SYLLABUS:

A Seminar on Selected Topics in Cyberlaw and the First Amendment

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Course Information and Syllabus
Class: Thursdays 1-3
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Office Hours: Tuesdays, 8-10. You may drop by at your convenience. I am in my office most of the time during regular business hours.

The Subject Matter of This Course: The development of the Internet and, more recently, Internet-based applications such as Facebook and Twitter have generated new types of communications between individuals across the globe. These new media promote free speech and association by allowing speakers to instantaneously communicate information, thoughts, and ideas to mass audiences and, at times, to mobilize those audiences to action. But the same characteristics that enable these new media to foster First Amendment freedoms can magnify the potential for conflicts between free speech and other values, such as fair trial, discipline within schools, efficiency within the workplace, and the rights of individuals to be free from defamation, harassment, or bullying. The ubiquity of these new media, many of which are mobile increases the opportunities for disruptive speech to invade jury boxes, schoolrooms, and workplaces. In addition, many social media environments prize informality and instantaneous information sharing and responses, which further increases the likelihood of clashes between social media speech and other social values. Courts, policymakers, and law enforcement are struggling to resolve these clashes, both by adapting existing legal remedies and by developing new ones. This seminar (and your papers) will attempt to identify new areas of conflict and to sketch, where possible, how the law is currently responding to them and is likely to respond in the coming years. Topics are likely include: Intermediary Liability and Section 230; Libel, Privacy, and Anonymous Speech; Cyberbullying, Revenge Porn, and Sexting; Threats and Incitement; Online Gambling Regulation; Hate Speech Regulation; Commercial Speech Regulation (including Bar Restrictions on Lawyer Advertising); and/or Legal Issues Surrounding Online Gaming (e.g., Right of Appropriation); Big Data & Surveillance. I will gauge the interests of the students on the first day and then focus
our assignments around the topics of greatest student interest, so you may want to do a little research beforehand to see which of these topics are of most interest to you. If you already know what you’re interested in, please email me and let me know.

**Course Materials:** I will provide the course materials by emailing them to you, emailing the link to the materials to you, and/or posting them on the TWEN page for this course. I apologize if you find this method inconvenient, but I am editing the materials myself to save you the almost $200 a casebook would cost you. I hope you will find the savings worth the hopefully minor inconvenience.

**Course Requirements:**

1. **Paper Requirement** (60 percent of your final grade in the course). The purpose of the writing requirement is to allow you to demonstrate your understanding of the law that applies to your chosen topic; develop your skills in analyzing and synthesizing cases and integrating them with secondary sources (mainly law review articles and treatises); perform in-depth research on a narrow topic of your choice; write persuasively about how existing legal principles should be developed, extended, or modified to address a “new” issue; and demonstrate your familiarity with the conventions of legal writing and citation (including use of the Bluebook). In order to satisfy the writing requirement, you will produce a SELECTED BIBLIOGRAPHY OF SOURCES (in Bluebook Form) (due in class on Week 5); a written OUTLINE of your chosen topic of at least five pages in length (due in class on Week 6); a ROUGH DRAFT of your chosen topic of at least 15 pages in length (due in class on Week 7); a FINAL DRAFT of your chosen topic that is 7,500 words in length, in Word format, with double-spaced body text and footnotes. Your footnotes will conform to the 19th edition of the Bluebook. These requirements will be described in more detail in class. I will give you guidance on how to write this type of paper and give you examples of what it should look like. You will want to meet with me to select a topic within the first three weeks of class. I will also urge all of you to submit your papers to a Technology Law writing competition sponsored by IT-Lex. See details of the contest at [http://it-lex.org/writing-contest/](http://it-lex.org/writing-contest/).

2. **Participation Requirement** (10 percent of your final grade in the course): I will grade you on various types of participation in this course. I will grade you on whether you speak and participate regularly in classroom discussions and whether your comments demonstrate that you have read and thought carefully about the assignments. I will grade you on whether you respond to the blog posts of your peers on the blog site I set up for our course. (See below). I will be particularly attentive to your level of participation during presentations by your fellow students.

3. **Blog Post and Tweet Requirement** (10 percent of your final grade in the course). In addition to writing your final paper, you will write one blog post of
about 750-1,000 words on a “breaking development” in Cyberlaw. I will help you select a breaking development. The quickest way to find a breaking development is to follow journalist and professors who tweet about Cyberlaw issues. I’ll set up the blog site for posting. I’ll be judging your blog post based on accuracy, thoroughness, and writing style. To get an idea of what your blog post should look like, check out the posts on breaking topics here: http://it-lex.org/

and here: http://www.dmlp.org/

and here: http://prawfsblawg.blogs.com/

and here: http://newmedialaw.proskauer.com/

and here: http://blog.ericgoldman.org/

As part of this course, you must sign up for a Twitter account. Each week I expect you to tweet at least twice before class, using the hashtag #UFCyberlaw. One tweet should be a question or comment about some aspect of the assigned readings, and one tweet should contain a link to a story or article about a Cyberlaw issue. I’ll give you some ideas of where you can look for those types of stories. It would also be nice if you responded to the tweets of your classmates. The purpose of this requirement is to help ensure you engage with the assigned materials and to start training you on how to stay abreast of issues in an area of law that is constantly changing. I also hope you will see the benefits of sharing information you’ve learned with other attorneys (or soon-to-be attorneys) in your field. By the way, the “tweet” requirement is not meant to be onerous.

4. Presentation Requirement (20 percent of your final grade in the course). The presentation should be based on your paper and may include PowerPoint slides, but if it does, you should really think about making them engaging. Don’t just put text on the slides and then “speak” what is on the slides. In the presentation, you should demonstrate your thorough knowledge of your topic and your ability to answer thoughtful and informed questions from your peers. You will assign readings to your classmates to accompany your presentations. You can either assign your paper itself or related readings. I’ll give you guidelines as to what might be appropriate readings once I know your topics. I’ll also give more guidelines on the components I expect your presentation to include.

Attendance. I take attendance in accordance with University of Florida and ABA rules. You must be in class and prepared unless there are extenuating circumstances. Please be on time out of respect for everyone. It is distracting to have people coming in after class starts. I reserve the right to drop you from the class if you have more than two absences.
Statement related to accommodations for students with disabilities: Students requesting classroom accommodation must first register with the Office of Disability Resources. The UF Office of Disability Resources will provide documentation to the student who must then provide this documentation to the Law School Office of Student Affairs when requesting accommodation.

ASSIGNMENTS FOR CLASS I

Please read the materials below (including the linked Lessig article) for the first class. This assignment is somewhat long, but please recall that there are only fourteen total classes of two hours each.

What is Cyberlaw?

In 1996, Judge Frank Easterbrook has argued that cyberlaw is not a distinctive subject any more than the “Law of the Horse” is. Judge Easterbrook wrote:

Lots of cases deal with sales of horses; others deal with people kicked by horses; still more deal with the licensing and racing of horses, or with the care veterinarians give to horses, or with prizes at horse shows. Any effort to collect these strands into a course on “The Law of the Horse” is doomed to be shallow and to miss unifying principles.

See Frank H. Easterbrook, Cyberspace and the Law of the Horse, 1996 U. CHI. LEGAL F. 207, 207 (1996). In essence Judge Easterbrook is claiming that there is no such thing as cyberlaw because cyberlaw cases merely involve the extension of existing legal principles or doctrines to new issues as they arise. Your job throughout this course will be to decide if Judge Easterbrook is correct. Are the free speech conflicts that arise as a result of new communications technologies different than the conflicts generated by older communications technologies? If the conflicts are truly “new,” can we use existing doctrines to resolve them or must we develop new doctrines?

Professor Lawrence Lessig responded with to Judge Easterbrook with this classic article, which I’d like you to read for our first class. See Lawrence Lessig, The Law of the Horse: What Cyberlaw Might Teach, 113 HARV. L. REV. 501 (1999), available here: http://www.edtechpolicy.org/Lessig/lessig-horse.pdf.

If you’d like to see Professor Lessig actually presenting, in a fairly engaging fashion, some of the arguments he makes about cyberlaw, see this talk he gave in 2011: http://www.youtube.com/watch?v=us5CUAsH0U0
THE FIRST AMENDMENT IN CYBERSPACE

SOME FIRST AMENDMENT BASICS:1

Freedom of speech and freedom of the press are often referred to collectively as “freedom of expression.” This term recognizes that speech and press freedoms are interrelated: the freedom to speak protects communication of one’s ideas and beliefs, and the freedom of the press protects the dissemination of one’s ideas and beliefs to a wide audience via print, broadcast, cable, or the Internet.

Because freedom of speech and freedom of the press are interrelated, the theoretical justifications for protecting them are largely the same. These justifications include both consequentialist and deontological theories: in other words, theorists have argued for protecting freedom of expression both because it leads to good consequences for society and because it is a good in and of itself.

THE “MARKETPLACE OF IDEAS” AND THE SEARCH FOR TRUTH:

John Milton and John Stuart Mill both famously argued that the free exchange of ideas fosters the search for truth. The “marketplace of ideas” metaphor, which was introduced to First Amendment jurisprudence by Justice Oliver Wendell Holmes, is perhaps the dominant theoretical justification for protecting freedom of expression. Yet this theory is open to serious challenge. As a practical matter, many viewpoints never enter the marketplace of ideas. Many citizens lack the money or education required to become a serious participant in the marketplace of ideas. Other citizens are barred from meaningful participation because class, race, or gender biases impair their ability to make themselves heard. Moreover, many have argued that the concentration of mass media ownership allows a relatively small number of giant corporations to dominate the marketplace of ideas. Driven by profit, a handful of corporations set the parameters of public debate based on what they think will be profitable rather than on what an informed public should know. Although the Internet has given more citizens access to a medium of mass communications, it has not guaranteed them the opportunity to be heard. Indeed, even in cyberspace the most powerful speakers tend to be the same media corporations that dominate “real space.”

[IS THIS TRUE? DO YOU “BUY” THIS ARGUMENT? WHY OR WHY NOT? DO A MULTITUDE OF BLOGS, TWITTER ACCOUNTS, FACEBOOK ACCOUNTS, AND SO FORTH CORRESPOND TO A RICH DISCOURSE ANCHORED IN FACTS AND OPINIONS? WHAT ABOUT THE FACT THAT MOST PEOPLE USE ONLY ONE SEARCH ENGINE—GOOGLE--TO SEARCH FOR FACTS? DOES IT MATTER THAT GOOGLE’S SEARCH PROCESS IS NOT TRANSPARENT?] Thus, for many citizens, the “marketplace of ideas” metaphor is little more than a hollow aspiration.

Another potential problem with the marketplace of ideas as the dominant metaphor in First Amendment law is its assumption that truth will ultimately prevail. The persistence of popular delusions, like the widespread belief in UFOs, casts doubt on

1 Adapted from Lyrissa Lidsky & R. George Wright, Freedom of the Press.
the potential for rational discourse. And if we do not have faith in citizens’ abilities to weed out false information, why should society allow blatant and sometimes harmful lies, like those disseminated by Holocaust deniers, to pollute the marketplace of ideas? Finally, the “search for truth” rationale presupposes that Truth is out there, waiting to be discovered; it does not concede that truth may be merely subjective, relative, historically and socially contingent. Although these criticisms of the marketplace of ideas have force, the alternative—ceding power to a government authority to decide what citizens ought to hear—is a dangerous remedy that few First Amendment scholars have been willing to embrace.

INDIVIDUAL FULFILLMENT AND SELF-REALIZATION:

Freedom of expression fosters not only the individual’s search for truth but also his or her quest for self-realization and self-determination. If individuals are to achieve their potential as human beings, they must have access to a wide range of ideas and experiences. Freedom of expression in the arts, sciences, literature, and music all contribute to the range of possibilities the individual may explore. Yet the individual must also be free to develop and express his or her potential in ways he or she has chosen. In other words, freedom of expression fosters self-determination, and government suppression is therefore an affront to individual dignity.

The “individual self-realization” rationale is a powerful justification for speech and press freedoms, for it rests on the premise that the individual should have access to the widest possible range of ideas and information. Still, some have questioned whether all paths to self-realization are equally valid. Both the individual and society might benefit if information about becoming a hit man or a serial killer were suppressed. Moreover, the self-realization argument has limits. There are many activities that are not protected by the First Amendment that an individual may consider crucial to his self-realization. The First Amendment, for example, does not guarantee the right to open a restaurant or to marry a spouse of the same sex or to enter a bigamous marriage, even though the individual may consider these crucial to his self-fulfillment. Moreover, if an individual is to realize her potential as a human being, she may require access to subsidized education, housing, and health care, yet the First Amendment does not give her a right to these things. Is it fair, then, to question whether freedom of expression is the font of all other freedoms?

DEMOCRATIC SELF-GOVERNANCE AND SOCIAL STABILITY:

A fundamental premise of democratic society is that government authority derives from the consent of the governed. An informed citizenry is essential to a self-governing society, and a free press is essential to an informed citizenry. The press gathers and disseminates information about public affairs, laying the foundation for discussion, debate, and citizen participation in public decision-making. Closely linked to this idea is the argument that freedom of expression promotes social stability. Citizens who can make themselves heard through the political process need not make themselves heard
through force of arms. Thus, orderly change can take place without undue disruption of
the social fabric if freedom of expression is allowed to flourish.

The most influential proponent of the idea that press freedom is essential to
“democratic self-governance” was Alexander Meiklejohn, who argued that the First
Amendment protects only those forms of expression “by which we ‘govern.’”¹ In other
words, the First Amendment protects only “political speech.” This notion has been
enshrined in law by a series of Supreme Court decisions holding that speech on matters
of public concern lies at the core of the First Amendment. Yet the “democratic self-
governance” rationale for protecting freedom of expression fails as a general theory of
the First Amendment. As Professor Zechariah Chafee pointed out soon after Meiklejohn
presented his thesis in 1948, many types of expression that are not related directly to
politics nonetheless deserve protection in a free society.² Neither Van Gogh’s “Starry
Night” nor Walt Whitman’s “Crossing Brooklyn Ferry” are overtly political, but few of
us would want to live in a society where the government could suppress them.

Meiklejohn responded to such criticisms by expanding the definition of “political speech”
to include literary, artistic, philosophical and scientific speech, arguing that they relate to
political matters because voters derive from them the “knowledge, intelligence, [and]
sensitivity to human values” that allow them to make “sane and objective judgment[s].”
Defined this broadly, however, it becomes difficult to draw a line excluding any speech
from the definition of political speech.

Other theories have been offered to justify speech and press protection. One
scholar has argued in particular that the protection of diverse and even offensive speech
creates a tolerant society.³ Courts, unlike scholars, have never felt compelled to adhere to
a single justification for protecting freedom of expression but instead have treated the
justifications discussed above as overlapping and as a philosophical grab bag, adapting
the justification or justifications that are most resonant in the individual case.

METHODS OF ANALYSIS IN FIRST AMENDMENT CASES

In the same manner, courts have used various analytical tools or legal doctrines
for testing the constitutionality of laws that implicate freedom of expression. However,
courts have never felt compelled to adopt a single method for analyzing every First
Amendment case but have instead applied the theory that they felt best suited the
particular circumstances.

ABSOLUTISM:

One of the less frequently employed legal doctrines used to resolve First
Amendment cases is absolutism. Absolutism originates in the text of the First
Amendment: The First Amendment says Congress can pass “no law” abridging freedom
of expression, and any and every law that abridges freedom of expression is
unconstitutional. Absolutism, associated most famously with Justice Hugo Black (who
served on the Supreme Court from 1937 to 1971), is attractive in its simplicity. Justice
Black, for example, interpreted the First Amendment to forbid all regulations except for
those that placed only incidental restrictions on the time, place and manner of an individual’s freedom of expression. Absolutism tries to tie the hands of judges so that they will not be swayed by the temptation to restrict speech in response to historical “emergencies” (like the Red Scare of the 1950s and the “war on terrorism” today). But absolutism forced even Justice Black to unduly narrow the scope of what counts as speech in order to reach what he felt was the “correct” result in a speech case. In Cohen v. California, for example, Justice Black argued that a state could constitutionally punish one of its citizens for a jacket that said “Fuck the Draft.” (Black, J., joining in the dissent written by Blackmun, J.); (Adderley v. Florida, 1966). Expressing this type of antiwar sentiment on one’s jacket, said Justice Black, was not speech but was instead a type of physical conduct in a courthouse corridor that the state could legitimately regulate. Because Justice Black’s absolutism did not allow him to balance the State’s interests against the right to freedom of expression, he was forced to resort to this strained argument in order to avoid what to him was an unacceptable constitutional outcome.

BALANCING:

An obvious alternative to absolutism of this sort is a balancing process that weighs First Amendment freedoms against other important societal interests. Balancing is the dominant method of analyzing First Amendment cases today. A simple example of balancing occurred in the Supreme Court’s decision in New York v. Ferber. There, the Supreme Court held that a state statute criminalizing the distribution of child pornography was constitutional because “the evil . . . restricted so overwhelmingly outweigh[ed] the expressive interests, if any, at stake.” The Court evaluated both the State’s interest in protecting children with society’s and the individual defendant’s interest in the expression (child pornography) and found the balance tipped in favor of regulation.

When balancing interests, the Supreme Court often specifies not simply that the State’s interest must outweigh the First Amendment interest at stake but must outweigh it by a specified amount. Because First Amendment freedoms occupy such a central role in our democracy (what is sometimes referred to as a “preferred position”), the Supreme Court has often said that freedom of expression may not be regulated unless a State can show a “compelling” or “important” interest in such regulation. In addition, the State is often required to show that the regulation it has chosen is “narrowly tailored” to achieve its interest or is the “least [speech]-restrictive means” of achieving that interest. This type of balancing test, in which the Court tips the scale heavily in favor of freedom of expression, is known as “strict scrutiny” and is applied in many First Amendment cases.

The Supreme Court has often chosen to balance the competing interests in First Amendment cases on an ad hoc basis. In other words, the Court assigns a weight to the interests based on the specific facts of the case it is deciding. However, the balance struck is so fact-specific to that case that the Court’s decision gives little guidance to resolve future cases. Thus the virtue of such ad hoc balancing, its flexibility, is also its vice, its unpredictability.
The second type of balancing commonly employed by the court, categorical balancing, is less subject to the criticism of unpredictability. When the Court employs categorical balancing, it attempts to assign a weight to general categories of speech; the weight assigned transcends the merits of the particular case at hand and is designed to be applied to every case involving that category of speech, regardless of the specific facts. The Court’s decision in Chaplinsky v. New Hampshire is the classic illustration of categorical balancing. In *Chaplinsky*, the Court declared “fighting words, inherently injurious words, or “words likely to cause an average addressee to fight”–to make so little contribution to the “exposition of ideas” as to be totally unworthy of constitutional protection. Thus, “fighting words” are always of such low value that the balance must be struck in favor of regulation.

Categorical balancing, however, does not always provide clear resolutions for future cases because it is often not easy to know whether the speech at issue falls into an unprotected category. May the state forbid the use of racial epithets on the grounds that they are fighting words? What about insults to a person’s mother? Obscenity, another category of “low value” speech, has been so notoriously difficult to define that one Justice was forced to proclaim, “I know it when I see it” (Jacobellis v. Ohio, 1964) This type of analysis is no more predictable than ad hoc balancing. To further complicate matters, the Supreme Court has said that the State may not even punish the use of low value speech like fighting words if the State’s purpose is to single out particular content or viewpoints for sanction by the State. (R.A.V. v. City of St. Paul, 1992) Categorical balancing does not obviate the need for judges to make difficult value choices in individual cases.

**THE CLEAR AND PRESENT DANGER TEST:**

The clear and present danger test originated with Justices Oliver Wendell Holmes and Louis Brandeis, who contended that speech could only be suppressed when it posed a “clear and present danger” (that is, a real and immediate danger) of harm to society. Holmes and Brandeis developed the clear and present danger test in a series of cases involving the prosecution of citizens who criticized U.S. policy during World War I. In most of these cases, the two justices argued that the government had shown only a speculative connection between the speech at issue and any substantive harms to the war effort. A majority of the Court eventually endorsed this view, and the “clear and present danger” test for speech restrictions was the dominant method of analyzing First Amendment cases for a large portion of the twentieth century.

Today, the libertarian conception of the First Amendment developed by Holmes and Brandeis is still ascendant, but the clear and present danger test has only limited importance as a legal doctrine. The clear and present danger test has given way to the “incitement” test of *Brandenburg v. Ohio*, a test used primarily for speakers who allegedly “incite” violence by their audience. *Brandenburg* involved a hooded Ku Klux Klan speaker who exhorted his audience, some of whom were armed, to “[s]end the Jews back to Israel” and to “bury the niggers.” In striking down Ohio’s prosecution of the speaker for advocating criminal activity, the Supreme Court held that the First
Amendment does not allow “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.” (Brandenburg v. Ohio, 1969) In other words, a State must show that the speaker intended to incite another to imminent violence in a context that made it highly likely such violence would actually occur. Drawing on notions developed by Holmes and Brandeis, Brandenburg rests on the premise that most Americans are not susceptible to the impassioned rhetoric of a radical speaker. Next week, we will start asking whether the Internet (and social media) change that premise.

TECHNOLOGY & THE FIRST AMENDMENT: DOES THE BROADCAST PARADIGM APPLY TO THE INTERNET?

Reno v. ACLU, excerpted below, is a foundational case in cyberlaw. In order to understand Reno, you first need to understand that the Supreme Court has applied First Amendment principles differently to different mediums of communication. In other words, the Supreme Court has applied the First Amendment in a “medium-specific” fashion. The question that Reno addresses, among others, is whether the Internet will receive the same First Amendment protections accorded newspapers and magazines or whether it will receive the protections traditionally accorded broadcasters.

Here’s some background on the Supreme Court’s “medium-specific” First Amendment jurisprudence. Most of First Amendment principles apply equally to newspapers, broadcasters, cable television, Internet publishers, and other mass media. Whether a defamatory statement about a public official is broadcast on NBC, aired on CNN, or published in the Washington Post, the First Amendment requires the public official to prove actual malice and falsity if she is to have any hope of a monetary recover. By the same token, the First Amendment equally forbids the imposition of prior restraints on television programs, radio broadcasts, or magazine articles. However, there are some instances in which the First Amendment permits regulation of broadcasters that would be forbidden when applied to other media.

The usual justification for this differential treatment of broadcasters is the unique nature of the broadcast medium as a scarce public resource. This justification, however, has always had its critics, and it is becoming more and more questionable as the technological differences between broadcast, cable, and other media erode.

To appreciate the difference between the First Amendment paradigm applied to broadcasters with the paradigm applied to the print media, consider that federal law requires licensing of the broadcasters. Until recently, federal law charged the Federal Communications Commission—the federal agency that regulates the electronic media—with the task of licensing broadcast stations in accordance with the “public interest, convenience, and necessity.” Even now the FCC is charged with basing license renewal decisions in part on the public interest. In other words, the FCC’s decision whether to renew a broadcast license is based at least partially on the content that the television or radio station broadcasts. There is no doubt that a similar licensing scheme applied to the
print media would be unconstitutional; although much is unclear about the history of the First Amendment, it is absolutely certain that the founding fathers regarded licensing of printing presses as inimical to press freedom. Yet licensing by government bureaucrats is not only tolerated but encouraged in the broadcast medium: Why?

The answer has to do with the history and physical characteristics of the medium. During the 1920s, hundreds of radio stations began broadcasting with little or no government oversight. As described by the Supreme Court, “the allocation of frequencies was left entirely to the private sector, and the result was chaos.” (Red Lion Broad. Co. v. F.C.C., 1969) Competing stations began broadcasting at the same frequencies in the same geographic locations. The signal interference thus created meant that none of the broadcasts could get through to listeners. The result was chaos, making it “apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government.” (Red Lion Broad. Co. v. F.C.C., 1969) Congress therefore created the Federal Radio Commission, which later became the Federal Communications Commission, to allocate the portion of the electromagnetic spectrum available for commercial and public broadcasting in a manner “consistent with the public interest, convenience [and] necessity.” The FCC performs these duties by issuing licenses to broadcasters, renewing licenses periodically, insuring that broadcasters comply with technical and operations rules, and developing rules to regulate broadcasting. Broadcasters, then, unlike newspaper publishers, are subject to pervasive governmental regulation because there is a need for an administrative body to allocate a limited resource--the electromagnetic spectrum--amongst competing users.5

The argument that an efficient and effective system of broadcasting demands that the government allocate of the airwaves is often referred to as the scarcity rationale. The scarcity rationale is the primary explanation for why the First Amendment tolerates content regulation of broadcasting that it would forbid in other mass media. Compare, for example, Miami Herald v. Tornillo with Red Lion Broadcasting v. FCC., two Supreme Court cases with very similar facts but with widely divergent answers to the question of whether the government can regulate to foster public access to the mass media. The Tornillo case dealt with the constitutionality of a Florida “right of reply” statute. The statute required newspapers that “assailed” the character or record of a political candidate to print the candidate’s response. Although the Court recognized that the statute’s purpose was to “ensure that a wide variety of views reach the public,” it nonetheless found the statute unconstitutional. “A responsible press,” as the Court eloquently stated, “is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues cannot be legislated.” (Miami Hearld v. Tornillo, 1974) The Court was unequivocal in its condemnation of “government-enforced access” to newspapers, characterizing the statute as a content-based penalty on speech. Not only does the “compelled printing of a reply” consume resources that a paper might prefer to use in a different manner. It also potentially “dampen[s] the vigor” of political reporting to the extent editors forego criticism of political candidates to avoid having to print their replies. Under these circumstances, the Court had no trouble concluding that the First Amendment does not tolerate governmental interference with “editorial control and judgment.” (Miami Hearld v. Tornillo, 1974)
In Red Lion v. FCC, however, the Supreme Court held that the First Amendment does tolerate governmental interference with the editorial control and judgment of broadcasters, at least for the purpose of ensuring that the public receives a full range of views on issues of public concern. Red Lion involved a challenge to two “right of reply” rules imposed on broadcasters by the FCC: the “political editorial” rule and the “personal attack” rule. These two rules were merely specific applications of the FCC’s “fairness doctrine,” which requires broadcasters to give fair coverage to important public issues. The political editorial rule required a broadcaster who endorsed or opposed a political candidate in an editorial to notify the opposed candidate and give a “reasonable opportunity” to respond. The “political attack” rule required broadcasters who aired attacks on the character of a person or group during discussion of a public issue to give the person or group attacked an opportunity to respond. The Supreme Court held that these “right of reply” rules did not violate the First Amendment, explicitly rejecting the argument that the rules would dampen the vigor of public debate and encourage undue “self-censorship” among broadcasters. (Red Lion Broad. v. F.C.C., 1969)

The Court justified its holding in Red Lion on the technological characteristics of broadcasting, specifically on “the scarcity of broadcast frequencies, the Government’s role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views.” Under Red Lion’s scarcity doctrine, the government can impose affirmative programming obligations on broadcasters because they have been given a license to use a limited public resource. When a licensee accepts the privilege of using the public airways, that licensee must also accept the responsibility of acting as a fiduciary or “proxy for the entire community.” In its role as fiduciary, the broadcaster is required to safeguard the First Amendment interests of its listening audience by giving “suitable time and attention to matters of great public concern.”

The scarcity doctrine that underlies Red Lion is a highly questionable basis for according broadcasters diminished First Amendment protection. Newspaper ownership is concentrated in an ever smaller number of hands, and yet this “economic scarcity” did not convince the Tornillo Court that government-enforced access was constitutional (cite Bollinger). Moreover, the “physical scarcity” of the broadcast spectrum stems from the fact that the government has only chosen to dedicate a small portion of all available frequencies to commercial and public broadcasting. And from a technological perspective, even this form of “allocational scarcity” may soon be a thing of the past. As Professor Christopher Yoo has noted, “[t]he impending arrival of a series of new broadcast technologies, including digital transmission, program storage, video-on-demand, spread spectrum, and packet switching, holds the promise of elimination spectrum as a physical constraint even if broadcasting is viewed in isolation from other media.”

In Red Lion, the Court focused on the scarcity of electromagnetic spectrum as a justification for treating broadcast media differently from print media. A related justification is that the public retains ownership of the airwaves, and broadcasters are

In 1978, for example, the Supreme Court held in FCC v. Pacifica Foundation 2 that the First Amendment did not bar the FCC from regulating indecency (not obscenity) in broadcasting, 3 even though content-based regulation of indecency in other media would surely be unconstitutional. Pacifica allowed the government to regulate broadcast indecency, such as profanity or sexual innuendo, due to the distinctive characteristics of the broadcast medium, including its “pervasiveness” and accessibility to children. 4 Do those same arguments apply to the Internet? Can new laws make the Internet safe(r) for children without violating the First Amendment?

Reno v. ACLU, below, deals with Congress’s first attempt to regulate online indecency. Title V of the Telecommunications Act of 1996 is called the Communications Decency Act (CDA). The constitutionality of two provisions of the CDA was at issue in Reno v. ACLU. However, in addressing the constitutionality of the CDA provisions, the Court also addressed a more fundamental jurisprudential issue, namely, whether the broadcast paradigm of indecency regulation laid out in Pacifica also applied to the Internet.

RENO v. ACLU

521 U.S. 844 (1997)


3. Id. at 741. The statutory authority for the FCC’s regulation of indecency is Title 18 of the U.S. Code, which makes it unlawful to utter “any obscene, indecent, or profane language by means of radio communication.” 18 U.S.C. § 1464 (2006). The FCC enforces this provision primarily through forfeitures but also has authority to enforce it through license revocation. 47 U.S.C. § 312(a)(6) (2006).

4. Although Pacifica also cited spectrum scarcity as a justification for treating broadcasters differently than other media, 438 U.S. at 731, the Roberts Court cited only pervasiveness and accessibility to children as Pacifica’s rationales for giving broadcasters “the most limited First Amendment protection.” Fox II, 132 S. Ct. at 2312 (quoting Pacifica, 438 U.S. at 748). In Red Lion Broad. v. FCC, 395 U.S. 367, 389 (1969) the Supreme Court focused on spectrum scarcity as the primary rationale for applying a different First Amendment standard to broadcasters and concluded that the government may require a broadcaster to act as a “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.” Some have also cited the intrusiveness, power, and vividness of the broadcast medium as well as “public ownership” of the airwaves as justifications “for treating broadcast media differently than print media.” See MARC A. FRANKLIN, DAVID A. ANDERSON, & LYRISSA LIDSKY, MASS MEDIA LAW: CASES AND MATERIALS 82–83 (7th ed. 2005) (listing justifications).
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.

[The Court began its opinion by reiterating some of the district court's extensive factual findings about the nature of the Internet, comparing it to "a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services." The Court also noted that "[f]rom 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." The Court then turned to the challenged provisions of the CDA: the "indecent transmission" provision and the "patently offensive display" provision. The first, §223(a), prohibited knowing transmission of obscene or indecent messages to any recipient under 18 years of age. The second provision, §223(d), prohibited knowing sending or displaying of patently offensive messages in a manner available to a person under 18 years of age. That section defined such messages as "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." It then provided for affirmative defenses for those who take good faith measure to restrict access by minors and for those who restrict access through certain age or credit card verification systems.]

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....[W]e 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." 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." Under the CDA, by contrast, neither the parents' consent—nor even their participation—in the communication would avoid the application of the statute. Second, the New York statute applied only to commercial transactions, 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." 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.

In *Pacifica*, we . . . 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.

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." Finally, the Commission's order applied to a medium which as a matter of history had "received the most limited First Amendment protection," 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.

....

In *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975), we observed that "each 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. In these cases, the Court relied on the history of extensive government regulation of the broadcast medium; the scarcity of available frequencies at its inception; and its "invasive" nature.

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. Moreover, the Internet is not as "invasive" as radio or television. The District Court specifically found that "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.’ " It also found that "almost 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."

....

[U]nlike 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 "as many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999." 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." 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.

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. 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. The regulated subject matter includes any of the seven "dirty words" used in the Pacifica monologue, the use of which the Government's expert acknowledged could constitute a felony. 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.

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. . . . 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.
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*, we remarked that the speech restriction at issue there amounted to "'burning 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.

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Justice O'CONNOR, with whom The Chief Justice joins, concurring in the judgment in part and dissenting in part. [Omitted.]

NOTES AND QUESTIONS

1. *Defining minors.* Is one of the problems with the CDA provisions that they make no distinctions between 17-year olds and 7-year olds? If so, how should Congress remedy this problem?

2. *A medium-specific First Amendment.* Is the First Amendment "medium specific"? Or is there one set of First Amendment standards for broadcasters and a different set of standards for all other media? Is "intrusiveness" (in the sense that one can be subjected to indecent material without warning or consent) still a valid rationale for tolerating more regulation of a medium than might otherwise be allowed?

3. *Protecting minors by restricting adults.* How much may a regulation designed to protect children infringe upon non-obscene speech before it is declared invalid?

4. *Community standards and the Internet.* Is the application of a "community standards" criterion to define indecency inherently unconstitutional when applied to the Internet, which crosses all geographical boundaries?

5. *Mobile Access and Invasiveness.* Today many children have access to smart phones, iPads, or other mobile devices that offer instant web access and browsing capability. As of 2009, 77 percent of teens had mobile phones. See *Implementation of the Child Safe Viewing Act: Examination of Parental Control Technologies for Video or Audio Programming*, 24 F.C.C.R. 11,413, 11, 414 & n.5. Does this make the Internet as invasive as radio or television?

6. *Video games as medium:* In *Brown v. Entertainment Merchants Assn.,* 131 S.Ct, 2729 (2011), the Supreme Court rejected the argument that the medium of video games should receive a reduced level of First Amendment protection. The Court’s opinion conceded that video games have little to do with protection of discourse on public matters, but the Court stated “we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try.” The Court therefore held unconstitutional a California statute that prohibited sale or rental of violent video games to minors.

7. *Medium-specific standards applied to video-on-demand?:* In *Citizens United v. FEC,* the Court refused to apply different First Amendment standards to “movies shown through video-on-demand” than it applied to “television ads” simply
because users must take affirmative steps to obtain video-on-demand. The Court stated:

While some means of communication may be less effective than others at influencing the public in different contexts, any effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise questions as to the courts’ own lawful authority. Substantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored. And in all events, those differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux. [ ]

Courts, too, are bound by the First Amendment. We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker.

Id. at 89—91.

COPA. Congress responded to the Court’s decision in Reno v. ACLU by enacting the Child Online Protection Act (COPA), 47 U.S.C. §231(a), which represented a more limited attempt to regulate Internet indecency. COPA imposed criminal penalties for the knowing posting, for “commercial purposes,” of Internet content “harmful to minors,” §231(a), which it defined as

any communication…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.”

The statute provided an affirmative defense to those who took steps to prevent minors from gaining access to the prohibited materials. Before COPA could take effect, Internet providers and civil liberties groups successfully sought a preliminary injunction against enforcement. The Supreme Court granted certiorari, vacated the judgment of the Court of Appeals, and remanded. The Court held that the community standards language of COPA did not, standing alone, render it unconstitutional. See Ashcroft v. ACLU ("Ashcroft I"), 535 U.S. 564 (2002). On remand, the Third Circuit again affirmed the district court’s grant of the preliminary injunction. The Supreme Court again granted certiorari. In Ashcroft v. American Civil Liberties ("Ashcroft II"), 542 U.S. 656 (2004),
the Court once again enjoined enforcement of COPA and remanded the case once again to the district court for trial. The Court held that the government had failed to show that proposed alternatives, such as filtering, would not be as effective as COPA’s content-based restrictions on speech. The Court also concluded that there were “

important practical reasons to let the injunction stand pending a full trial on the merits. First, the potential harms from reversing the injunction outweigh those of leaving it in place by mistake.…

Second, there are substantial factual disputes remaining in the case. As mentioned above, there is a serious gap in the evidence as to the effectiveness of filtering software.…

Third, and on a related point, the factual record does not reflect current technological reality—a serious flaw in any case involving the Internet. The technology of the Internet evolves at a rapid pace. Yet the factfindings of the District Court were entered in February 1999, over five years ago. Since then, certain facts about the Internet are known to have changed….It is reasonable to assume that other technological developments important to the First Amendment analysis have also occurred during that time. More and better filtering alternatives may exist than when the District Court entered its findings. Indeed, we know that after the District Court entered its factfindings, a congressionally appointed commission issued a report that found that filters are more effective than verification screens.

Delay between the time that a district court makes factfindings and the time that a case reaches this Court is inevitable, with the necessary consequence that there will be some discrepancy between the facts as found and the facts at the time the appellate court takes up the question….By affirming the preliminary injunction and remanding for trial, we allow the parties to update and supplement the factual record to reflect current technological realities.

….  

Justice STEVENS and Justice GINSBURG wrote a separate concurrence, objecting to the applying “community standards in defining the prohibited content, since it would “penalize speakers for making available to the general World Wide Web audience that which the least tolerant communities in America deem unfit for their children's consumption, and consider that principle a sufficient basis for deciding this case.”

Justice Breyer, the Chief Justice, and Justice O’Connor dissented. Justice Breywer wrote:.

After eight years of legislative effort, two statutes, and three Supreme Court cases the Court sends this case back to the District Court for further proceedings. What
proceedings? I have found no offer by either party to present more relevant evidence. What remains to be litigated? ....

Moreover, Congress passed the current statute "[i]n response to the Court's decision in Reno " striking down an earlier statutory effort to deal with the same problem. Congress read Reno with care. It dedicated itself to the task of drafting a statute that would meet each and every criticism of the predecessor statute that this Court set forth in Reno....What else was Congress supposed to do?

On remand, the district court again concluded that COPA was unconstitutionally vague, overbroad, and not narrowly tailored and, as a result, the court permanently enjoined the Attorney General from enforcing the statute. ACLU v. Gonzales, 478 F. Supp. 2d 775 (E.D. Pa. 2007). The Third Circuit affirmed. ACLU v. Mukasey, 534 F.3d 181 (3d Cir. 2008), cert. denied, 555 U.S. 1137 (2009). What would you advise Congress to do in response to Ashcroft II? Remember that this was a 5-4 decision, with Justices Scalia, O'Connor, Breyer, and Rehnquist dissenting. Chief Justice Roberts and Justice Alito replaced Chief Justice Rehnquist and Justice O'Connor after Ashcroft II was decided.

How should the government legislate to protect children when technological solutions, like filtering software, are rapidly evolving? Do technological problems evolve just as rapidly? As spam filters become better at identifying spam, senders of spam become better at evading spam filters. Do the providers of indecent content have the same incentive to evade filters?

The Supreme Court in 2007 considered the constitutionality of another attempt by Congress to criminalize virtual child pornography. United States v. Williams, 444 F.3d 1286 (11th Cir. 2006), cert. granted, 127 S.Ct.1874 (Mar. 26, 2007) (No. 06-694). After the Court's 2002 decision in Ashcroft v. Free Speech Coalition, striking down Congress's initial attempt to ban technologically created child pornography, Congress took another approach to the matter. It passed a new statute making it a crime to distribute or promote "purported material...that reflects the belief, or is intended to cause another to believe" that it is a "visual depiction of an actual minor engaging in sexually explicit conduct." See 18 U.S.C. §2252A(a)(3)(B). The Supreme Court held that the statute was neither overbroad nor vague. The Court construed the statute narrowly, limiting it to portrayals that would necessarily cause a reasonable viewer to believe that the actors actually engaged in sexual conduct on camera; the Court excluded from the statute’s reach materials billed as virtual child pornography or “sex between youthful-looking adult actors.” In dissent, Justices Souter and Ginsburg said the statute attempted to evade the First Amendment protection of virtual child pornography by punishing proposals to transact in it rather than the virtual child pornography itself.

Class 2—Defamation and Internet Service Provider Liability for Speech
2. For further discussion of Chaffee’s views see, Zechariah Chaffee, Free Speech in the United States (Cambridge, Mass.: Harvard University Press, 1941).


5 As the Supreme Court said in National Broadcasting Co. v. United States (1943): “[T]he radio spectrum is not available simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another. Regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile.”