," precisely because every Internet browser is presently PICS compliant, or will be soon. The irony is that PICS was originally developed as a way to show that the CDA was unconstitutional because mere private action, without legislative threat, would be enough to protect children from indecency. In fact, however, the availability of PICS makes the CDA *constitutional* because it offers adults an easy, practical and value neutral way to confine their indecent speech to an audience of other

adults. The technology designed to doom the CDA has in fact saved it. The irony is delicious, though it is an irony that I do not expect my Un-BRETHREN to appreciate, or even understand.

Endnotes:

1. The Act does not define "telecommunications device." However the parties responded to the lower court's order of February 27, 1996 to the effect that a modem was a telecommunications device. The CDA contains a puzzlingly worded exception, §; 223(h)(1)(B), that purportedly immunizes an interactive computer service from liability, this exception may have been written merely to provide a narrow immunization to access providers or to service providers such as America Online. In any event the court below held, and we agree, that there is no need to reach this issue of interpretation here.
2. *See generally* The Message in the Medium: The First Amendment on the Information Superhighway, 107 Harv. L. Rev. 1062 (1994) (taking note of Supreme Court's different standards for different media).
3. In *United States v. Bagnell*, the United States District Court for the Southern District of Florida applied community standards of a county. 679 F.2d 826, 836, cert. denied 460 U.S. 1047. In *United States v. Thomas*, the sixth circuit allowed the community standards of a federal district to apply. 74 F.3d 701, 710-11, cert. denied, 117 S.Ct. 74, 136 L. Ed. 2d 33.
4. Justice Holmes' famous Abrams dissent cautioned of the quelling of unpopular speech stating, "... the ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market..." 215 U.S. 616, 630. This court also rejected governmental regulation of newspapers in *Miami Herald Publishing Co. v. Tornillo*finding a Florida law unconstitutional which required newspapers to provide free space for replies from candidates the papers had assailed and noting that such state action would destroy the free market of ideas, particularly the discussion of governmental affairs. 418 U.S. 241, 257, 94 S.Ct. 2831, 2839.
5. *Turner Broadcasting System, Inc., v. Federal Communications Commission*, 492 U.S. 115 (1989); *Sable v. Broadcasting System, Inc., v. Federal Communications Commission*, 114 S. Ct. 2445 (1994).
6. *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931).
7. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J. concurring).
8. *Whitney* at 374.
9. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).
10. *Id.* at 158.
11. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting).
12. See, among many other examples, "Indecent Exposure and Internet," The Plain Dealer, March 15, 1995; "Censoring Cyberspace," The San Francisco Chronicle; Julie Harders, "Censorship in Cyberspace," The Quill, Oct. 1, 1995.
13. At one point, a June 1995 *Time* magazine article was introduced into the record, which reported: "'[The CDA is] a frontal assault on the First Amendment,' says Harvard law professor

Laurence Tribe. Even veteran prosecutors ridicule it. 'It won't pass scrutiny even in misdemeanor court,' says one." 141 Cong. Rec. S9017-02, S9019. The potential constitutional flaws of the CDA were the subject of frequent discussion before Congress. See, e.g., 141 Cong. Rec. S19185 (Dec. 22, 1995) (statement of Sen. Feingold); (142 Cong. Rec. S12042-02 (Sept. 30, 1996) (statement of Sen. Feingold). Perhaps, as Senator Leahy suggested, Congress deliberately passed a flawed statute "for the sake of political posturing." Statement of Senator Leahy on Repealing the Communications Decency Act, Feb. 9, 1996. As the Senator also points out, "such serious questions about the constitutionality of this legislation... [were] raised that a new section was added to speed up judicial review to see if the legislation... [would pass] constitutional muster." *Id.*

14. I say this notwithstanding the strident defense of the Act produced by my Un-brethren Un-SCALIA, Un-REHNQUIST and Un-THOMAS; With the greatest regret I must say that their DISSENT proves a point I had long suspected; our law clerks could produce an argument for any position. There is such a thing as being too clever by half.

15. See generally the discussion of shared responsibility for constitutional interpretation in Bonnie I. Robin-Vergeer's Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act, 69 S. Cal. L. Rev. 589 (1995).

16. In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73, 93 S.Ct. 2628, 2665, 37 L. Ed.2d 446, Mr. Justice Brennan, in a dissent joined by Mr. Justice Stewart and Mr. Justice Marshall, explained his approach to the difficult problem of obscenity under the First Amendment:

"I would hold, therefore, that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents. Nothing in this approach precludes those governments from taking action to serve what may be strong and legitimate interests through regulation of the manner of distribution of sexually oriented material." *Id.*, at 113, 93 S.Ct., at 2662.

17. Bernard D. Nossiter, "Licenses To Coin Money: The F.C.C.'s Big Giveaway Show," 240 Nation 402 (1985) (quoting Mark Fowler, former FCC Chair). Quoted in Cass R. Sunstein, The First Amendment in Cyberspace, 104 Yale L.J. 1757 (1995).

18. While the content of the speech is also of significant import in determining the level to which it is protected, these issues are addressed elsewhere in this dissent.

19. While the fourth element of *Pacifica*, the scarcity of radio spectrum space, is not yet implicated, it may be so in the future if the Net keeps growing at the current speed.

20. *See e.g.*, id at 127.

21. "Compromise Standard OK'd for Digital TV," Nov. 26, 1996, Chi. Trib., at 3.

22. Id

23. In fact many advertisements now include URLs to the websites of the products being advertised.

24. Joan Indiana Rigdon, "Netscape Offers 'Push' Abilities In New Software," Wall St. J., March 10, 1997. *See also*Geoff Nairn, "'Push' Technology," Financial Times, March 5, 1997 (While 'push technology' is not new, its firmer commercial base has caused it to become the prominent software development area.)
25. Software modeled after "PointCast" or similar programs allows "viewers" to receive channels without their actually choosing the "bookmark."
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Reno v. ACLU 117 S. Ct 2329
117 S.Ct. 2329

(Cite as: 117 S.Ct. 2329)

Janet RENO, Attorney General of the United States, et al., Appellants
v.
AMERICAN CIVIL LIBERTIES UNION et al.

No. 96-511.

Supreme Court of the United States

Argued March 19, 1997.

Decided June 26, 1997.

***2334** Justice STEVENS delivered the opinion of the Court.

At issue is the constitutionality of two statutory provisions enacted to protect minors from "indecent" and "patently offensive" communications on the Internet. Notwithstanding the legitimacy and importance of the congressional goal of protecting children from harmful materials, we agree with the three- judge District Court that the statute abridges "the freedom of speech" protected by the First Amendment. [FN1]

FN1. "Congress shall make no law ... abridging the freedom of speech." U.S. Const., Amdt. 1.

I

The District Court made extensive findings of fact, most of which were based on a detailed stipulation prepared by the parties. See 929 F.Supp. 824, 830-849 (E.D.Pa.1996). [FN2] The findings describe the character and the dimensions of the Internet, the availability of sexually explicit material in that medium, and the problems confronting age verification for recipients of Internet communications. Because those findings provide the underpinnings for the legal issues, we begin with a summary of the undisputed facts.

FN2. The Court made 410 findings, including 356 paragraphs of the parties' stipulation and 54 findings based on evidence received in open court. See 929 F.Supp. at 830, n. 9, 842, n. 15.

The Internet

The Internet is an international network of interconnected computers. It is the outgrowth of what began in 1969 as a military program called "ARPANET," [FN3] which was designed to enable computers operated by the military, defense contractors, and universities conducting defense-related research to communicate with one another by redundant channels even if some portions of the network were damaged in a war. While the ARPANET no longer exists, it provided an example for the development of a number of civilian networks that, eventually linking with each other, now enable tens of millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet is "a unique and wholly new medium of worldwide human communication." [FN4]

FN3. An acronym for the network developed by the Advanced Research Project Agency.

FN4. Id., at 844 (finding 81).

The Internet has experienced "extraordinary growth." [FN5] The number of "host" computers--those that store information and relay communications-- increased from about 300 in 1981 to approximately 9,400,000 by the time of the trial in 1996. Roughly 60% of these hosts are located in the United States. About 40 million people used the Internet at the time of trial, a number that is expected to mushroom to 200 million by 1999.

FN5. Id., at 831 (finding 3).

Individuals can obtain access to the Internet from many different sources, generally hosts themselves or entities with a host affiliation. Most colleges and universities provide access for their students and faculty; many corporations provide their employees with access through an office network; many communities and local libraries provide free access; and an increasing number of storefront "computer coffee shops" provide access for a small hourly fee. Several major national "online services" such as America Online, CompuServe, the Microsoft Network, and Prodigy offer access to their own extensive proprietary networks as well as a link to the much larger resources of the Internet. These commercial online services had almost 12 million individual subscribers at the time of trial.

Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely. But, as presently constituted, those most relevant to this case are electronic mail ("e-mail"), automatic mailing list services ("mail exploders," sometimes referred to as "listservs"), "newsgroups," "chat rooms," and the "World Wide Web." All of these methods can be used to transmit text; most can transmit sound, pictures, and moving video images. Taken together, these tools constitute a unique medium--***2335** known to its users as "cyberspace"--located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.

E-mail enables an individual to send an electronic message--generally akin to a note or letter--to another individual or to a group of addressees. The message is generally stored electronically, sometimes waiting for the recipient to check her "mailbox" and sometimes making its receipt known through some type of prompt. A mail exploder is a sort of e-mail group. Subscribers can send messages to a common e-mail address, which then forwards the message to the group's other subscribers. Newsgroups also serve groups of regular participants, but these postings may be read by others as well. There are thousands of such groups, each serving to foster an exchange of information or opinion on a particular topic running the gamut from, say, the music of Wagner to Balkan politics to AIDS prevention to the Chicago Bulls. About 100,000 new messages are posted every day. In most newsgroups, postings are automatically purged at regular intervals. In addition to posting a message that can be read later, two or more individuals wishing to communicate more immediately can enter a chat room to engage in real-time dialogue--in other words, by typing messages to one another that appear almost immediately on the others' computer screens. The District Court found that at any given time "tens of thousands of users are engaging in

conversations on a huge range of subjects." [FN6] It is "no exaggeration to conclude that the content on the Internet is as diverse as human thought." [FN7]

FN6. Id., at 835 (finding 27).

FN7. Id., at 842 (finding 74).

The best known category of communication over the Internet is the World Wide Web, which allows users to search for and retrieve information stored in remote computers, as well as, in some cases, to communicate back to designated sites. In concrete terms, the Web consists of a vast number of documents stored in different computers all over the world. Some of these documents are simply files containing information. However, more elaborate documents, commonly known as Web "pages," are also prevalent. Each has its own address--"rather like a telephone number." [FN8] Web pages frequently contain information and sometimes allow the viewer to communicate with the page's (or "site's") author. They generally also contain "links" to other documents created by that site's author or to other (generally) related sites. Typically, the links are either blue or underlined text--sometimes images.

FN8. Id., at 836 (finding 36).

Navigating the Web is relatively straightforward. A user may either type the address of a known page or enter one or more keywords into a commercial "search engine" in an effort to locate sites on a subject of interest. A particular Web page may contain the information sought by the "surfer," or, through its links, it may be an avenue to other documents located anywhere on the Internet. Users generally explore a given Web page, or move to another, by clicking a computer "mouse" on one of the page's icons or links. Access to most Web pages is freely available, but some allow access only to those who have purchased the right from a commercial provider. The Web is thus comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.

From the publishers' point of view, it constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can "publish" information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals. [FN9] Publishers may either ***2336** make their material available to the entire pool of Internet users, or confine access to a selected group, such as those willing to pay for the privilege. "No single organization controls any membership in the Web, nor is there any centralized point from which individual Web sites or services can be blocked from the Web." [FN10]

FN9. "Web publishing is simple enough that thousands of individual users and small community organizations are using the Web to publish their own personal 'home pages,' the equivalent of individualized newsletters about the person or organization, which are available to everyone on the Web." Id., at 837 (finding 42).

FN10. Id., at 838 (finding 46).

Sexually Explicit Material

Sexually explicit material on the Internet includes text, pictures, and chat and "extends from the modestly titillating to the hardest-core." [FN11] These files are created, named, and posted in the same manner as material that is not sexually explicit, and may be accessed either deliberately or unintentionally during the course of an imprecise search. "Once a provider posts its content on the Internet, it cannot prevent that content from entering any community." [FN12] Thus, for example,

FN11. Id., at 844 (finding 82).

FN12. Ibid. (finding 86).

> "when the UCR/California Museum of Photography posts to its Web site nudes by Edward Weston and Robert Mapplethorpe to announce that its new exhibit will travel to Baltimore and New York City, those images are available not only in Los Angeles, Baltimore, and New York City, but also in Cincinnati, Mobile, or Beijing--wherever Internet users live. Similarly, the safer sex instructions that Critical Path posts to its Web site, written in street language so that the teenage receiver can understand them, are available not just in Philadelphia, but also in Provo and Prague." [FN13]

FN13. Ibid. (finding 85).

Some of the communications over the Internet that originate in foreign countries are also sexually explicit. [FN14]

FN14. Id., at 848 (finding 117).

Though such material is widely available, users seldom encounter such content accidentally. "A document's title or a description of the document will usually appear before the document itself ... and in many cases the user will receive detailed information about a site's content before he or she need take the step to access the document. Almost all sexually explicit images are preceded by warnings as to the content." [FN15] For that reason, the "odds are slim" that a user would enter a sexually explicit site by accident. [FN16] Unlike communications received by radio or television, "the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended." [FN17]

FN15. Id., at 844-845 (finding 88).

FN16. Ibid.

FN17. Id., at 845 (finding 89).

Systems have been developed to help parents control the material that may be available on a home computer with Internet access. A system may either limit a computer's access to an approved list of sources that have been identified as containing no adult material, it may block designated inappropriate sites, or it may attempt to block messages containing identifiable objectionable features. "Although parental control software currently can screen for certain suggestive words or for known sexually explicit sites, it cannot now screen for sexually explicit images." [FN18] Nevertheless, the evidence indicates that "a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be available." [FN19]

FN18. Id., at 842 (finding 72).

FN19. Ibid. (finding 73).

Age Verification

The problem of age verification differs for different uses of the Internet. The District Court categorically determined that there "is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups ***2337** or chat rooms." [FN20] The Government offered no evidence that there was a reliable way to screen recipients and participants in such fora for age. Moreover, even if it were technologically feasible to block minors' access to newsgroups and chat rooms containing discussions of art, politics or other subjects that potentially elicit "indecent" or "patently offensive" contributions, it would not be possible to block their access to that material and "still allow them access to the remaining content, even if the overwhelming majority of that content was not indecent." [FN21]

FN20. Id., at 845 (finding 90): "An e-mail address provides no authoritative information about the addressee, who may use an e-mail 'alias' or an anonymous remailer. There is also no universal or reliable listing of e-mail addresses and corresponding names or telephone numbers, and any such listing would be or rapidly become incomplete. For these reasons, there is no reliable way in many instances for a sender to know if the e-mail recipient is an adult or a minor. The difficulty of e-mail age verification is compounded for mail exploders such as listservs, which automatically send information to all e-mail addresses on a sender's list. Government expert Dr. Olsen agreed that no current technology could give a speaker assurance that only adults were listed in a particular mail exploder's mailing list."

FN21. Ibid. (finding 93).

Technology exists by which an operator of a Web site may condition access on the verification of requested information such as a credit card number or an adult password. Credit card verification is only feasible, however, either in connection with a commercial transaction in which the card is used, or by payment to a verification agency. Using credit card possession as a surrogate for proof of age would impose costs on non-commercial Web sites that would require many of them to shut down. For that reason, at the time of the trial, credit card verification was "effectively unavailable to a substantial number of Internet content providers." Id., at 846 (finding 102). Moreover, the imposition of such a requirement "would completely bar adults who do not have a credit card and lack the resources to obtain one from accessing any blocked material." [FN22]

FN22. Id., at 846 (finding 102).

Commercial pornographic sites that charge their users for access have assigned them passwords as a method of age verification. The record does not contain any evidence concerning the reliability of these technologies. Even if passwords are effective for commercial purveyors of indecent

material, the District Court found that an adult password requirement would impose significant burdens on noncommercial sites, both because they would discourage users from accessing their sites and because the cost of creating and maintaining such screening systems would be "beyond their reach." [FN23]

FN23. Id., at 847 (findings 104-106):

"At least some, if not almost all, non-commercial organizations, such as the ACLU, Stop Prisoner Rape or Critical Path AIDS Project, regard charging listeners to access their speech as contrary to their goals of making their materials available to a wide audience free of charge.

. . . . .

"There is evidence suggesting that adult users, particularly casual Web browsers, would be discouraged from retrieving information that required use of a credit card or password. Andrew Anker testified that HotWired has received many complaints from its members about HotWired's registration system, which requires only that a member supply a name, e-mail address and self-created password. There is concern by commercial content providers that age verification requirements would decrease advertising and revenue because advertisers depend on a demonstration that the sites are widely available and frequently visited."

In sum, the District Court found:

"Even if credit card verification or adult password verification were implemented, the Government presented no testimony as to how such systems could ensure that the user of the password or credit card is in fact over 18. The burdens imposed by credit card verification and adult password verification systems make them effectively unavailable to a substantial number of Internet content providers." Ibid. (finding 107).

II

The Telecommunications Act of 1996, Pub.L. 104-104, 110 Stat. 56, was an unusually important legislative enactment. As stated on the first of its 103 pages, its primary purpose was to reduce regulation and encourage "***2338** the rapid deployment of new telecommunications technologies." The major components of the statute have nothing to do with the Internet; they were designed to promote competition in the local telephone service market, the multichannel video market, and the market for over-the-air broadcasting. The Act includes seven Titles, six of which are the product of extensive committee hearings and the subject of discussion in Reports prepared by Committees of the Senate and the House of Representatives. By contrast, Title V--known as the "Communications Decency Act of 1996" (CDA)--contains provisions that were either added in executive committee after the hearings were concluded or as amendments offered during floor debate on the legislation. An amendment offered in the Senate was the source of the two statutory provisions challenged in this case. [FN24] They are informally described as the "indecent transmission" provision and the "patently offensive display" provision. [FN25]

FN24. See Exon Amendment No. 1268, 141 Cong. Rec. S8120 (June 9, 1995). See also id., at S8087. This amendment, as revised, became § 502 of the Communications Act of 1996, 110 Stat. 133, 47 U.S.C.A. §§ 223(a)-(e) (Supp.1997). Some Members of the House of Representatives opposed the Exon Amendment because they thought it "possible for our parents now to child-proof the family computer with these products available in the private sector." They also thought the Senate's approach would "involve the Federal Government spending vast sums of money trying to define elusive terms that are going to lead to a flood of legal challenges while our kids are unprotected." These Members offered an amendment intended as a substitute for the Exon Amendment, but instead enacted as an additional section of the Act entitled "Online Family Empowerment." See 110 Stat. 137, 47 U.S.C.A. § 230 (Supp.1997); 141 Cong. Rec. H8468-H8472. No hearings were held on the provisions that became law. See S.Rep. No. 104-23 (1995), p. 9. After the Senate adopted the Exon amendment, however, its Judiciary Committee did conduct a one-day hearing on "Cyberporn and Children." In his opening statement at that hearing, Senator Leahy observed:

"It really struck me in your opening statement when you mentioned, Mr. Chairman, that it is the first ever hearing, and you are absolutely right. And yet we had a major debate on the floor, passed legislation overwhelmingly on a subject involving the Internet, legislation that could dramatically change--some would say even wreak havoc--on the Internet. The Senate went in willy-nilly, passed legislation, and never once had a hearing, never once had a discussion other than an hour or so on the floor." Cyberporn and Children: The Scope of the Problem, The State of the Technology, and the Need for Congressional Action, Hearing on S. 892 before the Senate Committee on the Judiciary, 104th Cong., 1st Sess., 7-8 (1995).

FN25. Although the Government and the dissent break § 223(d)(1) into two separate "patently offensive" and "display" provisions, we follow the convention of both parties below, as well the District Court's order and opinion, in describing § 223(d)(1) as one provision.

The first, 47 U.S.C.A. § 223(a) (Supp.1997), prohibits the knowing transmission of obscene or indecent messages to any recipient under 18 years of age. It provides in pertinent part:

"(a) Whoever--

"(1) in interstate or foreign communications--

. . . . .

"(B) by means of a telecommunications device knowingly--

"(i) makes, creates, or solicits, and

"(ii) initiates the transmission of,

"any comment, request, suggestion, proposal, image, or other communication

which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;

. . . . .

"(2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity,

"shall be fined under Title 18, or imprisoned not more than two years, or both."

The second provision, § 223(d), prohibits the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age. It provides:

"(d) Whoever--

"(1) in interstate or foreign communications knowingly--

***2339** "(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

"(B) uses any interactive computer service to display in a manner available to a person under 18 years of age,

"any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or

"(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity,

"shall be fined under Title 18, or imprisoned not more than two years, or both."

The breadth of these prohibitions is qualified by two affirmative defenses. See § 223(e)(5). [FN26] One covers those who take "good faith, reasonable, effective, and appropriate actions" to restrict access by minors to the prohibited communications. § 223(e)(5)(A). The other covers those who restrict access to covered material by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number or code. § 223(e)(5)(B).

FN26. In full, § 223(e)(5) provides:

"(5) It is a defense to a prosecution under subsection (a)(1)(B) or (d) of this section, or under subsection (a)(2) of this section with respect to the use of a facility for an activity under subsection (a)(1)(B) of this section that a person--

"(A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or

"(B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number."

III

On February 8, 1996, immediately after the President signed the statute, 20 plaintiffs [FN27] filed suit against the Attorney General of the United States and the Department of Justice challenging the constitutionality of §§ 223(a)(1) and 223(d). A week later, based on his conclusion that the term "indecent" was too vague to provide the basis for a criminal prosecution, District Judge Buckwalter entered a temporary restraining order against enforcement of § 223(a)(1)(B)(ii) insofar as it applies to indecent communications. A second suit was then filed by 27 additional plaintiffs, [FN28] the two cases were consolidated, and a three-judge District Court was convened pursuant to § 561 of the Act. [FN29] After an evidentiary hearing, that Court entered a preliminary injunction against enforcement of both of the challenged provisions. Each of the three judges wrote a separate opinion, but their judgment was unanimous.

FN27. American Civil Liberties Union; Human Rights Watch; Electronic Privacy Information Center; Electronic Frontier Foundation; Journalism Education Association; Computer Professionals for Social Responsibility; National Writers Union; Clarinet Communications Corp.; Institute for Global Communications; Stop Prisoner Rape; AIDS Education Global Information System; Bibliobytes; Queer Resources Directory; Critical Path AIDS Project, Inc.; Wildcat Press, Inc.; Declan McCullagh dba Justice on Campus; Brock Meeks dba Cyberwire Dispatch; John Troyer dba The Safer Sex Page; Jonathan Wallace dba The Ethical Spectacle; and Planned Parenthood Federation of America, Inc.

FN28. American Library Association; America Online, Inc.; American Booksellers Association, Inc.; American Booksellers Foundation for Free Expression; American Society of Newspaper Editors; Apple Computer, Inc.; Association of American Publishers, Inc.; Association of Publishers, Editors and Writers; Citizens Internet Empowerment Coalition; Commercial Internet Exchange Association; CompuServe Incorporated; Families Against Internet Censorship; Freedom to Read Foundation, Inc.; Health Sciences Libraries Consortium; Hotwired Ventures LLC; Interactive Digital Software Association; Interactive Services Association; Magazine Publishers of America; Microsoft Corporation; The Microsoft Network, L.L. C.; National Press Photographers Association; Netcom On-Line Communication Services, Inc.; Newspaper Association of America; Opnet, Inc.; Prodigy Services Company; Society of Professional Journalists; Wired Ventures, Ltd.

FN29. 110 Stat. 142-143, note following 47 U.S.C.A. § 223 (Supp.1997).

***2340** Chief Judge Sloviter doubted the strength of the Government's interest in regulating "the vast range of online material covered or potentially covered by the CDA," but acknowledged that the interest was "compelling" with respect to some of that material. 929 F.Supp., at 853. She

concluded, nonetheless, that the statute "sweeps more broadly than necessary and thereby chills the expression of adults" and that the terms "patently offensive" and "indecent" were "inherently vague." Id., at 854. She also determined that the affirmative defenses were not "technologically or economically feasible for most providers," specifically considering and rejecting an argument that providers could avoid liability by "tagging" their material in a manner that would allow potential readers to screen out unwanted transmissions. Id., at 856. Chief Judge Sloviter also rejected the Government's suggestion that the scope of the statute could be narrowed by construing it to apply only to commercial pornographers. Id., at 854-855.

Judge Buckwalter concluded that the word "indecent" in § 223(a)(1)(B) and the terms "patently offensive" and "in context" in § 223(d)(1) were so vague that criminal enforcement of either section would violate the "fundamental constitutional principle" of "simple fairness," id., at 861, and the specific protections of the First and Fifth Amendments, id., at 858. He found no statutory basis for the Government's argument that the challenged provisions would be applied only to "pornographic" materials, noting that, unlike obscenity, "indecency has not been defined to exclude works of serious literary, artistic, political or scientific value." Id., at 863. Moreover, the Government's claim that the work must be considered patently offensive "in context" was itself vague because the relevant context might "refer to, among other things, the nature of the communication as a whole, the time of day it was conveyed, the medium used, the identity of the speaker, or whether or not it is accompanied by appropriate warnings." Id., at 864. He believed that the unique nature of the Internet aggravated the vagueness of the statute. Id., at 865, n. 9.

Judge Dalzell's review of "the special attributes of Internet communication" disclosed by the evidence convinced him that the First Amendment denies Congress the power to regulate the content of protected speech on the Internet. Id., at 867. His opinion explained at length why he believed the Act would abridge significant protected speech, particularly by noncommercial speakers, while "[p]erversely, commercial pornographers would remain relatively unaffected." Id., at 879. He construed our cases as requiring a "medium- specific" approach to the analysis of the regulation of mass communication, id., at 873, and concluded that the Internet--as "the most participatory form of mass speech yet developed," id., at 883--is entitled to "the highest protection from governmental intrusion," ibid. [FN30]

> FN30. See also 929 F.Supp., at 877: "Four related characteristics of Internet communication have a transcendent importance to our shared holding that the CDA is unconstitutional on its face. We explain these characteristics in our Findings of fact above, and I only rehearse them briefly here. First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers." According to Judge Dalzell, these characteristics and the

> rest of the District Court's findings "lead to the conclusion that Congress may not regulate indecency on the Internet at all." Ibid. Because appellees do not press this argument before this Court, we do not consider it. Appellees also do not dispute that the Government generally has a compelling interest in protecting minors from "indecent" and "patently offensive" speech.

The judgment of the District Court enjoins the Government from enforcing the prohibitions in § 223(a)(1)(B) insofar as they relate to "indecent" communications, but expressly preserves the Government's right to investigate and prosecute the obscenity or child pornography activities prohibited therein. The injunction against enforcement of §§ 223(d)(1) and (2) is unqualified because those provisions contain no separate reference to obscenity or child pornography.

The Government appealed under the Act's special review provisions, § 561, 110 Stat. ***2341** 142-143, and we noted probable jurisdiction, see 519 U.S. ----, 117 S.Ct. 554, 136 L.Ed.2d 436 (1996). In its appeal, the Government argues that the District Court erred in holding that the CDA violated both the First Amendment because it is overbroad and the Fifth Amendment because it is vague. While we discuss the vagueness of the CDA because of its relevance to the First Amendment overbreadth inquiry, we conclude that the judgment should be affirmed without reaching the Fifth Amendment issue. We begin our analysis by reviewing the principal authorities on which the Government relies. Then, after describing the overbreadth of the CDA, we consider the Government's specific contentions, including its submission that we save portions of the statute either by severance or by fashioning judicial limitations on the scope of its coverage.

IV

In arguing for reversal, the Government contends that the CDA is plainly constitutional under three of our prior decisions: (1) Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968); (2) FCC v. Pacifica Foundation, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978); and (3) Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). A close look at these cases, however, raises--rather than relieves--doubts concerning the constitutionality of the CDA.

In Ginsberg, we upheld the constitutionality of a New York statute that prohibited selling to minors under 17 years of age material that was considered obscene as to them even if not obscene as to adults. We rejected the defendant's broad submission that "the scope of the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend on whether the citizen is an adult or a minor." 390 U.S., at 636, 88 S.Ct., at 1279. In rejecting that contention, we relied not only on the State's independent interest in the well-being of its youth, but also on our consistent recognition of the principle that "the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." [FN31]

> FN31. 390 U.S., at 639, 88 S.Ct., at 1280. We quoted from Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645

> (1944): "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."

In four important respects, the statute upheld in Ginsberg was narrower than the CDA. First, we noted in Ginsberg that "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children." Id., at 639, 88 S.Ct., at 1280. Under the CDA, by contrast, neither the parents' consent--nor even their participation-- in the communication would avoid the application of the statute. [FN32] Second, the New York statute applied only to commercial transactions, id., at 647, 88 S.Ct., at 1284-1285, whereas the CDA contains no such limitation. Third, the New York statute cabined its definition of material that is harmful to minors with the requirement that it be "utterly without redeeming social importance for minors." Id., at 646, 88 S.Ct., at 1284. The CDA fails to provide us with any definition of the term "indecent" as used in § 223(a)(1) and, importantly, omits any requirement that the "patently offensive" material covered by § 223(d) lack serious literary, artistic, political, or scientific value. Fourth, the New York statute defined a minor as a person under the age of 17, whereas the CDA, in applying to all those under 18 years, includes an additional year of those nearest majority.

> FN32. Given the likelihood that many E-mail transmissions from an adult to a minor are conversations between family members, it is therefore incorrect for the dissent to suggest that the provisions of the CDA, even in this narrow area, "are no different from the law we sustained in Ginsberg." Post, at 2355.

In Pacifica, we upheld a declaratory order of the Federal Communications Commission, holding that the broadcast of a recording of a 12-minute monologue entitled "Filthy Words" that had previously been delivered to a live audience "could have been the subject of administrative sanctions." 438 U.S., at ***2342** 730, 98 S.Ct., at 3030 (internal quotations omitted). The Commission had found that the repetitive use of certain words referring to excretory or sexual activities or organs "in an afternoon broadcast when children are in the audience was patently offensive" and concluded that the monologue was indecent "as broadcast." Id., at 735, 98 S.Ct., at 3033. The respondent did not quarrel with the finding that the afternoon broadcast was patently offensive, but contended that it was not "indecent" within the meaning of the relevant statutes because it contained no prurient appeal. After rejecting respondent's statutory arguments, we confronted its two constitutional arguments: (1) that the Commission's construction of its authority to ban indecent speech was so broad that its order had to be set aside even if the broadcast at issue was unprotected; and (2) that since the recording was not obscene, the First Amendment forbade any abridgement of the right to broadcast it on the radio.

In the portion of the lead opinion not joined by Justices Powell and Blackmun, the plurality stated that the First Amendment does not prohibit all governmental regulation that depends on the content of speech. Id., at 742- 743, 98 S.Ct., at 3036-3037. Accordingly, the availability of constitutional

protection for a vulgar and offensive monologue that was not obscene depended on the context of the broadcast. Id., at 744-748, 98 S.Ct., at 3037-3040. Relying on the premise that "of all forms of communication" broadcasting had received the most limited First Amendment protection, id., at 748-749, 98 S.Ct., at 3039-3040, the Court concluded that the ease with which children may obtain access to broadcasts, "coupled with the concerns recognized in Ginsberg," justified special treatment of indecent broadcasting. Id., at 749-750, 98 S.Ct., at 3040-3041.

As with the New York statute at issue in Ginsberg, there are significant differences between the order upheld in Pacifica and the CDA. First, the order in Pacifica, issued by an agency that had been regulating radio stations for decades, targeted a specific broadcast that represented a rather dramatic departure from traditional program content in order to designate when--rather than whether--it would be permissible to air such a program in that particular medium. The CDA's broad categorical prohibitions are not limited to particular times and are not dependent on any evaluation by an agency familiar with the unique characteristics of the Internet. Second, unlike the CDA, the Commission's declaratory order was not punitive; we expressly refused to decide whether the indecent broadcast "would justify a criminal prosecution." Id., at 750, 98 S.Ct., at 3041. Finally, the Commission's order applied to a medium which as a matter of history had "received the most limited First Amendment protection," id., at 748, 98 S.Ct., at 3040, in large part because warnings could not adequately protect the listener from unexpected program content. The Internet, however, has no comparable history. Moreover, the District Court found that the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material.

[1] In Renton, we upheld a zoning ordinance that kept adult movie theatres out of residential neighborhoods. The ordinance was aimed, not at the content of the films shown in the theaters, but rather at the "secondary effects"--such as crime and deteriorating property values--that these theaters fostered: " 'It is th[e] secondary effect which these zoning ordinances attempt to avoid, not the dissemination of "offensive" speech.' " 475 U.S., at 49, 106 S.Ct., at 930 (quoting Young v. American Mini Theatres, Inc., 427 U.S. 50, 71, n. 34, 96 S.Ct. 2440, 2453, n. 34, 49 L.Ed.2d 310 (1976)). According to the Government, the CDA is constitutional because it constitutes a sort of "cyberzoning" on the Internet. But the CDA applies broadly to the entire universe of cyberspace. And the purpose of the CDA is to protect children from the primary effects of "indecent" and "patently offensive" speech, rather than any "secondary" effect of such speech. Thus, the CDA is a content-based blanket restriction on speech, and, as such, cannot be "properly analyzed as a form of time, place, and manner regulation." 475 U.S., at 46, 106 S.Ct., at 928. See also Boos v. Barry, 485 U.S. 312, 321, 108 S.Ct. 1157, 1163, 99 L.Ed.2d 333 (1988) ***2343** ("Regulations that focus on the direct impact of speech on its audience" are not properly analyzed under Renton); Forsyth County v. Nationalist Movement, 505 U.S. 123, 134, 112 S.Ct. 2395, 2403, 120 L.Ed.2d 101 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation").

These precedents, then, surely do not require us to uphold the CDA and are fully consistent with the application of the most stringent review of its provisions.

V

In Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557, 95 S.Ct. 1239, 1245-1246, 43 L.Ed.2d 448 (1975), we observed that "[e]ach medium of expression ... may present its own problems." Thus, some of our cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers, see Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969); FCC v. Pacifica Foundation, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978). In these cases, the Court relied on the history of extensive government regulation of the broadcast medium, see, e.g., Red Lion, 395 U.S., at 399-400, 89 S.Ct., at 1811-1812; the scarcity of available frequencies at its inception, see, e.g., Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 637-638, 114 S.Ct. 2445, 2456-2457, 129 L.Ed.2d 497 (1994); and its "invasive" nature, see Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 128, 109 S.Ct. 2829, 2837-2838, 106 L.Ed.2d 93 (1989).

Those factors are not present in cyberspace. Neither before nor after the enactment of the CDA have the vast democratic fora of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry. [FN33] Moreover, the Internet is not as "invasive" as radio or television. The District Court specifically found that "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.' " 929 F.Supp., at 844 (finding 88). It also found that "[a]lmost all sexually explicit images are preceded by warnings as to the content," and cited testimony that " 'odds are slim' that a user would come across a sexually explicit sight by accident." Ibid.

FN33. Cf. Pacifica Foundation v. FCC, 556 F.2d 9, 36 (C.A.D.C.1977) (Levanthal, J., dissenting), rev'd, FCC v. Pacifica Foundation, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978). When Pacifica was decided, given that radio stations were allowed to operate only pursuant to federal license, and that Congress had enacted legislation prohibiting licensees from broadcasting indecent speech, there was a risk that members of the radio audience might infer some sort of official or societal approval of whatever was heard over the radio, see 556 F.2d, at 37, n. 18. No such risk attends messages received through the Internet, which is not supervised by any federal agency.

We distinguished Pacifica in Sable, 492 U.S., at 128, 109 S.Ct., at 2837-2838, on just this basis. In Sable, a company engaged in the business of offering sexually oriented prerecorded telephone messages (popularly known as "dial-a-porn") challenged the constitutionality of an amendment to the Communications Act that imposed a blanket prohibition on indecent as well as obscene interstate commercial telephone messages. We held that the statute was constitutional insofar as it applied to obscene messages but invalid as applied to indecent messages. In attempting to justify the complete ban and criminalization of indecent commercial telephone messages, the Government relied on Pacifica, arguing that the ban was necessary to prevent children from gaining access to such messages. We agreed that "there is a compelling interest in protecting the physical and psychological well-being of

minors" which extended to shielding them from indecent messages that are not obscene by adult standards, 492 U.S., at 126, 109 S.Ct., at 2836-2837, but distinguished our "emphatically narrow holding" in Pacifica because it did not involve a complete ban and because it involved a different medium of communication, id., at 127, 109 S.Ct., at 2837. We explained that "the dial-it medium requires the listener to take affirmative steps to receive the communication." Id., at 127-128, 109 S.Ct., at 2837. "Placing a telephone ***2344** call," we continued, "is not the same as turning on a radio and being taken by surprise by an indecent message." Id., at 128, 109 S.Ct., at 2837.

Finally, unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a "scarce" expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds. The Government estimates that "[a]s many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999." [FN34] This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought." 929 F.Supp., at 842 (finding 74). We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.

> FN34. Juris. Statement 3 (citing 929 F.Supp., at 831 (finding 3)).

VI

Regardless of whether the CDA is so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render it problematic for purposes of the First Amendment. For instance, each of the two parts of the CDA uses a different linguistic form. The first uses the word "indecent," 47 U.S.C.A. § 223(a) (Supp.1997), while the second speaks of material that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," § 223(d). Given the absence of a definition of either term, [FN35] this difference in language will provoke uncertainty among speakers about how the two standards relate to each other [FN36] and just what they mean. [FN37] Could a speaker confidently assume that a serious discussion about birth control practices, homosexuality, the First Amendment issues raised by the Appendix to our Pacifica opinion, or the consequences of prison rape would not violate the CDA? This uncertainty undermines the likelihood that the CDA has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials.

> FN35. "Indecent" does not benefit from any textual embellishment at all. "Patently offensive" is qualified only to the extent that it involves "sexual or excretory activities or organs" taken "in context" and "measured by

contemporary community standards."

FN36. See Gozlon-Peretz v. United States, 498 U.S. 395, 404, 111 S.Ct. 840, 846-847, 112 L.Ed.2d 919 (1991) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion") (internal quotation marks omitted).

FN37. The statute does not indicate whether the "patently offensive" and "indecent" determinations should be made with respect to minors or the population as a whole. The Government asserts that the appropriate standard is "what is suitable material for minors." Reply Brief for Appellants 18, n. 13 (citing Ginsberg v. New York, 390 U.S. 629, 633, 88 S.Ct. 1274, 1276-1277, 20 L.Ed.2d 195 (1968)). But the Conferees expressly rejected amendments that would have imposed such a "harmful to minors" standard. See S. Conf. Rep. No. 104-230, p. 189 (1996) (S.Conf.Rep.), 142 Cong. Rec. H1145, H1165-1166 (Feb. 1, 1996). The Conferees also rejected amendments that would have limited the proscribed materials to those lacking redeeming value. See S. Conf. Rep., at 189, 142 Cong. Rec. H1165-1166 (Feb. 1, 1996).

[2] The vagueness of the CDA is a matter of special concern for two reasons. First, the CDA is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech. See, e.g., Gentile v. State Bar of Nev., 501 U.S. 1030, 1048-1051, 111 S.Ct. 2720, 2731-2733, 115 L.Ed.2d 888 (1991). Second, the CDA is a criminal statute. In addition to the opprobrium and stigma of a criminal conviction, the CDA threatens violators ***2345** with penalties including up to two years in prison for each act of violation. The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images. See, e.g., Dombrowski v. Pfister, 380 U.S. 479, 494, 85 S.Ct. 1116, 1125, 14 L.Ed.2d 22 (1965). As a practical matter, this increased deterrent effect, coupled with the "risk of discriminatory enforcement" of vague regulations, poses greater First Amendment concerns than those implicated by the civil regulation reviewed in Denver Area Ed. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 116 S.Ct. 2374, 135 L.Ed.2d 888 (1996).

The Government argues that the statute is no more vague than the obscenity standard this Court established in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). But that is not so. In Miller, this Court reviewed a criminal conviction against a commercial vendor who mailed brochures containing pictures of sexually explicit activities to individuals who had not requested such materials. Id., at 18, 93 S.Ct., at 2611-2612. Having struggled for some time to establish a definition of obscenity, we set forth in Miller the test for obscenity that controls to this day:

"(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Id., at 24, 93 S.Ct., at 2615 (internal quotation marks and citations omitted).

Because the CDA's "patently offensive" standard (and, we assume arguendo, its synonymous "indecent" standard) is one part of the three-prong Miller test, the Government reasons, it cannot be unconstitutionally vague.

The Government's assertion is incorrect as a matter of fact. The second prong of the Miller test--the purportedly analogous standard--contains a critical requirement that is omitted from the CDA: that the proscribed material be "specifically defined by the applicable state law." This requirement reduces the vagueness inherent in the open-ended term "patently offensive" as used in the CDA. Moreover, the Miller definition is limited to "sexual conduct," whereas the CDA extends also to include (1) "excretory activities" as well as (2) "organs" of both a sexual and excretory nature.

The Government's reasoning is also flawed. Just because a definition including three limitations is not vague, it does not follow that one of those limitations, standing by itself, is not vague. [FN38] Each of Miller 's additional two prongs--(1) that, taken as a whole, the material appeal to the "prurient" interest, and (2) that it "lac[k] serious literary, artistic, political, or scientific value"--critically limits the uncertain sweep of the obscenity definition. The second requirement is particularly important because, unlike the "patently offensive" and "prurient interest" criteria, it is not judged by contemporary community standards. See Pope v. Illinois, 481 U.S. 497, 500, 107 S.Ct. 1918, 1920-1921, 95 L.Ed.2d 439 (1987). This "societal value" requirement, absent in the CDA, allows appellate courts to impose some limitations and regularity on the definition by setting, as a matter of law, a national floor for socially redeeming value. The Government's contention that courts will be able to give such legal limitations to the CDA's standards is belied by Miller 's own rationale for having juries determine whether material is "patently offensive" according to community standards: that such questions are essentially ones of fact. [FN39]

FN38. Even though the word "trunk," standing alone, might refer to luggage, a swimming suit, the base of a tree, or the long nose of an animal, its meaning is clear when it is one prong of a three-part description of a species of gray animals.

FN39. 413 U.S., at 30, 93 S.Ct., at 2618 (Determinations of "what appeals to the 'pruri ent interest' or is 'patently offensive' .... are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists"). The CDA, which implements the "contemporary community standards" language of Miller, thus conflicts with the Conferees' own assertion that the CDA was intended "to establish a

uniform national standard of content regulation." S. Conf. Rep., at 191.

***2346** In contrast to Miller and our other previous cases, the CDA thus presents a greater threat of censoring speech that, in fact, falls outside the statute's scope. Given the vague contours of the coverage of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional protection. That danger provides further reason for insisting that the statute not be overly broad. The CDA's burden on protected speech cannot be justified if it could be avoided by a more carefully drafted statute.

VII

We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.

[3] In evaluating the free speech rights of adults, we have made it perfectly clear that "[s]exual expression which is indecent but not obscene is protected by the First Amendment." Sable, 492 U.S., at 126, 109 S.Ct., at 2836. See also Carey v. Population Services Int'l, 431 U.S. 678, 701, 97 S.Ct. 2010, 2024, 52 L.Ed.2d 675 (1977) ("[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression"). Indeed, Pacifica itself admonished that "the fact that society may find speech offensive is not a sufficient reason for suppressing it." 438 U.S., at 745, 98 S.Ct., at 3038.

[4] It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. See Ginsberg, 390 U.S., at 639, 88 S.Ct., at 1280; Pacifica, 438 U.S., at 749, 98 S.Ct., at 3040. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults. As we have explained, the Government may not "reduc[e] the adult population ... to ... only what is fit for children." Denver, 518 U.S., at ----, 116 S.Ct., at 2393 (internal quotation marks omitted) (quoting Sable, 492 U.S., at 128, 109 S.Ct., at 2837-2838). [FN40] "[R]egardless of the strength of the government's interest" in protecting children, "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 74-75, 103 S.Ct. 2875, 2884-2885, 77 L.Ed.2d 469 (1983).

FN40. Accord, Butler v. Michigan, 352 U.S. 380, 383, 77 S.Ct. 524, 525- 526, 1 L.Ed.2d 412 (1957) (ban on sale to adults of books deemed harmful to children unconstitutional); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 128, 109 S.Ct. 2829, 2837-2838, 106 L.Ed.2d 93 (1989) (ban on "dial-a-porn" messages unconstitutional); Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 73, 103 S.Ct. 2875, 2883-2884, 77 L.Ed.2d 469 (1983) (ban on mailing of unsolicited advertisement for

> contraceptives unconstitutional).

[5] The District Court was correct to conclude that the CDA effectively resembles the ban on "dial-a-porn" invalidated in Sable. 929 F.Supp., at 854. In Sable, 492 U.S., at 129, 109 S.Ct., at 2838, this Court rejected the argument that we should defer to the congressional judgment that nothing less than a total ban would be effective in preventing enterprising youngsters from gaining access to indecent communications. Sable thus made clear that the mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into its validity. [FN41] As we pointed out last Term, that ***2347** inquiry embodies an "over-arching commitment" to make sure that Congress has designed its statute to accomplish its purpose "without imposing an unnecessarily great restriction on speech." Denver, 518 U.S., at ----, 116 S.Ct., at 2385.

> FN41. The lack of legislative attention to the statute at issue in Sable suggests another parallel with this case. Compare 492 U.S., at 129-130, 109 S.Ct., at 2838 ("[A]side from conclusory statements during the debates by proponents of the bill, as well as similar assertions in hearings on a substantially identical bill the year before, ... the congressional record presented to us contains no evidence as to how effective or ineffective the FCC's most recent regulations were or might prove to be.... No Congressman or Senator purported to present a considered judgment with respect to how often or to what extent minors could or would circumvent the rules and have access to dial-a-porn messages") with n. 24, supra.

[6] In arguing that the CDA does not so diminish adult communication, the Government relies on the incorrect factual premise that prohibiting a transmission whenever it is known that one of its recipients is a minor would not interfere with adult-to-adult communication. The findings of the District Court make clear that this premise is untenable. Given the size of the potential audience for most messages, in the absence of a viable age verification process, the sender must be charged with knowing that one or more minors will likely view it. Knowledge that, for instance, one or more members of a 100-person chat group will be minor--and therefore that it would be a crime to send the group an indecent message--would surely burden communication among adults. [FN42]

> FN42. The Government agrees that these provisions are applicable whenever "a sender transmits a message to more than one recipient, knowing that at least one of the specific persons receiving the message is a minor." Opposition to Motion to Affirm and Reply to Juris. Statement 4-5, n. 1.

The District Court found that at the time of trial existing technology did not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying access to adults. The Court found no effective way to determine the age of a

user who is accessing material through e-mail, mail exploders, newsgroups, or chat rooms. 929 F.Supp., at 845 (findings 90-94). As a practical matter, the Court also found that it would be prohibitively expensive for noncommercial--as well as some commercial--speakers who have Web sites to verify that their users are adults. Id., at 845-848 (findings 95-116). [FN43] These limitations must inevitably curtail a significant amount of adult communication on the Internet. By contrast, the District Court found that "[d]espite its limitations, currently available user-based software suggests that a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be widely available." Id., at 842 (finding 73) (emphases added).

> FN43. The Government asserts that "[t]here is nothing constitutionally suspect about requiring commercial Web site operators ... to shoulder the modest burdens associated with their use." Brief for Appellants 35. As a matter of fact, however, there is no evidence that a "modest burden" would be effective.

The breadth of the CDA's coverage is wholly unprecedented. Unlike the regulations upheld in Ginsberg and Pacifica, the scope of the CDA is not limited to commercial speech or commercial entities. Its open-ended prohibitions embrace all nonprofit entities and individuals posting indecent messages or displaying them on their own computers in the presence of minors. The general, undefined terms "indecent" and "patently offensive" cover large amounts of nonpornographic material with serious educational or other value. [FN44] Moreover, the "community standards" criterion as applied to the Internet means that any communication available to a nation-wide audience will be judged by the standards of the community most likely to be offended by the message. [FN45] The regulated subject matter includes ***2348** any of the seven "dirty words" used in the Pacifica monologue, the use of which the Government's expert acknowledged could constitute a felony. See Olsen Test., Tr. Vol. V, 53:16-54:10. It may also extend to discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalogue of the Carnegie Library.

> FN44. Transmitting obscenity and child pornography, whether via the Internet or other means, is already illegal under federal law for both adults and juveniles. See 18 U.S.C. §§ 1464-1465 (criminalizing obscenity); § 2251 (criminalizing child pornography). In fact, when Congress was considering the CDA, the Government expressed its view that the law was unnecessary because existing laws already authorized its ongoing efforts to prosecute obscenity, child pornography, and child solicitation. See 141 Cong. Rec. S8342 (June 14, 1995) (letter from Kent Markus, Acting Assistant Attorney General, U.S. Department of Justice, to Sen. Leahy).
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> FN45. Citing Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993), among other cases, appellees offer an additional reason why, in their view, the CDA fails strict scrutiny. Because so much sexually

> explicit content originates overseas, they argue, the CDA cannot be "effective." Brief for Appellees American Library Association et al. 33-34. This argument raises difficult issues regarding the intended, as well as the permissible scope of, extraterritorial application of the CDA. We find it unnecessary to address those issues to dispose of this case.

For the purposes of our decision, we need neither accept nor reject the Government's submission that the First Amendment does not forbid a blanket prohibition on all "indecent" and "patently offensive" messages communicated to a 17-year old--no matter how much value the message may contain and regardless of parental approval. It is at least clear that the strength of the Government's interest in protecting minors is not equally strong throughout the coverage of this broad statute. Under the CDA, a parent allowing her 17-year- old to use the family computer to obtain information on the Internet that she, in her parental judgment, deems appropriate could face a lengthy prison term. See 47 U.S.C.A. § 223(a)(2) (Supp.1997). Similarly, a parent who sent his 17-year-old college freshman information on birth control via e-mail could be incarcerated even though neither he, his child, nor anyone in their home community, found the material "indecent" or "patently offensive," if the college town's community thought otherwise.

The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA. It has not done so. The arguments in this Court have referred to possible alternatives such as requiring that indecent material be "tagged" in a way that facilitates parental control of material coming into their homes, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet--such as commercial web sites--differently than others, such as chat rooms. Particularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA, we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all.

VIII

In an attempt to curtail the CDA's facial overbreadth, the Government advances three additional arguments for sustaining the Act's affirmative prohibitions: (1) that the CDA is constitutional because it leaves open ample "alternative channels" of communication; (2) that the plain meaning of the Act's "knowledge" and "specific person" requirement significantly restricts its permissible applications; and (3) that the Act's prohibitions are "almost always" limited to material lacking redeeming social value.

The Government first contends that, even though the CDA effectively censors discourse on many of the Internet's modalities--such as chat groups, newsgroups, and mail exploders--it is nonetheless constitutional because it provides a "reasonable opportunity" for speakers to engage in the restricted speech on the World Wide Web. Brief for Appellants 39. This argument is unpersuasive because the CDA regulates speech on the basis of its content. A "time, place, and manner" analysis is therefore inapplicable. See Consolidated Edison Co. of N.Y. v. Public

Serv. Comm'n of N.Y., 447 U.S. 530, 536, 100 S.Ct. 2326, 2332-2333, 65 L.Ed.2d 319 (1980). It is thus immaterial whether such speech would be feasible on the Web (which, as the Government's own expert acknowledged, would cost up to $10,000 if the speaker's interests were not accommodated by an existing Web site, not including costs for database management and age verification). The Government's position is equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish ***2349** books. In invalidating a number of laws that banned leafletting on the streets regardless of their content--we explained that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Schneider v. State of N.J. (Town of Irvington), 308 U.S. 147, 163, 60 S.Ct. 146, 151-152, 84 L.Ed. 155 (1939).

The Government also asserts that the "knowledge" requirement of both §§ 223(a) and (d), especially when coupled with the "specific child" element found in § 223(d), saves the CDA from overbreadth. Because both sections prohibit the dissemination of indecent messages only to persons known to be under 18, the Government argues, it does not require transmitters to "refrain from communicating indecent material to adults; they need only refrain from disseminating such materials to persons they know to be under 18." Brief for Appellants 24.

This argument ignores the fact that most Internet fora--including chat rooms, newsgroups, mail exploders, and the Web--are open to all comers. The Government's assertion that the knowledge requirement somehow protects the communications of adults is therefore untenable. Even the strongest reading of the "specific person" requirement of § 223(d) cannot save the statute. It would confer broad powers of censorship, in the form of a "heckler's veto," upon any opponent of indecent speech who might simply log on and inform the would-be discoursers that his 17-year-old child--a "specific person ... under 18 years of age," 47 U.S.C.A. § 223(d)(1)(A) (Supp.1997)--would be present.

Finally, we find no textual support for the Government's submission that material having scientific, educational, or other redeeming social value will necessarily fall outside the CDA's "patently offensive" and "indecent" prohibitions. See also n. 37, supra.

IX

The Government's three remaining arguments focus on the defenses provided in § 223(e)(5). [FN46] First, relying on the "good faith, reasonable, effective, and appropriate actions" provision, the Government suggests that "tagging" provides a defense that saves the constitutionality of the Act. The suggestion assumes that transmitters may encode their indecent communications in a way that would indicate their contents, thus permitting recipients to block their reception with appropriate software. It is the requirement that the good faith action must be "effective" that makes this defense illusory. The Government recognizes that its proposed screening software does not currently exist. Even if it did, there is no way to know whether a potential recipient will actually block the encoded material. Without the impossible knowledge that every guardian in America is screening for the "tag," the transmitter could not reasonably rely on its action to be "effective."

FN46. For the full text of § 223(e)(5), see n. 26, supra.

For its second and third arguments concerning defenses--which we can consider together--the Government relies on the latter half of § 223(e)(5), which applies when the transmitter has restricted access by requiring use of a verified credit card or adult identification. Such verification is not only technologically available but actually is used by commercial providers of sexually explicit material. These providers, therefore, would be protected by the defense. Under the findings of the District Court, however, it is not economically feasible for most noncommercial speakers to employ such verification. Accordingly, this defense would not significantly narrow the statute's burden on noncommercial speech. Even with respect to the commercial pornographers that would be protected by the defense, the Government failed to adduce any evidence that these verification techniques actually preclude minors from posing as adults. [FN47] Given that the risk of criminal sanctions "hovers over each content provider, like the proverbial sword of ***2350** Damocles," [FN48] the District Court correctly refused to rely on unproven future technology to save the statute. The Government thus failed to prove that the proffered defense would significantly reduce the heavy burden on adult speech produced by the prohibition on offensive displays.

FN47. Thus, ironically, this defense may significantly protect commercial purveyors of obscene postings while providing little (or no) benefit for transmitters of indecent messages that have significant social or artistic value.

FN48. 929 F.Supp., at 855-856.

We agree with the District Court's conclusion that the CDA places an unacceptably heavy burden on protected speech, and that the defenses do not constitute the sort of "narrow tailoring" that will save an otherwise patently invalid unconstitutional provision. In Sable, 492 U.S., at 127, 109 S.Ct., at 2837, we remarked that the speech restriction at issue there amounted to " 'burn[ing] the house to roast the pig.' " The CDA, casting a far darker shadow over free speech, threatens to torch a large segment of the Internet community.

X

[7] At oral argument, the Government relied heavily on its ultimate fall- back position: If this Court should conclude that the CDA is insufficiently tailored, it urged, we should save the statute's constitutionality by honoring the severability clause, see 47 U.S.C. § 608, and construing nonseverable terms narrowly. In only one respect is this argument acceptable.

A severability clause requires textual provisions that can be severed. We will follow § 608's guidance by leaving constitutional textual elements of the statute intact in the one place where they are, in fact, severable. The "indecency" provision, 47 U.S.C.A. § 223(a) (Supp.1997), applies to "any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent." (Emphasis added.) Appellees do not challenge the application of the statute to obscene speech, which, they acknowledge, can be banned totally because it enjoys no First Amendment protection. See Miller, 413 U.S., at 18, 93 S.Ct., at 2611-2612. As set forth by the statute, the restriction of

"obscene" material enjoys a textual manifestation separate from that for "indecent" material, which we have held unconstitutional. Therefore, we will sever the term "or indecent" from the statute, leaving the rest of § 223(a) standing. In no other respect, however, can § 223(a) or § 223(d) be saved by such a textual surgery.

The Government also draws on an additional, less traditional aspect of the CDA's severability clause, 47 U.S.C., § 608, which asks any reviewing court that holds the statute facially unconstitutional not to invalidate the CDA in application to "other persons or circumstances" that might be constitutionally permissible. It further invokes this Court's admonition that, absent "countervailing considerations," a statute should "be declared invalid to the extent it reaches too far, but otherwise left intact." Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503-504, 105 S.Ct. 2794, 2801-2802, 86 L.Ed.2d 394 (1985). There are two flaws in this argument.

[8] First, the statute that grants our jurisdiction for this expedited review, 47 U.S.C.A. § 561 (Supp.1997), limits that jurisdictional grant to actions challenging the CDA "on its face." Consistent with § 561, the plaintiffs who brought this suit and the three-judge panel that decided it treated it as a facial challenge. We have no authority, in this particular posture, to convert this litigation into an "as-applied" challenge. Nor, given the vast array of plaintiffs, the range of their expressive activities, and the vagueness of the statute, would it be practicable to limit our holding to a judicially defined set of specific applications.

[9] Second, one of the "countervailing considerations" mentioned in Brockett is present here. In considering a facial challenge, this Court may impose a limiting construction on a statute only if it is "readily susceptible" to such a construction. Virginia v. American Bookseller's Assn., Inc., 484 U.S. 383, 397, 108 S.Ct. 636, 645, 98 L.Ed.2d 782 (1988). See also Erznoznik, v. Jacksonville, 422 U.S. 205, 216, 95 S.Ct. 2268, 2276, 45 L.Ed.2d 125 (1975) ("readily subject" to narrowing construction). The open- ended character of the CDA provides no guidance what ever for limiting its coverage.

***2351** This case is therefore unlike those in which we have construed a statute narrowly because the text or other source of congressional intent identified a clear line that this Court could draw. Cf., e.g., Brockett, 472 U.S., at 504-505, 105 S.Ct., at 2802 (invalidating obscenity statute only to the extent that word "lust" was actually or effectively excised from statute); United States v. Grace, 461 U.S. 171, 180-183, 103 S.Ct. 1702, 1708-1710, 75 L.Ed.2d 736 (1983) (invalidating federal statute banning expressive displays only insofar as it extended to public sidewalks when clear line could be drawn between sidewalks and other grounds that comported with congressional purpose of protecting the building, grounds, and people therein). Rather, our decision in United States v. National Treasury Employees Union, 513 U.S. 454, 479, n. 26, 115 S.Ct. 1003, 1019, n. 26, 130 L.Ed.2d 964 (1995), is applicable. In that case, we declined to "dra[w] one or more lines between categories of speech covered by an overly broad statute, when Congress has sent inconsistent signals as to where the new line or lines should be drawn" because doing so "involves a far more serious invasion of the legislative domain." [FN49] This Court "will not rewrite a ... law to conform it to constitutional

requirements." American Booksellers, 484 U.S., at 397, 108 S.Ct., at 645. [FN50]

FN49. As this Court long ago explained, "It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully be detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government." United States v. Reese, 92 U.S. 214, 221, 23 L.Ed. 563 (1875). In part because of these separation of powers concerns, we have held that a severability clause is "an aid merely; not an inexorable command." Dorchy v. Kansas, 264 U.S. 286, 290, 44 S.Ct. 323, 325, 68 L.Ed. 686 (1924).

FN50. See also Osborne v. Ohio, 495 U.S. 103, 121, 110 S.Ct. 1691, 1702-1703, 109 L.Ed.2d 98 (1990) (judicial rewriting of statutes would derogate Congress's "incentive to draft a narrowly tailored law in the first place").

XI

In this Court, though not in the District Court, the Government asserts that-- in addition to its interest in protecting children-- its "[e]qually significant" interest in fostering the growth of the Internet provides an independent basis for upholding the constitutionality of the CDA. Brief for Appellants 19. The Government apparently assumes that the unregulated availability of "indecent" and "patently offensive" material on the Internet is driving countless citizens away from the medium because of the risk of exposing themselves or their children to harmful material.

We find this argument singularly unpersuasive. The dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention. The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.

For the foregoing reasons, the judgment of the district court is affirmed.

It is so ordered.

Justice O'CONNOR, with whom THE CHIEF JUSTICE joins, concurring in the judgment in part and dissenting in part.

I write separately to explain why I view the Communications Decency Act of 1996(CDA) as little more than an attempt by Congress to create "adult zones" on the Internet. Our precedent indicates that the creation of such zones can be constitutionally sound. Despite the soundness of its purpose, however, portions of the CDA are unconstitutional because they stray from the blueprint our prior cases have developed for constructing a "zoning law" that passes constitutional muster.

Appellees bring a facial challenge to three provisions of the CDA. The first, which the Court describes as the "indecency

transmission" provision, makes it a crime to knowingly ***2352** transmit an obscene or indecent message or image to a person the sender knows is under 18 years old. 47 U.S.C.A. § 223(a)(1)(B) (May 1996 Supp.). What the Court classifies as a single " 'patently offensive display' " provision, see ante, at 2338, is in reality two separate provisions. The first of these makes it a crime to knowingly send a patently offensive message or image to a specific person under the age of 18 ("specific person" provision). § 223(d)(1)(A). The second criminalizes the display of patently offensive messages or images "in a[ny] manner available" to minors ("display" provision). § 223(d)(1)(B). None of these provisions purports to keep indecent (or patently offensive) material away from adults, who have a First Amendment right to obtain this speech. Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93 (1989) ("Sexual expression which is indecent but not obscene is protected by the First Amendment"). Thus, the undeniable purpose of the CDA is to segregate indecent material on the Internet into certain areas that minors cannot access. See S. Conf. Rep. No. 104-230, p. 189 (1996) (CDA imposes "access restrictions ... to protect minors from exposure to indecent material").

The creation of "adult zones" is by no means a novel concept. States have long denied minors access to certain establishments frequented by adults. [FN1] States have also denied minors access to speech deemed to be "harmful to minors." [FN2] The Court has previously sustained such zoning laws, but only if they respect the First Amendment ***2353** rights of adults and minors. That is to say, a zoning law is valid if (i) it does not unduly restrict adult access to the material; and (ii) minors have no First Amendment right to read or view the banned material. As applied to the Internet as it exists in 1997, the "display" provision and some applications of the "indecency transmission" and "specific person" provisions fail to adhere to the first of these limiting principles by restricting adults' access to protected materials in certain circumstances. Unlike the Court, however, I would invalidate the provisions only in those circumstances.

FN1. See, e.g., Alaska Stat. Ann. § 11.66.300 (1996) (no minors in "adult entertainment" places); Ariz.Rev.Stat. Ann. § 13-3556 (1989) (no minors in places where people expose themselves); Ark.Code Ann. §§ 5-27-223, 5-27-224 (1993) (no minors in poolrooms and bars); Colo.Rev.Stat. § 18-7-502(2) (1986) (no minors in places displaying movies or shows that are "harmful to children"); Del.Code Ann., Tit. 11, § 1365(i)(2) (1995) (same); D.C.Code Ann. § 22- 2001(b)(1)(B) (1996) (same); Fla. Stat. § 847.013(2) (1994) (same); Ga.Code Ann. § 16-12-103(b) (1996) (same); Haw.Rev.Stat. § 712- 1215(1)(b) (1994) (no minors in movie houses or shows that are "pornographic for minors"); Idaho Code § 18-1515(2) (1987) (no minors in places displaying movies or shows that are "harmful to minors"); La.Rev.Stat. Ann. § 14:91.11(B) (West 1986) (no minors in places displaying movies that depict sex acts and appeal to minors' prurient interest); Md. Ann.Code, Art. 27, § 416E (1996) (no minors in establishments where certain enumerated acts are performed or portrayed); Mich. Comp. Laws § 750.141 (1991) (no

minors without an adult in places where alcohol is sold); Minn.Stat. § 617.294 (1987 and Supp.1997) (no minors in places displaying movies or shows that are "harmful to minors"); Miss.Code Ann. § 97-5-11 (1994) (no minors in poolrooms, billiard halls, or where alcohol is sold); Mo.Rev.Stat. § 573.507 (1995) (no minors in adult cabarets); Neb.Rev.Stat. § 28-809 (1995) (no minors in places displaying movies or shows that are "harmful to minors"); Nev.Rev.Stat. § 201.265(3) (1997) (same); N.H.Rev.Stat. Ann. § 571-B:2(II) (1986) (same); N.M. Stat. Ann. § 30-37-3 (1989) (same); N.Y. Penal Law § 235.21(2) (McKinney 1989) (same); N.D. Cent.Code § 12.1-27.1-03 (1985 and Supp.1995) (same); 18 Pa. Cons.Stat. § 5903(a) (Supp.1997) (same); S.D. Comp. Laws Ann. § 22-24- 30 (1988) (same); Tenn.Code Ann. § 39-17-911(b) (1991) (same); Vt. Stat. Ann., Tit. 13, § 2802(b) (1974) (same); Va.Code Ann. § 18.2-391 (1996) (same).

FN2. See, e.g., Ala.Code § 13A-12-200.5 (1994); Ariz.Rev.Stat. Ann. § 13-3506 (1989); Ark.Code Ann. 5-68-502 (1993); Cal.Penal Code Ann. § 313.1 (West Supp.1997); Colo.Rev.Stat. § 18-7-502(1) (1986); Conn. Gen.Stat. § 53a-196 (1994); Del.Code Ann., Tit. 11, § 1365(i)(1) (1995); D.C.Code Ann. § 22-2001(b)(1)(A) (1996); Fla. Stat. § 847.012 (1994); Ga.Code Ann. § 16-12-103(a) (1996); Haw.Rev.Stat. § 712-1215(1) (1994); Idaho Code § 18- 1515(1) (1987); Ill. Comp. Stat., ch. 720, § 5/11-21 (1993); Ind.Code § 35-49-3-3(1) (Supp.1996); Iowa Code § 728.2 (1993); Kan. Stat. Ann. § 21-4301c(a)(2) (1988); La.Rev.Stat. Ann. § 14:91.11(B) (West 1986); Md. Ann.Code, Art. 27, § 416B (1996); Mass. Gen. Laws, ch. 272, § 28 (1992); Minn.Stat. § 617.293 (1987 and Supp.1997); Miss.Code Ann. § 97-5-11 (1994); Mo.Rev.Stat. § 573.040 (1995); Mont.Code Ann. § 45-8-206 (1995); Neb.Rev.Stat. § 28-808 (1995); Nev.Rev.Stat. §§ 201.265(1), (2) (1997); N.H.Rev.Stat. Ann. § 571-B:2(I) (1986); N.M. Stat. Ann. § 30-37-2 (1989); N.Y. Penal Law § 235.21(1) (McKinney 1989); N.C. Gen.Stat. § 14-190.15(a) (1993); N.D. Cent.Code § 12.1-27.1-03 (1985 and Supp.1995); Ohio Rev.Code Ann. § 2907.31(A)(1) (Supp.1997); Okla. Stat., Tit. 21, § 1040.76(2) (Supp.1997); 18 Pa. Cons.Stat. § 5903(c) (Supp.1997); R.I. Gen. Laws § 11-31-10(a) (1996); S.C.Code Ann. § 16-15-385(A) (Supp.1996); S.D. Comp. Laws Ann. § 22-24-28 (1988); Tenn.Code Ann. § 39-17-911(a) (1991); Tex Penal Code Ann. § 43.24(b) (1994); Utah Code Ann. § 76-10-1206(2) (1995); Vt. Stat. Ann., Tit. 13, § 2802(a) (1974); Va.Code Ann. § 18.2-

391 (1996); Wash. Rev.Code § 9.68.060 (1988 and Supp.1997); Wis. Stat. § 948.11(2) (Supp.1995).

I

Our cases make clear that a "zoning" law is valid only if adults are still able to obtain the regulated speech. If they cannot, the law does more than simply keep children away from speech they have no right to obtain--it interferes with the rights of adults to obtain constitutionally protected speech and effectively "reduce[s] the adult population ... to reading only what is fit for children." Butler v. Michigan, 352 U.S. 380, 383, 77 S.Ct. 524, 526, 1 L.Ed.2d 412 (1957). The First Amendment does not tolerate such interference. See id., at 383, 77 S.Ct., at 526 (striking down a Michigan criminal law banning sale of books--to minors or adults--that contained words or pictures that " 'tende[d] to ... corrup[t] the morals of youth' "); Sable Communications, supra (invalidating federal law that made it a crime to transmit indecent, but nonobscene, commercial telephone messages to minors and adults); Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 74, 103 S.Ct. 2875, 2884, 77 L.Ed.2d 469 (1983) (striking down a federal law prohibiting the mailing of unsolicited advertisements for contraceptives). If the law does not unduly restrict adults' access to constitutionally protected speech, however, it may be valid. In Ginsberg v. New York, 390 U.S. 629, 634, 88 S.Ct. 1274, 1277-1278, 20 L.Ed.2d 195 (1968), for example, the Court sustained a New York law that barred store owners from selling pornographic magazines to minors in part because adults could still buy those magazines.

The Court in Ginsberg concluded that the New York law created a constitutionally adequate adult zone simply because, on its face, it denied access only to minors. The Court did not question--and therefore necessarily assumed--that an adult zone, once created, would succeed in preserving adults' access while denying minors' access to the regulated speech. Before today, there was no reason to question this assumption, for the Court has previously only considered laws that operated in the physical world, a world that with two characteristics that make it possible to create "adult zones": geography and identity. See Lessig, Reading the Constitution in Cyberspace, 45 Emory L.J. 869, 886 (1996). A minor can see an adult dance show only if he enters an establishment that provides such entertainment. And should he attempt to do so, the minor will not be able to conceal completely his identity (or, consequently, his age). Thus, the twin characteristics of geography and identity enable the establishment's proprietor to prevent children from entering the establishment, but to let adults inside.

The electronic world is fundamentally different. Because it is no more than the interconnection of electronic pathways, cyberspace allows speakers and listeners to mask their identities. Cyberspace undeniably reflects some form of geography; chat rooms and Web sites, for example, exist at fixed "locations" on the Internet. Since users can transmit and receive messages on the Internet without revealing anything about their identities or ages, see Lessig, supra, at 901, however, it is not currently possible to exclude persons from accessing certain messages on the basis of their identity.

Cyberspace differs from the physical world in another basic way: Cyberspace is malleable. Thus, it is possible to construct barriers in cyberspace and use them to screen for identity, making cyberspace more like the physical world and, consequently, more amenable to zoning laws. This transformation of cyberspace is already underway. Lessig, supra, at 888- 889. Id., at 887 (cyberspace "is moving ... from a relatively unzoned place to a universe that is extraordinarily well zoned"). Internet speakers (users who post material on the Internet) have begun to zone ***2354** cyberspace itself through the use of "gateway" technology. Such technology requires Internet users to enter information about themselves--perhaps an adult identification number or a credit card number--before they can access certain areas of cyberspace, 929 F.Supp. 824, 845 (E.D.Pa.1996), much like a bouncer checks a person's driver's license before admitting him to a nightclub. Internet users who access information have not attempted to zone cyberspace itself, but have tried to limit their own power to access information in cyberspace, much as a parent controls what her children watch on television by installing a lock box. This user-based zoning is accomplished through the use of screening software (such as Cyber Patrol or SurfWatch) or browsers with screening capabilities, both of which search addresses and text for keywords that are associated with "adult" sites and, if the user wishes, blocks access to such sites. Id., at 839-842. The Platform for Internet Content Selection (PICS) project is designed to facilitate user-based zoning by encouraging Internet speakers to rate the content of their speech using codes recognized by all screening programs. Id., at 838-839.

Despite this progress, the transformation of cyberspace is not complete. Although gateway technology has been available on the World Wide Web for some time now, id., at 845; Shea v. Reno, 930 F.Supp. 916, 933-934 (S.D.N.Y.1996), it is not available to all Web speakers, 929 F.Supp., at 845-846, and is just now becoming technologically feasible for chat rooms and USENET newsgroups, Brief for Federal Parties 37-38. Gateway technology is not ubiquitous in cyberspace, and because without it "there is no means of age verification," cyberspace still remains largely unzoned--and unzoneable. 929 F.Supp., at 846; Shea, supra, at 934. User-based zoning is also in its infancy. For it to be effective, (i) an agreed-upon code (or "tag") would have to exist; (ii) screening software or browsers with screening capabilities would have to be able to recognize the "tag"; and (iii) those programs would have to be widely available--and widely used--by Internet users. At present, none of these conditions is true. Screening software "is not in wide use today" and "only a handful of browsers have screening capabilities." Shea, supra, at 945-946. There is, moreover, no agreed-upon "tag" for those programs to recognize. 929 F.Supp., at 848; Shea, supra, at 945.

Although the prospects for the eventual zoning of the Internet appear promising, I agree with the Court that we must evaluate the constitutionality of the CDA as it applies to the Internet as it exists today. Ante, at 2349. Given the present state of cyberspace, I agree with the Court that the "display" provision cannot pass muster. Until gateway technology is available throughout cyberspace, and it is not in 1997, a speaker cannot be reasonably assured that the speech he displays will reach only adults because it is impossible to confine speech to an "adult zone." Thus, the only

way for a speaker to avoid liability under the CDA is to refrain completely from using indecent speech. But this forced silence impinges on the First Amendment right of adults to make and obtain this speech and, for all intents and purposes, "reduce[s] the adult population [on the Internet] to reading only what is fit for children." Butler, 352 U.S., at 383, 77 S.Ct., at 526. As a result, the "display" provision cannot withstand scrutiny. Accord, Sable Communications, 492 U.S., at 126-131, 109 S.Ct., at 2836-2839; Bolger v. Youngs Drug Products Corp., 463 U.S., at 73-75, 103 S.Ct., at 2883-2885.

The "indecency transmission" and "specific person" provisions present a closer issue, for they are not unconstitutional in all of their applications. As discussed above, the "indecency transmission" provision makes it a crime to transmit knowingly an indecent message to a person the sender knows is under 18 years of age. 47 U.S.C.A. § 223(a)(1)(B) (May 1996 Supp.). The "specific person" provision proscribes the same conduct, although it does not as explicitly require the sender to know that the intended recipient of his indecent message is a minor. § 223(d)(1)(A). Appellant urges the Court to construe the provision to impose such a knowledge requirement, see Brief for Federal Parties 25-27, and I would do so. See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, ***2355** 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, 99 L.Ed.2d 645 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

So construed, both provisions are constitutional as applied to a conversation involving only an adult and one or more minors--e.g., when an adult speaker sends an e-mail knowing the addressee is a minor, or when an adult and minor converse by themselves or with other minors in a chat room. In this context, these provisions are no different from the law we sustained in Ginsberg. Restricting what the adult may say to the minors in no way restricts the adult's ability to communicate with other adults. He is not prevented from speaking indecently to other adults in a chat room (because there are no other adults participating in the conversation) and he remains free to send indecent e-mails to other adults. The relevant universe contains only one adult, and the adult in that universe has the power to refrain from using indecent speech and consequently to keep all such speech within the room in an "adult" zone.

The analogy to Ginsberg breaks down, however, when more than one adult is a party to the conversation. If a minor enters a chat room otherwise occupied by adults, the CDA effectively requires the adults in the room to stop using indecent speech. If they did not, they could be prosecuted under the "indecency transmission" and "specific person" provisions for any indecent statements they make to the group, since they would be transmitting an indecent message to specific persons, one of whom is a minor. Accord, ante, at 2347. The CDA is therefore akin to a law that makes it a crime for a bookstore owner to sell pornographic magazines to anyone once a minor enters his store. Even assuming such a law might be constitutional in the physical world as a reasonable alternative to excluding minors completely from the store, the absence of any means of excluding minors from chat rooms in cyberspace

restricts the rights of adults to engage in indecent speech in those rooms. The "indecency transmission" and "specific person" provisions share this defect.

But these two provisions do not infringe on adults' speech in all situations. And as discussed below, I do not find that the provisions are overbroad in the sense that they restrict minors' access to a substantial amount of speech that minors have the right to read and view. Accordingly, the CDA can be applied constitutionally in some situations. Normally, this fact would require the Court to reject a direct facial challenge. United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987) ("A facial challenge to a legislative Act [succeeds only if] the challenger ... establish[es] that no set of circumstances exists under which the Act would be valid"). Appellees' claim arises under the First Amendment, however, and they argue that the CDA is facially invalid because it is "substantially overbroad"--that is, it "sweeps too broadly ... [and] penaliz[es] a substantial amount of speech that is constitutionally protected," Forsyth County v. Nationalist Movement, 505 U.S. 123, 130, 112 S.Ct. 2395, 2401, 120 L.Ed.2d 101 (1992). See Brief for Appellees American Library Association et al. 48; Brief for Appellees American Civil Liberties Union et al. 39-41. I agree with the Court that the provisions are overbroad in that they cover any and all communications between adults and minors, regardless of how many adults might be part of the audience to the communication.

This conclusion does not end the matter, however. Where, as here, "the parties challenging the statute are those who desire to engage in protected speech that the overbroad statute purports to punish ... [t]he statute may forthwith be declared invalid to the extent that it reaches too far, but otherwise left intact." Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504, 105 S.Ct. 2794, 2802, 86 L.Ed.2d 394 (1985). There is no question that Congress intended to prohibit certain communications between one adult and one or more minors. See 47 U.S.C.A. § 223(a)(1)(B) (May 1996 Supp.) (punishing "[w]hoever ... initiates the transmission of [any indecent communication] knowingly that the recipient of the communication is under 18 years of age"); § 223(d)(1)(A) (punishing ***2356** "[w]hoever ... send[s] to a specific person or persons under 18 years of age [a patently offensive message]"). There is also no question that Congress would have enacted a narrower version of these provisions had it known a broader version would be declared unconstitutional. 47 U.S.C. § 608 ("If ... the application [of any provision of the CDA] to any person or circumstance is held invalid, ... the application of such provision to other persons or circumstances shall not be affected thereby"). I would therefore sustain the "indecency transmission" and "specific person" provisions to the extent they apply to the transmission of Internet communications where the party initiating the communication knows that all of the recipients are minors.

II

Whether the CDA substantially interferes with the First Amendment rights of minors, and thereby runs afoul of the second characteristic of valid zoning laws, presents a closer question. In Ginsberg, the New York law we sustained prohibited the sale to minors of magazines that were "harmful to minors." Under that law, a magazine was "harmful to minors" only if it was obscene as to minors. 390 U.S., at 632-633, 88 S.Ct., at 1276-1277. Noting that obscene speech is

not protected by the First Amendment, Roth v. United States, 354 U.S. 476, 485, 77 S.Ct. 1304, 1309, 1 L.Ed.2d 1498 (1957), and that New York was constitutionally free to adjust the definition of obscenity for minors, 390 U.S., at 638, 88 S.Ct., at 1279-1280, the Court concluded that the law did not "invad[e] the area of freedom of expression constitutionally secured to minors." Id., at 637, 88 S.Ct., at 1279. New York therefore did not infringe upon the First Amendment rights of minors. Cf. Erznoznik v. Jacksonville, 422 U.S. 205, 213, 95 S.Ct. 2268, 2274-2275, 45 L.Ed.2d 125 (1975) (striking down city ordinance that banned nudity that was not "obscene even as to minors").

The Court neither "accept[s] nor reject[s]" the argument that the CDA is facially overbroad because it substantially interferes with the First Amendment rights of minors. Ante, at 2348. I would reject it. Ginsberg established that minors may constitutionally be denied access to material that is obscene as to minors. As Ginsberg explained, material is obscene as to minors if it (i) is "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable ... for minors"; (ii) appeals to the prurient interest of minors; and (iii) is "utterly without redeeming social importance for minors." 390 U.S., at 633, 88 S.Ct., at 1276. Because the CDA denies minors the right to obtain material that is "patently offensive"--even if it has some redeeming value for minors and even if it does not appeal to their prurient interests--Congress' rejection of the Ginsberg "harmful to minors" standard means that the CDA could ban some speech that is "indecent" (i.e., "patently offensive") but that is not obscene as to minors.

I do not deny this possibility, but to prevail in a facial challenge, it is not enough for a plaintiff to show "some" overbreadth. Our cases require a proof of "real" and "substantial" overbreadth, Broadrick v. Oklahoma, 413 U.S. 601, 615, 93 S.Ct. 2908, 2917-2918, 37 L.Ed.2d 830 (1973), and appellees have not carried their burden in this case. In my view, the universe of speech constitutionally protected as to minors but banned by the CDA--i.e., the universe of material that is "patently offensive," but which nonetheless has some redeeming value for minors or does not appeal to their prurient interest-- is a very small one. Appellees cite no examples of speech falling within this universe and do not attempt to explain why that universe is substantial "in relation to the statute's plainly legitimate sweep." Ibid. That the CDA might deny minors the right to obtain material that has some "value," see ante, at 2347-2348, is largely beside the point. While discussions about prison rape or nude art, see ibid., may have some redeeming education value for adults, they do not necessarily have any such value for minors, and under Ginsberg, minors only have a First Amendment right to obtain patently offensive material that has "redeeming social importance for minors," 390 U.S., at 633, 88 S.Ct., at 1276 (emphasis added). There is also no evidence in the record to support the contention that "many [e]-mail transmissions from an adult ***2357** to a minor are conversations between family members," ante, at 2341, n. 32, and no support for the legal proposition that such speech is absolutely immune from regulation. Accordingly, in my view, the CDA does not burden a substantial amount of minors' constitutionally protected speech.

Thus, the constitutionality of the CDA as a zoning law hinges on the extent to which it

substantially interferes with the First Amendment rights of adults. Because the rights of adults are infringed only by the "display" provision and by the "indecency transmission" and "specific person" provisions as applied to communications involving more than one adult, I would invalidate the CDA only to that extent. Insofar as the "indecency transmission" and "specific person" provisions prohibit the use of indecent speech in communications between an adult and one or more minors, however, they can and should be sustained. The Court reaches a contrary conclusion, and from that holding that I respectfully dissent.

II
C. 2)
Case Study -- Child On-Line Protection Act

L. TITLE XIV--CHILD ONLINE PROTECTION

SEC. 1401. SHORT TITLE.

This title may be cited as the ``Child Online Protection Act".

SEC. 1402. CONGRESSIONAL FINDINGS.

The Congress finds that--

(1) while custody, care, and nurture of the child resides first with the parent, the widespread availability of the Internet presents opportunities for minors to access materials through the World Wide Web in a manner that can frustrate parental supervision or control;

(2) the protection of the physical and psychological well-being of minors by shielding them from materials that are harmful to them is a compelling governmental interest;

(3) to date, while the industry has developed innovative ways to help parents and educators restrict material that is harmful to minors through parental control protections and self-regulation, such efforts have not provided a national solution to the problem of minors accessing harmful material on the World Wide Web;

(4) a prohibition on the distribution of material harmful to minors, combined with legitimate defenses, is currently the most effective and least restrictive means by which to satisfy the compelling government interest; and

(5) notwithstanding the existence of protections that limit the distribution over the World Wide Web of material that is harmful to minors, parents, educators, and industry must continue efforts to find ways to protect children from being exposed to harmful material found on the Internet.

SEC. 1403. REQUIREMENT TO RESTRICT ACCESS BY MINORS TO MATERIALS COMMERCIALLY DISTRIBUTED BY MEANS OF THE WORLD WIDE WEB THAT ARE HARMFUL TO MINORS.

Part I of title II of the Communications Act of 1934 (47

U.S.C. 201 et seq.) is amended by adding at the end the following new section:

``SEC. 231. RESTRICTION OF ACCESS BY MINORS TO MATERIALS COMMERCIALLY DISTRIBUTED BY MEANS OF WORLD WIDE WEB THAT ARE HARMFUL TO MINORS.

``(a) Requirement To Restrict Access.--

``(1) Prohibited conduct.--Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both.

``(2) Intentional violations.--In addition to the penalties under paragraph (1), whoever intentionally violates such paragraph shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

``(3) Civil penalty.--In addition to the penalties under paragraphs (1) and (2), whoever violates paragraph (1) shall be subject to a civil penalty of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

``(b) Inapplicability of Carriers and Other Service Providers.--For purposes of subsection (a), a person shall not be considered to make any communication for commercial purposes to the extent that such person is--

``(1) a telecommunications carrier engaged in the provision of a telecommunications service;

``(2) a person engaged in the business of providing an Internet access service;

``(3) a person engaged in the business of providing an Internet information location tool; or

``(4) similarly engaged in the transmission, storage, retrieval, hosting, formatting, or translation (or any

combination thereof) of a communication made by another person, without selection or alteration of the content of the communication, except that such person's deletion of a particular communication or material made by another person in a manner consistent with subsection (c) or section 230 shall not constitute such selection or alteration of the content of the communication.

``(c) Affirmative Defense.--

``(1) Defense.--It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors--

``(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;

``(B) by accepting a digital certificate that verifies age; or

``(C) by any other reasonable measures that are feasible under available technology.

``(2) Protection for use of defenses.--No cause of action may be brought in any court or administrative agency against any person on account of any activity that is not in violation of any law punishable by criminal or civil penalty, and that the person has taken in good faith to implement a defense authorized under this subsection or otherwise to restrict or prevent the transmission of, or access to, a communication specified in this section.

``(d) Privacy Protection Requirements.--

``(1) Disclosure of information limited.--A person making a communication described in subsection (a)--

``(A) shall not disclose any information collected for the purposes of restricting access to such communications to individuals 17 years of age or older without the prior written or electronic consent of--

``(i) the individual concerned, if the individual is an adult; or

``(ii) the individual's parent or guardian, if the individual is under 17 years of age; and

``(B) shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the person making such communication and the recipient of such communication.

``(2) Exceptions.--A person making a communication described in subsection (a) may disclose such information if the disclosure is--

``(A) necessary to make the communication or conduct a legitimate business activity related to making the communication; or

``(B) made pursuant to a court order authorizing such disclosure.

``(e) Definitions.--For purposes of this subsection, the following definitions shall apply:

``(1) By means of the world wide web.--The term `by means of the World Wide Web' means by placement of material in a computer server-based file archive so that it is publicly accessible, over the Internet, using hypertext transfer protocol or any successor protocol.

``(2) Commercial purposes; engaged in the business.--

``(A) Commercial purposes.--A person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications.

``(B) Engaged in the business.--The term `engaged in the business' means that the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income).

A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web.

``(3) Internet.--The term `Internet' means the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected worldwide network of computer networks that employ the Transmission Control Protocol/Internet Protocol or any successor protocol to transmit information.

``(4) Internet access service.--The term `Internet access service' means a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. Such term does not include telecommunications services.

``(5) Internet information location tool.--The term `Internet information location tool' means a service that refers or links users to an online location on the World Wide Web. Such term includes directories, indices, references, pointers, and hypertext links.

``(6) Material that is harmful to minors.--The term `material that is harmful to minors' means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that--

``(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

``(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast;

and

``(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

``(7) Minor.--The term `minor' means any person under 17 years of age.".

SEC. 1404. NOTICE REQUIREMENT.

(a) Notice.--Section 230 of the Communications Act of 1934 (47 U.S.C. 230) is amended--

(1) in subsection (d)(1), by inserting ``or 231'' after ``section 223'';

(2) by redesignating subsections (d) and (e) as subsections (e) and (f), respectively; and

(3) by inserting after subsection (c) the following new subsection:

``(d) Obligations of Interactive Computer Service.--A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.".

(b) Conforming Amendment.--Section 223(h)(2) of the Communications Act of 1934 (47 U.S.C. 223(h)(2)) is amended by striking ``230(e)(2)'' and inserting ``230(f)(2)''.

SEC. 1405. STUDY BY COMMISSION ON ONLINE CHILD PROTECTION.

(a) Establishment.--There is hereby established a temporary Commission to be known as the Commission on Online Child Protection (in this section referred to as the ``Commission'') for the purpose of conducting a study under this section regarding methods to help reduce access by

minors to material that is harmful to minors on the Internet.

(b) Membership.--The Commission shall be composed of 19 members, as follows:

(1) Industry members.--The Commission shall include--

(A) 2 members who are engaged in the business of providing Internet filtering or blocking services or software;

(B) 2 members who are engaged in the business of providing Internet access services;

(C) 2 members who are engaged in the business of providing labeling or ratings services;

(D) 2 members who are engaged in the business of providing Internet portal or search services;

(E) 2 members who are engaged in the business of providing domain name registration services;

(F) 2 members who are academic experts in the field of technology; and

(G) 4 members who are engaged in the business of making content available over the Internet.

Of the members of the Commission by reason of each subparagraph of this paragraph, an equal number shall be appointed by the Speaker of the House of Representatives and by the Majority Leader of the Senate.

(2) Ex officio members.--The Commission shall include the following officials:

(A) The Assistant Secretary (or the Assistant Secretary's designee).

(B) The Attorney General (or the Attorney General's designee).

(C) The Chairman of the Federal Trade Commission (or the Chairman's designee).

(c) Study.--

(1) In general.--The Commission shall conduct a study to identify technological or other methods that--

(A) will help reduce access by minors to material that is harmful to minors on the Internet; and

(B) may meet the requirements for use as affirmative defenses for purposes of section 231(c) of the Communications Act of 1934 (as added by this title).

Any methods so identified shall be used as the basis for making legislative recommendations to the Congress under subsection (d)(3).

(2) Specific methods.--In carrying out the study, the Commission shall identify and analyze various technological tools and methods for protecting minors from material that is harmful to minors, which shall include (without limitation)--

(A) a common resource for parents to use to help protect minors (such as a ``one-click-away'' resource);

(B) filtering or blocking software or services;
(C) labeling or rating systems;

(D) age verification systems;

(E) the establishment of a domain name for posting of any material that is harmful to minors; and

(F) any other existing or proposed technologies or methods for reducing access by minors to such material.

(3) Analysis.--In analyzing technologies and other methods identified pursuant to paragraph (2), the Commission shall examine--

(A) the cost of such technologies and methods;

(B) the effects of such technologies and methods on law enforcement entities;

(C) the effects of such technologies and methods on

privacy;

(D) the extent to which material that is harmful to minors is globally distributed and the effect of such technologies and methods on such distribution;

(E) the accessibility of such technologies and methods to parents; and

(F) such other factors and issues as the Commission considers relevant and appropriate.

(d) Report.--Not later than 1 year after the enactment of this Act, the Commission shall submit a report to the Congress containing the results of the study under this section, which shall include--

(1) a description of the technologies and methods identified by the study and the results of the analysis of each such technology and method;

(2) the conclusions and recommendations of the Commission regarding each such technology or method;

(3) recommendations for legislative or administrative actions to implement the conclusions of the committee; and

(4) a description of the technologies or methods identified by the study that may meet the requirements for use as affirmative defenses for purposes of section 231(c) of the Communications Act of 1934 (as added by this title).

(e) Staff and Resources.--The Assistant Secretary for Communication and Information of the Department of Commerce shall provide to the Commission such staff and resources as the Assistant Secretary determines necessary for the Commission to perform its duty efficiently and in accordance with this section.

(f) Termination.--The Commission shall terminate 30 days after the submission of the report under subsection (d).

(g) Inapplicability of Federal Advisory Committee Act.--The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the Commission.

SEC. 1406. EFFECTIVE DATE.

This title and the amendments made by this title shall take effect 30 days after the date of enactment of this Act.

Reed, TRO Memorandum

(Cite as: 1998 WL 813423 (E.D.Pa.))

AMERICAN CIVIL LIBERTIES UNION, et al.
v.
Janet RENO, in her official capacity as Attorney General of the United States.

No. CIV. A. 98-5591.

United States District Court, E.D. Pennsylvania.

Nov. 23, 1998.

MEMORANDUM

REED, J.

***1** The plaintiffs, representing individuals and entities who are speakers and content providers on the World Wide Web (the "Web"), many of whom are seeking to make a profit, and users of the Web who use such sites, filed a complaint in this Court challenging the constitutionality of the recently enacted Child Online Protection Act ("COPA") under the First and Fifth Amendments. [FN1] The plaintiffs allege in their complaint that COPA infringes upon protected speech of adults and minors and that it is unconstitutionally vague. The plaintiffs sought a temporary restraining order to prohibit the Attorney General from enforcing COPA, which was to go into effect on November 20, 1998. See Attachment A. This memorandum sets forth pursuant to Federal Rule of Civil Procedure 65(d) the reasons for the issuance of the temporary restraining order yesterday. (Document No. 29).

FN1. This Court has jurisdiction under 28 U.S.C. § 1331.

COPA represents the efforts of Congress to remedy the constitutional defects in the Child Decency Act ("CDA"), the first attempt by Congress to regulate content on the Internet. The CDA was struck down by the Supreme Court in ACLU v. Reno, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) as violative of the First Amendment. Resolution of the motion for temporary restraining order is the first stepping stone in determining the constitutionality of COPA.

To obtain a temporary restraining order, the plaintiffs must prove four elements: (1) likelihood of success on the merits; (2) irreparable harm; (3) that less harm will result to the defendant if the TRO issues than to the plaintiffs if the TRO does not issue; and (4) that the public interest, if any, weighs in favor of plaintiff. See Drysdale v. Woerth, 1998 WL 647281, *1 (E.D.Pa.) (citing Pappan Enterprises, Inc. v. Hardees's Food Systems, Inc., 143 F.3d 800, 803 (3d Cir.1998)). The plaintiffs need not prove their whole case to show a likelihood of success on the merits. If the balance of hardships tips in favor of plaintiffs, then the plaintiffs must only raise " 'questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberative investigation.' " ACLU v. Reno I, 1996 WL 65464, *2 (E.D.Pa.) (quoting Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir.1953)).

For the purposes of the resolution of this motion for a temporary restraining order, I

assume that strict scrutiny should be applied to COPA to determine if it is narrowly tailored to achieve a compelling governmental interest. [FN2] See ACLU v. Reno, 521 U.S. 844, 117 S.Ct. 2329, 2344, 138 L.Ed.2d 874 (1996) (concluding that the case law provided "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium"). In addition, the parties are in agreement that the "harmful to minors" speech described in COPA is protected speech as to adults.

> FN2. The government asserts in its brief that the statute may be subject to the lower level of scrutiny which has been applied to "commercial speech;" however, the government did not press that position for the purposes of the temporary restraining order at the hearing.

***2** Nonobscene sexual expression is protected by the First Amendment. See Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989). Thus, the content of such protected speech may be regulated in order to promote a compelling governmental interest "if it chooses the least restrictive means to further the articulated interest." Id. at 126 ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends."). Attempts of Congress to serve these compelling interest must be narrowly tailored to serve those interests without unnecessarily interfering with First Amendment freedoms. Id. The Supreme Court has repeatedly stated that the free speech rights of adults may not be reduced to allow them to read only what is acceptable for children. Id. at 127 (citing Butler v. Michigan, 352 U.S. 380, 383, 77 S.Ct. 524, 1 L.Ed.2d 412 (1957) (reversing a conviction under a statute which made it an offense to make available to the public materials found to have a potentially harmful influence on minors as an effort to "burn the house to roast the pig")).

It is clear that Congress has a compelling interest in the protection of minors, including shielding them from materials that are not obscene by adult standards. See id. at 126 (citing Ginsberg v. New York, 390 U.S. 629, 639-40, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968)). Thus, the issue for which the plaintiffs must show a likelihood of success on the merits is whether COPA is narrowly tailored to this interest. The defendant argued that COPA on its face is not a total ban on speech that is protected for adults because commercial communicators may avail themselves of the affirmative defenses to prosecution. The plaintiffs argue that COPA is not narrowly tailored to this legitimate, compelling interest because the affirmative defenses provided by the statute are technologically and economically unavailable to many of the plaintiffs and overly burdensome on protected speech. The plaintiffs further argue that speech that is protected as to adults will be chilled on the Web and COPA in effect will reduce the content of the Web to the level of what is acceptable for minors. Therefore, the plaintiffs argue, COPA unconstitutionally infringes upon speech that is protected as to adults.

A statute which has the effect of deterring of speech, even if not the total suppression of the speech, is a restraint on free expression. See Erznoznik v. City of Jacksonville, 422 U.S. 205, 211 n. 8, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975) (considering the expense of erecting a wall around appellant's drive-in theater in determining whether an ordinance prohibiting public

display of films containing nudity was narrowly tailored) (citing Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958)). The Court in Erznoznik noted that the regulation on speech at issue left the plaintiff "faced with an unwelcome choice: to avoid prosecution of themselves and their employees they must either restrict their movie offerings or construct adequate protective fencing which may be extremely expensive or even physically impracticable." Erznoznik, 422 U.S. at 217.

***3** The plaintiffs presented testimony from principals of two named plaintiffs, Norman Laurila, founder and owner of A Different Light, and David Talbot, CEO and editor of Salon Magazine, from which I find that they had conducted sufficient investigations which led them to the reasonable conclusion that attempting to avail themselves of the affirmative defenses provided in COPA would cause serious and debilitating effects on their businesses. Based on the evidence before me, I am satisfied that plaintiffs have raised serious and substantial questions as to the technological and economic feasibility of these affirmative defenses. (Testimony of Laurila; Testimony of Talbot). At least one other plaintiff reached the same conclusion. (Declaration of Barry Steinhardt). [FN3] Without these affirmative defenses, COPA on its face would prohibit speech which is protected as to adults. Thus, I am satisfied that plaintiffs have shown a likelihood of success on the merits on their claim that COPA violates the First Amendment rights of adults. [FN4]

> FN3. The defendant objected to certain statements made by declarants which contained hearsay or lacked foundation. To the extent that any of the declarations contained statements that contained hearsay or lacked foundation, those statements were not relied on by the Court; the declarations submitted by the plaintiffs were only received for the purpose of determining whether the declarant conducted an investigation which lead him to a reasonable conclusion about the effect on his business of complying with COPA.
>
> FN4. This opinion does not purport to address the myriad of arguments presented by both sides, nor to address each of the grounds presented by the plaintiffs for invalidating the statute. Those arguments and claims will be dealt with by the Court at a later time to the extent that they are necessary to a full resolution of this case.

The defendant notes that "it is far from clear that plaintiffs have standing" to pursue this litigation. (Def.'s Brief at 11). However, the defendant has suggested that for purposes of disposition of the motion for temporary restraining order, the Court should assume that some of the plaintiffs are entities covered by COPA that engage in activities regulated by COPA. (Def.'s Proposed Conclusions of Law ¶ 2). In addition, the Court concludes that for purposes of the temporary restraining order, the plaintiffs have raised serious and substantial questions as to whether some of the materials posted on their Web sites are covered by the Act as material harmful to minors.

Because the plaintiffs have established to the satisfaction of the Court a likelihood of success on the merits of their challenge, they clear the remaining legally imposed hurdles to injunctive relief with ease.

The plaintiffs have persuaded me that at least with respect to some plaintiffs, their fears of prosecution under COPA will result in the self- censorship of their online materials in an effort to avoid prosecution. This chilling effect will result in the censoring of constitutionally protected speech, which constitutes an irreparable harm to the plaintiffs. "It is well established that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Hohe v. Casey, 868 F.2d 69 at 72,73 (3d Cir.1989). For plaintiffs who choose not to self-censor their speech, they face criminal prosecution and penalties for communicating speech that they have shown is likely to be protected under the First Amendment.

In deciding whether to issue injunctive relief, I must balance the interests and potential harm to the parties. It is well established that no one, the government included, has an interest in the enforcement of an unconstitutional law. See ACLU v. Reno, 929 F.Supp. 824, 849 (1996). It follows in this context that the harm to plaintiffs from the infringement of their rights under the First Amendment clearly outweighs any purported interest of the defendant.

***4** While the public certainly has an interest in protecting its minors, the public interest is not served by the enforcement of an unconstitutional law. Indeed, to the extent that other members of the public who are not parties to this lawsuit may be effected by this statute, the interest of the public is served by preservation of the status quo until such time that this Court, with the benefit of a fuller factual record and thorough advocacy from the parties, may more closely examine the constitutionality of this statute.

Based on the foregoing findings and conclusions that the plaintiffs have established a likelihood of success on the merits and irreparable harm, and that the balance of interests, including the interest of the public, weighs in favor of enjoining the enforcement of this statute, the motion for a temporary restraining order was granted in an Order dated November 19, 1998 (Document No. 29), a copy of which is attached to this Memorandum as Attachment B.

Excerpts from the Child Online Protection Act

In what will be codified as 47 U.S.C. § 231, COPA provides that:

(1) PROHIBITED CONDUCT.--Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both.

(2) INTENTIONAL VIOLATIONS.--In addition to the penalties under paragraph (1), whoever intentionally violates such paragraph shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(3) CIVIL PENALTY.--In addition to the penalties under paragraphs (1) and (2), whoever violates paragraph (1) shall be subject to a civil penalty of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

COPA specifically provides that a person shall be considered to make a communication for commercial purposes "only if such person is engaged in the business of making such communication." 47 U.S.C. § 231(e)(2)(A). A person will be deemed to be "engaged in the business" if the

> person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web.

***5** 47 U.S.C. § 231(e)(2)(B).

Congress defined material that is harmful to minors as:

> any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that--
>
> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Id. at § 231(e)(6). Under COPA, a minor is any person under 17 years of age. Id. at § 231(e)(7).

COPA provides communicators on the Web for commercial purposes affirmative defenses to prosecution under the statute. Section 231(c) provides that:

> (c) AFFIRMATIVE DEFENSE.--
>
> (1) DEFENSE.--It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors--
>
> (A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;
>
> (B) by accepting a digital certificate that verifies age; or
>
> (C) by any other reasonable measures that are feasible under available technology.

ORDER

AND NOW, this 19th day of November, 1998, upon consideration of the motion of plaintiffs for a temporary restraining order, the response of the defendant, the exhibits and declarations submitted by the parties, having held a hearing on this date in which counsel for both sides presented evidence and argument, and having found and concluded, for the specific reasons required under

Federal Rule of Civil Procedure 65(b) set forth in a Memorandum to be issued forthwith, that plaintiffs have shown (1) a likelihood of success on the merits of at least some of their claims, (2) that they will suffer irreparable harm if a temporary restraining order is not issued, and (3) that the balance of harms and the public interest weigh in favor of granting the temporary restraining order, it is hereby ORDERED that the motion is GRANTED and defendant Janet Reno, in her official capacity as Attorney General of the United States, and, pursuant to Federal Rule of Civil Procedure 65(d), defendant's officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with defendant who receive actual notice of this Order, are TEMPORARILY RESTRAINED from enforcing or prosecuting matters premised upon 47 U.S.C. § 231 of the Child Online Protection Act at any time [FN5] for any conduct [FN6] that occurs while this Order is in effect. This Order does not extend to or restrict any action by defendant in connection with any investigations or prosecutions concerning child pornography or material that is obscene under 47 U.S.C. § 231 or any other provisions of the United States Code.

> FN5. It appears from the arguments of the parties and research conducted by this Court that it is unclear whether a federal court has the power to enjoin prosecution under a statute for acts that occur during the pendency of the injunctive relief if the decision to enjoin enforcement of the statute is later reversed on appeal. See Edgar v. MITE Corporation, 457 U.S. 624, 647, 655, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982) (Stevens, J., concurring) (asserting that a federal judge lacked the authority to enjoin later state prosecution under a state statute) (Marshall, J., dissenting) (asserting that federal judges have the power to grant such injunctive relief and if the order is ambiguous, it should be presumed to grant such relief). While there is no binding precedent that affirmatively establishes the power of a court to enter such an injunction, there is an indication in the case law that plaintiffs who rely in their actions on judgments of the court and are later prosecuted for their actions after the judgment is reversed can be successful in raising the judgment of the court as a defense to prosecution. See Clarke v. U.S., 915 F.2d 699 (D.C.Cir.1990) (citing cases and noting that a federal judge enjoining a federal prosecution does not present the federalism concerns that were present in Edgar). Granting injunctive relief to the plaintiffs, who are raising a constitutional challenge to a criminal statute that imposes imprisonment and fines on its violators, that only immunizes them for prosecution during the pendency of the injunction, but leaves them open to potential prosecution later if the Order of this Court is reversed, would be hollow relief indeed for plaintiffs and members of the public similarly situated. Thus, the Court enjoins the defendant

from enforcing COPA against acts which occur during the pendency of this Order, in an effort to tailor the relief to the realities of the situation facing the plaintiffs.

FN6. The defendant urges this Court to bar enforcement of COPA, if at all, only as to the plaintiffs. However, the defendant has presented no binding authority or persuasive reason that indicates that this Court should not enjoin total enforcement of COPA. See ACLU v. Reno, 929 F.Supp. 824, 883 (1996); Virginia v. American Booksellers Association, 484 U.S. 383, 392, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988) (noting that in the First Amendment context, "litigants ... are permitted to challenge a statute not because of their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression") (internal quotations omitted).

***6** IT IS FURTHER ORDERED that the filing of a bond is waived. [FN7]

FN7. See ACLU v. Reno, 929 F.Supp. at 884 (citing Temple University v. White, 941 F.2d 201, 220 (3d Cir.1991)).

IT IS FURTHER ORDERED that this temporary restraining order shall remain in effect for ten days which, calculated according to Federal Rule of Civil Procedure 6(a), expires on Friday, December 4, 1998.

The Court may modify this Order as the ends of justice require.

II. Civil Liberties in Cyberspace

B. Privacy

Who Owns Personal Information? Anatomy of a Privacy Case

The EPIC Web Page, http://www.epic.org./privacy/junk_mail/law.html

Famous quotation

"That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been necessary from time to time to define anew the exact nature and extent of such protection." — Samuel D. Warren and Louis D. Brandeis, THE RIGHT TO PRIVACY, 4 Harvard Law Review 193 (1890)

This case turns on a particular section of Virginia law which protects the right of an individual to control the use of his or her name. Mr. Avrahami believes that USN&WR violated that law when it rented his name to the Smithsonian Magazine. If Mr. Avrahami prevails in court, it may have profound implications for the future of the direct marketing industry and the sale of personal data.

The case arises at a time of growing public concerns about the misuse of personal information. Several opinion polls show public opposition to the sale of personal information. When public concerns about industry practice are sufficient, Congress will often pass legislation if courts fail to act. In fact, the first federal privacy law The Fair Credit Reporting Act came about after disclosures of rampant violations of privacy by the credit reporting bureaus.

The case is important for another reason. The Virginia law is based on a famous law review article that appeared in 1890. In The Right to Privacy, Samuel Warren and later-to-be Supreme Court Justice Louis Brandeis argued that the law should protect an individual's right to control the use of his or her name or likeness.

Legal scholars have debated for years exactly what it is that the privacy right described in 1890 protects. In one of the most famous articles, Dean Prosser suggested that when Brandeis and Warren spoke of a right to privacy, they were really describing four rights -- a right to be protected from intrusion, a right to control the disclosure of private facts, a right to protect the commercial value of one's name or likeness, and a right to protect against "false light" disclosures.

Mr. Avrahami's case focuses on the commercial appropriation issue. He is saying that USN&WR misappropriated something of value -- his name -- when it sold it to another publication. Courts have generally taken the position that the law protects only the names of celebrities, sport heroes, and movie stars. Mr. Avrahami contends that the law should protect everyone, not just the commercially successful. He says that the fact that companies are able to buy and sell his data is enough to establish that the information has value.

The case also raises an interesting privacy dimension for libertarians who believe that market solutions are preferable to government regulation. In the area of privacy, this requires establishing a property interest so that individuals are able to negotiate for the commercial value of the their names. While traditional legal analysis tends to focus on whether it is right for an individual to own his name, libertarians and economists look at whether it is efficient. This issue is likely to come up in the Avrahami case.

Finally, the case is taking place as many states across the US and many countries around the world are considering new safeguards to protect personal information. In Europe a new directive on privacy protection may limit the ability of marketing firms to collect and sell personal information. In Canada privacy agencies are considering safeguards to protect medical records, credit reports, and personal communications. New proposals to promote anonymous transactions are also under consideration.

Will the Avrahami case establish new legal precedents in Virginia or lead to new legislation in Washington? Only time will tell.

Virginia Code

This is the critical provision

"Unauthorized use of name or picture of any person; exemplary damages; statute of limitations -- A.

Any person whose name, portrait, or picture is used without having first obtained the written consent of such person, or if dead, of the surviving consort and if none, of the next of kin, or if a minor, the written consent of his or her parent or guardian, for advertising purposes or for the purposes of trade, such persons may maintain a suit in equity against the person, firm or corporation so using such person's name, portrait, or picture to prevent and restrain the use thereof; and may also sue and recover damage for any injuries sustained by reason of such use.

And if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by this chapter, the jury, in its discretion, may award exemplary damages."

(Code of Virginia, Section 8,01-40)

The Appropriation Tort
A legal defintion

Appropriation of Name or Likeness. One who appropriates to his own use of benefit the name or likeness of another is subject to liabaility to the other for invasion of his privacy.

(Restatement (Second) of Torts, section 652C)

Avrahami Motion

EPIC web page: http://www.epic.org/privacy/junk_mail/motion.html

VIRGINIA

IN THE GENERAL DISTRICT COURT OF ARLINGTON COUNTY CIVIL DIVISION

RAM AVRAHAMI
Apartment 110
1001 North Randolph Street
Arlington, Virginia 22201

Plaintiff

v. Civil Action 95-7479

U.S. NEWS & WORLD REPORT, INC.
2400 N Street, N.W.
Washington, D.C. 20037

Defendant

SERVE:

CT Corporation
Suite 400
1025 Vermont Avenue
Washington, D.C. 20005

MOTION FOR JUDGMENT

COMES NOW the Plaintiff, RAM AVRAHAMI, by counsel, and moves this Honorable Court for judgment against the Defendant, U.S. NEWS & WORLD REPORT, INC., hereinafter "U.S. NEWS & WORLD REPORT," on the grounds and in the amount hereinafter set forth.

STATEMENT OF FACTS

1. Plaintiff, RAM AVRAHAMI, is a resident of the Commonwealth of Virginia and resides at Apartment 110, 1001 North Randolph Street, Arlington, Virginia 22201.

2. At all times relevant hereto, Defendant U.S. NEWS & WORLD REPORT was a corporation organized under the laws of the State of Delaware with its principles place of business located at 2400 N Street. N.W., Washington, D.C. 20037, and at all times relevant hereto, Defendant U.S.

NEWS & WORLD REPORT solicited and conducted business in the Commonwealth of Virginia.

3. Jurisdiction is invoked against the Defendant under Virginia Code Ann. Section 8.01-328.1.

4. On or about February 25, 1995, Plaintiff received by mail promotional literature from Defendant which included an offer to subscribe to the magazine "U.S. News & World Report."

5. On or about March 10, 1995, Plaintiff accept Defendant's offer of subscription and mailed said acceptance to Defendant.

6. On or about March 21, 1995, Plaintiff was billed for said subscription and mailed his payment for the subscription in the amount of $15.00 to defendant.

7. At no time during the course of this contractual relationship or otherwise did Defendant request or did Plaintiff give his consent, either oral, written or otherwise, to Defendant to use Plaintiff's name for any advertising, trade or otherwise commercial purpose of Defendant.

8. On or about May 22, 1995, Plaintiff received by mail promotional literature from the Smithsonian Institution which included an offer to subscribe to the magazine "Smithsonian."

9. On or about May 22, 1995, Plaintiff inquired of the Smithsonian Institution how it received Plaintiff's name and address.

10. On or about June 5, 1995, Plaintiff received by mail a letter from the Circulation Department of the Smithsonian magazine, Smithsonian Institution, attached hereto at Plaintiff's Exhibit A, indicating that the Smithsonian Institution had "rented [Plaintiff's] name from U.S. News and World Report for a one time use."

COUNT I

(Unauthorized Use of Name Virginia Code Section 8.01-40)

11. Plaintiff incorporates by reference paragraphs 1 through 10

12. Without having first obtained the written consent of Plaintiff RAM AVRAHAMI, Defendant U.S. NEWS & WORLD REPORT used Plaintiff's name and/or likeness for the purpose of trade by renting Plaintiff's name to the Smithsonian Institution, Smithsonian magazine, in violation of Virginia Code Section 8.01-40.

13. Without having first obtained the written consent of Plaintiff RAM AVRAHAMI, Defendant U.S. NEWS & WORLD REPORT willfully and knowingly used Plaintiff's name and/or likeness for the

purpose of trade by renting Plaintiff;s name to the to the Smithsonian Institution, Smithsonian magazine, in violation of Virginia Code Section 8.01-40.

14. As a direct and proximate result of Defendant U.S. NEWS & WORLD REPORT's use of Plaintiff RAM AVRAHAMI's name and/or likeness for the purpose of trade without Plaintiff's consent, Plaintiff suffered damages, including but not limited to the value of his name as a property interest and the time spent by Plaintiff to investigate how his name and/or likeness was appropriated.

WHEREFORE, the Plaintiff, RAM AVRAHAMI, prays for Judgment against the Defendant, U.S. NEWS & WORLD REPORT, in the amount of $100.00 compensatory damages and $1000.00 exemplary damages.

COUNT II

(Conversion)

15. Plaintiff incorporates by reference paragraphs 1 through 14.

16. Plaintiff RAM AVRAHAMI has a property interest in his name and/or likeness.

17. Defendant U.S. NEWS & WORLD REPORT willfully used Plaintiff's property as its own and exercised dominion over it without Plaintiff's consent by renting Plaintiff's name to the Smithsonian Institution, Smithsonian magazine.

18. As a direct and proximate result of Defendant U.S. NEWS & WORLD REPORT's conversion of Plaintiff's name and/or likeness without his consent, Plaintiff suffered damages, including but no limited to the value of his name as a property interest and the time spent by Plaintiff to investigate how his name and/or likeness was appropriated.

WHEREFORE, the Plaintiff, RAM AVRAHAMI, prays for judgment against the Defendant, U.S. NEWS & WORLD REPORT, in the amount of $100.00 compensatory damages and $1000.00 exemplary damages.

Respectfully submitted,

RAM AVRAHAMI

By Counsel

/s/
Jonathan C. Dailey
Counsel for Ram Avrahami
Va. Bar No. 37442

2111 Wilson Blvd., Suite 700
Arlington, Virginia 22201
(703) 351-5097

Avrahami Letter to DMA
EPIC web page: http:/www.epic.org/privacy/junk_mail/DMAletter.html

Ram Avrahami
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avrahami@ragis.com

24 June 1996

Mr. Jonah Gitlitz
President
Direct Marketing Association
1120 Avenue of the Americas
New York, NY 10036-3603

Dear Mr. Gitlitz,

As you are probably aware, I have been involved in a legal litigation with US News & World Report regarding their unauthorized use of my name as part of their mailing list. While the Arlington County Circuit Court has just ruled in favor of US News, curiously by adopting its position verbatim without comment, most of the questions that the case pointed to still remain unclear. Who owns personal information, how can it be utilized in a way that is acceptable and desirable by all sides and how to continue from here are the prominent ones.

My case does not mention direct marketing, nor am I opposed to it. But the fact that it received national publicity and resonated with many people speaks for itself. There is a fundamental distrust among many consumers in the practices of the direct marketing industry, and unauthorized trading in names is a major contributor to this feeling. The latest poll conducted by Direct magazine shows the same attitude.

Last November, during an open panel discussion, I told DMA Counsel that the DMA should treat my case not as a problem but as a proposed solution to how better practices could be structured. Just recently, DM News called the industry to proactively issue new guidelines before legislators take that action. Initiatives in several states and in the federal level indicate that if the DMA will not move on this issue, someone else will.

Having looked at the Court's decision, I have little doubt that there is not only ample grounds for appeal, but that its chances are good. I have no doubt that at the end people will own their personal information. But the industry has now the time to prepare itself for such outcome.

I would like to offer constructive suggestions to how personal information can and can be used in the direct marketing industry in a positive way. Assuming personal information belongs to individuals, its commercial trading can only take place with the

explicit permission of its owners, practically implying opt-in. The following four guidelines will make a smooth transition to such an opt-in protocol:

1) The Direct Marketing Association will explicitly and publicly endorse opt-in. This act will prevent speculations and misunderstanding among consumers and companies and provide clear leadership of the DMA in building a new relationship between them.

2) The DMA will provide a central repository for people who are happy with the current situation and do not want to be bothered with multiple requests for the use of their name. These people could simply contact the DMA and give it one general permission to exchange their names. The DMA would then disseminate such permissions among its members in a centralized and efficient way.

3) Soliciting companies would explicitly inform consumers who they got their names from. This is both a matter of courtesy and a simple way to oversee the proper use of the opt-in protocol. In addition, once permission for such solicitation was given, the mentioning of the source will not annoy the consumer but provide a personable connection with him or her.

4) List companies would contact all the consumers on their lists, explain the benefit of being on the lists, and ask for explicit permission to retain their names there. While this may initially seem an unnecessary burden, the new relationship that will be built between the list companies and the consumers who opted to stay on their lists will overcome the initial cost of establishing it. As Polk's Buyer's Choice shows, consumers do opt-in when given the chance.

My belief is that in the electronic age direct marketing can be stronger and more prominent than its role in the traditional world. Yet to do so, consumers need to believe that the industry works on their behalf and not enforced on them. I hope that this letter will help in building a new relationship between consumers and direct marketing companies, that is founded on openness and trust and will therefore be stronger and better to all sides in the long term. I appreciate your attention in advance. Please let me know if I can assist you further on this issue.

Sincerely,

Ram Avrahami

CC: Ms. Christine Varney, Commissioner, FTC

Mr. Marc Rotenberg, Director, EPIC

Opt-In is Absolutely Unworkable
DMA's Response to Mr. Avrahami's Letter
EPIC web page: http//www.org/privacy/junk_mail/DMAresponse.html
DM News, July 15, 1996)

By Jonah Gitlitz

Given his quest for media attention in his recent lawsuit against U.S. News & World Report, I was not surprised that Ram Avrahami sent you (and likely others in the media) a copy of a letter that he hand-delivered to me with no indication you were being copied.

Nonetheless, to the substance of his letter, the issue of positive consent is an absolutely unworkable and unnecessary idea.

It does not work for consumers, who are denied the benefits of receiving offers for products and services they cannot anticipate in the global marketplace. Consumers vote with their pocketbooks and their documented acceptance of direct mail is impressive (with consumers spending nearly $600 billion in 1995, based on the DMA Economic Impact study conducted by the WEFA Group).

In addition, positive consent does not work for the countless companies and organizations that rely on direct mail in the competitive world to communicate to customers and prospects -- including businesses, educational and charitable institutions, nonprofit organizations, and political parties and candidates. It would place an undue burden on commerce, without any corresponding additional social or economic benefit.

America prides itself on being the open marketplace of ideas. In a commercial context, direct mail, like other advertising media, gives support and nourishment to this fundamental concept.

Those who do not accept the process should be given the opportunity to opt out. That option has been offered through DMA's MPS as well as company in-house suppression systems. Moreover, as one jurist noted, the distance between the mailbox and the trash can is a short one.

Mr. Avrahami's ideas for positive consent would decimate and undermine the process and cause harm to consumers, businesses and the free flow of ideas and information.

In light of his recent unsuccessful lawsuit, I cannot believe Mr. Avrahami does not understand this.

Jonah Gitlitz
President
Direct Marketing Association
New York

Anonymously Yours -- Part 1
Wired, p. 50, June 1994

An Interview with Johan Helsingius.

He can give you your own PO Box on the Net.

By Joshua Quittner

Johan Helsingius is the 32-year-old president of Penetic, a Helsinki,Finland, firm that helps businesses connect to the Internet. His hobby is running a controversial anonymous remail server on the Internet, anon@penet.fi. Think of it as your own secret PO Box on the Net. Anyone can send e-mail to the server. Unlike some other such servers, anon@penet.fi also forwards replies to you. (Send e-mail for further instructions.) We caught up with Helsingius recently at the Massachusetts Institute of Technology.

Wired: What's the setup of penet.fi? What kind of computer do you use, where is it, and so forth?

Helsingius: It's a generic 486; I don't even remember the brand. It's just a typical 486 box. The current machine has been in operation for something like a half a year - an earlier 386 ran out of steam pretty early.

Where physically is it?

That's something I probably wouldn't like to discuss. It's not in my house. It used to be. It's now somewhere that I have access to, but I wouldn't like people to know where it's located. It's in a machine room at a business in Helsinki, a pretty big business with lots of machines. Nobody knows except a couple of guys who are running the computing room. It's not in a university, because at universities you always run into political problems.

I'm a bit paranoid about people getting access to the actual server. I think there are lots of people around who'd like to have that database, the database correlating the real people to their anonymous handles. That's kept forever, but I don't keep copies of the messages that actually go through the machine.

How do we know that you don't read any of the mail that flows through penet.fi?

You don't. There's absolutely no way I could guarantee to anyone, I mean really prove I'm not looking at the stuff. There's no way to prove it. People just have to trust me.

Do you use it yourself?

I haven't actually posted anything through the server, except using the administrative account anonymously. I actually don't use it myself, nope. I never had the need. But I can definitely relate to people who have the need. Who has the need? People who

want to talk about things having to do with minorities. I actually belong to a Swedish-speaking minority [that makes up 4 percent of Finland's population]. I was born in Finland to Swedish-speaking parents. It's not a problem but it sort of makes you appreciate the problems. There are some situations where I wouldn't want people to know I belong to the Swedish-speaking minority.

So why do you run an anonymous remailer?

It's important to be able to express certain views without everyone knowing who you are. One of the best examples was the great debate about Caller ID on phones. People were really upset that the person at the receiving end would know who was calling. On things like telephones, people take for granted the fact that they can be anonymous if they want to and they get really upset if people take that away. I think the same thing applies for e-mail....

Living in Finland, I got a pretty close view of how things were in the former Soviet Union. If you actually owned a photocopier or even a typewriter there you would have to register it and they would take samples of what your typewriter would put out so they could identify it later. That's something I find so appalling. The fact that you have to register every means of providing information to the public sort of parallels it - like saying you have to sign everything on the Net. We always have to be able to track you down.

Who really needs to use an anonymous remailer?

It's clear that for things like the Usenet groups on sexual abuse, people need to be able to discuss their own experiences without everyone knowing who they are. Where you're dealing with minorities - racial, political, sexual, whatever - you always find cases in which people belonging to a minority would like to discuss things that are important to them without having to identify who they are.

But there are other people who use it, too, right? You mentioned people who posted questions to groups on child rearing and programmers who wanted to ask technical questions anonymously.

That's right. Posting technical questions because they're really afraid they don't know what they're supposed to know. A more important case would be someone who, for example, found out that his or her computer had a bad security problem and the manufacturer wasn't doing anything about it.

How long does it take for a message to go through your machine, have any traces of the user's identity stripped, and move on?

Theoretically, it only takes a couple of minutes. But the machine has been really overloaded lately, and delays can stretch up to a few hours. It's currently handling about 4,000 messages a day. I'm actually about to rewrite the software to be more efficient.

You've been the target of a number of attacks, I understand. Someone said your server was shut down recently when someone from the US government complained to Finnish authorities?

It wasn't actually someone from the government in the US. It was someone who was pretty well known on the Net, a guy who has been on the Net for a really long time. I don't want to say who he is because I feel he didn't know his actions would result in a shutdown.

It was a short shutdown and never a complete shutdown - I shut down the posting part for something like two to three weeks, but mail still worked and I re-enabled the full service pretty soon.... I shut down because of the sensitive nature of the connection. The international network connection went through the Finnish University net, FUnet, and this man complained to the domain administrator at FUnet. He said basically that the anon server was generating lots of junk traffic on the Net. He was saying it wasn't a good thing. Most of it was just stuff like silly arguments, personal attacks against people. The domain administrator contacted me and said he had received complaints; because of the delicate situation with the international connection, I thought it was best to restrict the service for some time until we actually got the international thing sorted out.

Some people are very hostile to your setup, aren't they? People have tried everything from "saturation mail bombings" to anon-mail-eating worms, right?

Saturation bombings actually happen every now and then. About once a month someone tries to send 100 Mbytes of something. It's random data mostly. When that happens you either get lots of delays or start losing data.

Mostly at that point the traffic goes so high the service provider notices it and contacts me and I ask to have service blocked from that site for a couple of days. I know it's not the same person doing it. It seems to come from random sites.

What about the anon-mail-eating worm?

It was just a really silly scheme, the cancel bomb. Someone wrote a program to automatically cancel anonymous messages. The basic idea was to send out cancel messages for all the anonymous postings. But it actually backfired pretty badly, both politically and technically. Politically, there were lots of people who got really angry about censorship - that their articles were canceled and that someone was actively censoring stuff, trying to play network police. As far as technically, there was some problem with the software, so it actually ended up posting hundreds of messages on usenet. admin.something. There were just lots of garbage messages there suddenly and everyone got really pissed off and a few mail servers crashed from the load.

You could make a lot of money selling some of the secrets of cyberspace, couldn't you?

There was an April Fools' joke last spring, an e-mail message coming from an obscure site in South America, saying that someone had managed to crack my machine and get access to the

database. They posted something like, "If you wish to know under which ID someone's posting, just send $10 to us. For well-known net personalities, send $50."

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David Chaum, Achieving Electronic Privacy,
Scientific American, August 1992, p. 96

A cryptographic invention known as a blind signature permits numbers to serve as electronic cash or to replace conventional identification. The author hopes it may return control of personal information to the individual.

by David Chaum

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Every time you make a telephone call, purchase goods using a credit card, subscribe to a magazine or pay your taxes, that information goes into a data base somewhere. Furthermore, all these records can be linked so that they constitute in effect a single dossier on your life not only your medical and financial history but also what you buy, where you travel and whom you communicate with. It is almost impossible to learn the full extent of the files that various organizations keep on you, much less to assure their accuracy or to control who may gain access to them.

Organizations link records from different sources for their own protection. Certainly it is in the interest of a bank looking at a loan application to know that John Doe has defaulted on four similar loans in the past two years. The bank's possession of that information also helps its other customers, to whom the bank passes on the cost of bad loans. In addition, these records permit Jane Roe, whose payment history is impeccable, to establish a charge account at a shop that has never seen her before.

That same information in the wrong hands, however, provides neither protection for businesses nor better service for consumers. Thieves routinely use a stolen credit card number to trade on their victims' good payment records; murderers have tracked down their targets by consulting government-maintained address records. On another level, the U.S. Internal Revenue Service has attempted to single out taxpayers for audits based on estimates of household income compiled by mailing-list companies.

The growing amounts of information that different organizations collect about a person can be linked because all of them use the same key (in the U.S. the social security number) to identify the individual in question. This identifier-based approach perforce trades off security against individual liberties. The more information that organizations have (whether the intent is to protect them from fraud or simply to target marketing efforts), the less privacy and control people retain.

Over the past eight years, my colleagues and I at CWI (the Dutch nationally funded Center for Mathematics and Computer Science in Amsterdam) have developed a new approach, based on fundamental theoretical and practical advances in cryptography, that makes this trade-off unnecessary. Transactions employing these techniques avoid the possibility of fraud while maintaining the privacy of those who use them.

In our system, people would in effect give a different (but definitively verifiable) pseudonym to every organization they do business with and so make dossiers impossible. They could pay for

goods in untraceable electronic cash or present digital credentials that serve the function of a banking passbook, driver's license or voter registration card without revealing their identity. At the same time, organizations would benefit from increased security and lower record-keeping costs.

Recent innovations in microelectronics make this vision practical by providing personal "representatives" that store and manage their owners' pseudonyms, credentials and cash. Microprocessors capable of carrying out the necessary algorithms have already been embedded in pocket computers the size and thickness of a credit card. Such systems have been tested on a small scale and could be in widespread use by the middle of this decade.

The starting point for this approach is the digital signature, first proposed in 1976 by Whitfield Diffie, then at Stanford University. A digital signature transforms the message that is signed so that anyone who reads it can be sure of who sent it [see "The Mathematics of Public-Key Cryptography", by Martin E. Hellman; Scientific American, August 1979]. These signatures employ a secret key used to sign messages and a public one used to verify them. Only a message signed with the private key can be verified by means of the public one. Thus, if Alice wants to send a signed message to Bob (these two are the cryptographic community's favorite hypothetical characters), she transforms it using her private key, and he applies her public key to make sure that it was she who sent it. The best methods known for producing forged signatures would require many years, even using computers billions of times faster than those now available.

To see how digital signatures can provide all manner of unforgeable credentials and other services, consider how they might be used to provide an electronic replacement for cash. The First Digital Bank would offer electronic bank notes: messages signed using a particular private key. All messages bearing one key might be worth a dollar, all those bearing a different key five dollars, and so on for whatever denominations were needed. These electronic bank notes could be authenticated using the corresponding public key, which the bank has made a matter of record. First Digital would also make public a key to authenticate electronic documents sent from the bank to its customers.

To withdraw a dollar from the bank, Alice generates a note number (each note bears a different number, akin to the serial number on a bill); she chooses a 100-digit number at random so that the chance anyone else would generate the same one is negligible. She signs the number with the private key corresponding to her "digital pseudonym" (the public key that she has previously established for use with her account). The bank verifies Alice's signature and removes it from the note number, signs the note number with its worth-one-dollar signature and debits her account. It then returns the signed note along with a digitally signed withdrawal receipt for Alice's records. In practice, the creation, signing and transfer of note numbers would be carried out by Alice's card computer. The power of the cryptographic protocols, however, lies in the fact that they are secure regardless of physical medium: the same transactions could be carried out using only pencil and paper.

When Alice wants to pay for a purchase at Bob's shop, she connects her "smart" card with his card reader and transfers one of the signed note numbers the bank has given her. After verifying the bank's digital signature, Bob transmits the note to the bank, much as a merchant verifies a credit card transaction today. The bank reverifies its signature, checks the note against a list of those already spent and credits Bob's account. It then transmits a "deposit slip," once again unforgeably signed with the appropriate key. Bob hands the merchandise to Alice along with his own digitally signed receipt, completing the transaction.

This system provides security for all three parties. The signatures at each stage prevent any one from cheating either of the others: the shop cannot deny that it received payment, the bank cannot deny that it issued the notes or that it accepted them from the shop for deposit, and the customer can neither deny withdrawing the notes from her account nor spend them twice.

This system is secure, but it has no privacy. If the bank keeps track of note numbers, it can link each shop's deposit to the corresponding withdrawal and so determine precisely where and when Alice (or any other account holder) spends her money. The resulting dossier is far more intrusive than those now being compiled. Furthermore, records based on digital signatures are more vulnerable to abuse than conventional files. Not only are they self-authenticating (even if they are copied, the information they contain can be verified by anyone), but they also permit a person who has a particular kind of information to prove its existence without either giving the information away or revealing its source. For example, someone might be able to prove incontrovertibly that Bob had telephoned Alice on 12 separate occasions without having to reveal the time and place of any of the calls.

I have developed an extension of digital signatures, called blind signatures, that can restore privacy. Before sending a note number to the bank for signing, Alice in essence multiplies it by a random factor. Consequently, the bank knows nothing about what it is signing except that it carries Alice's digital signature. After receiving the blinded note signed by the bank, Alice divides out the blinding factor and uses the note as before.

The blinded note numbers are "unconditionally untraceable" that is, even if the shop and the bank collude, they cannot determine who spent which notes. Because the bank has no idea of the blinding factor, it has no way of linking the note numbers that Bob deposits with Alice's withdrawals. Whereas the security of digital signatures is dependent on the difficulty of particular computations, the anonymity of blinded notes is limited only by the unpredictability of Alice's random numbers. If she wishes, however, Alice can reveal these numbers and permit the notes to be stopped or traced.

Blinded electronic bank notes protect an individual's privacy, but because each note is simply a number, it can be copied easily. To prevent double spending, each note must be checked on-line against a central list when it is spent. Such a verification procedure might be acceptable when large amounts of money are at stake, but it is far too expensive to use when someone is just buying a newspaper. To solve this problem, my colleagues Amos Fiat and Moni Naor and I have

proposed a method for generating blinded notes that requires the payer to answer a random numeric query about each note when making a payment.
Spending such a note once does not compromise unconditional untraceability, but spending it twice reveals enough information to make the payer's account easily traceable. In fact, it can yield a digitally signed confession that cannot be forged even by the bank.

Cards capable of such anonymous payments already exist. Indeed, DigiCash, a company with which I am associated, has installed equipment in two office buildings in Amsterdam that permits copiers, fax machines, cafeteria cash registers and even coffee vending machines to accept digital "bank notes." We have also demonstrated a system for automatic toll collection in which automobiles carry a card that responds to radioed requests for payment even as they are traveling at highway speeds.

My colleagues and I call a computer that handles such cryptographic transactions a "representative." A person might use different computers as representatives depending on which was convenient: Bob might purchase software (transmitted to him over a network) by using his home computer to produce the requisite digital signatures, go shopping with a "palm-top" personal computer and carry a smart credit card to the beach to pay for a drink or crab cakes. Any of these machines could represent Bob in a transaction as long as the digital signatures each generates are under his control.

Indeed, such computers can act as representatives for their owners in virtually any kind of transaction. Bob can trust his representative and Alice hers because they have each chosen their own machine and can reprogram it at will (or, in principle, build it from scratch). Organizations are protected by the cryptographic protocol and so do not have to trust the representatives.

The prototypical representative is a smart credit-card-size computer containing memory and a microprocessor. It also incorporates its own keypad and display so that its owner can control the data that are stored and exchanged. If a shop provided the keypad and display, it could intercept passwords on their way to the card or show one price to the customer and another to the card. Ideally, the card would communicate with terminals in banks and shops by a short-range communications link such as an infrared transceiver and so need never leave its owner's hands.

When asked to make a payment, the representative would present a summary of the particulars and await approval before releasing funds. It would also insist on electronic receipts from organizations at each stage of all transactions to substantiate its owner's position in case of dispute. By requiring a password akin to the PIN (personal identifying number) now used for bank cards, the representative could safeguard itself from abuse by thieves. Indeed, most people would probably keep backup copies of their keys, electronic bank notes and other data; they could recover their funds if a representative were lost or stolen.

Personal representatives offer excellent protection for individual privacy, but organizations might prefer a mechanism to protect their interests as strongly as possible. For example, a bank might

want to prevent double spending of bank notes altogether rather than simply detecting it after the fact. Some organizations might also want to ensure that certain digital signatures are not copied and widely disseminated (even though the copying could be detected afterwards).

Organizations have already begun issuing tamperproof cards (in effect, their own representatives) programmed to prevent undesirable behavior. But these cards can act as "Little Brothers" in everyone's pocket.

We have developed a system that satisfies both sides. An observer a tamper-resistant computer chip, issued by some entity that organizations can trust acts like a notary and certifies the behavior of a representative in which it is embedded. Philips Industries has recently introduced a tamperresistant chip that has enough computing power to generate and verify digital signatures. Since then, Siemens, Thomson CSF and Motorola have announced plans for similar circuits, any of which could easily serve as an observer.

The central idea behind the protocol for observers is that the observer does not trust the representative in which it resides, nor does the representative trust the observer. Indeed, the representative must be able to control all data passing to or from the observer; otherwise the tamperproof chip might be able to leak information to the world at large.

When Alice first acquires an observer, she places it in her smart-card representative and takes it to a validating authority. The observer generates a batch of public and private key pairs from a combination of its own random numbers and numbers supplied by the card. The observer does not reveal its numbers but reveals enough information about them so that the card can later check whether its numbers were in fact used to produce the resulting keys. The card also produces random data that the observer will use to blind each key.

Then the observer blinds the public keys, signs them with a special built-in key and gives them to the card. The card verifies the blinding and the signature and checks the keys to make sure they were correctly generated. It passes the blinded, signed keys to the validating authority, which recognizes the observer's built-in signature, removes it and signs the blinded keys with its own key. The authority passes the keys back to the card, which unblinds them. These keys, bearing the signature of the validating authority, serve as digital pseudonyms for future transactions; Alice can draw on them as needed.

An observer could easily prevent (rather than merely detect) double spending of electronic bank notes. When Alice withdraws money from her bank, the observer witnesses the process and so knows what notes she received. At Bob's shop, when Alice hands over a note from the bank, she also hands over a digital pseudonym (which she need use only once) signed by the validating authority. Then the observer, using the secret key corresponding to the validated pseudonym, signs a statement certifying that the note will be spent only once, at Bob's shop and at this particular time and date. Alice's card verifies the signed statement to make sure that the observer does not leak any information and passes it to Bob. The observer is programmed to sign only one such statement for any given note.

Many transactions do not simply require a transfer of money. Instead they involve credentials information about an individual's relationship to some organization. In today's identifier-based world, all of a person's credentials are easily linked. If Alice is deciding whether to sell Bob insurance, for example, she can use his name and date of birth to gain access to his credit status,
medical records, motor vehicle file and criminal record, if any.

Using a representative, however, Bob would establish relationships with different organizations under different digital pseudonyms. Each of them can recognize him unambiguously, but none of their records can be linked.

In order to be of use, a digital credential must serve the same function as a paper-based credential such as a driver's license or a credit report. It must convince someone that the person attached to it stands in a particular relation to some issuing authority. The name, photograph, address, physical description and code number on a driver's license, for example, serve merely to link it to a particular person and to the corresponding record in a data base. Just as a bank can issue unforgeable, untraceable electronic cash, so too could a university issue signed digital diplomas or a credit-reporting bureau issue signatures indicating a person's ability to repay a loan.

When the young Bob graduates with honors in medieval literature, for example, the university registrar gives his representative a digitally signed message asserting his academic credentials. When Bob applies to graduate school, however, he does not show the admissions committee that message. Instead his representative asks its observer to sign a statement that he has a B.A. cum laude and that he qualifies for financial aid based on at least one of the university's criteria (but without revealing which ones). The observer, which has verified and stored each of Bob's credentials as they come in, simply checks its memory and signs the statement if it is true.

In addition to answering just the right question and being more reliable than paper ones, digital credentials would be both easier for individuals to obtain and to show and cheaper for organizations to issue and to authenticate. People would no longer need to fill out long and revealing forms. Instead their representatives would convince organizations that they meet particular requirements without disclosing any more than the simple fact of qualification. Because such credentials reveal no unnecessary information, people would be willing to use them even in contexts where they would not willingly show identification, thus enhancing security and giving the organization more useful data than it would otherwise acquire.

Positive credentials, however, are not the only kind that people acquire. They may also acquire negative credentials, which they would prefer to conceal: felony convictions, license suspensions or statements of pending bankruptcy. In many cases, individuals will give organizations the right to inflict negative credentials on them in return for some service. For instance, when Alice borrows books from a library, her observer would be instructed to register an overdue notice unless it had received a receipt for the books' return within some fixed time.

Once the observer has registered a negative credential, an organization can find out about it simply by asking the observer (through the representative) to sign a message attesting to its presence or absence. Although a representative could muzzle the observer, it could not forge an assertion about the state of its credentials. In other cases, organizations might simply take the lack of a positive credential as a negative one. If Bob signs up for skydiving lessons, his instructors may assume that he is medically unfit unless they see a credential to the contrary.

For most credentials, the digital signature of an observer is sufficient to convince anyone of its authenticity. Under some circumstances, however, an organization might insist that an observer demonstrate its physical presence. Otherwise, for example, any number of people might be able to gain access to nontransferable credentials (perhaps a health club membership) by using representatives connected by concealed communications links to another representative containing the desired credential.

Moreover, the observer must carry out this persuasion while its input and output are under the control of the representative that contains it. When Alice arrives at her gym, the card reader at the door sends her observer a series of single-bit challenges. The observer immediately responds to each challenge with a random bit that is encoded by the card on its way back to the organization. The speed of the observer's response establishes that it is inside the card (since processing a single bit introduces almost no delay compared with the time that signals take to traverse a wire). After a few dozen iterations the card reveals to the observer how it encoded the responses; the observer signs a statement including the challenges and encoded responses only if it has been a party to that challengeresponse sequence. This process convinces the organization of the observer's presence without allowing the observer to leak information.

Organizations can also issue credentials using methods that depend on cryptography alone rather than on observers. Although currently practical approaches can handle only relatively simple queries, Gilles Brassard of the University of Montreal, Claude Cripeau of the Ecole Normale Supirieure and I have shown how to answer arbitrary combinations of questions about even the most complex credentials while maintaining unconditional unlinkability. The concealment of purely cryptographic negative credentials could be detected by the same kinds of techniques that detect double spending of electronic bank notes. And a combination of these cryptographic methods with observers would offer accountability after the fact even if the observer chip were somehow compromised.

The improved security and privacy of digital pseudonyms exact a price: responsibility. At present, for example, people can disavow credit card purchases made over the telephone or cash withdrawals from an automatic teller machine (ATM). The burden of proof is on the bank to show that no one else could have made the purchase or withdrawal. If computerized representatives become widespread, owners will establish all their own passwords and so control access to their representatives. They will be unable to disavow a representative's actions.

Current tamper-resistant systems such as ATMs and their associated cards typically rely on weak, inflexible security procedures because they must be used by people who are neither highly competent nor overly concerned about security. If people supply their own representatives, they can program them for varying levels of security as they see fit. (Those who wish to trust their assets to a single four-digit code are free to do so, of course.) Bob might use a short PIN (or none at all) to authorize minor transactions and a longer password for major ones. To protect himself from a robber who might force him to give up his passwords at gunpoint, he could use a "duress code" that would cause the card to appear to operate normally while hiding its more important assets or credentials or perhaps alerting the authorities that it had been stolen.

A personal representative could also recognize its owner by methods that most people would consider unreasonably intrusive in an identifier-based system; a notebook computer, for example, might verify its owner's voice or even fingerprints. A supermarket checkout scanner capable of recognizing a person's thumbprint and debiting the cost of groceries from their savings account is Orwellian at best. In contrast, a smart credit card that knows its owner's touch and doles out electronic bank notes is both anonymous and safer than cash. In addition, incorporating some essential part of such identification technology into the tamperproof observer would make such a card suitable even for very high security applications.

Computerized transactions of all kinds are becoming ever more pervasive. More than half a dozen countries have developed or are testing chip cards that would replace cash. In Denmark, a consortium of banking, utility and transport companies has announced a card that would replace coins and small bills; in France, the telecommunications authorities have proposed general use of the smart cards now used at pay telephones. The government of Singapore has requested bids for a system that would communicate with cars and charge their smart cards as they pass various points on a road (as opposed to the simple vehicle identification systems already in use in the U.S. and elsewhere). And cable and satellite broadcasters are experimenting with smart cards for delivering pay-per-view television. All these systems, however, are based on cards that identify themselves during every transaction.

If the trend toward identifier-based smart cards continues, personal privacy will be increasingly eroded. But in this conflict between organizational security and individual liberty, neither side emerges as a clear winner. Each round of improved identification techniques, sophisticated data analysis or extended linking can be frustrated by widespread noncompliance or even legislated limits, which in turn may engender attempts at further control.

Meanwhile, in a system based on representatives and observers, organizations stand to gain competitive and political advantages from increased public confidence (in addition to the lower costs of pseudonymous record-keeping). And individuals, by maintaining their own cryptographically guaranteed records and making only necessary disclosures, will be able to protect their privacy without infringing on the legitimate needs of those with whom they do business.

The choice between keeping information in the hands of individuals or of organizations is being made each time any government or business decides to automate another set of transactions. In one direction lies unprecedented scrutiny and control of people's lives, in the other, secure parity between individuals and organizations. The shape of society in the next century may depend on which approach predominates.

A Cypherpunk´s Manifesto

by Eric Hughes

http://www.t0.or.at/crypto/crypmani.htm

Privacy is necessary for an open society in the electronic age. Privacy is not secrecy. A private matter is something one doesn't want the whole world to know, but a secret matter is something one doesn't want anybody to know. Privacy is the power to selectively reveal oneself to the world.

If two parties have some sort of dealings, then each has a memory of their interaction. Each party can speak about their own memory of this; how could anyone prevent it? One could pass laws against it, but the freedom of speech, even more than privacy, is fundamental to an open society; we seek not to restrict any speech at all. If many parties speak together in the same forum, each can speak to all the others and aggregate together knowledge about individuals and other parties. The power of electronic communications has enabled such group speech, and it will not go away merely because we might want it to.

Since we desire privacy, we must ensure that each party to a transaction have knowledge only of that which is directly necessary for that transaction. Since any information can be spoken of, we must ensure that we reveal as little as possible. In most cases personal identity is not salient. When I purchase a magazine at a store and hand cash to the clerk, there is no need to know who I am. When I ask my electronic mail provider to send and receive messages, my provider need not know to whom I am speaking or what I am saying or what others are saying to me; my provider only need know how to get the message there and how much I owe them in fees. When my identity is revealed by the underlying mechanism of the transaction, I have no privacy. I cannot here selectively reveal myself; I must always reveal myself.

Therefore, privacy in an open society requires anonymous transaction systems. Until now, cash has been the primary such system. An anonymous transaction system is not a secret transaction system. An anonymous system empowers individuals to reveal their identity when desired and only when desired; this is the essence of privacy.

Privacy in an open society also requires cryptography. If I say something, I want it heard only by those for whom I intend it. If the content of my speech is available to the world, I have no privacy. To encrypt is to indicate the desire for privacy, and to encrypt with weak cryptography is to indicate not too much desire for privacy. Furthermore, to reveal one's identity with assurance when the default is anonymity requires the cryptographic signature.

We cannot expect governments, corporations, or other large, faceless organizations to grant us privacy out of their beneficence. It is to their advantage to speak of us, and we should expect that they will speak. To try to prevent their speech is to fight against the realities of information. Information does not just want to be free, it longs to be free. Information expands to fill the available storage space. Information is Rumor's younger, stronger cousin; Information is fleeter of foot, has more eyes,
knows more, and understands less than Rumor.

We must defend our own privacy if we expect to have any. We must come together and create systems which allow anonymous transactions to take place. People have been defending their own privacy for centuries with whispers, darkness, envelopes, closed doors, secret handshakes, and couriers. The technologies of the past did not allow for strong privacy, but electronic technologies do.

We the Cypherpunks are dedicated to building anonymous systems. We are defending our privacy with cryptography, with anonymous mail forwarding systems, with digital signatures, and with electronic money.

Cypherpunks write code. We know that someone has to write software to defend privacy, and since we can't get privacy unless we all do, we're going to write it. We publish our code so that our fellow Cypherpunks may practice and play with it. Our code is free for all to use, worldwide. We don't much care if you don't approve of the software we write. We know that software can't be destroyed and that a widely dispersed system can't be shut down.

Cypherpunks deplore regulations on cryptography, for encryption is fundamentally a private act. The act of encryption, in fact, removes information from the public realm. Even laws against cryptography reach only so far as a nation's border and the arm of its violence. Cryptography will ineluctably spread over the whole globe, and with it the anonymous transactions systems that it makes possible.

For privacy to be widespread it must be part of a social contract. People must come and together deploy these systems for the common good. Privacy only extends so far as the cooperation of one's fellows in society. We the Cypherpunks seek your questions and your concerns and hope we may engage you so that we do not deceive ourselves. We will not, however, be moved out of our course because some may disagree with our goals.

The Cypherpunks are actively engaged in making the networks safer for privacy. Let us proceed together apace.

Onward.

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THE PRIVATE AND OPEN SOCIETY BY JOHN GILMORE

A transcript of remarks given by John Gilmore at the First Conference on Computers, Freedom, and Privacy, March 28,1991

My talk concerns two ethics - the belief in an open society and the belief in privacy. These two ethics are related , and I would like to say something about how they relate to our conduct in the world.

This society was built as a free and open society. Our ancestors, our parents, our peers, and ourselves are all making and building this society in such a way - because we believe such a society outperforms closed societies - in quality of life, in liberty, and in the pursuit of happiness.

But I see this free and open society being nibbled to death by ducks, by small, unheralded changes. It's still legal to exist in our society without an ID - but just barely. It is still legal to exist by paying with cash - just barely. It is still legal to associate with anyone you want - unless they bring a joint onto your boat, photograph naked children for your museum, or work for you building a fantasy roleplaying game. And I think conferences like ours run the risk of being co-opted; we sit here and we work hard and we talk to people and build our consensus on what are relatively minor points, while we lose the larger open society.

For example - we have the highest percentage in the world of our own population in jail. We used to be number two but last year we passed South Africa. We are number one.

Over the last ten years we've doubled the number of people in jail. In fact, those extra cells are mostly filled with people on drug charges, a victimless crime that twenty years ago was accepted behavior.

But it's no wonder we are concerned about privacy, because we are all "lawbreakers", We all break the law, but few of us are criminals. The problem is that simply attracting the attention of the police is enough to put the best of us at risk, because we break the law all the time and it's set up to make that happen!

I don't blame the cops for this. They mostly just enforce the bad laws that the legislatures write. The legislatures aren't completely at fault either, because in the long run, only educating the whole population about the benefits of openness has a chance. And I think I do a little bit of work in this area.

But beyond that, as P. T. Barnum said, "Nobody ever lost money by underestimating the intelligence of the American public." Where I hold out the most hope is in a different approach. In the paraphrased words of Ted Nelson, we probably can't stop this elephant but maybe we can run between its legs.

In most of Europe, phone companies don't record the phone numbers when you call, and they don't show up on your bill. They only tick off the charges on a meter. Now, I was told that this is partly because the Nazis used the call records that they used to have, to track and identify the

opposition after taking over those countries in World War II. They don't keep those records any more.

In the U.S., people boycotted the 1990 census in record numbers. I think that the most shameful story of how Japanese-Americans were rounded up using census data had a lot to do with that.

Professor Tribe talked about the distrust we must hold for our government. We have to realize that people who run the government can and do change. Our society and laws must assume that bad people - criminals even - will run the government, at least part of the time.

There's been a lot of talk here about privacy ... but we haven't focused much on why we want it. Privacy is a means; what is the real end we are looking for here? I submit that what we're looking for increased tolerance.

Society tolerates all different kinds of behavior - differences in religion, differences in political opinions, races, etc. But if your differences aren't accepted by the government or by other parts of society, you can still be tolerated if they simply don't know that you are different. Even a repressive government or a regressive individual can't persecute you if you look the same as everybody else. And, as George Perry said today, "Diversity is the comparative advantage of American society". I think that's what privacy is really protecting.

The whole conference has spent a lot of time talking about ways to control uses of information and to protect peoples' privacy after the information was collected. But that only works if you assume a good government. If we get one seriously bad government, they'll have all the information they need to make an efficient police state and make it the last government. It's more than convenient for them - in fact, it's a temptation for people who want to do that, to try to get into power and do it. Because we are giving them the means.

What if we could build a society where the information was never collected? Where you could pay to rent a video without leaving a credit card number or a bank number? Where you could prove you're certified to drive without ever giving your name? Where you could send and receive messages without revealing your physical location, like an electronic post office box?

That's the kind of society I want to build. I want a guarantee - with physics and mathematics, not with laws - that we can give ourselves things like real privacy of personal communications. Encryption strong enough that even the NSA can't break it. We already know how. But we're not applying it. We also need better protocols for mobile communication that can't be tracked.

We also want real privacy of personal records. Our computers are extensions of our minds. We should build them so that a thought written in the computer is as private as a thought held in our minds.

We should have real freedom of trade. We must be free to sell what we make and buy what we want - from anyone and to anyone - to support ourselves and accomplish what we need to do in this world.

Importantly, we need real financial privacy because the goods and information cost money. When you buy or sell or communicate, money is going to change hands. If they can track the money, they can track the trade and the communication, and we lose the privacy involved.

We also need real control of identification. We need the right to be anonymous while exercising all other rights. So that even with our photos, our fingerprints and our DNA profile, they can't link our communication and trade and financial activities to our person.

Now I'm not talking about lack of accountability here, at all. We must be accountable to the people we communicate with. We must be accountable to the people we trade with. And the technology must be built to enforce that. But we must not be accountable to THE PUBLIC for who we talk to, or who we buy and sell from.

There's plenty of problems here. I think we need to work on them. Just laws need to be enforced in such a society. People need to find like-minded people. And somebody still has to pay the cost of government, even when they can't spy on our income and our purchases. I don't know how to solve these problems, but I'm not willing to throw the baby out with the bath water. I still think that we should shoot for real privacy and look for solutions to these problems.

How do we create this kind of society? One way is to stop building and supporting fake protections, like laws that say you can't listen to cellular phone calls. We should definitely stop building outright threatening systems like the Thai ID system or the CalTrans vehicle tracking system.

Another thing to do is, if you know how, start and continue building real protections into the things you build. Build for the US market even if the NSA continues to suppress privacy with export controls on cryptography. It costs more to build two versions, one for us and one for export, but it's your society you're building for, and I think you should build for the way you want to live.

If you don't know how to build real protection, buy it. Make a market for those people who are building it, and protect your own privacy at the same time by putting it to use. Demand it from the people who supply you, like computer companies and cellular telephone manufacturers.

Another thing is to work to eliminate trade restrictions. We should be able to import the best from everywhere and we should be able to export the privacy and the best of our products to the rest of the world. The NSA is currently holding us hostage; Mainframe manufacturers, for example, haven't built in security because they can't export it. IBM put DES into their whole new line of computers, and they were only going to put it on the U.S. models, but the NSA threatened

to persecute them by stalling even their allowable exports in red tape. IBM backed down and took it out. We can't allow this to continue.

We also need to educate everyone about what's possible so we can choose this kind of freedom rather than assume it's unattainable. None of these ideas are new. Freedom of association and privacy have been prized by people everywhere. Cryptography has been used for these goals for thousands of years. But we owe a special debt to cryptographer David Chaum for researching how modern cryptography can enable these goals to be met by everyone in society, on a large scale. By reading David's work, you can begin to understand the capabilities of cryptography and how to apply them to provide financial and personal privacy.

We need to keep cash and anonymity legal. We'll need them as precedents for untraceable electronic cash and cryptographic anonymity.

I think with these approaches, we'll do a lot more for our REAL freedom, our real privacy, and our real security, than passing a few more laws or scaring a few more kid crackers. Please join me in building a future we'll be proud to inhabit and happy to leave to our children.

II. Civil Liberties In Cyberspace

C. Copyright and Civil Liberties

The Washington Post

August 19, 1995, Saturday, Final Edition

SECTION: STYLE; Pg. C01

LENGTH: 3171 words

HEADLINE: Church in Cyberspace; Its Sacred Writ Is on the Net. Its Lawyers Are on the Case.

BYLINE: Marc Fisher, Washington Post Staff Writer

BODY:

It was 9:30 and Arnie Lerma was lounging in his living room in Arlington, drinking his Saturday morning coffee, hanging. Suddenly, a knock at the door -- who could it be at this hour? -- and boom, before he could force anything out of his mouth, they were pouring into his house: federal marshals, lawyers, computer technicians, cameramen.

They stayed for three hours last Saturday. They inventoried and confiscated everything Lerma cherished: his computer, every disk in the place, his client list, his phone numbers. And then they left.

"I'm one of those guys who keeps everything -- my whole life -- on the computer," Lerma says. "And now they have it all."

"They" are lawyers for the Church of Scientology, the controversial group that Lerma once considered his home, his rock, his future. Now they call him a criminal, accusing him of divulging trade secrets and violating copyrights.

Founded in 1954 by science fiction writer L. Ron Hubbard, Scientology has grown into a worldwide organization that has been recognized as a religion by the Internal Revenue Service but has been called a cult by the German government. The church claims membership of more than 8 million; its critics say the figure is dramatically lower.

Lerma spent nearly 10 years in Scientology. But that was almost two decades ago. Since then, he's lived in Virginia, designing sound and video systems for nightclubs and other clients.

It was only in the past year or so that Scientology and Arnie Lerma have gotten reacquainted, and this time Lerma has a different view of the church: He considers it a dangerous cult, a corrupt organization dedicated to brainwashing

its followers.

To convince others of this view, Lerma used his facility with computers to distribute some of Scientology's most sacred texts, documents he says were obtained from a public court file in Los Angeles. In recent months, Lerma and others have placed dozens of these documents on the Internet, in a discussion group called alt.reli gion.scientology, a busy place in cyberspace where Scientology critics and adherents gather to trade arguments, insults and threats.

"I thought it essential that the public know this, so people can make an informed decision when some kid on a street corner asks you, 'Would you care to take a free personality analysis?' " Lerma says.

For a long time, the church treated its Internet critics as bothersome pests, sometimes answering their critiques, sometimes ignoring them. But in the past week Scientology has revved up its awesome legal machinery, launching a fierce campaign to protect its most closely guarded scripture.

A federal judge ordered the raid on Lerma's house after the church filed a lawsuit accusing Lerma of copyright infringement and revealing trade secrets. Church officials also paid a surprise visit to the home of a Washington Post reporter that Saturday evening, seeking the return of documents Lerma had sent him. And in Los Angeles, the church has persuaded a judge to seal the court file containing the disputed Scientology documents.

Arnie Lerma was lost without his computer. He resorted to jotting everything on legal pads. Finally this week, he got a new laptop. And then a sympathetic stranger mailed him a modem. But Lerma, 44, is deeply shaken. Tears drip down his cheeks at the slightest provocation. He descends into deep, barking sobs and cannot understand why.

He believes the church will try to harass him until he is silent. But he says that will not happen. On the Internet, Lerma signs his postings "Arnaldo Lerma, Clear 3502, Ex-Sea Organization Slave." It's a reference to his old Scientology code name and his status as a mostly unpaid church staffer. And then he writes: "I would prefer to die speaking my mind than to live fearing to speak."

Except that when he recites the line, Lerma cannot get it out without collapsing into spasms of sorrow.

'Ruin Him Utterly'

From the documents Lerma posted on the Internet, an oft-quoted Hubbard directive on litigation against unauthorized use of the church's texts:

The purpose of the suit is to harass and discourage rather than to win. The law can be used very easily to harass and enough harassment on somebody who is simply on the thin edge anyway, well knowing that he is not authorized, will generally be sufficient to cause his professional decease. If possible, of course, ruin him utterly.

The church has long been quick to use the legal system against government investigators, ex-members turned critics, and news organizations that publish criticism of Scientology. At one point a few years ago, it had 71 active lawsuits against the IRS alone. In 1992 the church filed a $ 416 million libel suit -- still pending -- against Time magazine, which had published a cover story titled "Scientology: The Cult of Greed." Earlier this year in California it filed suit against -- and confiscated computer disks belonging to -- another former member whom it accused of distributing copyrighted texts. And in the past year, the church has spent millions of dollars on an advertising blitz accusing the German government of a "hate campaign against Scientology."

A Scientology document filed in the Los Angeles case advises church members to discourage news reports on Scientology anywhere but in religion pages, and to "be very alert to sue for slander at the slightest chance so as to discourage the public presses from mentioning Scientology."

Free-Speech vs. Copyright

The Church of Scientology says the Lerma case is a simple matter of trade secrets and copyright violations. The church's unpublished, copyrighted texts -- previously available only to church members who have paid thousands of dollars to rise through Scientology's hierarchy of training courses -- have been placed on the Internet, open to all.

This, Scientology lawyers argue, threatens the church's intellectual property rights.

"Of course we want Scientology to go out as far and wide as possible," says Kurt Weiland, a director of the Church of Scientology International. "There are 60 books written by the founder. There is one small section, the upper-level materials, which are trade secrets based on our religious understanding. A person has to have advanced in an orderly fashion, spiritually, in order to understand its content.

"We are determined to maintain their confidentiality. We take very forceful and elaborate steps to maintain the confidentiality. This is not a free-speech issue. It's a copyright issue."

Scientology, which runs a celebrity outreach program and counts among its members John Travolta, Tom Cruise and Lisa Marie Presley-Jackson, offers to help people attain a near-god state through several levels of training sessions. At the upper levels, church doctrine reads like a science fiction plot.

The church believes that 75 million years ago, the leader of the Galactic Federation, Xenu, solved an overpopulation problem by freezing the excess people in a compound of alcohol and glycol and transporting them by spaceship to Teegeeack -- which we know as Earth. There they were chained to a volcano and exploded by hydrogen bombs. The souls of those dead -- "body thetans" -- are the root of most human misery to this day.

Much of Scientology's upper-level training consists of re-creations of that galactic genocide. Weiland says most church members pay up to $ 20,000 to reach the final stages of the training. Critics estimate the total cost at closer to $ 300,000.

It is the texts of those training sessions -- known as "Operating Thetan" or "OT" courses -- that the church now seeks to keep secret.

In the lawsuit against Lerma, court documents unsealed Wednesday in U.S. District Court in Alexandria contain 30 color photographs showing how Scientology protects its sacred scriptures. Members ready to learn the material obtain magnetized photo ID cards and sign agreements to keep the information confidential. To see the material, they scan their ID cards to walk through two sanitized white doors, and security guards unlock the scriptures from cabinets where they are wired in place. Then guards escort the members to a room where they are locked in and monitored on video cameras.

But despite the church's precautions, the OT documents have been in a public court file for two years, ever since they were submitted in Los Angeles by Steven Fishman, a former Scientologist who was quoted in the Time magazine article in 1991 and subsequently was sued by the church for libel. The suit was dropped last year, but for more than a year, federal court clerks say, eight people have served as a rotating guard, arriving each morning at the L.A. courthouse to check out five volumes of the Fishman case file and keep them all day.

"They get here when the door opens at 8:30 -- they come every day, faithfully," says Tyrone Lawson, exhibit custodian for the U.S. District Court clerk's office. "They never miss a day. It's like they don't want anyone to read it."

On Monday, after a Washington Post staffer asked the clerk for the file, one of the men challenged the clerk's right to take it to copy it, according to Joe Nunez, another official in the clerk's office.

"He came at me [saying], 'Oh, do you have the right to take this away?' " Nunez says.

When the Post staffer approached two of the men Tuesday, they would not say for whom they work. "We're just helping out," one said. "It's not public," the other claimed when the staffer asked to look at the file.

Weiland confirms that the people in the clerk's office were Scientology employees. "We took elaborate steps to assure that no one made copies of our copyrighted material," he says. "We actually had people there." Weiland says the only copies ever made from the court file were those made for the Washington Post staffer.

After learning that the Post had received the documents, Scientology lawyers renewed their efforts to seal the file in the Fishman case. Federal Judge Harold Hupp had denied previous Scientology motions to seal the material, but the church won a temporary sealing of the file pending the judge's next decision.

But that may not change anything, says Los Angeles lawyer Graham Berry, who represented Fishman's co-defendant, psychologist Uwe Geertz, in the libel case. "Now that it's all on the Internet, the genie is out of the bottle, and no amount of pushing and shoving by the Church of Scientology will put it back in."

Copyright lawyers say Scientology does not lose its copyright on the sacred texts simply because they are filed in court. "The Church of Scientology is correct," says Ilene Gotts, a partner in the Washington office of Foley and Lardner who specializes in intellectual property law. "The mere fact that you file something in the public domain does not get rid of its copyright protection."

Gotts says any citizen has the right to go to a courthouse and read anything in the files. But making photocopies of copyrighted materials could get you in trouble, as warning signs in many libraries, for example, make clear. And

putting those documents on the Internet can further muddy the waters, Gotts says. "That's something courts grapple with every day," she says. "A short passage for educational purposes is one thing, but if you're talking about 60, 80 pages, that defense is not going to work."

Clusters and Prep-Checks

If the court clerk's daily visitors made it difficult for citizens to see the public file, some copies of the documents nonetheless got out. Lerma says several former Scientologists passed the copies among themselves and then gave them to him; he then used a scanner to put them onto the Internet. Lerma also put the copies in an envelope and sent them to Richard Leiby, a Washington Post reporter who has written frequently about Scientology.

On the evening after the raid on Lerma's house, church lawyer Helena Kobrin and Scientology executive Warren McShane arrived unannounced at Leiby's home and demanded all copies he might have of the disputed documents.

Weiland says Scientology representatives went to Leiby's home "because Arnie Lerma gave stolen materials to Richard Leiby to hide." Lerma says he sent the papers to the reporter in search of publicity. This week, at Lerma's request, The Post returned the papers.

Meanwhile, the Post staffer in Los Angeles got copies of the documents from the court file.

Most of the 103 pages of disputed texts from the Fishman file are instructions for leaders of the OT training sessions. They are written in the dense jargon of the church: "If you do OT IV and he's still in his head, all is not lost, you have other actions you can take. Clusters, Prep-Checks, failed to exteriorise directions."

Scientology's jargon is often similar to the self-actualization lingo used by self-help groups that emerged from California in the 1960s and '70s. Like est and Lifespring, it includes concentration exercises in which trainees sharpen their perceptive abilities by focusing deeply on objects or people around them. In one high-level OT session, trainees are asked to pick an object, "wrap an energy beam around it" and pull themselves toward the object. Another instructs the trainee to "be in the following places -- the room, the sky, the moon, the sun."

Many excerpts from Scientology texts have been published in news accounts

over the past 20 years. What appears to be new in the Fishman documents is a 1980 "Confidential Student Briefing" on OT-VIII. The church calls the four-page briefing a fake. Purportedly written by Hubbard, who died in 1986, it tells the story of the church founder's "mission here on Earth," and warns that "virtually all religions of any significance on this planet" are designed to "bring about the eventual enslavement of mankind." It also states that "The historic Jesus was not nearly the sainted figure [he] has been made out to be. In addition to being a lover of young boys and men, he was given to uncontrollable bursts of temper and hatred."

Ultimately, the briefing says Hubbard will return to Earth "not as a religious leader but a political one. That happens to be the requisite beingness for the task at hand. I will not be known to most of you, my activities misunderstood by many, yet along with your constant effort in the theta band I will effectively postpone and then halt a series of events designed to make happy slaves of us all."

The text concludes, "L. Ron Hubbard, Founder." But Scientology director Weiland says it is "a complete forgery."

Genie Out of the Bottle

Forgery or the real thing, the documents are out there. The Internet newsgroups where the Scientology texts have been posted are among the most popular in cyberspace, and a recent brouhaha over the erasure of Internet messages has drawn new readers.

"I'm a computer scientist, and I knew nothing about Scientology until all this started happening," says Dick Cleek, a professor of geography and computer science at the University of Wisconsin Center in West Bend who believes Scientologists are behind the erasures. "This is about the ability of people to speak out. It's as if every letter you sent saying 'Vote Republican' got removed from the mails. . . .

"Every time they cancel one message, three more people post the documents," says Cleek, who is also a member of the Ad Hoc Committee Against Internet Censorship, a group of academics, computer users and Scientology critics who want law enforcement authorities to investigate the erased messages. "In the past, the church has harassed individuals who dared to criticize them. Now they've attacked the Internet, and they get people like me involved."

The church says it has never removed any messages from the Internet. "There

are thousands of messages there about Scientology," says Weiland. "Those people were critical and obscene and we never did a thing about it."

Weiland says people who post messages about Scientology are "just a bunch of people of low moral standards. They don't have a life. It's really only a handful of people, maybe 15 to 20 guys who just post, post, post, and they just get high on each other's verbiage."

Despite the church's claim to copyright protection of its documents, Scientology will be hard-pressed to eliminate distribution of information already zipping around the world on the computer network, says Gotts. "The beauty and the beast of the Internet is that information gets out immediately," the lawyer says. The church could win every court battle, yet still find its sacred texts flying across phone lines from Bethesda to Beijing.

Which would suit Arnie Lerma just fine. His goal is to dissuade people from joining Scientology by revealing the church's philosophy to be empty and corrupt.

Lerma -- who says he left the church after leaders forced him out of a budding romance with a daughter of the church founder -- is an angry and sad man. He says Scientology took advantage of him as a boy of 16, luring him into a life of virtual slavery, housing him in cold dormitories with insufficient food. "They prey on the naive with stars in their eyes. I just wanted to save the world."

Weiland says Lerma left because "Scientology has certain ethical standards. And Arnie Lerma was not able to live up to these standards and therefore decided to leave. There were problems with honesty."

"Ultimately," Weiland says, "his motivation is money." The director adds that Lerma never asked Scientology for money. "Not yet," he says.

Lerma contends he has violated no copyright, and intended only to distribute portions of the court file, "a public court record that I had a public duty to make available to the people because they were keeping it secret."

Arnie Lerma is a man given to causes. For years, he sought solutions through Scientology. More recently, he became intensely active in Ross Perot's abortive presidential campaign. Then he dived into efforts to unmask what he calls Perot's "terrible misdeeds." Now he has turned to Scientology once more.

Or, rather, against it. He says he does not seek revenge, only justice. He says that after he left the church, he went through a post-traumatic stress reaction, then through denial and, finally, a "reawakening."

Lerma lights up another Marlboro. He says he's smoking too much now. Every time the phone rings, he jumps up off the couch. Every time there's a knock at the door, he glances around the room.

Suddenly, he recalls the moment in 1977 when he called his mother in Georgetown and asked her to take him away from Scientology. "I said, 'Mom, I want to come home now and see if I can make life make some sense, because it surely doesn't right now.' "

And now, 18 years later, as Lerma says those words once more, he rolls over on his couch, drops his cigarette, and sobs until he laughs.

Special correspondent Kathryn Wexler in Los Angeles and staff writer Lan Nguyen in Alexandria contributed to this report.

GRAPHIC: Photo, robert a. reeder; Photo, courtesy church of scientology, Arnie Lerma holds the plug to his computer, confiscated by the Church of Scientology after he posted copyrighted documents on the Internet. "We take very forceful and elaborate steps to maintain the confidentiality," says one Scientology official. Scientology founder L. Ron Hubbard, left, and church official Kurt Weiland, who says: "This is not a free-speech issue. It's a copyright issue."

LANGUAGE: ENGLISH

LOAD-DATE: August 19, 1995

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September 16, 1995, Saturday, Final Edition SECTION: STYLE; Pg. D02

LENGTH: 585 words

HEADLINE: Scientology Reined In; Church May Have to Return Computer Files
BYLINE: Charles W. Hall, Washington Post Staff Writer

BODY:
Arnaldo Lerma, the Arlington man who took on the Church of Scientology by putting its texts on the Internet, won a partial victory yesterday when a federal judge in Alexandria ordered that the church return 58 computer disks that it seized from him.

U.S. District Judge Leonie M. Brinkema also verbally slapped Scientology lawyers, saying their handling of Lerma's files went far beyond what she had authorized as part of a suit alleging copyright and trade secrecy violations.

"This case is somewhat out of control, and I need to get it under control," said Brinkema. "It was not the court's intention to give wholesale license to go through Mr. Lerma's possessions willy-nilly."

But within hours, a judge for the U.S. 4th Circuit Court of Appeals granted the church a temporary stay, preventing Lerma from receiving the disks until Brinkema's written opinion can be reviewed.

Brinkema's ruling was the latest twist in a case that has pitted numerous conflicting rights -- copyright protection, freedom of speech and religious expression -- in the age of the Internet, when documents can be distributed worldwide with the push of a button.

Brinkema authorized the unusual Aug. 12 search of Lerma's home, conducted by the U.S. Marshals Service, after church lawyers said they needed to block further spread of the texts, which they described as sacred materials to be seen only by advanced church members.

Brinkema said yesterday that she had meant for the search to be "narrow," saying the church was allowed to examine only files with any of three key words, including "Scientology" and "Hubbard" -- for L. Ron Hubbard, the late science fiction author who founded the church.

Yesterday, Lerma's lawyers charged that Scientology searched computer files without regard to whether they were covered by Brinkema's order.

"This is a dirty search, your honor," said Lerma's lawyer, Michael D. Sullivan. "They went through e-mail after e-mail after e-mail. This is an egregious violation of my client's Fourth Amendment rights. [Scientology] must be banned from using the material they seized in this case." Earle Cooley, a lawyer for the church, defended the search. "There was no effort to intrude beyond the materials we were concerned about," said Cooley. "But it's impossible to sterilize a search and then be certain you've gotten everything."

The church, which has a long history of suing critics or news publications that print negative stories, also is suing The Washington Post to prevent the use of copyrighted materials in stories about Scientology.

The Post obtained church texts from a federal court file in Los Angeles and printed excerpts in a story about the Lerma case.

Brinkema said yesterday that The Post's excerpts appeared to be protected by the "fair use" doctrine, which allows some quotation of copyrighted materials to discuss public issues. But

she said it was less clear that the doctrine would protect Lerma, who put much longer passages onto the Internet.

Brinkema's ruling was the second defeat in court this week for Scientology. On Tuesday, a federal judge in Denver ordered the church to return computers and files seized from two Scientology critics in Boulder, Colo.

Lerma said yesterday that he had no idea his transmission of the church text would cause such a legal blowup, and expressed cautious optimism.

"It's progress. You want me to say I'm happy?" said Lerma. "I can't jump up and down, because we're dealing with mad dogs."

RELIGIOUS TECHNOLOGY CENTER, Plaintiff, v. ARNALDO PAGLIARINA LERMA, DIGITAL GATEWAY SYSTEMS, THE WASHINGTON POST, MARC FISHER, and RICHARD LEIBY, Defendants.

Civil Action No. 95-1107-A

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

908 F. Supp. 1362; 1995 U.S. Dist. LEXIS 17833; 37 U.S.P.Q.2D (BNA) 1258; 24 Media L. Rep. 1115

November 28, 1995, Decided
November 28, 1995, FILED

COUNSEL: [**1] Bruce B. McHale (Local Counsel) for Religious Technology Center. Jay Ward Brown (Counsel for Arnaldo P. Lerma). Michael A. Grow, Esquire (Counsel for Digital Gateway Systems). John P. Corrado, Esquire (Local Counsel for The Washington Post, Marc Fisher, and Richard Leiby).

JUDGES: Leonie M. Brinkema, United States District Judge

OPINIONBY: Leonie M. Brinkema

OPINION: [*1364] MEMORANDUM OPINION

Before the Court is the Motion for Summary Judgment filed by defendants, The Washington Post, and two of its reporters, Marc Fisher and Richard Leiby (hereinafter referred to collectively as "The Post"). A court may grant summary judgment "only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Miller v. Leathers, 913 F.2d 1085, 1087 (4th Cir. 1990) (citing Fed. R. Civ. P. 56(c)). In ruling on such motions, the court must construe the facts and all inferences drawn from those facts in favor of the non-moving party. Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979). Having performed this analysis, the Court finds that summary judgment should be entered in favor of the defendants.

1. UNDISPUTED FACTS

The essential facts [**2] are not in dispute. In 1991, the Church of Scientology sued Steven Fishman, a disgruntled former member of the Church of Scientology, in the United States District Court for the Central District of California. Church of Scientology Int'l v. Fishman, No. CV 91-6426. On April 14, 1993, Fishman filed in the open court file what has come to be known as the Fishman affidavit, to which were attached 69 pages of what the Religious Technology Center ("RTC") describes as various Advanced Technology works, specifically levels OT-I through OT-VII documents. Plaintiff claims that these documents are protected from both unauthorized use and unauthorized disclosure under the copyright laws of the United States and under trade secret laws, respectively.

In California, the RTC moved to seal the Fishman affidavit, arguing that the attached AT documents were trade secrets. That motion was denied and the Ninth Circuit upheld the district court's decision not to seal the file. Church of Scientology Int'l v. Fishman, 35 F.3d 570 (9th Cir.

1994). The case was remanded for further proceedings and the district court again declined to seal the file, which remained unsealed until August 15, 1995. [**3]

Defendant Arnaldo Lerma, another former Scientologist, obtained a copy of the Fishman affidavit and the attached AT documents. Lerma admits that on July 31 and August 1, 1995, he published the AT documents on the Internet through defendant Digital Gateway Systems ("DGS"), an Internet access provider. RTC, which regularly scans the Internet, discovered the publication of documents and on August 11, 1995, warned Lerma to return the AT documents and not publish them any further. After Lerma refused to cooperate, RTC obtained a Temporary Restraining Order prohibiting Lerma from any further publication of the documents and a seizure warrant which authorized the United States Marshal to seize Lerma's personal computer, floppy disks and any copies of the copyrighted works of L. Ron Hubbard, the author of the AT documents.

During the same time period, on or abut August 5 or 6, 1995, Lerma sent a hard copy of the Fishman affidavit and AT attachments to Richard Leiby, an investigative reporter for The Washington Post. On August 12, 1995, counsel for RTC discovered this disclosure and approached The Post, which was told that the Fishman affidavit might be stolen. In response to the RTC's representations, [**4] The Post returned the actual copy which Lerma had given it. However, The Post had by then learned that a copy of the [*1365] same Fishman affidavit was available in the open court file in the United States District Court for the Central District of California. On August 14, 1995, The Post sent Kathryn Wexler, a news aide stationed in California, to that court to obtain a copy of the Fishman affidavit. The Clerk's office made a copy for Wexler, who then mailed it to Washington. Although it is undisputed that RTC staff members had been checking that file out and holding it all day to prevent anyone from seeing it, the file was not sealed and obviously was available, upon request, to any member of the public who wished to see it.

The day after The Post obtained its copy of the Fishman affidavit, the RTC applied for a sealing order and the trial judge ordered the file sealed. However, there is no evidence in the record that the judge ordered The Post to return the copy made by the Clerk's office or that any kind of a restraining order was issued by that court against The Post.

Five days later, on August 19, 1995, The Post published a news article, entitled "Church in Cyberspace: Its Sacred Writ [**5] is on the Net. Its Lawyers are on the Case," written by defendant Marc Fisher. In that article, RTC's lawsuit against Lerma and the seizure of his computer equipment were discussed, as was the history of Scientology litigation against its critics and the growing use of the Internet by Scientology dissidents. The article included three brief quotes (totalling 46 words) from three of the AT documents. On August 22, 1995, the RTC filed its First Amended Verified Complaint for Injunctive Relief and Damages in which it added The Washington Post and its two reporters, Fisher and Leiby, as additional defendants. A Second Amended Verified was later filed and is now the subject of this summary judgment motion.

II. THE COPYRIGHT CLAIM

Although the Court has serious reservations about whether the AT documents at issue in this litigation are properly copyrighted, for the purposes of this motion, the Court assumes that the RTC holds properly registered, valid copyrights for the AT documents attached to the Fishman affidavit.

The Post does not deny that it copied the AT documents and quoted from them. It argues, however, that this copying and these quotations fall squarely within the "fair use" [**6] exception. Thus, the dispositive issue as to the copyright claim is whether or not The Post's use of the AT documents falls within the fair use exception to the copyright law. Under that exception, "the fair use of a copyright ... for purposes such as criticism, comment, news reporting . . . or research, is not an infringement of copyright." 17 U.S.C.A. @ 107 (West Supp. 1995) (emphasis added). As the Supreme Court has held "fair use is a mixed question of law and fact." Harper & Row Publishers Inc. v. Nation Enters., 471 U.S. 539, 560, 85 L. Ed. 2d 588, 105 S. Ct. 2218 (1985). In the instant case, the Court finds no material facts in dispute; therefore, the issue can be resolved as a matter of law.

At the outset of its opposition, the RTC argues that because the fair use doctrine is an equitable one, The Post should not be allowed to rely on this defense because of unclean hands. Specifically, the RTC points to The Post's failure to disclose that it had made several copies of the Fishman affidavit. In an affidavit signed on September 26, 1995, Mary Ann Werner, a Post Vice President and counsel, averred that "only one copy of that [Fishman] declaration has been made." [**7] In fact, through discovery RTC has learned, and The Post does not dispute, that other copies were made. Wexler admits that she made an additional copy of the materials received from the Clerk's office. She sent that copy to Washington as well to ensure that Washington got a copy. A second copy was created, not by copying the Fishman affidavit which had been obtained in California, but by down loading a copy off the Internet. The Post argues persuasively here that the presence of the AT documents on the Internet was part of their very news worthiness and that making this copy was an act of legitimate news gathering.

A third copy of the AT documents was generated after Lerma sent a duplicate of the Fishman affidavit to Leiby via e-mail. That e-mail was copied to a disk in response to a demand by RTC's counsel on August 12, [*1366] 1995, that The Post secure any materials it had been sent by Lerma. (Second Werner Decl. @@ 4-5).

None of these acts of copying strike this Court as constituting unethical behavior and the Court is satisfied from her second declaration that Ms. Werner did not mislead the Court or counsel in referring to one copy. In any case, the Court agrees with The Post that the [**8] issue of unclean hands is a weak attempt by RTC to avoid the real issue of fair use.

In determining whether the use of a copyrighted work is fair use and therefore not an infringement, the Court must consider four factors:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

2. the nature of the copyrighted work;

3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole;

4. the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.
17 U.S.C.A. @ 107 (West Supp. 1995). These four statutory factors may not "be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright." Campbell v. Acuff-Rose Music Inc., 127 L. Ed. 2d 500, 114 S. Ct. 1164, 1170-71 (1994). The interplay of the four factors is recognized elsewhere as well. See, e.g., Sony Corp. of America v. Universal Studios, [**9] Inc., 464 U.S. 417, 449-450, 78 L. Ed. 2d 574, 104 S. Ct. 774 (1984) (reproduction of entire work "does not have its ordinary effect of militating against a finding of fair use" as to home videotaping of television programs); Harper & Row, Publishers, Inc. v. National Enterprises, 471 U.S. 539, 564, 85 L. Ed. 2d 588, 105 S. Ct. 2218 (1985) ("Even substantial quotations might qualify as fair use in a review of a published work or a news account of a speech" but not in a scoop of a soon-to-be-published memoir). Thus, we may not evaluate any single fair use factor in isolation.

As to the first factor, the purpose and character of the use, there is no evidence in this record that The Post copied the AT documents for any purposes other than news gathering, news reporting and responding to litigation. Although the RTC has argued that The Post harbors some animus towards Scientology, an unbiased observer would conclude that the Church of Scientology and its treatment of critics is a newsworthy subject about which The Post is permitted to investigate and report. There is no evidence that The Post was trying to "scoop" the RTC in quoting the AT documents or trying to avoid payment of [**10] a royalty, conduct to which other courts have looked in finding that a media organization, violated copyright. Harper & Row Publishers, Inc., v. Nation Enterprises, 471 U.S. 539, 85 L. Ed. 2d 588, 105 S. Ct. 2218 (1985); Iowa State University Foundation, Inc., v. American Broadcasting Co., Inc., 463 F. Supp. 902 (S.D.N.Y. 1978).

Under the second factor, the scope of the fair use doctrine is greater with respect to factual works than creative or literary works. Hubbard's works are difficult to classify and courts dealing with this issue have differed in their conclusion. As the Second Circuit stated in New Era Publications Int'l v. Carol Publishing Group, 904 F.2d 152, 158 (2d Cir.), cert. denied, 498 U.S. 921, 111 S. Ct. 297, 112 L. Ed. 2d 251 (1990), "reasonable people can disagree over how to classify Hubbard's works." However, that court also concluded that the works "deal with Hubbard's life, his views on religion, human relations, the Church, etc. -- [and] are more properly viewed as factual or informational." Id. at 157. The United States District Court for the Southern District of California is of another view, however. In Bridge Publications, Inc. v. [**11] Vien, 827 F. Supp. 629, 636 (S.D. Cal. 1993), the court stated that "the undisputed evidence shows that L. Ron Hubbard's works are the product of his creative thought process, and not merely informational." [*1367] However, in this litigation the RTC has characterized the AT documents essentially as training materials. Therefore, this Court concludes that despite their obtuse language the AT documents are intended to be informational rather than creative and, therefore, that a broader fair use approach is appropriate.

To evaluate the third factor, which essentially requires making a qualitative as well as quantitative analysis of the use made of the work, the three quotes need to be read in the context of the article. The first and longest quote is obviously included merely as an example of the

obtuse language used in the AT documents. No fair-minded reader could possibly construe this quote otherwise.

Most of the 103 pages of disputed texts from the Fishman file are instructions for leaders of the OT training sessions. They are written in the dense jargon of the church. 'If you do OT IV and he's still in his head, all is not lost, you have other actions you can take. Clusters, Prep-Checks, [**12] failed to exercise directions.'

The second quote describes how in "one high-level OT session trainees are asked to pick an object 'wrap an energy beam around it' and pull themselves toward the object." The last quote occurs in the very next sentence which describes how trainees are to "be in the following places--the room, the sky, the moon, the sun." These underlined words comprise the total of the copyrighted materials quoted.

The RTC argues that where quotes, although fragmentary, are of "significant material," even de minimis copying infringes. It then bootstraps this argument by claiming that because Fisher chose to include these three quotes in his article, the quoted language must necessarily be significant. Under this reasoning, no one, let alone a newspaper, could ever quote from copyrighted materials without fear of being hauled into court for infringement because any quote would be deemed significant. To accept this argument would essentially destroy the fair use doctrine. It also clearly is unsupported by the facts because as discussed above, the three quotes, read in context of the entire article, are offered solely as illustrations of the author's claims [**13] about Scientology. They are not intended to offer a complete definition of the Scientology religion or to capture the total essence of what it means to be a Scientologist.

Lastly, we must look at the effect of The Post's use upon the potential market for or value of the copyrighted work. Although the RTC claims it has demonstrated an enormous effect upon its potential market, a fair view of the record discloses no evidence of any economic exploitation by The Post of RTC's copyrighted material. As The Post cogently argues, no follower of Scientology could possibly be satisfied by these three random fragments quoted in its article so as to bypass the complete regime of indoctrination.

Although both sides have raised numerous additional issues, the essential analysis for the copyright claim comes down to these four factors. Based on this analysis, we find for the defendants. RTC properly argues that the mere existence of a copyrighted work in an open court file does not destroy the owner's property interests in that work. In the same way, the placement of a copyrighted book on a public library shelf does not permit unbridled reproduction by a potential infringer. However, RTC cannot [**14] selectively avail itself of only a segment of the copyright law. With the preservation of copyright protection invariably comes the fair use exception, and on that ground The Post's actions, are proper.

III. ATTORNEY'S FEES

Because The Post has been found to be the prevailing party on the copyright claim, it qualifies for an award of attorney's fees and litigation expenses. The RTC opposes such an award. Whether to award such fees is a matter left to the Court's discretion. Fogerty v. Fantasy, Inc., 127 L. Ed. 2d 455, U.S. , 114 S. Ct. 1023, 1033 (1994). In deciding the appropriateness of a fee award, the Court should consider the motivation of the plaintiff in bringing the action for

copyright infringement and the extent to which plaintiff's position [*1368] is reasonable and well-grounded in fact and law.

On the first issue, the Court finds that the motivation of plaintiff in filing this lawsuit against The Post is reprehensible. Although the RTC brought the complaint under traditional secular concepts of copyright and trade secret law, it has become clear that a much broader motivation prevailed--the stifling of criticism and dissent of the religious practices [**15] of Scientology and the destruction of its opponents. L. Ron Hubbard, the founder of Scientology, has been quoted as looking upon the law as a tool to

harass and discourage rather than to win. The law can be used very easily to harass and enough harassment on somebody who is simply on the thin edge anyway, well knowing that he is not authorized, will generally be sufficient to cause his professional decease. If possible, of course, ruin him utterly.

(Declaration of Mary Ann Werner, Attachment A, at C5; see also The Post's reply brief at p. 24, note 23).

The context and extent in which The Post copied and quoted from the AT documents was so de minimis that this Court finds that no reasonable copyright holder could have in good faith brought a copyright infringement action. Although there are limits beyond which the media may not go, even in the interests of news gathering and reporting, this case does not come anywhere near those limits. Therefore, an award of reasonable attorneys' fees is appropriate and granted.

...

RELIGIOUS TECHNOLOGY CENTER, Plaintiff, v. ARNALDO PAGLIARINA LERMA, Defendant.

Civil Action No. 95-1107-A

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

1996 U.S. Dist. LEXIS 15454; 40 U.S.P.Q.2D (BNA) 1569; 24 Media L. Rep. 2473

October 4, 1996, Decided
October 4, 1996, FILED

DISPOSITION: [*1] Summary judgment on the copyright claim is found in favor of plaintiff, RTC, against defendant Lerma.

...

History of the Case
The dispute in this case surrounds Lerma's acquisition and publication on the Internet of texts that the Church of Scientology considers sacred and protects heavily from unauthorized disclosure.

...

This litigation initially consisted of both trade secret and copyright infringement counts against multiple defendants, including Lerma, Digital Gateway Systems (Lerma's access provider to the Internet), The Washington Post (which published a story about the case which quoted fractions of the OT Documents), Marc Fisher (a Washington Post reporter), and Richard Leiby (a Washington Post reporter). However, the Court earlier dismissed the trade secrets count as to all defendants and the copyright infringement count as to the Washington Post and its reporters. RTC voluntarily dismissed its claims against Digital Gateway Systems. Therefore, the only issue remaining in the case is RTC's copyright infringement claim against defendant [*5] Lerma. Even that issue has been progressively honed, with RTC moving for summary judgment on only a subset of the copyrighted works originally contested in RTC's complaint. n1

...

Fair Use Defense

Lerma freely admits that he copied portions of the Works by downloading or

scanning them into his computer and by posting segments of this material to the Internet. He argues that even if the works are copyrightable and copyrighted, this copying was lawful because it was "fair use."

In determining whether the use of a copyrighted work constitutes fair use, the Court must consider four factors:

1. the purpose [*12] and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

2. the nature of the copyrighted work;

3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

4. the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. @ 107. These four statutory factors may not be "treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578, 127 L. Ed. 2d 500, 114 S. Ct. 1164 (1994).

Lerma urges us, when conducting the fair use analysis, to evaluate his actions in the special context of modern communication on the Internet. He describes the unique characteristics of computer interaction and argues for special treatment under copyright law. While the Internet does present a truly revolutionary advance, neither Congress nor the courts have afforded it unique status under the fair use standard of @ 107. The law of copyright has evolved with technological change, with each new technological advancement [*13] creating complicated questions of copyright interpretation and application. Nevertheless, the new technologies -- from television, to video cassette recorders, to digitized transmissions -- have been made to fit within the overall scheme of copyright law and to serve the ends which copyright was intended to promote. See Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 78 L. Ed. 2d 574, 104 S. Ct. 774 (1984). The Internet is no exception, and postings on it must be judged in reference to the already flexible considerations which fair use affords.

Purpose and Character of the Use: The first fair use factor is the purpose and character of the use made by the alleged infringer. 17 U.S.C. @ 107(1). Lerma posits that his use of the Works falls within several of the classic fair use

categories listed in the first paragraph of @ 107, namely, that his copying and posting of the Works constitutes "criticism", "comment", "news reporting", and "scholarship." "There is a strong presumption that factor one favors the defendant if an allegedly infringing work fits the description of uses described in section 107." Wright v. Warner Books, Inc., 953 F.2d 731, 736 (2nd [*14] Cir. 1991).

Lerma argues that his Internet posting of the Fishman Declaration originated from publication of information in a California court record that was open to the public and which the court refused to seal. Lerma asserts that he merely gathered that information like a news reporter and then published it on the Internet to unveil for the Internet community the "foibles" of Scientology in the same spirit of the modern news expose.

This analogy fails. The full record clearly shows that Lerma's motives, unlike those of news reporters, were not neutral and that his postings were not done primarily "for public benefit." MCA, Inc. v. Wilson, 677 F.2d 180, 182 (2nd Cir. 1981). When judged in light of the degree of copying and the use to which the infringing material was ultimately put, Lerma stands in a position significantly different from the Washington Post and its employees earlier dismissed from this suit. Even if Lerma were a newspaper reporter, the mere fact that a copyrighted document was in a public court file in no respect destroys its copyright protection.

Lerma also describes himself as a dedicated researcher delving into the theory and scholarship of Scientology. [*15] He claims to be performing academic work of a "transformative" nature, providing materials which "add new value to public knowledge and understanding, thereby advancing the goals of copyright as set forth in the Constitution." Opp'n Br. at 24. That argument does not justify the wholesale copying and republication of copyrighted material. The degree of copying by Lerma, combined with the absence of commentary on most of his Internet postings, is inconsistent with the scholarship exception. Even assuming, arguendo, that Lerma's copying to his hard drive was done solely in the name of academic research, this does not end the fair use analysis. Such uses are only "presumptively" permissible; there is a limit to the extent of reproduction that can be undertaken even by the bona-fide researcher. See American Geophysical Union v. Texaco, Inc., 802 F. Supp. 1, 17 (S.D.N.Y. 1992), aff'd., 60 F.3d 913 (2nd Cir. 1994) (archival photocopying of scientific journals for internal use by for-profit research laboratory and is not fair use) See also Marcus v. Rowley, 695 F.2d 1171, 1176 (9th Cir. 1983) ("Wholesale copying of copyrighted material precludes application of the fair use [*16] doctrine."), 3 Nimmer @ 13.05[A] [3] (1996) ("[Generally] it may not constitute

a fair use if the entire work is reproduced").

Lerma argues that his "research" conducted via downloads from newsgroups on the Internet provides a particularly strong argument for fair use. Because newsgroup output is by its nature ephemeral, Lerma asserts that saving such postings for later review is indistinguishable from the temporary storage on a VCR tape that was upheld by the Supreme Court in Sony Corp. of America v. Universal Studios, Inc., 464 U.S. 417, 78 L. Ed. 2d 574, 104 S. Ct. 774 (1984). Lerma's analogy fails because the "time-shifting" approved in Sony concerned the reproduction of television programs that were implicitly licensed at no charge to the viewer who then copied them for purposes of convenience. These critical factors are absent in the instant case. Lerma is not licensed to view or copy the Works, and his reproduction of the Works on his disc served purposes beyond convenience. The proper analogy of Lerma to Sony would be if the Sony defendant obtained an unauthorized copy of a television movie from a premium cable channel and then re-broadcast that [*17] movie on a public access channel, something that would be clearly prohibited.

...

As a final defense under this fair use factor, Lerma urges this Court to consider the Internet postings in their unique newsgroup context. Rather than viewing each individual posting in isolation, Lerma contends that each posting must be considered within the context of the ongoing dialogue he has conducted on the newsgroup. The qualitative analysis would then include the multiple communications posted before and after the alleged infringements, communications which are likely to contain greater commentary and analysis than the postings at issue.

This approach would permit a would-be infringer to participate in blatant [*28] theft of a copyright yet still escape punishment via the subsequent posting of subsequent commentary -- a commentary that may not always be seen in tandem with the infringing work. Under this argument "cyberbandits" could easily cover their tracks.

...

Conclusion

For the above-stated reasons, summary judgment on the copyright claim is found in favor of plaintiff, RTC, against defendant Lerma.

February 23, 1995, Thursday, Final Edition

HEADLINE: Shoe-In On the Web; From Planet Reebok, Ad Copy by the Foot

BODY:
Perturbations, pleasures and predicaments on the information superhighway:
...
Scientology Battle

A federal judge in San Jose, Calif., declined this week to hold an Internet service provider and a computer bulletin board operator responsible for electronic messages posted by one of their customers, setting back an effort by officials of the Church of Scientology to silence one of its most vocal critics.

The attempt by church officials to require Netcom On-Line Communication Services and BBS operator Tom Klemesrud to screen messages had alarmed cyberspace civil liberties advocates, who feared it would chill the freewheeling discussion common in Internet newsgroups. "Any tactics that are designed to scare providers from carrying information are private censorship, and that is just intolerable on the networks," said Shari Steele of the Electronic Frontier Foundation in Washington.

But U.S. District Judge Ronald Whyte did extend a restraining order against Dennis Erlich of Glendale, Calif., a former Scientology minister who has posted portions of church publications in the alt.religion.scientology newsgroup. In a lawsuit against Netcom, Erlich and Klemesrud, the church says it is seeking to protect copyrighted material and trade secrets. Last week, armed with a court order from Whyte and backed by off-duty police officers, Scientology officials raided Erlich's home and seized six boxes of computer diskettes and 29 books, and made backup copies of the hard disks from Erlich's computers.

-- David Bank

RELIGIOUS TECHNOLOGY CENTER, a California non-profit corporation; and BRIDGE PUBLICATIONS, INC., a California non-profit corporation, Plaintiffs, v. NETCOM ON-LINE COMMUNICATION SERVICES, INC., a Delaware corporation; DENNIS ERLICH, an individual; and TOM KLEMESRUD, an individual, dba CLEARWOOD DATA SERVICES, Defendants.

NO. C-95-20091 RMW

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

907 F. Supp. 1361; 1995 U.S. Dist. LEXIS 18173; 37 U.S.P.Q.2D (BNA) 1545; Copy. L. Rep. (CCH) P27,500; 24 Media L. Rep. 1097

November 21, 1995, DATED
November 21, 1995, FILED

COUNSEL: [**1] For RELIGIOUS TECHNOLOGY CENTER, a California non-profit corporation, BRIDGE PUBLICATIONS, INC., a California non-profit corporation, Plaintiffs: Andrew H. Wilson, Wilson Ryan & Campilongo, San Francisco, CA. Kendrick L. Moxon, Bowles & Moxon, Los Angeles, CA. Earle C. Cooley, Cooley Manion Moore & Jones, Boston, MA. Thomas M. Small, Small Larkin Kidde & Golant, Los Angeles, CA. Helena K. Kobrin, North Hollywood, CA. Elliot J. Abelson, Los Angles, CA.
For NETCOM ON-LINE COMMUNICATION SERVICES, INC., a Delaware corporation, defendant: Randolf J. Rice, Pillsbury Madison & Sutro, San Jose, CA. For DENNIS ERLICH, an individual, defendant: Carla B. Oakley, Morrison & Foerster, San Francisco, CA. For TOM KLEMESRUD, an individual, defendant: Daniel A. Leipold, Cathy L. Shipe, Hagenbaugh & Murphy, Orange, CA.
JUDGES: RONALD M. WHYTE, United States District Judge

OPINIONBY: RONALD M. WHYTE

OPINION: [*1365] ORDER DENYING DEFENDANT NETCOM'S MOTION FOR SUMMARY JUDGMENT; DENYING DEFENDANT KLEMESRUD'S MOTION FOR JUDGMENT ON THE PLEADINGS; AND DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AGAINST NETCOM AND KLEMESRUD

This case concerns an issue of first impression regarding intellectual property rights in cyberspace. n1 Specifically, this order addresses whether the operator of a computer bulletin board service ("BBS"), and the large Internet n2 access provider that allows that BBS to reach the Internet, should be liable for copyright infringement committed by a subscriber of the BBS.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 Cyberspace is a popular term for the world of electronic communications over computer networks. See Trotter Hardy, The Proper Legal Regime for "Cyberspace," 55 U. Pitt. L. Rev. 993, 994 (1994).

n2 "The Internet today is a worldwide entity whose nature cannot be easily or simply defined. From a technical definition, the Internet is the 'set of all interconnected IP networks'--the

collection of several thousand local, regional, and global computer networks interconnected in real time via the TCP/IP Internetworking Protocol suite. . . ." Daniel P. Dern, The Internet Guide For New Users 16 (1994).

One article described the Internet as

a collection of thousands of local, regional, and global Internet Protocol networks. What it means in practical terms is that millions of computers in schools, universities, corporations, and other organizations are tied together via telephone lines. The Internet enables users to share files, search for information, send electronic mail, and log onto remote computers. But it isn't a program or even a particular computer resource. It remains only a means to link computer users together.

Unlike on-line computer services such as CompuServe and America On Line, no one runs the Internet. . . .

No one pays for the Internet because the network itself doesn't exist as a separate entity. Instead various universities and organizations pay for the dedicated lines linking their computers. Individual users may pay an Internet provider for access to the Internet via its server.
David Bruning, Along the InfoBahn, Astronomy, Vol. 23, No. 6, p. 76 (June 1995).
- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - [**2]

Plaintiffs Religious Technology Center ("RTC") and Bridge Publications, Inc. ("BPI") hold copyrights in the unpublished and published works of L. Ron Hubbard, the late founder of the Church of Scientology ("the Church"). Defendant Dennis Erlich ("Erlich") n3 is a former minister of Scientology turned vocal critic of the Church, whose pulpit is now the Usenet newsgroup n4 alt.religion.scientology ("a.r.s."), an on-line forum for discussion and criticism of Scientology. Plaintiffs maintain that Erlich infringed their copyrights when he posted portions of their [*1366] works on a.r.s. Erlich gained his access to the Internet through defendant Thomas Klemesrud's ("Klemesrud's") BBS "support.com." Klemesrud is the operator of the BBS, which is run out of his home and has approximately 500 paying users. Klemesrud's BBS is not directly linked to the Internet, but gains its connection through the facilities of defendant Netcom On-Line Communications, Inc. ("Netcom"), one of the largest providers of Internet access in the United States.
- - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n3 Issues of Erlich's liability were addressed in this court's order of September 22, 1995. That order concludes in part that a preliminary injunction against Erlich is warranted because plaintiffs have shown a likelihood of success on their copyright infringement claims against him. Plaintiffs likely own valid copyrights in Hubbard's published and unpublished works and Erlich's near-verbatim copying of substantial portions of plaintiffs' works was not likely a fair use. To the extent that Netcom and Klemesrud argue that plaintiffs' copyrights are invalid and that Netcom and Klemesrud are not liable because Erlich had a valid fair use defense, the court previously rejected these arguments and will not reconsider them here. [**3]

n4 The Usenet has been described as
a worldwide community of electronic BBSs that is closely associated with the Internet and with the Internet community. P The messages in Usenet are organized into thousands of topical groups, or "Newsgroups" .... P As a Usenet user, you read and contribute ("post") to your local

Usenet site. Each Usenet site distributes its users' postings to other Usenet sites based on various implicit and explicit configuration settings, and in turn receives postings from other sites. Usenet traffic typically consists of as much as 30 to 50 Mbytes of messages per day. P Usenet is read and contributed to on a daily basis by a total population of millions of people.... P There is no specific network that is the Usenet. Usenet traffic flows over a wide range of networks, including the Internet and dial-up phone links.
Dern, supra, at 196-97.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

After failing to convince Erlich to stop his postings, plaintiffs contacted defendants Klemesrud and Netcom. Klemesrud responded to plaintiffs' demands that Erlich be kept off his system by asking plaintiffs to prove that [**4] they owned the copyrights to the works posted by Erlich. However, plaintiffs refused Klemesrud's request as unreasonable. Netcom similarly refused plaintiffs' request that Erlich not be allowed to gain access to the Internet through its system. Netcom contended that it would be impossible to prescreen Erlich's postings and that to kick Erlich off the Internet meant kicking off the hundreds of users of Klemesrud's BBS. Consequently, plaintiffs named Klemesrud and Netcom in their suit against Erlich, although only on the copyright infringement claims. n5

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n5 The First Amended Complaint ("FAC") contains three claims: (1) copyright infringement of BPI's published literary works against all defendants; (2) copyright infringement of RTC's unpublished confidential works against all defendants; and (3) misappropriation of RTC's trade secrets against defendant Erlich only.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

On June 23, 1995, this court heard the parties' arguments on eight motions, three of which relate to Netcom and Klemesrud and are discussed in this [**5] order: (1) Netcom's motion for summary judgment: (2) Klemesrud's motion for judgment on the pleadings; n6 and (3) plaintiffs' motion for a preliminary injunction against Netcom and Klemesrud. For the reasons set forth below, the court grants in part and denies in part Netcom's motion for summary judgment and Klemesrud's motion for judgment on the pleadings and denies plaintiffs' motion for a preliminary injunction.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - n6 Klemesrud alternatively filed a motion for summary judgment, which will not be considered at this time because Klemesrud was unavailable to be deposed to time for plaintiffs' opposition. In a previous order, the court struck those portions of the motion that referred to matters outside of the pleadings.

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I. NETCOM'S MOTION FOR SUMMARY JUDGMENT OF NONINFRINGEMENT

A. Summary Judgment Standards

Because the court is looking beyond the pleadings in examining this motion, it will be treated as a motion for summary judgment rather than a motion to dismiss. Grove v. Mead School District, 753 [**6] F.2d 1528, 1532 (9th Cir. 1985). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). There is a "genuine" issue of material fact only when there is sufficient evidence such that a reasonable juror could find for the party opposing the motion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Entry of summary judgment is mandated against a party if, after adequate time for discovery and upon motion, the party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The court, however, must draw all justifiable inferences in favor of the nonmoving parties, including questions of credibility and of the weight to be accorded particular evidence. Masson v. New Yorker Magazine, Inc., [**7] 501 U.S. 496, 520, 115 L. Ed. 2d 447, 111 S. Ct. 2419 (1991).

B. Copyright Infringement

To establish a claim of copyright infringement, a plaintiff must demonstrate (1) ownership of a valid copyright and (2) "copying" n7 [*1367] of protectable expression by the defendant. Baxter v. MCA, Inc., 812 F.2d 421, 423 (9th Cir.), cert. denied, 484 U.S. 954, 108 S. Ct. 346, 98 L. Ed. 2d 372 (1987). Infringement occurs when a defendant violates one of the exclusive rights of the copyright holder. 17 U.S.C. @ 501(a). These rights include the right to reproduce the copyrighted work, the right to prepare derivative works, the right to distribute copies to the public, and the right to publicly display the work. 17 U.S.C. @@ 106(1)-(3) & (5). The court has already determined that plaintiffs have established that they own the copyrights to all of the Exhibit A and B works, except item 4 of Exhibit A. n8 The court also found plaintiffs likely to succeed on their claim that defendant Erlich copied the Exhibit A and B works and was not entitled to a fair use defense. Plaintiffs argue that, although Netcom was not itself the source of any of the infringing materials on its system, it nonetheless should be liable for infringement, [**8] either directly, contributorily, or vicariously. n9 Netcom disputes these theories of infringement and further argues that it is entitled to its own fair use defense.

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n7 In this context, "copying" is "shorthand for the infringing of any of the copyright owner's five exclusive rights." S.O.S., Inc. v. Payday, Inc., 886 F.2d 1081, 1085 n.3 (9th Cir. 1989).

n8 The court has under submission plaintiffs' request to expand the preliminary injunction against Erlich.

n9 Plaintiffs have argued at times during this litigation that Netcom should only be required to respond after being given notice, which is only relevant to contributory infringement. Nevertheless, the court will address all three theories of infringement liability.

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1. Direct Infringement

Infringement consists of the unauthorized exercise of one of the exclusive rights of the copyright holder delineated in section 106. 17 U.S.C. @ 501. Direct infringement does not require intent or any particular state of mind, n10 although willfulness [**9] is relevant to the award of statutory damages. 17 U.S.C. @ 504(c).

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n10 The strict liability for copyright infringement is in contrast to another area of liability affecting online service providers: defamation. Recent decisions have held that where a BBS exercised little control over the content of the material on its service, it was more like a "distributor" than a "republisher" and was thus only liable for defamation on its system where it knew or should have known of the defamatory statements. Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991). By contrast, a New York state court judge found that Prodigy was a publisher because it held itself out to be controlling the content of its services and because it used software to automatically prescreen messages that were offensive or in bad taste. Stratton Oakmont, Inc. v. Prodigy Services Co., The Recorder, June 1, 1995, at 7 (excerpting May 24, 1995 Order Granting Partial Summary Judgment to Plaintiffs)c.

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Many of the facts pertaining to [**10] this motion are undisputed. The court will address the relevant facts to determine whether a theory of direct infringement can be supported based on Netcom's alleged reproduction of plaintiffs' works. The court will look at one controlling Ninth Circuit decision addressing copying in the context of computers and two district court opinions addressing the liability of BBS operators for the infringing activities of subscribers. The court will additionally examine whether Netcom is liable for infringing plaintiffs' exclusive rights to publicly distribute and display their works.

a. Undisputed Facts

The parties do not dispute the basic processes that occur when Erlich posts his allegedly infringing messages to a.r.s. Erlich connects to Klemesrud's BBS using a telephone and a modem. Erlich then transmits his messages to Klemesrud's computer, where they are automatically briefly stored. According to a prearranged pattern established by Netcom's software, Erlich's initial act of posting a message to the Usenet results in the automatic copying of Erlich's message from Klemesrud's computer onto Netcom's computer and onto other computers on the Usenet. In order to ease transmission and [**11] for the convenience of Usenet users, Usenet servers maintain postings from newsgroups for a short period of time--eleven days for Netcom's system and three days for Klemesrud's system. Once on Netcom's computers, messages are available to Netcom's customers and Usenet neighbors, who may then download the messages to their [*1368] own computers. Netcom's local server makes available its postings to a group of Usenet servers, which do the same for other servers until all Usenet sites worldwide have obtained access to the postings, which takes a matter of hours. Francis Decl. P 5.

Unlike some other large on-line service providers, such as CompuServe, America Online, and Prodigy, Netcom does not create or control the content of the information available to its subscribers. It also does not monitor messages as they are posted. It has, however, suspended the accounts of subscribers who violated its terms and conditions, such as where they had commercial software in their posted files. Netcom admits that, although not currently configured to do this, it may be possible to reprogram its system to screen postings containing particular words or coming from particular individuals. Netcom, however, took [**12] no action after it was told by plaintiffs that Erlich had posted messages through Netcom's system that violated

plaintiffs' copyrights, instead claiming that it could not shut out Erlich without shutting out all of the users of Klemesrud's BBS.

b. Creation of Fixed Copies

The Ninth Circuit addressed the question of what constitutes infringement in the context of storage of digital information in a computer's random access memory ("RAM"). MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993). In MAI, the Ninth Circuit upheld a finding of copyright infringement where a repair person, who was not authorized to use the computer owner's licensed operating system software, turned on the computer, thus loading the operating system into RAM for long enough to check an "error log." Id. at 518-19. Copyright protection subsists in original works of authorship "fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. @ 102 (emphasis added). A work is "fixed" when its "embodiment in a copy . . . [**13] is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." Id. @ 101. MAI established that the loading of data from a storage device into RAM constitutes copying because that data stays in RAM long enough for it to be perceived. MAI Systems, 991 F.2d at 518.

In the present case, there is no question after MAI that "copies" were created, as Erlich's act of sending a message to a.r.s. caused reproductions of portions of plaintiffs' works on both Klemesrud's and Netcom's storage devices. Even though the messages remained on their systems for at most eleven days, they were sufficiently "fixed" to constitute recognizable copies under the Copyright Act. See Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights 66 (1995) ("IITF Report").

c. Is Netcom Directly Liable for Making the Copies?

Accepting that copies were made, Netcom argues that Erlich, and not Netcom, is directly liable for the copying. MAI did not address the question raised in this case: whether [**14] possessors of computers are liable for incidental copies automatically made on their computers using their software as part of a process initiated by a third party. Netcom correctly distinguishes MAI on the ground that Netcom did not take any affirmative action that directly resulted in copying plaintiffs' works other than by installing and maintaining a system whereby software automatically forwards messages received from subscribers onto the Usenet, and temporarily stores copies on its system. Netcom's actions, to the extent that they created a copy of plaintiffs' works, acre necessary to having a working system for transmitting Usenet postings to and from the Internet. Unlike the defendants in MAI, neither Netcom nor Klemesrud initiated the copying. The defendants in MAI turned on their customers' computers thereby creating temporary copies of the operating system, whereas Netcom's and Klemesrud's systems can operate without any human intervention. Thus, unlike MAI, the mere fact that Netcom's system incidentally makes temporary copies [*1369] of plaintiffs' works does not mean Netcom has caused the copying. n11 The court believes that Netcom's act of designing or implementing a [**15] system that automatically and uniformly creates temporary copies of all data sent through it is not unlike that

of the owner of a copying machine who lets the public make copies with it. n12 Although some of the people using the machine may directly infringe copyrights, courts analyze the machine owner's liability under the rubric of contributory infringement, not direct infringement. See, e.g., RCA Records v. All-Fast Systems, Inc., 594 F. Supp. 335 (S.D.N.Y. 1984); 3 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT @ 12.04[A][2][b], at 12-78 to -79 (1995) ("NIMMER ON COPYRIGHT"); Elkin-Koren, supra, at 363 (arguing that "contributory infringement is more appropriate for dealing with BBS liability, first, because it focuses attention on the BBS-users relationship and the way imposing liability on BBS operators may shape this relationship, and second because it better addresses the complexity of the relationship between BBS operators and subscribers"). Plaintiffs' theory would create many separate acts of infringement and, carried to its natural extreme, would lead to unreasonable liability. It is not difficult to conclude that Erlich infringes by copying a protected [**16] work onto his computer and by posting a message to a newsgroup. However, plaintiffs' theory further implicates a Usenet server that carries Erlich's message to other servers regardless of whether that server acts without any human intervention beyond the initial setting up of the system. It would also result in liability for every single Usenet server in the worldwide link of computers transmitting Erlich's message to every other computer. These parties, who are liable under plaintiffs' theory, do no more [*1370] than operate or implement a system that is essential if Usenet messages are to be widely distributed. There is no need to construe the Act to make all of these parties infringers. Although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - n11 "One commentator addressed the difficulty in translating copyright concepts, including the public/private dichotomy, to the digitized environment. See Niva Elkin-Koren, Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators, 13 Cardozo Arts & Ent. L.J. 346, 390 (1993). This commentator noted that one way to characterize a BBS operation is that it "provides subscribers with access and services. As such, BBS operators do not create copies, and do not transfer them in any way. Users post the copies on the BBS, which other users can then read or download." Id. at 356. [**17]

n12 Netcom compares itself to a common carrier that merely acts as a passive conduit for information. In a sense, a Usenet server that forwards all messages acts like a common carrier, passively retransmitting every message that gets sent through it. Netcom would seem no more liable than the phone company for carrying an infringing facsimile transmission or storing an infringing audio recording on its voice mail. As Netcom's counsel argued, holding such a server liable would be like holding the owner of the highway, or at least the operator of a toll booth, liable for the criminal activities that occur on its roads. Since other similar carriers of information are not liable for infringement, there is some basis for exempting Internet access providers from liability for infringement by their users. The IITF Report concluded that "if an entity provided only the wires and conduit--such as the telephone company, it would have a good argument for an exemption if it was truly in the same position as a common carrier and could not control who or what was on its system." IITF Report at 122. Here, perhaps, the analogy is not completely appropriate as Netcom does more than just "provide the wire and conduits." Further, Internet providers are not natural monopolies that are bound to carry all the traffic that one wishes to

pass through them, as with the usual common carrier. See id. at 122 n.392 (citing Federal Communications Commission v. Midwest Video Corp., 440 U.S. 689, 701, 59 L. Ed. 2d 692, 99 S. Ct. 1435 (1979)). Section 111 of the Copyright Act codifies the exemption for passive carriers who are otherwise liable for a secondary transmission. 3 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT @ 12.04[B][3], at 12-99 (1995). However, the carrier must not have any direct or indirect control over the content or selection of the primary transmission. Id.; 17 U.S.C. @ 111(a)(3). Cf. infra part I.B.3.a. In any event, common carriers are granted statutory exemptions for liability that might otherwise exist. Here, Netcom does not fall under this statutory exemption, and thus faces the usual strict liability scheme that exists for copyright. Whether a new exemption should be carved out for online service providers is to be resolved by Congress, not the courts. Compare Comment, "Online Service Providers and Copyright Law: The Need for Change," 1 SYRACUSE J. LEGIS. & POL'Y 197, 202 (1995) (citing recommendations of online service providers for amending the Copyright Act to create liability only where a "provider has actual knowledge that a work that is being or has been transmitted onto, or stored on, its system is infringing,' and has the 'ability and authority' to stop the transmission, and has, after a reasonable amount of time, allowed the infringing activity to continue'") with IITF Report at 122 (recommending that Congress not exempt service providers from strict liability for direct infringements).

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Plaintiffs point out that the infringing copies resided for eleven days on Netcom's computer and were sent out from it onto the "Information Superhighway." However, under plaintiffs theory, any storage of a copy that occurs in the process of sending a message to the Usenet is an infringement. While it is possible that less "damage" would have been done if Netcom had heeded plaintiffs' warnings and acted to prevent Erlich's message from being forwarded, n13 this is not relevant to its direct liability for copying. The same argument is true of Klemesrud and any Usenet server. Whether a defendant makes a direct copy that constitutes infringement cannot depend on whether it received a warning to delete the message. See D.C. Comics, Inc. v. Mini Gift, 912 F.2d 29, 35 (2d Cir. 1990). This distinction may be relevant to contributory infringement, however, where knowledge is an element. See infra part I.B.2.a.

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n13 The court notes however, that stopping the distribution of information once it is on the Internet is not easy. The decentralized network was designed so that if one link in the chain be closed off, the information will be dynamically rerouted through another link. This was meant to allow the system to be used for communication after a catastrophic event that shuts down part of it. Francis Decl. P. 4.

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The court will now consider two district court opinions that have addressed the liability of BBS operators for infringing files uploaded by subscribers.

d. Playboy Case

Playboy Enterprises, Inc. v. Frena involved a suit against the operator of a small BBS whose system contained files of erotic pictures. 839 F. Supp. 1552, 1554 (M.D. Fla. 1993). A subscriber of the defendant's BBS had uploaded files containing digitized pictures copied from the plaintiff's

copyrighted magazine, which files remained on the BBS for other subscribers to download. Id. The court did not conclude, as plaintiffs suggest in this case, that the BBS is itself liable for the unauthorized reproduction of plaintiffs' work; instead, the court concluded that the BBS operator was liable for violating the plaintiff's right to publicly distribute and display copies of its work. Id. at 1556-57.

In support of their argument that Netcom is directly liable for copying plaintiffs' works, plaintiffs cite to the court's conclusion that "there is no dispute that [the BBS operator] supplied a product containing unauthorized copies of a copyrighted work. It does not matter that [the BBS operator] [**20] claims he did not make the copies himself." Id. at 1556. It is clear from the context of this discussion n14 that the Playboy court was looking only at the exclusive right to distribute copies to the public, where liability exists regardless of whether the defendant makes copies. Here, however, plaintiffs do not argue that Netcom is liable for its public distribution of copies. Instead, they claim that Netcom is liable because its computers in fact made copies. Therefore, the above-quoted language has no bearing on the issue of direct liability for unauthorized reproductions. Notwithstanding Playboy's holding that a BBS operator may be directly liable for distributing or displaying to the public copies of protected works, n15 this court holds [*1371] that the storage on a defendant's system of infringing copies and retransmission to other servers is not a direct infringement by the BBS operator of the exclusive right to reproduce the work where such copies are uploaded by an infringing user. Playboy does not hold otherwise. n16

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n14 The paragraph in Playboy containing the quotation begins with a description of the right of public distribution. Id. Further, the above quoted language is followed by a citation to a discussion of the right of public distribution in Jay Dratler, Jr., INTELLECTUAL PROPERTY LAW: COMMERCIAL, CREATIVE AND INDUSTRIAL PROPERTY @ 6.01[3], at 6-15 (1991). This treatise states that "the distribution right may be decisive, if, for example, a distributor supplies products containing unauthorized copies of a copyrighted work but has not made the copies itself." Id. (citing to Williams Electronics, Inc. v. Artic International, Inc., 685 F.2d 870, 876 (3d Cir. 1982)). In any event, the Williams holding regarding public distribution was dicta, as the court found that the defendant had also made copies. Id. [**21]

n15 Given the ambiguity in plaintiffs' reference to a violation of the right to "publish" and to Playboy, it is possible that plaintiffs are also claiming that Netcom infringed their exclusive right to publicly distribute their works. The court will address this argument infra.

n16 The court further notes that Playboy has been much criticized. See, e.g., L. Rose, NETLAW 91-92 (1995). The finding of direct infringement was perhaps influenced by the fact that there was some evidence that defendants in fact knew of the infringing nature of the works, which were digitized photographs labeled "Playboy" and "Playmate."

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e. Sega Case

A court in this district addressed the issue of whether a BBS operator is liable for copyright infringement where it solicited subscribers to upload files containing copyrighted materials to the BBS that were available for others to download. Sega Enterprises Ltd. v. MAPHIA, 857 F. Supp.

679, 683 (N.D. Cal. 1994). The defendant's "MAPHIA" BBS contained copies of plaintiff Sega's video game programs that were uploaded by users. Id. at [**22] 683. The defendant solicited the uploading of such programs and received consideration for the right to download files. Id. Access was given for a fee or to those purchasing the defendant's hardware device that allowed Sega video game cartridges to be copied. Id. at 683-84. The court granted a preliminary injunction against the defendant, finding that plaintiffs had shown a prima facie case of direct and contributory infringement. Id. at 687. The court found that copies were made by unknown users of the BBS when files were uploaded and downloaded. Id. Further, the court found that the defendant's knowledge of the infringing activities, encouragement, direction and provision of the facilities through his operation of the BBS constituted contributory infringement, even though the defendant did not know exactly when files were uploaded or downloaded. Id. at 686-87.

This court is not convinced that Sega provides support for a finding of direct infringement where copies are made on a defendant's BBS by users who upload files. Although there is some language in Sega regarding direct infringement, it is entirely conclusory: Sega has established a prima [**23] facie case of direct copyright infringement under 17 U.S.C. @ 501. Sega has established that unauthorized copies of its games are made when such games are uploaded to the MAPHIA bulletin board, here with the knowledge of Defendant Scherman. These games are thereby placed on the storage media of the electronic bulletin board by unknown users. Id. at 686 (emphasis added). The court's reference to the "knowledge of Defendant" indicates that the court was focusing on contributory infringement, as knowledge is not an element of direct infringement. Perhaps, Sega's references to direct infringement and that "copies...are made" are to the direct liability of the "unknown users," as there can be no contributory infringement by a defendant without direct infringement by another. See 3 NIMMER ON COPYRIGHT @ 12.04[A][3][a], at 12-89. Thus, the court finds that neither Playboy nor Sega requires finding Netcom liable for direct infringement of plaintiffs' exclusive right to reproduce their works. n17

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n17 To the extent that Sega holds that BBS operators are directly liable for copyright infringement when users upload infringing works to their systems, this court respectfully disagrees with the court's holding for the reasons discussed above. Further, such a holding was dicta, as there was evidence that the defendant knew of the infringing uploads by users and, in fact, actively encouraged such activity, thus supporting the contributory infringement theory Id. at 683.

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f. Public Distribution and Display?

Plaintiffs allege that Netcom is directly liable for making copies of their works. See FAC P 25. They also allege that Netcom violated their exclusive rights to publicly display copies of their works. FAC PP 44, 51. There are no allegations that Netcom violated plaintiffs' exclusive right to publicly distribute their works. However, in their discussion of direct infringement, plaintiffs insist that Netcom is liable for "maintaining copies of [Erlich's] messages on its server for eleven days for access by its subscribers and 'USENET neighbors'" and they compare this case to the Playboy case, which discussed [*1372] the right of public distribution. Opp'n at 7. Plaintiffs also

argued this theory of infringement at oral argument. Tr. n18 5:22. Because this could be an attempt to argue that Netcom has infringed plaintiffs' rights of public distribution and display, the court will address these arguments.

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n18 References to "Tr." are to the reporter's transcript of the June 23, 1995 hearing on these motions.

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Playboy concluded that the defendant infringed the plaintiff's exclusive rights to publicly distribute and display copies of its works. 839 F. Supp. at 1556-57. The court is not entirely convinced that the mere possession of a digital copy on a BBS that is accessible to some members of the public constitutes direct infringement by the BBS operator. Such a holding suffers from the same problem of causation as the reproduction argument. Only the subscriber should be liable for causing the distribution of plaintiffs' work, as the contributing actions of the BBS provider are automatic and indiscriminate. Erlich could have posted his messages through countless access providers and the outcome would be the same: anyone with access to Usenet newsgroups would be able to read his messages. There is no logical reason to draw a line around Netcom and Klemesrud and say that they are uniquely responsible for distributing Erlich's messages. Netcom is not even the first link in the chain of distribution--Erlich had no direct relationship with Netcom but dealt solely with Klemesrud's BBS, which used Netcom to gain its Internet access. Every Usenet server has a role in the distribution, so plaintiffs' [**26] argument would create unreasonable liability. Where the BBS merely stores and passes along all messages sent by its subscribers and others, the BBS should not be seen as causing these works to be publicly distributed or displayed.

Even accepting the Playboy court's holding, the case is factually distinguishable. Unlike the BBS in that case, Netcom does not maintain an archive of files for its users. Thus, it cannot be said to be "supplying a product." In contrast to some of its larger competitors, Netcom does not create or control the content of the information available to its subscribers; it merely provides access to the Internet, whose content is controlled by no single entity. Although the Internet consists of many different computers networked together, some of which may contain infringing files, it does not make sense to hold the operator of each computer liable as an infringer merely because his or her computer is linked to a computer with an infringing file. It would be especially inappropriate to hold liable a service that acts more like a conduit, in other words, one that does not itself keep an archive of files for more than a short duration. Finding such a service [**27] liable would involve an unreasonably broad construction of public distribution and display rights. No purpose would be served by holding liable those who have no ability to control the information to which their subscribers have access, even though they might be in some sense helping to achieve the Internet's automatic "public distribution" and the users' "public" display of files.

g. Conclusion

The court is not persuaded by plaintiffs' argument that Netcom is directly liable for the copies that are made and stored on its computer. Where the infringing subscriber is clearly directly liable for the same act, it does not make sense to adopt a rule that could lead to the liability of

countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet. Such a result is unnecessary as there is already a party directly liable for causing the copies to be made. Plaintiffs occasionally claim that they only seek to hold liable a party that refuses to delete infringing files after they have been warned. However, such liability cannot be based on a theory of direct infringement, where knowledge is [**28] irrelevant. The court does not find workable a theory of infringement that would hold the entire Internet liable for activities that cannot reasonably be deterred. Billions of bits of data flow through the Internet and are necessarily stored on servers throughout the network and it is thus practically impossible [*1373] to screen out infringing bits from noninfringing bits. Because the court cannot see any meaningful distinction (without regard to knowledge) between what Netcom did and what every other Usenet server does, the court finds that Netcom cannot be held liable for direct infringement. Cf. IITF Report at 69 (noting uncertainty regarding whether BBS operator should be directly liable for reproduction or distribution of files uploaded by a subscriber). n19

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n19 Despite that uncertainty, the IITF Report recommends a strict liability paradigm for BBS operators. See IITF Report at 122-24. It recommends that Congress not exempt on-line service providers from strict liability because this would prematurely deprive the system of an incentive to get providers to reduce the damage to copyright holders by reducing the chances that users will infringe by educating them, requiring indemnification, purchasing insurance, and, where efficient, developing technological solutions to screening out infringement. Denying strict liability in many cases would leave copyright owners without an adequate remedy since direct infringers may act anonymously or pseudonymously or may not have the resources to pay a judgment. Id.; see also Hardy, supra.

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2. Contributory Infringement

Netcom is not free from liability just because it did not directly infringe plaintiffs' works; it may still be liable as a contributory infringer. Although there is no statutory rule of liability for infringement committed by others,

the absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringement on certain parties who have not themselves engaged in the infringing activity. For vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 435, 78 L. Ed. 2d 574, 104 S. Ct. 774 (1984) (footnote omitted). Liability for participation in the infringement will be established where the defendant, "with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another." Gershwin Publishing Corp. v. Columbia Artists Management, Inc., 443 F.2d 1159, [**30] 1162 (2d Cir. 1971).

a. Knowledge of Infringing Activity

Plaintiffs insist that Netcom knew that Erlich was infringing their copyrights at least after receiving notice from plaintiffs' counsel indicating that Erlich had posted copies of their works onto a.r.s. through Netcom's system. Despite this knowledge, Netcom continued to allow Erlich to post messages to a.r.s. and left the allegedly infringing messages on its system so that Netcom's subscribers and other Usenet servers could access them. Netcom argues that it did not possess the necessary type of knowledge because (1) it did not know of Erlich's planned infringing activities when it agreed to lease its facilities to Klemesrud, (2) it did not know that Erlich would infringe prior to any of his postings, (3) it is unable to screen out infringing postings before they are made, and (4) its knowledge of the infringing nature of Erlich's postings was too equivocal given the difficulty in assessing whether the registrations were valid and whether Erlich's use was fair. The court will address these arguments in turn.

Netcom cites cases holding that there is no contributory infringement by the lessors of premises that are later [**31] used for infringement unless the lessor had knowledge of the intended use at the time of the signing of the lease. See, e.g., Deutsch v. Arnold, 98 F.2d 686, 688 (2d Cir. 1938). n20 The contribution to the infringement by the defendant in Deutsch was merely to lease use of the premises to the infringer. Here, Netcom not only leases space but also serves as an access provider, which includes the storage and transmission of information necessary to facilitate [*1374] Erlich's postings to a.r.s. Unlike a landlord, Netcom retains some control over, the use of its system. See infra part I.B.3.a. Thus, the relevant time frame for knowledge is not when Netcom entered into an agreement with Klemesrud. It should be when Netcom provided its services to allow Erlich to infringe plaintiffs' copyrights. Cf. Screen Gems-Columbia Music, Inc. v. Mark-Fi Records, Inc., 256 F. Supp. 399, 403 (S.D.N.Y. 1966) (analyzing knowledge at time that defendant rendered its particular service). It is undisputed that Netcom did not know that Erlich was infringing before it received notice from plaintiffs. Netcom points out that the alleged instances of infringement occurring on Netcom's system all [**32] happened prior to December 29, 1994, the date on which Netcom first received notice of plaintiffs' infringement claim against Erlich. See Pisani Feb. 8, 1995 Decl., P 6 & Exs. (showing latest posting made on December 29, 1994); McShane Feb. 8, 1995 Decl.; FAC PP 36-38 & Ex. I. Thus, there is no question of fact as to whether Netcom knew or should have known of Erlich's infringing activities that occurred more than 11 days before receipt of the December 28, 1994 letter.

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n20 Adopting such a rule would relieve a BBS of liability for failing to take steps to remove infringing works from its system even after being handed a court's order finding infringement. This would be undesirable and is inconsistent with Netcom's counsel's admission that Netcom would have an obligation to act in such circumstances. Tr. 35:25; see also Tr. 42:18-42:20.

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However, the evidence reveals a question of fact as to whether Netcom knew or should have known that Erlich had infringed plaintiffs' copyrights following receipt of plaintiffs' [**33] letter. Because Netcom was arguably participating in Erlich's public distribution of plaintiffs' works, there is a genuine issue as to whether Netcom knew of any infringement by Erlich before it was too late to do anything about it. If plaintiffs can prove the knowledge element, Netcom will be liable for contributory infringement since its failure to simply cancel Erlich's infringing message and thereby stop an infringing copy from being distributed worldwide constitutes substantial

participation in Erlich's public distribution of the message. Cf. R.T. Nimmer, THE LAW OF COMPUTER TECHNOLOGY P 15.11B, at S15-42 (2d ed. 1994) (opining that "where information service is less directly involved in the enterprise of creating unauthorized copies a finding of contributory infringement is not likely").

Netcom argues that its knowledge after receiving notice of Erlich's alleged infringing activities was too equivocal given the difficulty in assessing whether registrations are valid and whether use is fair. Although a mere unsupported allegation of infringement by a copyright owner may not automatically put a defendant on notice of infringing activity, Netcom's position that liability must [**34] be unequivocal is unsupportable. While perhaps the typical infringing activities of BBSs will involve copying software, where BBS operators are better equipped to judge infringement, the fact that this involves written works should not distinguish it. Where works contain copyright notices within them, as here, it is difficult to argue that a defendant did not know that the works were copyrighted. To require proof of valid registrations would be impractical and would perhaps take too long to verify, making it impossible for a copyright holder to protect his or her works in some cases, as works are automatically deleted less than two weeks after they are posted. The court is more persuaded by the argument that it is beyond the ability of a BBS operator to quickly and fairly determine when a use is not infringement where there is at least a colorable claim of fair use. Where a BBS operator cannot reasonably verify a claim of infringement, either because of a possible fair use defense, the lack of copyright notices on the copies, or the copyright holder's failure to provide the necessary documentation to show that there is a likely infringement, the operator's lack of knowledge will be [**35] found reasonable and there will be no liability for contributory infringement for allowing the continued distribution of the works on its system.

Since Netcom was given notice of an infringement claim before Erlich had completed his infringing activity, there may be a question of fact as to whether Netcom knew or should have known that such activities were infringing. Given the context of a dispute between a former minister and a church he is criticizing, Netcom may be able to show that its lack of knowledge that Erlich was infringing was reasonable. However, Netcom admits that it did not even look at the postings once given notice and that had it looked at the copyright notice and statements [*1375] regarding authorship it would have triggered an investigation into whether there was infringement. Kobrin June 7, 1995 Decl., Ex. H, Hoffman Depo. At 125-128. These facts are sufficient to raise a question as to Netcom's knowledge once it received a letter from plaintiffs on December 29, 1994. n21

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n21 The court does not see the relevance of plaintiffs' argument that Netcom's failure to investigate their claims of infringement or take actions against Erlich was a departure from Netcom's normal procedure. A policy and practice of acting to stop postings where there is inadequate knowledge of infringement in no way creates a higher standard of care under the Copyright Act as to subsequent claims of user infringement.

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b. Substantial Participation

Where a defendant has knowledge of the primary infringer's infringing activities, it will be liable if it "induces, causes or materially contributes to the infringing conduct of" the primary infringer. Gershwin Publishing, 443 F.2d at 1162. Such participation must be substantial. Apple Computer, Inc. v.
Microsoft Corp., 821 F. Supp. 616, 625 (N.D. Cal. 1993), aff'd, 35 F.3d 1435 (9th Cir. 1994); Demetriades v. Kaufmann, 690 F. Supp. 289, 294 (S.D.N.Y. 1988).

Providing a service that allows for the automatic distribution of all Usenet postings, infringing and noninfringing, goes well beyond renting a premises to an infringer. See Fonovisa, Inc. v. Cherry Auction, Inc., 847 F. Supp. 1492, 1496 (E.D. Cal. 1994) (finding that renting space at swap meet to known bootleggers not "substantial participation" in the infringers' activities). It is more akin to the radio stations that were found liable for rebroadcasting an infringing broadcast. See, e.g., Select Theatres Corp. v. Ronzoni Macoroni Corp, 59 U.S.P.Q. 288, 291 (S.D.N.Y. 1943). Netcom allows Erlich's infringing messages to remain on its system and be further distributed [**37] to other Usenet servers worldwide. It does not completely relinquish control over how its system is used, unlike a landlord. Thus, it is fair, assuming Netcom is able to take simple measures to prevent further damage to plaintiffs' copyrighted works, to hold Netcom liable for contributory infringement where Netcom has knowledge of Erlich's infringing postings yet continues to aid in the accomplishment of Erlich's purpose of publicly distributing the postings. Accordingly, plaintiffs do raise a genuine issue of material fact as to their theory of contributory infringement as to the postings made after Netcom was on notice of plaintiffs' infringement claim.

3. Vicarious Liability

Even if plaintiffs cannot prove that Netcom is contributorily liable for its participation in the infringing activity, it may still seek to prove vicarious infringement based on Netcom's relationship to Erlich. A defendant is liable for vicarious liability for the actions of a primary infringer where the defendant (1) has the right and ability to control the infringer's acts and (2) receives a direct financial benefit from the infringement. See Shapiro, Bernstein & Co. v. H.L. Green Co., 316 [**38] F.2d 304, 306 (2d Cir. 1963). Unlike contributory infringement, knowledge is not an element of vicarious liability. 3 NIMMER ON COPYRIGHT @ 12.04[A][1], at 12-70.

a. Right and Ability To Control

The first element of vicarious liability will be met if plaintiffs can show that Netcom has the right and ability to supervise the conduct of its subscribers. Netcom argues that it does not have the right to control its users' postings before they occur. Plaintiffs dispute this and argue that Netcom's terms and conditions, to which its subscribers n22 must agree, specify that Netcom reserves the right to take remedial action against subscribers. See, e.g., Francis Depo. at 124-126. Plaintiffs argue that under "netiquette," the informal rules and customs that have developed on the Internet, violation of copyrights by a user is unacceptable and the access provider has a duty take measures to prevent this; where the immediate service [*1376] provider fails, the next service provider up the transmission stream must act. See Castleman Decl. PP 32-43. Further evidence of Netcom's right to restrict infringing activity is its prohibition of copyright infringement and its requirement that [**39] its subscribers indemnify it for any

damage to third parties. See Kobrin May 5, 1995 Decl., Ex. G. Plaintiffs have thus raised a question of fact as to Netcom's right to control Erlich's use of its services.

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n22 In this case, Netcom is even further removed from Erlich's activities. Erlich was in a contractual relationship only with Klemesrud. Netcom thus dealt directly only with Klemesrud. However, it is not crucial that Erlich does not obtain access directly through Netcom. The issue is Netcom's right and ability to control the use of its system, which it can do indirectly by controlling Klemesrud's use.

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Netcom argues that it could not possibly screen messages before they are posted given the speed and volume of the data that goes through its system. Netcom further argues that it has never exercised control over the content of its users' postings. Plaintiffs' expert opines otherwise, stating that with an easy software modification Netcom could identify postings that contain particular words or come from [**40] particular individuals. Castleman Decl. PP 39-43; see also Francis Depo. at 262-63; Hoffman Depo. at 173-74, 178. n23 Plaintiffs further dispute Netcom's claim that it could not limit Erlich's access to Usenet without kicking off all 500 subscribers of Klemesrud's BBS. As evidence that Netcom has in fact exercised its ability to police its users' conduct, plaintiffs cite evidence that Netcom has acted to suspend subscribers' accounts on over one thousand occasions. See Ex. J (listing suspensions of subscribers by Netcom for commercial advertising, posting obscene materials, and off-topic postings). Further evidence shows that Netcom can delete specific postings. See Tr. 9:16. Whether such sanctions occurred before or after the abusive conduct is not material to whether Netcom can exercise control. The court thus finds that plaintiffs have raised a genuine issue of fact as to whether Netcom has the right and ability to exercise control over the activities of its subscribers, and of Erlich in particular.

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n23 However, plaintiffs submit no evidence indicating Netcom, or anyone, could design software that could determine whether a posting is infringing.

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b. Direct Financial Benefit

Plaintiffs must further prove that Netcom receives a direct financial benefit from the infringing activities of its users. For example, a landlord who has the right and ability to supervise the tenant's activities is vicariously liable for the infringements of the tenant where the rental amount is proportional to the proceeds of the tenant's sales. Shapiro, Bernstein, 316 F.2d at 306. However, where a defendant rents space or services on a fixed rental fee that does not depend on the nature of the activity of the lessee, courts usually find no vicarious liability because there is no direct financial benefit from the infringement. See, e.g., Roy Export Co. v. Trustees of Columbia University, 344 F. Supp. 1350, 1353 (S.D.N.Y. 1972) (finding no vicarious liability of university because no financial benefit from allowing screening of bootlegged films); Fonovisa, 847 F. Supp. at 1496 (finding swap meet operators did not financially benefit from fixed fee); see also Kelly Tickle, Comment, The Vicarious Liability of Electronic Bulletin Board Operators for the

Copyright Infringement Occurring on Their Bulletin Boards, 80 IOWA L. REV. [**42] 391, 415 (1995) (arguing that BBS operators "lease cyberspace" and should thus be treated like landlords, who are not liable for infringement that occurs on their premises).

Plaintiffs argue that courts will find a financial benefit despite fixed fees. In Polygram International Publishing, Inc. v. Nevada/TIG, Inc., 855 F. Supp. 1314, 1330-33 (D. Mass. 1994), the court found a trade show organizer vicariously liable for the infringing performance of an exhibitor because, although the infringement did not affect the fixed rental fee received by the organizers, the organizers benefitted from the performances, which helped make the show a financial success. But see Artists Music, Inc. v. Reed Publishing, Inc., 1994 U.S. Dist. LEXIS 6395, 31 U.S.P.Q.2D (BNA) 1623, 1994 WL 191643, at *6 (S.D.N.Y. 1994) (finding no vicarious liability for trade show organizers where revenues not increased because of infringing music performed by exhibitors). Plaintiffs cite two other cases where, despite fixed fees, defendants received financial benefits from allowing groups to perform infringing works over the radio without having to get an ASCAP license, which minimized the defendants' expenses. [**43] See Boz Scaggs Music v. KND Corp, 491 F. Supp. 908, 913 (D. Conn. 1980); Realsongs v. Gulf Broadcasting [*1377] Corp., 824 F. Supp. 89, 92 (M.D. La. 1993). Plaintiffs' cases are factually distinguishable. Plaintiffs cannot provide any evidence of a direct financial benefit received by Netcom from Erlich's infringing postings. Unlike Shapiro, Bernstein, and like Fonovisa, Netcom receives a fixed fee. There is no evidence that infringement by Erlich, or any other user of Netcom's services, in any way enhances the value of Netcom's services to subscribers or attracts new subscribers. Plaintiffs argue, however, that Netcom somehow derives a benefit from its purported "policy of refusing to take enforcement actions against its subscribers and others who transmit infringing messages over its computer networks." Opp'n at 18. Plaintiffs point to Netcom's advertisements that, compared to competitors like CompuServe and America Online, Netcom provides easy, regulation-free Internet access. Plaintiffs assert that Netcom's policy attracts copyright infringers to its system, resulting in a direct financial benefit. The court is not convinced that such an argument, if true, would constitute [**44] a direct financial benefit to Netcom from Erlich's infringing activities. See Fonovisa, 847 F. Supp. at 1496 (finding no direct financial benefit despite argument that lessees included many vendors selling counterfeit goods and that clientele sought "bargain basement prices"). Further, plaintiffs' argument is not supported by probative evidence. The only "evidence" plaintiffs cite for their supposition is the declaration of their counsel, Elliot Abelson, who states that

> on April 7, 1995, in a conversation regarding Netcom's position related to this case, Randolf Rice, attorney for Netcom, informed me that Netcom's executives are happy about the publicity it is receiving in the press as a result of this case. Mr. Rice also told me that Netcom was concerned that it would lose business if it took action against Erlich or Klemesrud in connection with Erlich's infringements.

Abelson Decl. P 2. Netcom objects to this declaration as hearsay and as inadmissible evidence of statements made in compromise negotiations. Fed. R. Ev. 801, 408. Whether or not this declaration is admissible, it does not support plaintiffs' argument that Netcom either has a policy of not enforcing [**45] violations of copyright laws by its subscribers or, assuming such a policy exists, that Netcom's policy directly financially benefits Netcom, such as by attracting new

subscribers. Because plaintiffs have failed to raise a question of fact on this vital element, their claim of vicarious liability fails. See Roy Export, 344 F. Supp. at 1353.

4. First Amendment Argument

Netcom argues that plaintiffs' theory of liability contravenes the first amendment, as it would chill the use of the Internet because every access provider or user would be subject to liability when a user posts an infringing work to a Usenet newsgroup. While the court agrees that an overbroad injunction might implicate the First Amendment, see In re Capital Cities/ABC, Inc., 918 F.2d 140, 144 (11th Cir. 1990), n24 imposing liability for infringement where it is otherwise appropriate does not necessarily raise a First Amendment issue. The copyright concepts of the idea/expression dichotomy and the fair use defense balance the important First Amendment rights with the constitutional authority for "promoting the progress of science and useful arts," U.S. CONST. art. I, @ 8, cl. 8; 1 NIMMER ON COPYRIGHT [**46] @ 1.10[B], at 1-71 to -83. Netcom argues that liability here would force Usenet servers to perform the impossible--screening all the information that comes through their systems. However, the court is not convinced that Usenet servers are directly liable for causing a copy to be made, and absent evidence of knowledge and participation or control and direct profit, they will not be contributorily or vicariously liable. If Usenet servers were responsible for screening all messages coming through their systems, this could have a serious chilling effect on what some say may turn out to be the best public forum for free speech yet [*1378] devised. See Jerry Berman & Daniel J. Weitzner, Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media, 104 Yale L.J. 1619, 1624 (1995) (praising decentralized networks for opening access to all with no entity stifling independent sources of speech); Rose, supra, at 4. n25 Finally, Netcom admits that its First Amendment argument is merely a consideration in the fair use argument, which the court will now address. See Reply at 24.

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n24 For example, plaintiffs' demand that the court order Netcom to terminate Klemesrud's BBS's access to the Internet, thus depriving all 500 of his subscribers, would be overbroad, as it would unnecessarily keep hundreds of users, against whom there are no allegations of copyright infringement, from accessing a means of speech. The overbroadness is even more evident if, as plaintiffs contend, there is a way to restrict only Erlich's access to a.r.s. [**47]

n25 Netcom additionally argues that plaintiffs' theory of liability would have a chilling effect on users, who would be liable for merely browsing infringing works. Browsing technically causes an infringing copy of the digital information to be made in the screen memory. MAI holds that such a copy is fixed even when information is temporarily placed in RAM, such as the screen RAM. The temporary copying involved in browsing is only necessary because humans cannot otherwise perceive digital information. It is the functional equivalent of reading, which does not implicate the copyright laws and may be done by anyone in a library without the permission of the copyright owner. However, it can be argued that the effects of digital browsing are different because millions can browse a single copy of a work in cyberspace, while only one can read a library's copy at a time.

Absent a commercial or profit-depriving use, digital browsing is probably a fair use; there could hardly be a market for licensing the temporary copying of digital works onto computer screens to allow browsing. Unless such a use is commercial, such as where someone reads a copyrighted work online and therefore decides not to purchase a copy from the copyright owner, fair use is likely. Until reading a work online becomes as easy and convenient as reading a paperback, copyright owners do not have much to fear from digital browsing and there will not likely be much market effect.

Additionally, unless a user has reason to know, such as from the title of a message, that the message contains copyrighted materials, the browser will be protected by the innocent infringer doctrine, which allows the court to award no damages in appropriate circumstances. In any event, users should hardly worry about a finding of direct infringement; it seems highly unlikely from a practical matter that a copyright owner could prove such infringement or would want to sue such an individual.

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5. Fair Use Defense

Assuming plaintiffs can prove a violation of one of the exclusive rights guaranteed in section 106, there is no infringement if the defendant's use is fair under section 108. The proper focus here is on whether Netcom's actions qualify as fair use, not on whether Erlich himself engaged in fair use; the court has already found that Erlich was not likely entitled to his own fair use defense, as his postings contained large portions of plaintiffs' published and unpublished works quoted verbatim with little added commentary.

Although the author has the exclusive rights to reproduce, publicly distribute, and publicly display a copyrighted work under section 106, these rights are limited by the defense of "fair use." 17 U.S.C. @ 107. The defense "permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." Campbell v. Acuff-Rose Music, Inc., 127 L. Ed. 2d 500, 114 S. Ct. 1164, 1170 (1994) (citation omitted). Congress has set out four nonexclusive factors to be considered in determining the availability of the fair use defense:

(1) the [**49] purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. @ 107. The fair use doctrine calls for a case-by-case analysis. Campbell, 114 S. Ct. at 1170. All of the factors "are to be explored, and the results weighed together, in light of the purposes of copyright." Id. at 1170-71.

a. First Factor: Purpose and Character of the Use

The first statutory factor looks to the purpose and character of the defendant's use. Netcom's use of plaintiffs' works is to carry out its commercial function as an Internet access provider. Such a use, regardless of [*1379] the underlying uses made by Netcom's subscribers, is

clearly commercial. Netcom's use, though commercial, also benefits the public in allowing for the functioning of the Internet and the dissemination of other creative works, a goal of the Copyright Act. See Sega v. Accolade, 977 F.2d 1510, [**50] 1523 (9th Cir. 1992) (holding that intermediate copying to accomplish reverse engineering of software fair use despite commercial nature of activity; considering public benefit of use). The Campbell Court emphasized that a commercial use does not dictate against a finding of fair use, as most of the uses listed in the statute are "generally conducted for profit in this country." 114 S. Ct. at 1174. Although Netcom gains financially from its distribution of messages to the Internet, its financial incentive is unrelated to the infringing activity and the defendant receives no direct financial benefit from the acts of infringement. Therefore, the commercial nature of the defendant's activity should not be dispositive. Moreover, there is no easy way for a defendant like Netcom to secure a license for carrying every possible type of copyrighted work onto the Internet. Thus, it should not be seen as "profiting from the exploitation of the copyrighted work without paying the customary prices." Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 562, 85 L. Ed. 2d 588, 105 S. Ct. 2218 (1985). It is undisputed that, unlike the defendants in Playboy and Sega, Netcom [**51] does not directly gain anything from the content of the information available to its subscribers on the Internet. See supra part I.B.3.b. Because it does not itself provide the files or solicit infringing works, its purpose is different from that of the defendants in Playboy and Sega. Because Netcom's use of copyrighted materials served a completely different function than that of the plaintiffs, this factor weighs in Netcom's favor, see Hustler Magazine, Inc. v. Moral Majority, Inc., 606 F. Supp. 1526, 1535 (C.D. Cal. 1985), aff'd, 796 F.2d 1148 (9th Cir. 1986), notwithstanding the otherwise commercial nature of Netcom's use.

b. Second Factor: Nature of the Copyrighted Work

The second factor focuses on two different aspects of the copyrighted work: whether it is published or unpublished and whether it is informational or creative. n26 Plaintiffs rely on the fact that some of the works transmitted by Netcom were unpublished and some were arguably highly creative and original. However, because Netcom's use of the works was merely to facilitate their posting to the Usenet, which is an entirely different purpose than plaintiffs' use (or, for that matter, Erlich's [**52] use), the precise nature of those works is not important to the fair use determination. See Campbell, 114 S. Ct. at 1175 (finding creative nature of work copied irrelevant where copying for purposes of parody); Hustler Magazine, 606 F. Supp. at 1537; 3 NIMMER ON COPYRIGHT @ 13.05[A][2][a], at 13-177 ("It is sometimes necessary, in calibrating the fair use defense, to advert to the defendant's usage simultaneously with the nature of the plaintiff's work.").

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n26 A recent report noted that a third aspect of the nature of the work may be relevant: whether it is in digital or analog form. IITF Report at 78. Although the copyright laws were developed before digital works existed, they have certainly evolved to include such works, and this court can see no reason why works should deserve less protection because they are in digital form, especially where, as here, they were not put in such form by plaintiffs.

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c. Third Factor: Amount and Substantiality of the Portion Used

The third factor concerns [**53] both the percentage of the original work that was copied and whether that portion constitutes the "heart" of the copyrighted work. Harper & Row, 471 U.S. at 564-65. Generally, no more of a work may be copied than is necessary for the particular use. See Supermarket of Homes v. San Fernando Valley Board of Realtors, 786 F.2d 1400, 1409 (9th Cir. 1986). The copying of an entire work will ordinarily militate, against a finding of fair use, although this is not a per se rule. Sony, 464 U.S. at 449-450.

Plaintiffs have shown that Erlich's postings copied substantial amounts of the originals or, in some cases, the entire works. Netcom, of course, made available to the [*1380] Usenet exactly what was posted by Erlich. As the court found in Sony, the mere fact that all of a work is copied is not determinative of the fair use question, where such total copying is essential given the purpose of the copying. Id. (allowing total copying in context of time-shifting copyrighted television shows by home viewers). For example, where total copying was necessary to carry out the defendants' beneficial purpose of reverse engineering software to get at the ideas found in the source code, the [**54] court found fair use. Sega v. Accolade, 977 F.2d at 1526-27. Here, Netcom copied no more of plaintiffs' works than necessary to function as a Usenet server. Like the defendant in Sega v. Accolade, Netcom had no practical alternative way to carry out its socially useful purpose; a Usenet server must copy all files, since the prescreening of postings for potential copyright infringement is not feasible. 977 F.2d at 1526. Accordingly, this factor should not defeat an otherwise valid defense.

d. Fourth Factor: Effect of the Use upon the Potential Market for the Work

The fourth and final statutory factor concerns "the extent of market harm caused by the particular actions of the alleged infringer" and "'whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would result in a substantially adverse impact on the potential market' for the original." Campbell, 114 S. Ct. at 1177 (quoting 3 NIMMER ON COPYRIGHT @ 13.05[A][4]) (remanding for consideration of this factor). Although the results of all four factors must be weighed together, id. at 1171, the fourth factor is the most important consideration. 3 NIMMER ON COPYRIGHT @ 13.05[A][4], [**55] at 13-188 to -189 (citing Harper & Row, 471 U.S. at 566). 13-207 (observing that fourth factor explains results in recent Supreme Court cases).

Netcom argues that there is no evidence that making accessible plaintiffs' works, which consist of religious scriptures and policy letters, will harm the market for these works by preventing someone from participating in the Scientology religion because they can view the works on the Internet instead. Further, Netcom notes that the relevant question is whether the postings fulfill the demand of an individual who seeks to follow the religion's teachings, and not whether they suppress the desire of an individual who is affected by the criticism posted by Erlich. Netcom argues that the court must focus on the "normal market" for the copyrighted work, which in this case is through a Scientology-based organization. Plaintiffs respond that the Internet's extremely widespread distribution--where more than 25 million people worldwide have access--multiplies the effects of market substitution. In support of its motion for a preliminary injunction against Erlich, plaintiffs submitted declarations regarding the potential effect of making the Church's [**56] secret scriptures available over the Internet. Plaintiffs point out that, although the Church currently faces no competition, groups in the past have used stolen copies

of the Church's scriptures in charging for Scientology-like religious training. See, e.g., Bridge Publications, Inc. v. Vien, 827 F. Supp. 629, 633-34 (S.D. Cal. 1993); Religious Technology Center v. Wollersheim, 796 F.2d 1076, 1078-79 (9th Cir. 1986), cert. denied, 479 U.S. 1103, 94 L. Ed. 2d 187, 107 S. Ct. 1336 (1987). This evidence raises a genuine issue as to the possibility that Erlich's postings, made available over the Internet by Netcom, could hurt the market for plaintiffs' works.

e. Equitable Balancing

In balancing the various factors, the court finds that there is a question of fact as to whether there is a valid fair use defense. Netcom has not justified its copying plaintiffs' works to the extent necessary to establish entitlement to summary judgment in light of evidence that it knew that Erlich's use was infringing and had the ability to prevent its further distribution. While copying all or most of a work will often preclude fair use, courts have recognized the fair use defense where [**57] the purpose of the use is beneficial to society, complete copying is necessary given the type of use, the purpose of the use is completely different than the purpose of the original, and there is no evidence that the use will significantly harm the market for the original. This case is distinguishable from those cases recognizing fair use [*1381] despite total copying. In Sony, the home viewers' use was not commercial and the viewers were allowed to watch the entire shows for free. In Sega v. Accolade, the complete copying was necessitated to access the unprotectable idea in the original. Here, plaintiffs never gave either Erlich or Netcom permission to view or copy their works. Netcom's use has some commercial aspects. Further, Netcom's copying is not for the purpose of getting to the unprotected idea behind plaintiffs' works. Although plaintiffs may ultimately lose on their infringement claims if, among other things, they cannot prove that posting their copyrighted works will harm the market for these works, see Religious Technology Center v. Lerma, 897 F. Supp. 260 (E.D. Va. 1995) (finding fair use defense exists where [**58] no separate market for works because Scientologists cannot effectively use them without the Church's supervision); Religious Technology Center v. F.A.C.T. Net, Inc., 901 F. Supp. 1519, 1995 U.S. Dist. LEXIS 13892, slip op. at 11-14 (D. Colo. 1995) (finding no showing of a potential effect on the market for plaintiffs' works), fair use presents a factual question on which plaintiffs have at least raised a genuine issue of fact. Accordingly, the court does not find that Netcom's use was fair as a matter of law.

C. Conclusion

The court finds that plaintiffs have raised a genuine issue of fact regarding whether Netcom should have known that Erlich was infringing their copyrights after receiving a letter from plaintiffs, whether Netcom substantially participated in the infringement, and whether Netcom has a valid fair use defense. Accordingly, Netcom is not entitled to summary judgment on plaintiffs' claim of contributory copyright infringement. However, plaintiffs' claims of direct and vicarious infringement fail.

II. KLEMESRUD'S MOTION FOR JUDGMENT ON THE PLEADINGS

A. Standards for Judgment on the Pleadings

A motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure [**59] 12(c) is directed at the legal sufficiency of a party's allegations. A judgment on the pleadings is proper when there are no issues of material fact, and the moving party is entitled to judgment as a matter of law. General Conference Corp. v. Seventh Day Adventist Church, 887 F.2d 228, 230 (9th Cir. 1989), cert. denied, 493 U.S. 1079, 107 L. Ed. 2d 1039, 110 S. Ct. 1134 (1990); Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542, 1550 (9th Cir. 1990). In ruling on a motion for judgment on the pleadings, district courts must accept all material allegations of fact alleged in the complaint as true, and resolve all doubts in favor of the nonmoving party. Id. The court need not accept as true conclusory allegations or legal characterizations. Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Materials submitted with the complaint may be considered. Hal Roach Studios, 896 F.2d at 1555. All affirmative defenses must clearly appear on the face of the complaint. McCalden v. California Library Ass'n, 955 F.2d 1214, 1219 (9th Cir. 1990).

B. Copyright Infringement

1. Direct Infringement

First, plaintiffs allege that Klemesrud directly infringed [**60] their copyrights by "reproducing and publishing plaintiffs' works. FAC P 35. The complaint alleges that "Erlich . . . caused copies of [plaintiffs' works] to be published, without authorization, on the BBS computer maintained by Klemesrud" and that "Klemesrud's BBS computer, after receiving and storing for some period of time the copies of the Works sent to it from Erlich, created additional copies of the works and sent these copies to Netcom's computer." FAC P 34. The allegations against Klemesrud fail for the same reason the court found that Netcom was entitled to judgment as a matter of law on the direct infringement claim. There are no allegations that Klemesrud took any affirmative steps to cause the copies to be made. The allegations, in fact, merely say that "Erlich ... caused" the copies to be made and that Klemesrud's computer, not Klemesrud himself, created additional copies. There are [*1382] no allegations in the complaint to overcome the missing volitional or causal elements necessary to hold a BBS operator directly liable for copying that is automatic and caused by a subscriber. See supra part I.B.1.

2. Contributory Infringement

Second, the complaint alleges that [**61] Klemesrud is contributorily liable. FAC P 35. It further alleges that plaintiffs repeatedly objected to Klemesrud's actions and informed him that Erlich's (and his) actions constituted infringement. FAC P 36. A letter attached to the complaint indicates that such notice was first sent to Klemesrud on December 30, 1994. FAC, Ex. I. Despite the warnings, Klemesrud allegedly refused to assist plaintiffs in compelling Erlich to stop his postings and refused to stop receiving, copying, transmitting and publishing the postings. FAC P 38. To state a claim for contributory infringement, plaintiffs must allege that Klemesrud knew or should have known of Erlich's infringing actions at the time they occurred and yet substantially participated by "inducing, causing or materially contributing to the infringing conduct" of Erlich. Gershwin, 443 F.2d at 1162. For the reasons discussed in connection with

Netcom's motion, the court finds plaintiffs' pleadings sufficient to raise an issue of contributory infringement.

3. Vicarious Liability

The third theory of liability argued by plaintiffs, vicarious liability, is not specifically mentioned in the complaint. Nonetheless, this theory fails as [**62] a matter of law because there are insufficient factual allegations to support it. Plaintiffs must show that Klemesrud had the right and ability to control Erlich's activities and that Klemesrud had a direct financial interest in Erlich's infringement. Shapiro, Bernstein, 316 F.2d at 306. A letter from Klemesrud to plaintiffs' counsel states that Klemesrud would comply with plaintiffs' request to take actions against Erlich by deleting the infringing postings from his BBS if plaintiffs mailed him the original copyrighted work and he found that they matched the allegedly infringing posting. FAC, Ex. J. Plaintiffs argue that this letter indicates Klemesrud's ability and right to control Erlich's activities on his BBS. The court finds that this letter, construed in the light most favorable to plaintiffs, raises a question as to whether plaintiffs can show that Klemesrud, in the operation of his BBS, could control Erlich's activities, such as by deleting infringing postings. However, plaintiffs' failure to allege a financial benefit is fatal to their claim for vicarious liability.

The complaint alleges that Klemesrud is in the business of operating a BBS for subscribers for a fee. [**63] The complaint does not say how the fee is collected, but there are no allegations that Klemesrud's fee, or any other direct financial benefit received by Klemesrud, varies in any way with the content of Erlich's postings. Nothing in or attached to the complaint states that Klemesrud in any way profits from allowing Erlich to infringe copyrights. Plaintiffs are given 30 days leave in which to amend to cure this pleadings deficiency if they can do so in good faith.

III. PRELIMINARY INJUNCTION AGAINST NETCOM AND KLEMESRUD

A. Legal Standards for a Preliminary Injunction

A party seeking a preliminary injunction may establish its entitlement to equitable relief by showing either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) serious questions as to these matters and the balance of hardships tipping sharply in the movant's favor. First Brands Corp. v. Fred Meyer, Inc., 809 F.2d 1378, 1381 (9th Cir. 1987). These two tests are not separate, but represent a "continuum" of equitable discretion whereby the greater the relative hardship to the moving party, the less probability of success need be shown. Regents of University of [**64] California v. American Broadcasting Cos., 747 F.2d 511, 515 (9th Cir. 1984). The primary purpose of a preliminary injunction is to preserve the status quo pending a trial on the merits. Los Angeles Memorial Coliseum Commission v. National Football League, 634 F.2d 1197, 1200 (9th Cir. 1980).

[*1383] B. Likelihood of Success

The court finds that plaintiffs have not met their burden of showing a likelihood of success on the merits as to either Netcom or Klemesrud. The only viable theory of infringement is contributory infringement, and there is little evidence that Netcom or Klemesrud knew or should have known that Erlich was engaged in copyright infringement of plaintiffs' works and was not entitled to a fair use defense, especially as they did not receive notice of the alleged infringement

until after all but one of the postings were completed. Further, their participation in the infringement was not substantial. Accordingly, plaintiffs will not likely prevail on their claims.

C. Irreparable Injury

The court will presume irreparable harm for the copyright claim where plaintiffs have shown a likelihood of success on their claims of infringement. Johnson Controls, Inc. v. [**65] Phoenix Control Systems, Inc., 886 F.2d 1173, 1174 (9th Cir. 1989). Here, however, plaintiffs have not made an adequate showing of likelihood of success. More importantly, plaintiffs have not shown that the current preliminary injunction prohibiting Erlich from infringing plaintiffs' copyrights will not be sufficient to avoid any harm to plaintiffs' intellectual property rights.

D. First Amendment Concerns

There is a strong presumption against any injunction that could act as a "prior restraint" on free speech, citing CBS, Inc. v. Davis, 127 L. Ed. 2d 358, 114 S. Ct. 912, 913-14 (1994) (Justice Blackmun, as Circuit Justice, staying a preliminary injunction prohibiting CBS from airing footage of inside of meat packing plant). Because plaintiffs seek injunctive relief that is broader than necessary to prevent Erlich from committing copyright infringement, there is a valid First Amendment question raised here. Netcom and Klemesrud play a vital role in the speech of their users. Requiring them to prescreen postings for possible infringement would chill their users' speech. Cf. In re Capital Cities/ABC, Inc., 918 F.2d at 144.

E. Conclusion

Plaintiffs have not shown [**66] a likelihood of success on the merits of their copyright claims nor irreparable harm absent an injunction against defendants Netcom and Klemesrud. Accordingly, plaintiffs are not entitled to a preliminary injunction.

IV. ORDER

The court denies Netcom's motion for summary judgment and Klemesrud's motion for judgment on the pleadings, as a triable issue of fact exists on the claim of contributory infringement. The court also gives plaintiffs 30 days leave in which to amend to state a claim for vicarious liability against defendant Klemesrud, if they can do so in good faith. Plaintiffs' application for a preliminary injunction against defendants Netcom and Klemesrud is denied.

The parties shall appear for a case management conference at 10:30 a.m. on Friday, January 19, 1996. The deadline for completing required disclosures is January 5, 1996. The joint case management conference statement must be filed by January 12, 1996.

DATED: 11/21/95

RONALD M. WHYTE

United States District Judge