Volume 110
Issue 3 *Dickinson Law Review - Volume 110, 2005-2006*

1-1-2006

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During the last millennium, a steady evolution in "speech technology" has transformed the nature of public discussion. Prior to the development of the printing press in 1436,[1] mass communication was notoriously difficult. Oral methods of communication were available, but were an ineffective means for reaching large audiences. Handwritten texts could be distributed more widely, but could only be produced slowly and laboriously. As a result, the printing press represented a major advancement in speech technology that made it possible for people to communicate much more easily and effectively and enabled people to disseminate their ideas far more widely, once literacy rates caught up with the ability to print texts.

In the last two hundred years, technological developments have continued to revolutionize mass communication. In the Nineteenth Century and the early part of the Twentieth Century, development of the telegraph and of broadcast technology (in particular, radio and television) enabled people to communicate over long distances very quickly, and made quick and effective national and international communication possible for the first time. Despite the significance of broadcast communication, it pales in comparison to the technological explosion that occurred at the end of the Twentieth Century. During the last thirty years, communications technology has evolved rapidly in many divergent ways. In addition to cable television, new technologies have evolved including satellite communications, the Internet, and cell phones (which now come with text messaging and rapidly evolving content).

Throughout history, as new communications have developed, governments have struggled to respond to the power and the perceived potential for harm that resulted from those technologies. In some instances, governments recoiled at the prospect that people could more

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1. Johannes Guttenberg of Mainz, Germany, created the first printing press when he devised a system of movable and removable typeface. When a page was set, it could be used to produce multiple copies of the same printed text.

readily communicate with one another. Governments feared that these new technologies would be used to criticize and undermine their authority. They also feared that new technologies might be used to disseminate harmful content such as pornography.

Within the constraints of a short piece, this article offers insight into the history of speech communication and speech regulation, and examines different regulatory approaches applied to new and evolving forms of technology.

I. Print Media

Fearing that printing presses might be used to criticize government, many governments responded with repression and efforts to control this new technology. The British Crown established licensing schemes that forced printers to obtain official approval before publishing.[2] Licensors could withhold permission to print texts that they found objectionable or that they regarded as unduly critical of government. In addition to licensing, England responded by creating the crime of seditious libel,[3] which made it illegal to criticize the government or governmental officials (and, at one point, the clergy as well).[4] Governments also repressed printing through the use of civil defamation laws, which made it possible for governmental officials and others to recover civil damages

2. *See* William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 97-98 (1984); *see also* NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE THEORY OF THE HISTORY OF THE LAW OF LIBEL (U. N. Carolina Press 1986); M. LINDSAY KAPLAN, THE CULTURE OF SLANDER IN EARLY MODERN ENGLAND (Cambridge Univ. Press 1997); RUSSELL L. WEAVER & ARTHUR D. HELLMAN, THE FIRST AMENDMENT: CASES, MATERIALS AND PROBLEMS 279 (LexisNexis 2002); *De Libellis Famosis,* 77 Eng. Rep. 250 (Star Chamber 1606); *see* Judith Schenck Koffler & Bennett L. Gershman, *The New Seditious Libel*, 69 CORNELL L. REV. 816 (1984); Jeffrey K. Walker, *A Poisen in Ye Commonwealthe: Seditious Libel in Hanoverian London*, 25(3) ANGLO-AM. L. REV. 341-66 (1996).

3. *De Libellis Famosis,* 77 Eng. Rep. 250 (Star Chamber 1606); *see* Judith Schenck Koffler & Bennett L. Gershman, *The New Seditious Libel*, 69 CORNELL L. REV. 816 (1984); Jeffrey K. Walker, *A Poisen in Ye Commonwealthe: Seditious Libel in Hanoverian London*, 25(3) ANGLO-AM. L. REV. 341-66 (1996).

4. The crime was justified by the notion that criticism of the government "inculcated a disrespect for public authority." *See* Matt J. O'Laughlin, *Exigent Circumstances: Circumscribing the Exclusionary Rule in Response to 9/11*, 70 UMKC L. REV. 707, 720-21 (2002). "Since maintaining a proper regard for government was the goal of this new offense, it followed that truth was just as reprehensible as falsehood" and therefore was not a defense. William R. Glendon, *The Trial of John Peter Zenger*, 68 N.Y. ST. B.J. 48, 49 (Dec. 1996). Indeed, truthful criticisms were punished more severely because it was assumed that true criticisms were more potentially more damaging to the government. *See* Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111, 184 n.290 (1998).

for defamatory criticisms of their actions.[5]

Despite initial repression of the print media, the United States eventually came to grips with the printing press and began to limit the government's ability to suppress the press. The United States Supreme Court declared most licensing schemes presumptively unconstitutional[6] and invalidated the crime of seditious libel,[7] which made it difficult for public officials and public figures to recover for defamation.[8] The net effect is that the Court ultimately began to treat the printing press as a highly protected method of communication.[9]

In the United States, the printing press has not been completely insulated from governmental regulation. The Court has held that the government may prohibit certain categories of speech including "obscenity,"[10] and so-called "kiddie porn" (pornographic pictures of children.)[11] In addition, in *Ginsberg v. New York*,[12] the Court upheld a New York statute prohibiting the sale of material that was deemed to be "obscene" for minors even if not deemed "obscene" for adults. In that case, the Court emphasized the "State's independent interest in the well-being of its youth" and the parent's interest in directing the upbringing of their children.[13] Nevertheless, cases like *Miller*, *Ferber* and *Ginsberg* are the exceptions that prove the general rule.

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5. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

6. *See* Lovell v. City of Griffin, 303 U.S. 444 (1938).

7. *See* Garrison v. Louisiana, 379 U.S. 64 (1964).

8. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964). In order to do so, they were required to show that the defendant had acted with "actual malice," meaning that the defendant either knew that the allegedly defamatory statement was false or acted in reckless disregard for truth or falsity. *Id.* at 280.

9. For example, in *New York Times Co. v. United States*, 403 U.S. 713 (1971), the Court refused to enjoin the New York Times and the Washington Post from publishing the contents of a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy" despite claims that the documents were classified and that they had been stolen, as well as the fact that its disclosure might have an adverse impact on national security. Likewise, in *Near v. Minnesota ex rel. Olsen*, 283 U.S. 697 (1931), the Court articulated a broad rule against prior restraints in a case where the county attorney of Hennepin county sued to enjoin publication of what was described as a "malicious, scandalous and defamatory newspaper." *Id.* at 702. The Court even held that speakers could advocate illegal action except in limited situations. *See* Brandenburg v. Ohio, 395 U.S. 444 (1968) (Court struck down Ohio's Criminal Syndicalism Statute as applied to a Klu Klux Klan rally held in Ohio, and it did so even though there was talk of "revengance" as well as ethnic and racial slurs).

10. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973).

11. New York v. Ferber, 458 U.S. 747, 773-74 (1982).

12. 390 U.S. 629 (1968).

13. *Id.* at 640.

II. Broadcast Regulation: Stringency in the Face of Growing Irrelevancy

As broadcast technology began to supplement the print media in the Twentieth Century, Congress and the courts struggled to define its status and the level of protection it should receive. Eventually, the Court rejected the idea that broadcast media should be accorded the preferred status accorded to the print media and thereby receive a preferred position in the constitutional hierarchy. In *Red Lion Broadcasting Co. v. FCC* [14] the Court concluded that the government had much greater power to regulate radio and television broadcasts.

Red Lion involved the so-called "Fairness Doctrine" which required broadcast licensees to practice editorial fairness and balance.[15] Even though the doctrine would have been unconstitutional as applied to the print media (because it involved an inappropriate content-based restriction on speech), the Court upheld the Fairness Doctrine as applied to radio and television noting that "[a]lthough broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[16] The Court concluded that radio and television broadcasting should be treated differently than the print media because "there are substantially more individuals who want to broadcast than there are frequencies to allocate. . . ."[17] As a result of this scarcity of access, those few who were given access to the airwaves could be subjected to special obligations.

The Court's less protective approach to the broadcast media was dramatically revealed in *FCC v. Pacifica Foundation*.[18] In that case, the Court held that the FCC could prohibit a radio station from broadcasting George Carlin's "Filthy Words" monologue.[19] The Pacifica Foundation, which broadcast the material, argued that the monologue was broadcast as part of "a program about contemporary society's attitude toward language," and characterized Carlin as a satirist who was poking fun at our attitudes toward these words.[20] In other words, the broadcast involved material of literary, artistic, social and political value deserving of First Amendment protection. Describing the broadcast as "vulgar," "offensive" and "shocking," although not obscene, the Court concluded that the FCC could relegate the broadcast to late night hours when

14. 395 U.S. 367 (1969).
15. *Id.*
16. *Id.* at 387.
17. *Id.* at 388.
18. 438 U.S. 726 (1978).
19. *Id.*
20. *Id.* at 730.

children would be less likely to be listening.[21] The Court justified its decision by reference to the invasive nature of the technology, which can be accessed from both cars and houses, and the fact that broadcasting is uniquely accessible to children.[22]

Although the FCC has since abandoned the so-called "Fairness Doctrine," and has given the broadcast media special protections in some later cases,[23] the Court continues to apply its dual-track approach, which gives less protection to the broadcast media. In recent years, the Federal Communications Commission (FCC) has used its power to crack down on broadcast content, particularly "indecency." For example, the FCC sanctioned CBS for the Janet Jackson Superbowl flap when there was a one second "flash" of her breast during a half-time show.[24] In addition, the FCC has recently promulgated new rules designed to increase the penalties for indecent communications.[25]

The irony of the FCC's crackdown is that, as the FCC has increased its penalties, the FCC's role and importance has been dramatically diminished by technological advances. Following the FCC's announcement of its new rules, Clear Channel Communications suspended so-called "shock jock" Howard Stern for violating the new decency standards.[26] Howard responded by leaving Clear Channel for satellite broadcasting which was free of FCC oversight.[27] In the process, he freed himself from FCC control and the new rules. As other "new" forms of technology come online, traditional broadcast communication is rapidly being overtaken by these newer forms, and (absent major regulatory changes) the strict FCC rules are likely to assume a position of much less importance and relevance.

III. The Technological Onslaught

In recent decades, society has seen the development of a wave of new forms of speech technology. First came advances such as cable television and the Internet, but these advances were soon followed by

21. *Id.*

22. *Id.* at 748-49.

23. *See, e.g.*, FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984) (striking down a restriction on public broadcasters that prohibited "editorializing"); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

24. *See Janet Jackson Takes Responsibility for Breast-baring*, CNN, Feb. 4, 2004, *at* http://www.cnn.com/2004/SHOWBIZ/TV/02/04/jackson.apology.ap/index.html (providing a more detailed explanation of the incident, including some of the repercussions).

25. *See* http://www.peak.org/mailing-list/archive/grc/msg01005.html.

26. *See Howard Stern Suspended for Indecency*, CNN, Feb. 26, 2004, *at* http://www.cnn.com/2004/SHOWBIZ/News/02/25/stern.suspension/index.html.

27. *See* http://www.hotproductszone.com/tesat/4/howard-stern-satellite-radio.html.

significant innovations in satellite communications, as well as in cell phone and text messaging systems. These evolving, almost exploding, forms of technology have raised new and important regulatory questions. Specifically, will the Court apply its print media precedent, or will it apply its broadcast precedent to these technologies? Many of the new technologies are similar to broadcast technology in that they can enter millions of homes, but in some respects, the new technologies are more powerful than radio and television. Whereas broadcast technologies can only transmit information a limited distance, many of the new technologies can transmit information around the world through the push of a button or, more commonly, by the click of a mouse.

Many of the "new" technologies are also distinguishable from broadcast technology because the "scarcity" rationale, used by the Court in *Red Lion* to justify more restrictive regulation of radio and television broadcasting, simply does not apply.[28] With many of the new technologies, accessibility is a less important issue or a non-issue. Anyone who can afford a computer and the price of an Internet connection (or, for that matter, a cell phone and text messaging system) can "broadcast" information to people around the world. Even those who cannot afford a computer or a cell phone can gain access to the Internet through their employer or a university, their local library or a storefront "computer coffee shop." The net effect is that hundreds of millions of people now have access to modern speech technology, and that number is expected to grow dramatically in the coming years.[29] Those who do gain access can connect to millions of others through web sites, chat rooms, e-mails, listservices (which retransmit e-mails to everyone on the list), news groups, and the "World Wide Web."

While the accessibility of the Internet distinguishes it from broadcasting, this accessibility also raises a number of concerns. As computers and Internet access (as well as cell phones) become commonplace, there is a very real and significant risk that children will gain easy access to damaging or potentially harmful material. Anyone who uses modern e-mail systems, and who is bombarded by hundreds of spam e-mails per day, realizes that the Internet contains much material that is unsuitable for children, including a good deal of sexually explicit material. As the Court recognized in Pacifica, the government is entitled

28. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

29. *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 850 (1997), discussing how nearly forty million people use the internet and approximately 200 million are expected to do so by 1999. The Court estimated that the number of "host" computers (computers 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." *Id.* Forty percent of these "host computers" were located outside the U.S. *Id.*

to protect children from indecent communications, which an adult would have an unfettered right to receive, by "zoning" the material to times when children are less likely to be viewing.[30] As a result, there is a significant governmental interest in regulating the Internet. The difficulty is that "zoning" is virtually impossible on the Internet. Unlike radio and television broadcasting, which can restrict potentially objectionable programs to hours of the day when children are less likely to be listening, the Internet is "open for business" twenty-four hours a day. Indeed, most web pages and web sites are constantly available, and listserves can automatically forward e-mail at any time of the day or night. As a result, restricting Internet communications (or, for that matter, cell phone and text messaging) to "children-safe" hours is virtually impossible.

Of course, the Internet is different from broadcast technology in that Internet users are less likely to encounter sexually explicit materials accidentally. Before a document can be accessed online, it is usually preceded by its title and a description of its contents, and if it is sexually explicit material, it may also be accompanied by a warning.[31] Of course, these warnings do not prevent a child who sets out to access sexually explicit material from doing so. Moreover, although parents can attempt to control their children's access to certain sites through barrier software, that can block designated inappropriate sites or attempt to block messages containing identifiable objectionable features,[32] this software is hardly foolproof. Most blocking software is either ineffective or tends to over-block.[33]

The Internet creates particular problems relating to children because it is difficult for individuals who access web sites, listservices, chat rooms, or e-mails to verify the age and identity of the individuals to whom they communicate. Although 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, such verification is only possible in connection with a commercial transaction when a card is used, or by payment to a verification agency. Either approach imposes significant costs on Internet providers, and would preclude those who cannot obtain a credit card.

Despite the dangers of the new technologies, the United States Supreme Court has generally chosen to treat the Internet and other "modern" technologies more like print media than broadcast

30. *See* FCC v. Pacifica Found., 438 U.S. 726, 749-50 (1978).
31. *See Reno*, 521 U.S. at 854.
32. *Id.* at 855.
33. *Id.*

technology.[34] The precedent is not without exception. For example, in *Turner Broadcasting System, Inc. v. FCC*,[35] the Court held that cable television stations could be required to devote a percentage of their channels to the transmission of local broadcast stations, which is a restriction that would not have been upheld if applied against newspapers. In addition, the FCC has asserted jurisdiction over cable television.[36]

On the other hand, this analysis has been different with regard to the Internet. For example, in *Reno v. American Civil Liberties Union*, the Court articulated broad protections for Internet communications.[37] Reno involved the Communications Decency Act (CDA), which prohibited "indecent" and "patently offensive" communications on the Internet.[38] Congress's stated objective was to protect children from harmful materials, and the CDA sought to accomplish that objective in two ways. First, the Act prohibited the knowing transmission of obscene or indecent messages to any recipient under eighteen years of age.[39] Second, the Act prohibited knowingly sending or displaying patently offensive messages in a manner available to a person under eighteen years of age.[40] The

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34. *See id.*
35. 512 U.S. 622, 654-55 (1994).
36. *See* http://www.fcc.gov/mb/.
37. 521 U.S. 844 (1997).
38. *Id.* at 858-59.
39. 47 U.S.C.A. § 223(a) (Supp.1997) provided in relevant 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.

Id.

40. 47 U.S.C.A. § 223(a) (Supp.1997) provided in relevant part:

> (d) 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,

CDA contained a defense for individuals who take "good faith, reasonable, effective, and appropriate actions" to prevent minors from gaining access to prohibited communications, as well as for those individuals who restrict access by requiring proof of age.[41]

The Court struck down most provisions of the CDA.[42] In reaching its decision, the Court referred to the Internet as "a unique and wholly new medium of worldwide human communication,"[43] and refused to apply its broadcast precedent (particularly *Red Lion* and *Pacifica*) to this new technology.[44] The Court distinguished the Internet from broadcast technology based on its accessibility, noting that Internet technology is not as invasive as broadcast technology.[45] As a result, instead of relying on its broadcast precedent, the Court placed greater reliance on its holding in *Sable Communications of California, Inc. v. FCC*.[46] In *Sable*, the Court struck down portions of the Communications Act that imposed a ban on indecent and obscene commercial telephone messages (a/k/a "dial-a-porn").[47] In *Sable*, the Court upheld the statute as applied to obscene messages, but it struck it down the law as applied to indecent messages.[48] The Court did so because the "dial it" medium "requires the listener to take affirmative steps to receive the communication."[49]

In *Reno*, the Court also distinguished between "indecent" speech and "obscene" speech.[50] The Court noted that the CDA involved a content-based restriction on speech,[51] and that the First Amendment imposes "an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA."[52] The

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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.

Id.

41. *Reno*, 521 U.S. at 860-861.
42. *Id.*
43. *Id.* at 850.
44. *Id.* at 868-69.
45. *Id.* at 869.
46. *Id.* at 875 (*citing* Sable Communications of Cal., Inc. v. Fed. Commc'n Comm'n, 492 U.S. 115, 128 (1989)).
47. Sable Communications of Cal., Inc. v. Fed. Commc'n Comm'n, 492 U.S. 115, 128 (1989).
48. *Id.*
49. *Sable*, 492 U.S. at 127-28.
50. *Reno*, 521 U.S., at 872-74.
51. *Id.* at 872.
52. *Id.* at 879.

Court concluded that the government had failed to satisfy that burden.[53] The Court took an aggressive free speech stance and noted that, if indecent speech could be prohibited from the internet, there would be an unnecessarily broad suppression of speech available to adults that might "reduc[e] the adult population [to] only what is fit for children."[54] Existing technology did not include any effective method for preventing minors from obtaining access to information on the Internet, and it would be prohibitively expensive to establish rules requiring adult verification.[55] In the Court's view, the only reasonable alternative was for parents to use barrier software to prevent their children from accessing undesirable segments of the Internet.[56]

The Court was particularly concerned about the fact that the CDA applied to all commercial speech and commercial entities, as well as to nonprofit entities and individuals posting indecent messages or displaying them on their own computers in the presence of minors.[57] In addition, the CDA's vague terms—"indecent" and "patently offensive"—included large amounts of nonpornographic material that could have serious educational value. Finally, the CDA purported to apply "community standards" such that any communication, whether intended for a local or a national audience, would likely be judged by the standards of the very community that was offended by the message.[58]

The Court rejected any analogy to Pacifica noting that broadcasting communication had "received the most limited First Amendment protection," because of "the ease with which children may obtain access to broadcasts. . . ."[59] The Court pointed out that the order in Pacifica was "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."[60] The Court noted that the CDA did not limit its application to particular times, and did not involve an agency "familiar with the unique characteristics of the Internet."[61] In addition, the Court emphasized that the Pacifica order was not punitive whereas the CDA contained criminal

53. *Id.*
54. *Id.* at 875 (*quoting* Denver Area Ed. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 759 (1996)).
55. *Id.* at 876-77.
56. *Id.*at 877.
57. *Id.*
58. *See id.* at 877-78.
59. *Id.* at 866.
60. *Id.* at 867.
61. *Id.*

penalties.[62] Finally, "the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material."[63]

Reno also rejected the government's claim that it had the right to patrol the Internet for "indecency" on the basis 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."[64] The Court found that the Internet was growing dramatically, even in the absence of governmental control, and concluded that offensive content had not dampened the growth.[65] Indeed, the Court concluded that "governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it."[66]

In *Reno*'s aftermath, the Court decided *Ashcroft v. American Civil Liberties Union*,[67] a case that involved the constitutionality of the Child Online Protection Act (COPA), which was passed after *Reno* struck down the CDA.[68] COPA prohibited individuals from "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, making any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors."[69] The case came before the Court solely on the question of whether the Act's consideration and inclusion of the concept of "contemporary community standards" was constitutional.[70] The Court held that the community standards provision was constitutional, but reserved consideration of the

62. *Id.*
63. *Id.*
64. *Id.* at 885.
65. *Id.*
66. *Id.*
67. 535 U.S. 564 (2002).
68. *Id.*
69. *See* 47 U.S.C. § 231(e)(6) (2000). Specifically, COPA defined "material that is harmful to minors" to include:

> 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; and (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.
70. Ashcroft v. ACLU, 535 U.S. 564, 585 (2002).

overall constitutionality of COPA for a later day.[71]

In the Court's other major post-*Reno* decision, *Ashcroft v. Free Speech Coalition*,[72] the Court considered the constitutionality of the Child Pornography Prevention Act of 1996 (CPPA),[73] which extended the federal prohibition against child pornography to sexually explicit images that appear to depict minors but were produced without using any real children (also known as "virtual child pornography"). The CPPA applied not only to obscene depictions of virtual child pornography, but to non-obscene depictions. In an opinion by Justice Kennedy, the Court struck down most of the CPPA.[74] The Court indicated that it would have upheld Section 2256(8)(C), dealing with morphed images (images of real children that have been altered), but the parties chose not to challenge that provision.[75] However, the Court struck down the prohibition against purely virtual images concluding that they did not harm or implicate the interests of real children as required under the Court's prior holding in *New York v. Ferber*.[76] The Court considered and rejected arguments that virtual child pornography should be prohibited because it might whet the appetite of pedophiles, might be used to lure children into pedophilia, or might be indistinguishable from pictures of actual children.[77]

IV. Conclusion

Just as the history of the world involves a steady path of technological advancement and development, speech technology has rapidly advanced over the centuries. Each new advance presents new technological and regulatory challenges for governments. Whereas the initial response to the printing press involved an attempt to stifle criticism of government, governmental responses to more modern technologies have focused on insulating children (and society, in general) from intrinsically harmful materials. In the United States, doctrinal development remains in a state of flux and uncertainty.

In recent years, there has been much discussion regarding the possibility of creating international standards to control the Internet. These attempts have been hampered by the fact that an effective worldwide coalition requires the participation of most major developed countries (and, indeed, of the entire world), and that speech regulation is handled quite differently in other countries than it is handled in the

71. *See id.*
72. 535 U.S. 234 (2002).
73. *See* 18. U.S.C.§ 2251(2003).
74. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 258 (2002).
75. *Id.* at 252.
76. *Id.* at 249-51 (*citing* N.Y. v. Ferber, 458 U.S. 757 (1982)).
77. *Id.* at 253-54.

United States. As a result, regulations and restrictions that might be upheld in other countries would not survive in the United States.

Even though decisions like Reno make it difficult for government to impose content-based restrictions on Internet communications, they do not preclude all regulation. In fact, the government may prohibit certain types of communications from the Internet such as obscenity and "kiddie porn." Even regarding indecent speech, the government may be able to impose restrictions that do not unduly restrict adult access to such materials. For example, as the Court suggested in *Reno*, the government might require communications to be "tagged" in a way that facilitates parental control of material coming into their homes. As the decisional precedent indicates, the search for national and international standards for regulating "new technologies" will continue for some time into the future. In fact, as long as technology continues to advance, this search will not fully end.

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