Freedom of Speech on the Electronic Village Green: Applying the First Amendment Lessons of Cable Television to the Internet

Robert Kline

Follow this and additional works at: http://scholarship.law.cornell.edu/cjlpp

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.cornell.edu/cjlpp/vol6/iss1/2

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Journal of Law and Public Policy by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.
FREEDOM OF SPEECH ON THE ELECTRONIC VILLAGE GREEN: APPLYING THE FIRST AMENDMENT LESSONS OF CABLE TELEVISION TO THE INTERNET

Robert Kline†

I. Introduction ............................................ 24
II. Describing the Internet ................................ 26
III. Overview of First Amendment Regulation of Communications Media .................................. 27
   A. Broadcast Media ................................... 28
   B. Cable Television ................................... 30
   C. Telephone Communications ........................ 31
IV. Cable Television and the Denver Area Approach ...... 31
   A. Overview of the Court's Opinions ................... 32
   B. The Plurality Opinion's Approach ................... 33
       1. Permissive Speech Regulation on Leased Channels — § 10(a) ........................... 36
       2. Mandatory Speech Regulation of Leased Channels — § 10(b) ........................... 37
       3. Permissive Speech Regulation on "PEG" Channels — § 10(c) ........................... 38
   C. Justice Kennedy and the Public Forum Approach .... 39
V. Indecent Speech on the Internet and ACLU v. Reno ..... 41
   A. Findings of Fact ................................... 43
   B. The ACLU v. Reno Opinions ......................... 45
       1. Judge Dalzell's Search for an Internet Speech Analogy ...................................... 45
       2. Judge Sloviter, Obscenity, and Strict Scrutiny ........................................... 47
       3. Judge Buckwalter and the Vagueness Doctrine ........................................... 51
VI. Finding the Appropriate Analogy of Communications Media Attributes in the Internet Context .......... 52
   A. The Architecture of the Internet and the inapplicability of the Cable Regulation Analogy .... 52
   B. Internet Access by Children and in the Home ...... 54

† Adjunct Professor of Law, Suffolk University Law School, New England School of Law; B.A. Florida Atlantic University; J.D. Georgetown University Law Center; Staff Attorney, Tobacco Control Resource Center, Northeastern University School of Law. I am very grateful for the support and assistance of Suzanne Zellner, Michael Markett and Kim Barnes.
I. INTRODUCTION

There is a growing and legitimate concern that lurking behind the benefits of the Internet's openness is the danger that children will be harmed when they electronically stumble across obscenity, pornography, or indecency. The Internet — the fastest growing medium of communication in the world — provides for the exchange of ideas on a massive scale on a variety of topics limited only by the human imagination. The system's advantages include cutting-edge information retrieval and the opportunity to find and associate with like-minded individuals and to exchange ideas with people with whom one disagrees on matters great and small. The system's perceived disadvantages include in particular the accessibility and abundance of "indecent speech." The Internet is not, of course, the first arena in which society has debated the limits of public speech. When such debates arise, the judiciary skeptically examines government claims that it is necessary to limit speech of one type or another. Freely speaking one's mind without government interference has been described as the bedrock of democracy; as an effective check on government power; as important to the pursuit of truth in the "marketplace of ideas;" and as crucial to achieving self-awareness through self-expression. The judiciary has relied on any and all of these reasons in protecting the individual's right to speak freely and publicly.

In June 1996, two courts decided cases dealing with government regulation of indecent and patently offensive speech in two relatively new and evolving communication technologies. In Denver Area Educa-

1 See ACLU v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996) (the court estimated that approximately 40 million people presently use the Internet and that by the year 1999 the number of Internet users will have grown to approximately 200 million people).

2 See id. at 859 (Buckwalter, J.) (lauding protected speech as "the keystone, the bulwark, the very heart of democracy."); id. at 881 (Dalzell, J.) (noting "the 'democratizing' effects of Internet communication: individual citizens of limited means can speak to a worldwide audience on issues of concern to them.").


4 See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."); ACLU, 929 F. Supp. at 881 (Dalzell, J.) ("It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country - and indeed the world - has yet seen.")

tional Telecommunications Consortium, Inc. v. FCC, the United States Supreme Court heard a challenge to the government's regulation of indecent and patently offensive speech on cable television. While the Court upheld certain regulations and struck down others, the specific outcome in Denver Area is not the focus of this article. As discussed below, it is the methodology the Court utilized that is important for our purposes. Specifically related to the Internet (and just prior to the Court's decision in Denver Area), a three judge panel of the Third Circuit struck down certain provisions of the Communications Decency Act which regulated "indecent" and "patently offensive" material on the Internet in ACLU v. Reno.

It is important to note at the outset that the Court's specific disposition in Denver Area, upholding some speech regulations and striking down others, cannot readily be transferred to the Internet setting because of the factually different attributes of the Internet. Cable is a centralized, tightly controlled, one-way broadcast controlled by the cable operator acting as an information gatekeeper and bottleneck. The Internet, by contrast, is a wide-open, interactive frontier that has no central control figure because all participants may send and receive messages. Even if the cable system has one thousand channels it is still a finite, closed system with the capacity to accommodate only some speakers, either due to technical limitations or high expense. The Internet provides the opportunity for all participants to be speakers at a low cost.

Examining Denver Area as a guide to Internet speech cases is appropriate, however, because cable television, like the Internet, is a relatively new medium of communication, and the judiciary is struggling to determine the proper analogies and standards for reviewing speech regulation on it. The distinctions used by the Denver Area plurality to justify the differing treatment of different types of cable channels provide insight into the constitutional analysis to be applied in the context of speech regulation on the Internet. The Court begins its analysis in Denver Area by examining the attributes of cable television and its sub-categories (i.e., leased channels as well as public, educational, and governmental channels). After determining those attributes, the Court

---

10 Berman & Weitzner, supra note 9 at 1622-24 (economic market forces will ensure a limited number of cable channels because channels that are "idle" due to high cost of program production will be dropped).
chooses the proper level of scrutiny and the model for an examination of speech regulation. The Denver Area approach includes describing the medium's attributes, its accessibility by children, its intrusiveness into the home, and the public's ability to participate in the medium.

This article will (1) describe the Internet, (2) provide an historical view of First Amendment jurisprudence relating to government speech restrictions on different media, and (3) contrast Justice Breyer's reasoning in his Denver Area plurality opinion with Justice Kennedy's public forum approach in his Denver Area opinion. Turning to the ACLU case, this article will (4) discuss the three-judge panel's findings of fact, (5) examine the reasoning of the judges in ACLU, and (6) apply the Denver Area approach to resolve the questions regarding Internet speech rights presented by ACLU. Finally, this article (7) concludes that the appropriate free speech analogy for the Internet is the "village green": an arena for speech that is an interactive public forum.

II. DESCRIBING THE INTERNET

In recent years a growing number of people have begun using their computers to communicate with others and access information on the Internet. The Internet is a "network of networks" that interconnects smaller computer networks in a global communications system.\(^1\) It allows users to directly communicate with any other similarly linked user without immediate human control.\(^2\) The electronic information and messages that people send are broken down into sub-units or "packets." These packets are automatically routed and rerouted to their destinations through a series of linked, yet independent computers.\(^3\) This independence reflects the military purposes underlying the creation of the Internet; the military needed a computer communication system that could continue as a "decentralized, self-maintaining, series of redundant links" in the event of a devastating war or other disruption to communications channels.\(^4\) Subsequently, "There is no centralized storage location, control point, or communications channel for the Internet, and it would not be technically feasible for a single entity to control all of the information conveyed on the Internet."\(^5\)

Individuals can access the Internet by using a computer that is directly linked to a computer network that is itself a dedicated connection to the Internet. Such systems are usually provided by institutions such as

\(^{11}\) ACLU, 929 F. Supp. at 830.
\(^{12}\) Id.
\(^{13}\) Id. at 832.
\(^{14}\) Id. at 830.
\(^{15}\) Id. at 832.
a university or the military.\textsuperscript{16} Individuals can also access the Internet using a personal computer and modem to connect, via telephone lines, to computer networks already connected to the Internet.\textsuperscript{17} This service may be provided by commercial “online” services, local communities, local libraries, and even “computer coffee shops.”\textsuperscript{18} Another option is to link through a “bulletin board system” that offers dial-in connections to the Internet.\textsuperscript{19}

The Internet accommodates many different types and methods of communication. This includes one-to-one messaging (similar to a first class letter, a.k.a. “e-mail”), one-to-many messaging (automatic mailing list services), distributed message databases (user-sponsored newsgroups where information is “disseminated using ad hoc, peer to peer connections” that “cover all imaginable topics of interest”), real time communication (similar to a party line, a.k.a. “chat”), real time remote computer utilization (sharing computer resources at remote locations), and remote information retrieval.\textsuperscript{20} The ACLU court focused on the World Wide Web and its use of hypertext and hyperlinks as the communications model for the Internet; highlighted words, phrases, or images allow the user to select the hypertext item and link to another type or piece of related information.\textsuperscript{21}

\section{III. OVERVIEW OF FIRST AMENDMENT REGULATION OF COMMUNICATIONS MEDIA}

The Supreme Court has treated street corner speakers differently than the print media; the print media differently than the broadcast media; and the broadcast media differently from cable television media.\textsuperscript{22} With each innovation in communication technology, the Court has been forced to adjust its First Amendment jurisprudence to account for the special attributes of that medium.\textsuperscript{23} The Court has analyzed regulation of street corner speakers based on the low access cost, generally universal

\begin{thebibliography}{22}
\bibitem{16} Id.
\bibitem{17} Id.
\bibitem{18} Id. at 833.
\bibitem{19} Id. at 833-34.
\bibitem{20} Id. at 834-36.
\bibitem{21} Id. at 836 (“Links, for example, are used to lead from overview documents to more detailed documents, from tables of contents to particular pages, but also as cross references, footnotes, and new forms of information structure.”).
\bibitem{22} Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 114 S. Ct. 2445, 2459 (1994).
\bibitem{23} ACLU, 929 F. Supp. at 873 (Dalzell, J., concurring) (“Nearly fifty years ago, Justice Jackson recognized that ‘the moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers.’” (quoting \textit{Kovacs v. Cooper}, 336 U.S. 77 (1949) (Jackson, J., concurring)); \textit{see also} Owen Fiss, \textit{In Search of a New Paradigm}, 104 YALE L.J. 1613 (1995).
\end{thebibliography}
accessibility, and the government interest in traffic and litter control. The Court has analyzed print media in terms of editorial control, prior restraint, and information accessibility as a requirement to a healthy democracy. The Court has examined broadcast media in terms of editorial control, the reach of the medium into the home, and limited speaker access due to the finite nature of the frequency spectrum. The Court has analyzed cable television in terms of editorial control and the large (though finite) number of channels open for communication. In each instance the Court judges the intrusiveness of the government restriction by considering the medium's attributes. The following sections will discuss these First Amendment approaches to electronic media.

A. Broadcast Media

A broadcaster granted a license by the Federal Communications Commission (FCC) gains almost monopoly status with regard to information distribution over the airwaves; further, only a limited number of radio or television frequencies are available for those interested in speaking. Consequently, under the "fairness doctrine," the FCC required radio and television broadcasters to address public issues and to assure fair

---

24 Schneider v. New Jersey, 308 U.S. 147 (1939) (distribution of leaflets on city streets cannot be prevented to further city interest in prevention of litter); Chicago Police Dep't v. Mosley, 408 U.S. 92 (1972) (government can not prevent speech on street adjacent to school based solely on content of the speech); but see Ward v. Rock Against Racism, 491 U.S. 781 (1989) (government may "impose reasonable restrictions on the time, place and manner of protected speech" if the restriction is content-neutral and narrowly tailored to achieve the government interest); United States v. Kokinda, 497 U.S. 720 (1990) ("sidewalk" on Postal Service property was not a traditional public sidewalk and had been reserved for the Postal Service use, not a public forum).


27 New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam, Black, J., concurring) (the "Pentagon Papers" case which prevented government's prior restraint of newspapers' publication of classified documents because of press' important role in keeping electorate informed).


30 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); ACLU, 929 F. Supp. at 876-77 (Dalzell, J., concurring) (when dealing with First Amendment cases "in broadcast, courts focus on the limited number of band widths and the risk of interference with those frequencies.") (interpreting Turner, 114 S. Ct. at 2456-57).

31 Denver Area, 116 S. Ct. at 2419-20 (Thomas, J., concurring in part and dissenting in part).

32 ACLU, 929 F. Supp. at 877 (Dalzell, J. concurring) (when examining First Amendment cases "in cable (media), courts focus on the number of channels, the different kinds of operators, and the cost to the consumer.") (interpreting Turner, 114 S. Ct. at 2452).

33 ACLU, 929 F. Supp. at 877 (Dalzell, J., concurring) (in analyzing speech cases on the Internet, courts "must take into account the underlying technology, and the actual and potential reach of that medium").
coverage of both sides of an issue. In *Red Lion Broadcasting Co. v. FCC* the Court upheld the fairness doctrine because the public had a right of access to the airwaves. Those interested in speaking, writing, and publishing their ideas, without broadcasting them over the airwaves, could do so unencumbered by third parties. In broadcasting, however, a speaker could only address the audience by the grace of the station owner. The Court was concerned with the rights of viewers and listeners, and was not as concerned by the FCC's interference in the editorial decision making of the station owner. Subsequently, the FCC repealed the Fairness Doctrine as not being in "the public interest."

In *FCC v. Pacifica,* the Court held that the FCC could penalize Pacifica Foundation, Inc., the owner of a radio station, for broadcasting George Carlin's "Filthy Words" comedy routine at two o'clock in the afternoon. Carlin's routine included words that "can never ever be said on radio." A parent complained to the FCC after his child had heard the broadcast. In response to the complaint, the FCC placed a reprimand in Pacifica's file, which would factor into any license renewal application by Pacifica. The Court upheld the FCC's action because of broadcasting's intrusion into the home, its pervasive nature, the ineffectiveness of warnings to the public that indecent speech was to occur, and the ready access of the indecent speech to children "too young to read."

The Court stressed, however, that its holding was a narrow one.

---

36 Id. at 379; but see Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 126-30 (1973) (holding that FCC could properly take into account the fact that listeners and viewers constitute a kind of "captive audience" and that the public interest required that a substantial degree of journalistic discretion must remain with broadcasters).
39 For a transcript of Carlin's routine see *id.* at 751.
40 Id. at 729.
41 Id. at 730.
42 In *Pacifica,* Justice Stevens stated that indecent speech, like "fighting words," was "no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." 438 U.S. at 746 (quoting Murphy, J. in Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)). Justice Stevens had begun to create a hierarchical approach that valued some protected speech more than other protected speech. Justice Powell's concurrence sharply disagreed with this approach which allowed government to regulate protected speech. *Id.* at 761. For Justice Powell, once speech was determined to be protected, it was all of equal value and equally entitled to protection. Otherwise the government could pick and choose which speech was appropriate and which words were forbidden. As Justice Harlan said, "one man's vulgarity is another man's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Cohen v. California,* 403 U.S. 15, 25 (1971).
43 *Pacifica,* 438 U.S. at 750.
B. Cable Television

As the use of cable television has evolved and expanded, Congress has attempted to regulate it in several ways. Congress required cable television operators to provide access to cable programmers that were otherwise excluded from cable broadcasting.\(^4\) Congress' goal was to open up cable casts to more voices and not allow cable operators to monopolize and control the flow of information to the public.\(^5\) Congress required cable operators to set aside a certain percentage of their channels as "leased access channels" for commercial lease by unaffiliated cable programmers.\(^6\) In *Turner Broadcasting v. FCC*,\(^7\) the Supreme Court upheld this statute despite protests from cable operators that the government was interfering with their editorial control over the content of the channels.\(^8\)

The Court also held that cable television should be treated differently from broadcast television for First Amendment purposes. The rationale of the Court regarding broadcasting was that government regulation of broadcast television was appropriate because the physical constraints of the broadcasting spectrum limited the number of parties who could speak.\(^9\) The government's role, therefore, was to assure that different voices were heard and that the broadcaster in possession of a valuable public resource used that resource for the public good. Though regulations placed on broadcasters might limit their free speech rights, the Court reasoned that the government served as a preserver of free speech for those who might otherwise be unheard. Compared to broadcast television, the large number of cable television channels distin-

\(^{44}\) See 47 U.S.C. § 532 (1988 & Supp. 1993); *Turner*, 114 S. Ct. at 2453; *Denver Area*, 116 S. Ct. at 2381; see also Erik Forde Ugland, *Cable Television, New Technologies and the First Amendment After Turner Broadcasting System, Inc. v. FCC*, 60 Mo. L. Rev. 799, 802-03 (1995). Cable operators own and operate the cable network that links the consumer to the cable system. Cable programmers provide the content that is broadcast over the cable systems. Cable operators can also be cable programmers if they provide their own content.

\(^{45}\) The Court distinguished this type of control from the alleged monopoly enjoyed by newspapers in cities that no longer have more than one daily newspaper. The technology of cable, and the practice of local governments to grant monopoly status to cable operators, allows the cable operator to be an information gatekeeper. Newspapers have no such control over keeping rivals off news racks. *Turner*, 114 S. Ct. at 2466 (distinguishing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)); see also R. Stuart Phillips, *The Fourth Estate and the Third Level: Turner Broadcasting System, Inc. v. Federal Communications Commission - Cable Television and Intermediate Scrutiny*, 23 Pepp. L. Rev. 651, 673-74 (1996).

\(^{46}\) *Denver Area*, 116 S. Ct. at 2381-82.


\(^{48}\) Id. at 2464; but see Tornillo, 418 U.S. at 258 (government may not dictate the content or interfere with the editorial control of printed newspapers).

guished the two media allowing for different treatment of cable television.50

C. TELEPHONE COMMUNICATIONS

In the 1980's, Congress passed a series of amendments to the 1934 Communications Act to protect children from the new commercial "dial-a-porn" telephone services.51 The amendments prohibited all obscene and indecent telephone communications, regardless of whether the participants were children or adults. In *Sable Communications v. FCC*, the Court held that Congress could not place an absolute ban on indecent "dial-a-porn" telephone services.52 Congress could, however, criminalize obscene telephone messages. The Court recognized the government’s compelling interest in protecting children from obscene and indecent speech, but held that an absolute ban on indecent, yet protected, speech denied adults their First Amendment rights to engage in such speech.53 Upholding the law would produce a result denying “adults their free speech rights by allowing them to read only what was acceptable to children.”54 Therefore, the ban was not narrowly tailored to achieve the government’s purpose. The Court distinguished *Pacifica* by noting that the FCC action was an administrative penalty, not an absolute ban, and that the dial-a-porn services were not as intrusive to the home or as accessible to children as a radio broadcast.

IV. CABLE TELEVISION AND THE DENVER AREA APPROACH

Congress and local governments have both attempted to regulate the cable television industry. As discussed above, the Court in *Turner* held that Congress has the authority to require cable operators to set aside certain “leased access” channels for commercial lease to cable programmers who are otherwise excluded from cable channels.55 Local governments similarly exercise control over cable operators. When local

---

50 But see Berman & Weitzner, supra note 9, at 1628 (arguing that broadcast and cable television are alike because architecturally they both have a centralized operator determining programming and acting as a barrier to diversity).  
54 Id. at 127 (citing Butler v. Michigan, 352 U.S. 380 (1957) (decision overturning ban on reading material harmful to children)).  
55 *Turner*, 114 S. Ct. at 2472. The Court remanded the case to determine whether the validity of the government’s contention that the statute’s “must carry” provisions were no broader than necessary to achieve the government’s interest in preserving the broadcast television industry. Leased access channels are a certain percentage of an operators channels that are dedicated to commercial lease by unaffiliated cable programmers. *Denver Area*, 116 S. Ct. at 2381 (Breyer, J., plurality).
governments grant cable franchises to cable operators they usually require the cable operator to dedicate a certain number of channels to public, educational and governmental programming (PEG channels). The cable operator in response provides access to programmers presenting local public interest programming.

In Denver Area, the Supreme Court addressed a challenge to the Cable Television Consumer Protection and Competition Act of 1992 (1992 Act). Congress intended this statute to regulate indecent and patently offensive programming in the relatively new communication medium of cable television in three ways. First, § 10(a) allowed cable operators to prohibit programs on leased access channels that the operator reasonably believed were patently offensive. The operator was required to create specific policies and procedures for determining which programs are patently offensive, and to apply those policies in a uniform manner. Second, § 10(b) required cable operators who allow patently offensive programming on leased access channels to “segregate and block” those channels from viewers who did not provide an advanced written request for such channels. Third, § 10(c) allowed cable operators to prohibit programs on public, educational, or governmental channels (PEG channels) that the operator reasonably believed were patently offensive. The Court held that § 10(a) was constitutional, whereas it held §§ 10(b) and 10(c) were unconstitutional because they were “not appropriately tailored” to achieve the government’s goal of protecting children from sexually explicit programming.

A. Overview of the Court’s Opinions

The Court produced six opinions in Denver Area, each searching for the appropriate analogy to the Court’s First Amendment precedent. Justice Breyer’s plurality opinion garnered the votes of three other justices, each of whom wrote separate concurrences. Justice Breyer generalized that First Amendment jurisprudence takes time to evolve specific speech protections and that the Court should hesitate to set in stone rigid rules for a medium in a state of flux. Justice Kennedy, joined by Justice Ginsburg, wrote that aspects of cable television were a public forum and therefore should be analyzed using the already established public forum

56 This arrangement has been compared to (1) a public easement, (2) a reservation of rights by the grantor (the local government), and (3) an exaction of certain rights in exchange for the granting of a permit. Denver Area, 116 S. Ct. at 2394.


58 Denver Area, 116 S. Ct. at 2390 (Breyer, J., plurality).

59 PEG channels provide access to programmers presenting public interest programming. Denver Area, 116 S. Ct. at 2381.

60 Id. at 2398, 2401, 2403.

61 Justices Souter, Stevens, and O’Connor wrote concurrences. Id. at 2398, 2401, 2403.
doctrine. Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, wrote that the sections should all be upheld because the statute did not restrict First Amendment rights of the plaintiff cable programmers, but merely vindicated the First Amendment rights of the cable operator’s editorial discretion.  

B. THE PLURALITY OPINION’S APPROACH

Justice Breyer was reluctant to formulate a rule that would be binding on cable television while the evolution of cable television as a medium of communication remained in great flux. He perceived a convergence of different high technology communications systems in an era of general deregulation of those systems. In effect, cable television, telephone, and computer communications technology may one day merge into a communications system very different from the 1996 model. The future format, structure, and attributes of communication are difficult to forecast. Therefore, Justice Breyer refused to “definitively . . . pick one analogy or one specific set of words now” that might stunt the growth of new communications systems.  

Justice Breyer described the Court’s role as “enforcing the Constitution’s constraints, but without imposing judicial formulae so rigid that they become a straightjacket that disables Government from responding to serious problems.” He further stated that “[r]ather than seeking an analogy to a category of cases . . . we have looked to the cases themselves.”

Justices Souter and Stevens joined Justice Breyer’s plurality opinion urging that the Court avoid undue haste in determining standards for reviewing regulation of new communications technologies. Justice Souter echoed Justice Breyer’s approach of analogy rather than categorization, cautioning against “settling upon a definitive level-of-scrutiny rule of review for so complex a category.” He urged “maintaining the high value of open communication,” while focusing on the attributes of the medium in relation to the government’s regulatory con-

---

62 This article does not address Justice Thomas’ opinion at any length because the opinion focuses on the relationship between cable operators and cable programmers and does not readily translate to the Internet setting.

63 Denver Area, 116 S. Ct. at 2385 (Breyer, J., plurality).

64 Id.

65 Id. at 2388.

66 Id. at 2402 (Souter, J., concurring) (“All of the relevant characteristics of cable are presently in a state of technological and regulatory flux . . . . And as broadcast, cable, and the cyber-technology of the Internet and the World Wide Web approach the day of using a common receiver, we can hardly assume that standards for judging the regulation of one of them will not have immense, but now unknown and unknowable, effects on the others.”).

67 Id.
cerns. Justice Stevens was willing to give less than strict scrutiny to government regulation which opened otherwise closed communications systems because "Congress should not be put to an all or nothing-at-all choice" in attempting to promote more diverse speech in the early stage of the cable communication industry's development. Justice O'Connor agreed with Justice Breyer's cautious approach, but disagreed with his application of the analogy regarding public access channels.

Justice Kennedy decried the plurality's "standardless standard" as an evasion of judicial responsibility and a danger to First Amendment freedoms. His view was that the danger lay in not having a clear standard to guide Congress, lower courts, leased access programmers, and the public. Moreover, standards prevent statutes from suppressing unpopular, yet protected speech: "Standards are the means by which we state in advance how to test a law's validity, rather than letting the height of the bar be determined by the apparent exigencies of the day. They also provide notice and fair warning to those who must predict how the courts will respond to attempts to suppress their speech."

Justice Thomas criticized the plurality for "deciding not to decide on a governing standard." Instead Justice Thomas asserted that Turner had equated cable operators and print media's editorial rights. Therefore, the Court could not force the views of cable programmers on the

---

68 Id. at 2402. Justice Souter describes Justice Breyer's approach as "recognizing established First Amendment interests through a close analysis that constrains the Congress, without wholly incapacitating it in all matters of the significance apparent here, maintaining the high value of open communication, measuring the costs of regulation by exact attention to fact, and compiling a pedigree of experience with the changing subject." Id. at 2403.

69 Id. at 2398 (Stevens, J., concurring).

70 Id. at 2403 (O'Connor, J., concurring in part and dissenting in part) ("I agree with Justice Breyer that we should not yet undertake fully to adapt our First Amendment doctrine to the new context we confront here.").

71 Id. at 2405 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part); see also Jonathan Weinberg, Vagueness and Indecency, 3 VILL. SPORTS & ENT. L.J. 221, 242 (1996) (criticizing Pacifica's "Alice-in-Wonderland" approach. "Not only did the Court not require that the FCC apply a hard-edged, precise rule, it did not seem to require that the agency apply any rule . . . . it was permissible for the FCC simply to make up its speech regulation, in an unpredictable manner, as it confronted each new 'factual context.'").

72 Denver Area, 116 S. Ct. at 2406 (Kennedy, J.). But see id. at 2401 (Souter, J., concurring). Despite Justice Souter's view that speech restrictions on new technologies need to be reviewed based on the context of the medium and not by applying predetermined categories, he acknowledges that "[r]evaluating speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said." Id. at 2401.

73 Denver Area, 116 S. Ct. at 2422 (Thomas, J., concurring in the judgment in part and dissenting in part).

74 Id. at 2421; Ugland, supra note 44, at 814 n.108.
editorial discretion of cable operators any more than it could force opposing political statements on a newspapers editorial views.75

Justice Breyer's approach may be criticized as too open-ended. His approach raises the danger of letting Justices enforce their own point of view in an ad hoc manner, and then excuse it as just a matter of selecting the "right" analogy. The lack of categorization may prevent future jurists from relying on the standards in "those moments when the daily politics cries loudest for limiting what may be said."76

Nevertheless, Justice Breyer argued that the categorical approaches of Justices Kennedy and Thomas present the danger of strangling newborn communication technology before it has a chance to breathe and develop.

Both categorical approaches suffer from the same flaws: they import law developed in very different contexts into a new and changing environment, and they lack the flexibility necessary to allow government to respond to very serious practical problems without sacrificing the free exchange of ideas the First Amendment is designed to protect. . . . The essence of that protection is that Congress may not regulate speech except in cases of extraordinary need and with the exercise of a degree of care that we have not elsewhere required.77

Consequently, Justice Breyer avoided the categorical approach that might have provided more guidance to lower courts and the tangle of competing speakers in the cable television context.

Justice Breyer submitted a new test preserving flexibility that he characterized as narrower than the categorical approaches:78 "[W]e can decide this case more narrowly, by closely scrutinizing § 10(a) to assure that it properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech."79 Justice Breyer reformulated the usual First Amendment analysis because the Court was examining speech regulation in a new means of communication that did not fit neatly into the Court's pre-existing categories. Rather than the usual levels of compelling, important or legitimate government interest, Justice Breyer looked to whether the

75 Denver Area, 116 S. Ct. at 2421 (comparing Turner to Tornillo).
76 Id. at 2401 (Souter, J.).
77 Id. at 2384.
78 Id. at 2385 (Breyer, J.).
79 Id. Justice Breyer sets forth another formulation of his approach while criticizing Justices Kennedy and Thomas for "decid[ing] the case on the basis of categories that provide imprecise analogies rather than on the basis of a more contextual assessment, consistent with our First Amendment tradition, of assessing whether Congress carefully and appropriately addressed a serious problem." Id. at 2388 (emphasis added).
government was addressing "an extremely important problem." Then Justice Breyer balanced "the relevant interests" to assure that the government does not impose "an unnecessarily great restriction on speech." This is apparently in place of the usual means-end relationship analysis, which looks at "least restrictive means," "narrow tailoring," and "rational relationship." Justice Breyer's plurality opinion then addressed the specific speech restrictive statutory provisions at issue in *Denver Area* using the more flexible approach to new communications technologies.

1. *Permissive Speech Regulation on Leased Channels — § 10(a)*

Section 10(a) allowed a cable operator to screen leased access programming and to decide whether its leased access channels would carry programming that contained patently offensive material. The cable operator was required to screen programs "pursuant to written and published policy." The Court held that section 10(a) was constitutional.

Applying the fact specific analogy approach to this section, Justice Breyer identified four key considerations. First, the government has a compelling interest in protecting children from exposure to patently offensive material. Second, the interests of cable television programmers' expression must be balanced against the interests of cable operators' editorial control. Third, *Pacifica* was available as a close analogy in precedent regarding patently offensive material in the broadcast radio context. And fourth, Congress' method of regulation under section 10(a) was permissive, not prohibitory. Justice Breyer focused on the permissive nature of the regulations which allowed, but did not require, cable operators to prevent the broadcast of offensive or indecent programming on leased channels. Since this was not an absolute ban, section 10(a) did not impose as harsh a speech restriction as the limitations mandated by section 10(b), discussed below. Furthermore, Justice Breyer considered the relationship between cable operators and leased channel programmers in its complex historical context. Congress, in an attempt to promote diverse viewpoints in programming, had originally required cable operators to set aside some channels under their control for leased access programmers. Section 10(a) merely returned editorial control to cable operators over channels they had previously controlled. Congress' action, therefore, was not as intrusive to the First Amendment rights of the cable

---

80 See id. at 2406-07 (Kennedy, J.) ("This description of the question accomplishes little, save to clutter our First Amendment case law by adding an untested rule with an uncertain relationship to the others we use to evaluate laws restricting speech. The plurality cannot bring itself to apply strict scrutiny, yet realizes it cannot decide the case without uttering some sort of standard; so it has settled for synonyms.").


82 *Denver Area*, 116 S. Ct. at 2390.
programmers. Justice Breyer also regarded *Pacifica* as precedent for regulating indecent material broadcast directly into the home and accessible to children. Justice Breyer summarized his examination of the various considerations as follows:

The existence of this complex balance of interests persuades us that the permissive nature of the provisions, coupled with its viewpoint-neutral application, is a constitutionally permissible way to protect children from the type of sexual material that concerned Congress, while accommodating both the First Amendment interests served by the access requirements and those served in restoring to cable operators a degree of the editorial control that Congress removed in 1984 [by requiring access to independent programmers].

Using the fact specific approach, Justice Breyer was persuaded that section 10(a) was constitutional because of the permissive nature of the restriction, and the close analogy to the *Pacifica* rationale.

2. **Mandatory Speech Regulation of Leased Channels — § 10(b)**

Justice Breyer also applied his standard for new communications media in examining section 10(b), the second challenged provision in *Denver Area*. Section 10(b) required cable operators to relegate all patently offensive programming to one or more specific channels, and then to block access to those channels unless a viewer provided a written access request. The policy to be advanced by the regulation was to provide parents and other adults control over children’s television viewing. Justice Breyer, writing for a majority of the Court in this section, again refused to categorize the speech at issue. Instead, he said that the regulation did not pass even the lower level of scrutiny applied to protected speech regulations that are “content-neutral time, place, and manner restrictions.”

Comparing section 10(b) to the recently enacted provisions of the Telecommunications Act of 1996 (of which the CDA is a part), the Court found that the 1996 provisions were “significantly less restrictive than the provision here at issue.” Congress had made the judgment that the

---

83 See id. at 2387.
84 *Id.* at 2391-92. Justice Kennedy, also writing for Justice Ginsburg, joined the portion of Justice Breyer’s opinion holding § 10(b) unconstitutional. Thus six Justices agreed with the holding in this section.
85 See *id.* at 2418.
86 *Id.* at 2392. The 1996 Act’s prophylactic provisions require blocking programming “primarily dedicated to sexually oriented programming” on unleased channels. In addition, cable operators must honor a subscriber’s request to block any, or all, programs on any channel to which he or she does not wish to subscribe. And manufacturers, in the future, will have
1996 regulations were an appropriate response to a similar problem regarding children's access to indecent programming. This illustrated that the 1992 cable restrictions were more restrictive than necessary to achieve the government's interest. The inability to meet even a less-than-strict, yet heightened, intermediate scrutiny standard when applied to protected speech doomed the 1992 restriction.\footnote{Id. at 2393 ("[W]e can take Congress' different, and significantly less restrictive, treatment of a highly similar problem at least as some indication that more restrictive means are not 'essential' (or will not prove very helpful))." (emphasis in original) (citing Boos v. Barry, 485 U.S. 312, 329 (1988)).}

The absolute requirement in section 10(b) that the cable operator "segregate and block" the programming it reasonably believed to be "patently offensive" was fatal to the regulation. The government required cable operators to restrict speech. The permissive nature of section 10(a) reduced the seriousness of the speech restriction. The absolute nature of section 10(b) heightened the intrusiveness of the restriction on speech to an unconstitutional level.

3. Permissive Speech Regulation on "PEG" Channels — § 10(c)

Justice Breyer found significance in the distinction between the constitutionally sound permissive speech regulation of section 10(a) and the constitutionally flawed mandatory speech regulation of section 10(b). Justice Breyer struck down Section 10(c)'s permissive speech regulation on public, educational, and governmental channels (PEG), however, because PEG channels presented a different First Amendment context.\footnote{Id. at 2398 (Stevens, J., concurring) ('The difference between § 10(a) and § 10(c) is the difference between a permit and a prohibition.\text{"}); but see id. at 2403 (O'Connor, J., concurring in part and dissenting in part) ("I find the features shared by § 10(a), which covers leased access channels, and § 10(c), which covers public access channels, to be more significant than the differences\text{"}. Both §§ 10(a) and 10(c) serve an important governmental interest: the well-established compelling interest of protecting children from exposure to indecent material.".).}

Specifically, the historical and institutional background of PEG channels and the presence of an existing system of community controls led Justice Breyer to determine that even a permissive speech restriction exercised by cable operators would be too burdensome.\footnote{Id. at 2394-97 (Breyer, J.).}

to make television sets with a so-called 'V-chip' — a device that will be able automatically to identify and block sexually explicit or violent programs."\text{"} Id.

87 Id. at 2393 ("[W]e can take Congress' different, and significantly less restrictive, treatment of a highly similar problem at least as some indication that more restrictive means are not 'essential' (or will not prove very helpful))." (emphasis in original) (citing Boos v. Barry, 485 U.S. 312, 329 (1988)).

It is interesting to note that in the time it takes for any challenged regulation to reach the Court, new technology will most likely be developed that will inevitably create a less restrictive means of achieving the government's interest. The ironic result is that many new media speech restrictions will immediately be unconstitutional because any means Congress uses to achieve its interest will not be the least restrictive means available by the time the Court decides the case.

88 Id. at 2398 (Stevens, J., concurring) ("The difference between § 10(a) and § 10(c) is the difference between a permit and a prohibition.")); but see id. at 2403 (O'Connor, J., concurring in part and dissenting in part) ("I find the features shared by § 10(a), which covers leased access channels, and § 10(c), which covers public access channels, to be more significant than the differences\text{"}. Both §§ 10(a) and 10(c) serve an important governmental interest: the well-established compelling interest of protecting children from exposure to indecent material.".).

89 Id. at 2394-97 (Breyer, J.).
Historically, PEG channels were created pursuant to local government demands on the cable operator for dedications or exactions of channels for the public good in exchange for the awarding of a cable contract. Section 10(c) granted new censorial powers to the cable operator over channels that were never a part of his "bundle of rights," because the local government in effect "reserved" those channels for the public good — the cable operator never had editorial control over PEG channels. Justice Breyer distinguished this from section 10(a) where the statute restored a cable operator's control over the leased channels that were at one time under his control.

The cable programmer (lessee) of a leased channel has editorial control over the material presented on that program. PEG channels are, however, generally organized and operated by non-profit groups or by the local government itself. The plurality found this difference to be significant because PEG channels have an editorial entity other than the cable operator who will be responsive to the community rather than to the economic marketplace. Because "indecent" and "patently offensive" programming is determined on a community by community basis, this separate entity will most likely achieve the government's interest in protecting children from offensive programming without giving veto power to the cable operator. Therefore section 10(c)'s permissive speech restriction power granted to cable operators on PEG channels is superfluous to an existing system of editorial control. One level of censors is sufficient.

C. JUSTICE KENNEDY AND THE PUBLIC FORUM APPROACH

Justice Kennedy's opinion in Denver Area took a very different approach in addressing the free speech issue in the cable television context. His solution was to characterize public access channels as public fora and leased access channels as common carriers; he described the latter as the functional equivalent of public fora. Since section 10 regulates protected speech based on the speech's content, Justice Kennedy used a

90 Id. at 2394.
91 But see id. at 2404 (O'Connor, J., concurring in part and dissenting in part) ("I am not persuaded that the difference in the origin of the access channels is sufficient to justify upholding § 10(a) and striking down § 10(c). The interest in protecting children remains the same, whether on a leased access channel or a public access channel.").
92 Id. at 2395. ("The existence of a system aimed at encouraging and securing programming that the community considers valuable strongly suggests that a 'cable operator's veto' is less likely necessary to achieve the statute's basic objective, protecting children, than a similar veto in the context of leased channels . . . . And this latter (veto) threat must bulk large within a system that already has publicly accountable systems for maintaining responsible programs.").
93 Id. at 2409.
94 Id. at 2411-12.
strict scrutiny analysis of content-based restrictions in a public forum. Justice Kennedy found that the statute could not withstand that level of scrutiny and on that basis found the speech restrictions in §§ 10(a) and (c) unconstitutional.95

Justice Kennedy first focused on the public forum characteristics of public access channels.96 By making an analogy between the public access channels and public easements, Justice Kennedy described the access channels as a contractually bargained for right that the cable operator gives to the local government (or the local government reserves from its grant) in return for the ability to use the local utility conduits and right-of-ways.97 The local government then specifically sets aside this new “space” for public discourse, thus designating a public forum.

Justice Kennedy described a public access channel as an unlimited designated public forum.98 This means it is a government-controlled area committed to, or allowed to be used for, free speech purposes and open to all speakers.99 Once a forum is open as a place where expressive activity may occur, the government cannot pick and choose speakers based on the content of their ideas. Silencing a disfavored topic or style of speech because the government dislikes the message violates the First Amendment and requires strict judicial scrutiny. Thus the government may not provide an arena as a public forum, but then exclude those with whom it disagrees.

Justice Kennedy determined that leased access channels were analogous to common carriers, such as telephone companies, which are required to “provide a conduit for the speech of others.”100 He also saw common carriers as the functional equivalent of public fora, because they

95 Justice Kennedy joined the section of Justice Breyer’s opinion holding § 10(b) unconstitutional “insofar as it applies strict scrutiny.” Id. at 2419. Justice Breyer, however, apparently held that section unconstitutional because it could not pass even a lower level of scrutiny.
96 Id. at 2408-09. Justice Kennedy had less concern regarding the governmental and educational channels since those access channels were not an open public forum dedicated to bringing other voices to the public debate, but instead were presenting the views allowed by the local government.
97 Id. at 2409.
98 But see Ugland, supra note 44, at 815, n.110 (cable systems are not public forums; they are speakers that use public forums).
99 Denver Area, 116 S. Ct. at 2409 (“Public forums do not have to be physical gathering places, nor are they limited to property owned by the government.”) (citations omitted); see Hague v. CIO, 307 U.S. 496, 515 (1939) (Roberts, J., plurality opinion) (“Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purpose of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”).
provide a "place" for open, non-discriminatory communication. Justice Kennedy saw Sable as directly on point. In Sable the government banned indecent speech over the telephone. In Denver Area the government restricted indecent speech on cable television. In both cases, the government engaged in unconstitutional content-based discrimination against a certain type of disfavored speech on a common carrier. Application of strict scrutiny to speech-related regulation of common carriers "ensures open, nondiscriminatory access to the means of communication." Justice Kennedy was frustrated by the plurality's failure to explain why it would not apply strict scrutiny to content-based "selective exclusions" of protected speech.

V. INDECENT SPEECH ON THE INTERNET AND ACLU v. RENO

In 1996, Congress passed the Communications Decency Act (CDA) to combat the perceived flood of obscene, indecent, and patently offensive material available to children via the Internet. Section 223(a) criminalizes speech if a person "knowingly . . . makes, creates, or solicits" and "initiates the transmission" of "any comment, request, suggestion, proposal, image or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age." Moreover, section 223(d) criminalizes speech if it "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or—

101 Denver Area, 116 S. Ct. at 2413 ("Common carrier requirements of leased access are little different in function from designated public forums, and no different standard of review should apply.").
102 See supra note 52 and accompanying text.
103 Denver Area, 116 S. Ct. at 2412. See also Kay, supra note 100, at 373 ("Many [Internet] features are directly analogous to other common carrier services. E-mail, for instance, is directly equivalent to its land-based counterpart. The Internet Relay Chat (IRC) works much like either a private telephone line or a party line, depending on the number of parties chatting. Searching for a file on the World Wide Web is not unlike calling directory assistance to retrieve a phone number or address.").
105 § 223(a) subjects to criminal liability anyone who "(1) in interstate or foreign communications . . . (B) by means of a telecommunications device knowingly (i) makes, creates, or solicits, and (ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication; . . . (2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity."
gans, regardless of whether the user of such service placed the call or initiated the communication."

The CDA provides specific defenses to prosecution under the above sections. First, defenses are available to access providers who do not create or knowingly distribute content in violation of the CDA. Second, a defense limits vicarious employer liability. A third defense is a "good faith" effort to limit access to minors using available technology. Finally, a defense is also available for those restricting minors' access by requiring use of "a verified credit card, debit account, adult access code, or adult personal identification number."

The statutory language regarding "indecency" and "patently offensive material" was immediately challenged by a diverse group of plaintiffs including businesses, non-profit organizations, advocacy groups, commercial on-line services, and library organizations. None of the plaintiffs were commercial pornographers. The plaintiffs in ACLU did not challenge the CDA on grounds that it regulated obscenity or pornography, but rather that it regulated indecency.

The three ACLU judges, writing separately, found the provisions of the CDA unconstitutional for different, but overlapping reasons. Judge Dalzell, employing a medium-specific approach, found that the Internet is a unique medium of mass communication and that the CDA would homogenize speech on it. Judge Sloviter found that the CDA constituted content-based discrimination against First Amendment protected speech and could not pass strict scrutiny because it was not narrowly tailored to achieve a compelling government interest. Judge Buckwalter viewed the ill-defined use of the words "indecent" and "patently offensive" as unconstitutionally vague, thus chilling free speech.

---

106 § 223(d) imposes criminal penalties on anyone who "(1) in interstate or foreign communications knowingly (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the use of such service placed the call or initiated the communication; or (2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity."

107 47 U.S.C. 223(e).

108 ACLU, 929 F. Supp. at 827 n.2.

109 Id.

110 Id. at 829.
A. Findings of Fact

In an effort to expedite the proceedings, the parties entered into a lengthy stipulation of facts. The court derived many of its findings of fact from the stipulation. The full findings of fact are summarized here as an aid to the reader and to provide context for the legal discussion to follow. ACLU is the most comprehensive attempt to describe the Internet through judicial fact-finding. After reviewing the history and general structure of the Internet, the court addressed issues of fact particularly relevant to First Amendment analysis.

The court found that the content on the Internet is both commercial and non-commercial speech and "is as diverse as human thought." "[T]he Internet provides an easy and inexpensive way for a speaker to reach a large audience, potentially of millions." Importantly, it is an interactive form of communication allowing users to be both speaker and audience. "The Internet is therefore a unique and wholly new medium of worldwide human communication."

The court found that the level of communication and message sophistication on the Internet varied greatly. Users range from large corporations and universities with sophisticated mainframe computers to individuals with a personal computer. Significantly, the court found that the World Wide Web is a "distributed system with no centralized control... from which individual Web sites or services can be blocked from the Web." The court did find, however, that a process is under way to rate content on the Internet to assist parents in "screening and filtering" material that they feel is unsuitable for their children. Further, commercial screening services exist that provide software and blocking services to assist in preventing subscriber access to certain topics.

The court found that sexually explicit material of varying degrees exists on the Internet. Once posted on the Internet, it is accessible to anyone entering a particular Web site or seeking information retrieval.

---

111 Id. at 828.
112 Id. at 831.
113 See supra notes 11-21 and accompanying text.
114 See ACLU, 929 F. Supp. at 842.
115 Id. at 843.
116 See id.
117 Id. at 844.
118 See id. at 836-37.
119 See id.
120 Id. at 838.
121 See id. at 838-39.
122 See id. at 839-42.
123 See id. at 844.
The content provider has no control over who may receive it.\textsuperscript{124} Nonetheless, the Internet can be accessed only through a series of affirmative, deliberate steps.\textsuperscript{125} The court specifically found that “[c]ommunications over the Internet do not ‘invade’ an individual’s home” or appear without providing prior information as to their content.\textsuperscript{126} The court also found that without adult assistance a young child would not be able to retrieve material easily.\textsuperscript{127}

The court found that there is no reliable way to use age verification as a means for restricting children’s access to certain sites.\textsuperscript{128} If the site contains “indecent” material, there is no way for a content provider to screen that material from viewers who are minors, and still allow them access to the material that is not “indecent.”\textsuperscript{129} Currently there is no software available for credit card verification as a screening tool.\textsuperscript{130} Even if such technology becomes available, most non-profit sites and individual homepages could not afford the cost of verification services and would have to close their sites.\textsuperscript{131} Charging users for access to the sites to offset the cost of verification would necessarily inhibit the free flow of information.\textsuperscript{132} Further, those adults who do not have a credit card could not access the information.\textsuperscript{133} Other adult verification systems, such as password systems, would likewise inhibit free speech and be cost prohibitive for many content providers.\textsuperscript{134} The court also found the proposal for “tagging” sites to be insufficient. Tagged sites would have an imbedded code, placed there by the content provider, that would prevent access to that site for computers that had special software.\textsuperscript{135} The court found this would be burdensome to non-commercial organizations, and would not necessarily prevent the transmission of the information because it would only work if the adult at the receiving end of the transmission had properly installed the software.\textsuperscript{136} Further, technology does not exist that would allow a content provider to send information to a community that would not find the material indecent, and also prevent it from being received in a community that finds it indecent.\textsuperscript{137} Commu-

\begin{footnotesize}
\begin{enumerate}
\item[124] See id.
\item[125] See id. at 844-45.
\item[126] Id.
\item[127] See id. at 845.
\item[128] Id.
\item[129] Id.
\item[130] See id. at 846.
\item[131] See id.
\item[132] See id. at 847.
\item[133] Id. at 846.
\item[134] See id. at 846-47.
\item[135] Id. at 847-48.
\item[136] Id.
\item[137] Id. at 848.
\end{enumerate}
\end{footnotesize}
communications originating outside the United States would also present screening problems.138 "Many speakers who display arguably indecent content on the Internet must choose between silence and the risk of prosecution. The CDA's defenses . . . are effectively unavailable for non-commercial, not-for-profit entities."139

B. THE ACLU v. RENO OPINIONS

Because the existing Supreme Court analogies to communication technologies do not provide an appropriate model for Internet speech regulation, the court in ACLU examined the Internet's unique attributes as they relate to First Amendment issues. The judges' ultimately concluded that the Internet is a decentralized, open-access forum for discussion and exchange of ideas. Most speakers are individuals, or non-commercial entities and have limited financial resources so that regulation would most likely drive speakers from the forum. Even if technology existed (which it does not) for screening individual's identities prior to participation in a particular Internet setting, the labor intensive and intrusive aspects of such a screening system might force speakers to abandon their web sites.

1. Judge Dalzell's Search for an Internet Speech Analogy

In ACLU, Judge Dalzell's framework is closest to the Denver Area plurality's flexible First Amendment approach to new media. After reviewing the Supreme Court's treatment of various media, Judge Dalzell concluded that "[t]his medium-specific approach to mass communication examines the underlying technology of the communication to find the proper fit between First Amendment values and competing interests."140

The government's power to regulate indecency in television and radio broadcasting does not translate well to the Internet context. The government's reliance on Pacifica's treatment of indecency as applied to the Internet was misplaced because of the differences between the two media at issue.141 "[T]ime has not been kind to the Pacifica decision. Later cases have eroded its reach, and the Supreme Court has repeatedly instructed against overreading the rationale of its holding."142

---

138 Id.
139 Id. at 849.
140 ACLU, 929 F. Supp. at 873.
141 Id. at 877.
142 Id. at 875 (citing Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 74 (1983)) ("regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication," where the government's interest in protecting children and the privacy of the home did not support a prohibition on allegedly offensive junk mail). Denver Area, 116 S. Ct. at 2415 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("We have already rejected [Pacifica's] application of this lower
**Turner Broadcasting v. FCC**\(^{143}\) was of particular significance to Judge Dalzell in limiting the reach of *Pacifica*. For the consumer, broadcast and cable television are identical. Both present television programming that is pervasive, intrusive into the home, and is easily accessed by children. Yet *Turner* held that, for First Amendment purposes, cable television should be treated differently from broadcast television. Compared to broadcast television, the large number of cable television channels distinguished the two media. The large, but finite, cable television capacity for speakers distinguished *Turner* from the technologically limited broadcast radio capacity for speakers in *Pacifica*.\(^{144}\) If the potential for hundreds of channels on cable television removed *Turner* from the reach of *Pacifica*’s reasoning, then the potential for millions of speakers on the Internet removed *ACLU* from *Pacifica*’s rationale.\(^{145}\)

Of particular importance to Judge Dalzell was the “democratizing” effect of the Internet on speech.\(^{146}\) Consider Judge Dalzell’s description of further basic attributes that distinguish the Internet from other means of mass communication for First Amendment purposes:

> First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers.\(^{147}\)

Judge Dalzell continued: “Individual citizens of limited means can speak to a worldwide audience on issues of concern to them.”\(^{148}\) Other means of mass communication, such as newspapers, radio and television, require enormous investments of capital, labor and time. Internet speech is available for those with access to a computer. It also removes the filter of the other means of mass communication thereby allowing for more diversity of thought. Speech of all stripes, character, and sophistication can be found on innumerable topics from politics to dog-grooming.\(^{149}\) Judge Dalzell characterized the government’s premise as being that the Internet’s “failure” was making too much speech too available to too

---

\(^{143}\) 512 U.S. 622 (1994).

\(^{144}\) Id.

\(^{145}\) Kay, *supra* note 100, at 371.

\(^{146}\) *ACLU*, 929 F. Supp. at 881.

\(^{147}\) Id. at 877.

\(^{148}\) Id. at 881.

\(^{149}\) Id.
many people. He asserted that "[t]his is exactly the benefit of Internet communication."150

The danger of the CDA to Internet communication would be profound. The economic impact of trying to comply with the speech restrictions would force many content providers off the Internet.151 Well-financed individuals and large corporations, some of which already dominate more conventional forms of media, would be able to afford the cost of compliance. The result would be a withering of diverse views and a homogenization of content that would mirror the views already expressed in the mainstream media. This would destroy the whole character of Internet communication.

2. Judge Sloviter, Obscenity, and Strict Scrutiny

Judge Sloviter found the CDA discriminated against First Amendment non-obscene protected speech based on its content152 and therefore reviewed the statute with strict scrutiny. Where the government restricts speech based on the content of the ideas contained therein the government is at its most intrusive. Where a statute makes content-based distinctions in speech regulation, the courts apply a strict level of scrutiny.153 The statute will survive such scrutiny if the government regulation serves a compelling interest and the means it uses are narrowly tailored to achieve that interest.

Many subjects available on the Internet are not obscene but may be labeled as patently offensive, at least in some communities.154 Under the

150 Id.
151 Id. at 879 ("Perversely, commercial pornographers would remain relatively unaffected by the (CDA), since we learned that most of them already use credit card or adult verification anyway."). They would thus be able to raise one of the specific CDA defenses.
152 Id. at 855.
153 Id.
154 See Miller v. California, 413 U.S. 15, 24 (1973) (where the Court defined obscenity so that it varied from jurisdiction to jurisdiction based on "contemporary community standards."). This portion of the Miller obscenity test was imported into the area of indecent and "patently offensive" speech in Pacifica and through FCC regulation. In the Internet context, the issue of which contemporary community standard to apply is problematic because Internet communication cannot be effectively limited to one location. See John S. Zanghi, Community Standards in Cyberspace, 21 U. DAYTON L. REV. 95, 114-16 (1995) (advocating a new obscenity test for the Internet focusing the standard on the word "contemporary," not "community"); William S. Byassee, Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community, 30 WAKE FOREST L. REV. 197 (1995). But see Keith A. Ditthavong, Paving the Way for Women on the Information Superhighway: Curbing Sexism Not Freedoms, 4 AM. U. J. GENDER & L. 455, 506 (1996) ("Attempting to create a national standard of what constitutes in a nation that is as diverse in culture as it is in morality is a social and legal impossibility."). In United States v. Thomas, 74 F.3d 701 (6th Cir. 1996), cert. denied, 117 S. Ct. 74 (1996), a California couple who posted certain material on their web site were tried and convicted in Tennessee under a Federal obscenity statute, 18 U.S.C. 1465, by a jury applying Tennessee community standards. Justice Burger in Miller stated "it is neither realistic nor constitutionally sound to read the First Amendment as requiring the people of Maine or Mis-
CDA provisions challenged in *ACLU*, the person or organization posting such material on the Internet would be subject to prosecution in those communities. Judge Sloviter criticized Congress and the Justice Department for relying on examples of Internet speech that would fall well on the prosecutable side of the line. These included "hard-core pornographic materials (even if not technically obscene)." These examples did not address the plaintiffs' allegations that the CDA's definitions of indecency are so imprecise that prosecutions will not be limited to the hard-core, but will extend to valuable protected speech on controversial subjects. Individuals could be prosecuted under the CDA merely because their ideas or language are unpopular, which is exactly the type of government behavior the First Amendment is designed to prevent.

Judge Sloviter offered examples of non-obscene, but potentially "indecent" material that might be prosecuted under the CDA. These examples included the Broadway play "Angels in America" which uses graphic language regarding homosexuality and AIDS, news articles about female genital mutilation, and National Geographic style photographs of sexually explicit sculptures in India. Other examples included advice to sexually active minors about methods for practicing safer sex, and some feminist literature.

Judge Sloviter determined that the CDA acted as a content-based restriction on speech. She reached this conclusion because a prosecutor could only determine that a particular message on the Internet violated the CDA by reading the message's content and then categorizing the message by the ideas it contained. Government hostility to "indecent" or "patently offensive" ideas is the hallmark of content-based restrictions. To let the government regulate what is decent or indecent is

sissippi accept public depiction of conduct found tolerable in Las Vegas or New York City." *Miller*, 413 U.S. at 32. But this may not effectively be applied to a world-wide medium that, unlike print or broadcast media, loses control of its distribution channel upon sending out a message.

156 *Id.*
157 *Id.* at 852-53.
159 See supra note 152.
160 The government argued in its brief that a lesser standard of review applies to certain broadcast media and that the Internet regulations should be given the same level of reduced scrutiny as broadcast television and radio. Judge Sloviter leaves that argument to Judge Dalzell and this article addresses it more fully in section V. B. 1., *supra.*
to let the government decide what one may discuss and debate.\textsuperscript{161} Therefore the court's application of strict scrutiny to the CDA was proper.

Judge Sloviter assumed for analytical purposes a compelling government interest in children's access to certain materials available on the Internet.\textsuperscript{162} Her ultimate conclusion was that the CDA was not narrowly tailored to achieve that government interest. As discussed \textit{supra}, under strict judicial scrutiny analysis the government must establish that a content-based regulation of protected First Amendment speech has used the least restrictive means to achieve the asserted compelling interest. The CDA failed the "least restrictive means" test in an obvious fashion. If Congress is concerned with child pornography,\textsuperscript{163} obscenity, sexual abuse, and sexual predators on the Internet, then it should effectively enforce existing laws already designed to prevent and punish such conduct.

Judge Sloviter held that the CDA was not narrowly tailored despite statutory defenses regarding "good faith" efforts to limit minors' access or use age verification technology. Congress could not draw a line precise enough to limit minors' access to indecent material while simultaneously protecting adult access to the same material.\textsuperscript{164} Judge Sloviter

\textsuperscript{161} See Cohen v. California, 403 U.S. 15, 26 (1971) ("we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."); Strossen, \textit{supra} note 158, at 465-70, 473-78.

\textsuperscript{162} ACLU, 929 F. Supp. at 853 (Sloviter, J.) ("I am far less confident than the government that ... it has shown a compelling interest in regulating the vast range of online material covered or potentially covered by the CDA. Nonetheless, I acknowledge that there is certainly a compelling interest to shield a substantial number of minors from some of the online material that motivated Congress to enact the CDA, and do not rest my decision on the inadequacy of the government's showing in this regard.").

\textsuperscript{163} There is a difference between child pornography and children viewing indecent material. In New York v. Ferber, 458 U.S. 747 (1982), the Court addressed the harm caused to a child by \textit{participating} in the creation of pornography and the subsequent distribution of that pornography. The Court upheld the criminal penalties for five reasons. First, the actual use of children as participants in the pornography was "harmful to the physiological, emotional, and mental health of the child." \textit{Id.} at 758. Second, attacking the economic chain of distribution in the child pornography industry would promote the government's interest, because it was the only portion of the industry forced into public view to achieve its economic goals. Further, the distribution of the photographs compounded the harm to children by maintaining and circulating the record of the abuse. Third, the pornographers could not shield themselves behind the First Amendment where the government objective was to attack the economic motive behind an admittedly illegal activity. Fourth, the Court found a \textit{de minimis} value for visual child pornography as an adjunct to literary, artistic, scientific or educational work. Fifth, child pornography is a category of speech not protected by the First Amendment because "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required" for visual child pornography. The Court in \textit{Ferber} focused on the child abused creating the pornography not the problem of other children viewing that pornography.

\textsuperscript{164} ACLU, 929 F. Supp. at 855.
found the government's distinctions inadequate, or technologically or economically unfeasible.\textsuperscript{165} Generally, Internet speakers cannot control where or by whom their messages will be read. Though some age screening methods are available, implementing them is cost prohibitive. Most non-profit organizations and many for-profit organizations would be forced to stop speaking because they could not afford the technology to comply with the CDA.\textsuperscript{166} Even those who implemented the technology would not be certain they could screen out all minors, and therefore might also self-censor to protect themselves from liability.\textsuperscript{167}

Specifically, credit card and adult personal identification numbers are "not technologically or economically feasible for most providers."\textsuperscript{168} Another defense provided by the CDA is the use of available technology to prevent access by minors. No such technology exists that is practical for most providers.\textsuperscript{169} In addition, the use of "tagging" is dependent on the creator of the site properly evaluating and tagging its site and on parents loading software that would read the tagging scheme. Information providers would need to rely on parents, teachers and others to implement the software programs and the failure of these third parties would subject the provider to liability.\textsuperscript{170} Creating better tagging technology would not solve the problem. The labor intensive task of screening all messages posted on a bulletin board, for example, would force many providers to limit or cease operating.\textsuperscript{171}

Judge Sloviter also rejected the government argument that the CDA should be upheld because the court's decision would create a need for blocking material which would be satisfied by "the 'creative genius' of the Internet community" and presumably by economic market forces.\textsuperscript{172} Judge Sloviter stated that "I can imagine few arguments less likely to persuade a court to uphold a criminal statute than one that depends on future technology to cabin the reach of the statute within constitutional bounds."\textsuperscript{173}

In \textit{ACLU} the government argued that the legislature provided certain defenses for speakers in an attempt to insulate the speakers from prosecution. Nonetheless, as Judge Sloviter points out, the threat of criminal penalties under a speech restrictive statute such as the CDA

\footnotesize{\textsuperscript{165} Id.\textsuperscript{166} Id.\textsuperscript{167} But see Ditthavong, \textit{supra} note 154, at 501-06 (proposing legislation limiting Internet pornography, but providing defenses for system operators if they used "age validation checks" or lacked knowledge of the posting of pornography on their sites).\textsuperscript{168} ACLU, 929 F. Supp. at 856.\textsuperscript{169} Id.\textsuperscript{170} Id.\textsuperscript{171} Id. at 849, 856.\textsuperscript{172} Id. at 857.\textsuperscript{173} Id.}
does not permit speakers the comfort of exercising First Amendment rights without looking over their shoulder.\textsuperscript{174} The government’s “reassurance” that after indictment one may raise certain defenses would not prevent a chill on Internet communication, since it is unclear what might be prosecuted under the CDA.

3. **Judge Buckwalter and the Vagueness Doctrine**

In *ACLU*, Judge Buckwalter discussed the unconstitutional vagueness of the terms “patently offensive” and “indecent” in the CDA.\textsuperscript{175} Freedom of speech is chilled when speakers can not ascertain if their expression violates a vaguely-worded statute. Those who might otherwise venture close to the restricted area instead steer clear because of the threat of prosecution. The legislature’s failure to adequately define speech restrictions results in self-censorship by citizens too fearful to speak.

The vagueness issue has apparently been disposed of by *Denver Area* where Justice Breyer’s plurality opinion found that language defining “patently offensive” in the cable television context was not constitutionally vague because it was similar enough to “language previously used by this Court for roughly similar purposes.”\textsuperscript{176} The Court and the FCC have dealt with those terms a sufficient number of times to give...

\textsuperscript{174} *Id.* at 856-57.

\textsuperscript{175} The doctrine of vagueness seeks to vindicate three related policy goals. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972). First, the language of the statute must provide clear enough definitions of its terms to alert individuals subject to its strictures as to what is prohibited and what is acceptable behavior. In short, it is a matter of notice. *ACLU*, 929 F. Supp. at 860. Second, clear definitions of the statute’s terms restricts the discretion of enforcement officials who may otherwise use it in a selective or arbitrary manner. As Judge Buckwalter writes, it is a question “of simple fairness.” *Id.* Third, in the free speech context, protected speech will be chilled because speakers will not wish to risk potential prosecution. Unconstitutionally vague speech restrictions interrupt the free flow of ideas crucial to a democracy. *Id.*

Judge Buckwalter found the CDA unconstitutionally vague, but specifically refused to make a sweeping ruling on the appropriate standard for free speech on the Internet. In this regard his opinion anticipated Justice Breyer’s opinion in *Denver Area* counseling caution in determining the proper approach to free speech cases in new media. Judge Buckwalter concluded that future regulation of Internet speech is possible if the statute’s language is clearer and the restrictions are “sensitive to the unique qualities” of the Internet as a communication medium. *Id.* at 859.

Judge Buckwalter quotes from Smith v. California, 361 U.S. 147, 151 (1959): “This court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.” The CDA does not place any limitations on a prosecutor’s interpretation of the two terms. The statutory definitions are absent so no guide exists to warn citizens away from prohibited speech or to restrain prosecutors from attacking permitted speech. *ACLU*, 929 F. Supp. at 860.

\textsuperscript{176} *Denver Area*, 116 S. Ct. at 2389-90 (citing Miller v. California, 413 U.S. 15, 24 (1973); and *Pacifica*, 438 U.S. at 748, 750).
some reasonable level of definition and notice to speakers who may engage in speech bordering on the patently offensive.\textsuperscript{177}

VI. FINDING THE APPROPRIATE ANALOGY OF COMMUNICATIONS MEDIA ATTRIBUTES IN THE INTERNET CONTEXT


The lesson of the \textit{Denver Area} plurality is that a court examines each medium of expression on its own attributes with a cautious eye so as not to inhibit a new means of communication with overly restrictive regulation. The question then becomes: What are the attributes of the Internet that will provide the best analogies for First Amendment analysis? One commentator has likened discussion on the Internet to a town meeting where everyone who wishes to participate has the opportunity.\textsuperscript{178} Another commentator sees the Internet as the agora of ancient Greece where citizens met to discuss the issues of the day.\textsuperscript{179} It may also be likened to a megaphone amplifying the reach of one's message, but at the expense of potential intrusiveness. Each of these analogies ultimately proves unsatisfactory, however, because none can fully accommodate the Internet's unique attributes - including its global scope, diversity of perspective found beyond one's geographic-political setting, access to information, and ability for self expression.\textsuperscript{180} Cable television, broadcast television, and radio and print journalism represent inapt analogies because they lack the interactive aspects of the Internet and today are controlled by a limited number of people or entities.\textsuperscript{181}

Applying Justice Breyer's case analogy approach to the \textit{ACLU} Internet case, the government's constitutionally acceptable approach of allowing cable operators to make an editorial decision that might restrict cable programmers' speech under section 10(a) does not fit the Internet

\textsuperscript{177} Cf. \textit{Action for Children's Television v. FCC}, 852 F.2d 1332, 1338-39 (D.C. Cir. 1988) (Judge Ruth Bader Ginsburg (later Justice Ginsburg) rejecting a vagueness challenge to FCC indecency regulations in the broadcast television context, because the courts had previously upheld such provisions thereby giving broadcasters notice of the scope of the indecency definition). \textit{See} Weinberg, \textit{supra} note 71, at 221-23 (interpreting Judge Ginsburg's \textit{Action for Children's Television} decision).

\textsuperscript{178} Mike Godwin, \textit{The First On a New Frontier}, \textit{Quill}, Sept. 1991, at 18, 19.

\textsuperscript{179} Anne Wells Branscomb, \textit{Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces}, 104 \textit{Yale L.J.} 1639 (1995).

\textsuperscript{180} \textit{See} Branscomb, \textit{supra} note 179, at 1641-43 (discussing the Internet attribute of providing the opportunity to focus on words and ideas without preconceived notions about the speaker's message based on the physical appearance, race or gender of the speaker); \textit{see also id.} at 1643, 1675-76 (discussing theoretical and practical limitations of anonymity on-line).

\textsuperscript{181} Ironically, media powers are rushing to go "on-line." \textit{See} MSNBC, \textit{New York Times}, Delphi (Rupert Murdoch owned).
model. While the government has a compelling interest in protecting children in both settings, the three other factors in Justice Breyer's section 10(a) analysis are not transferrable to the Internet setting. The concern over balancing the access rights of cable programmers against the editorial rights of cable operators is not analogous to the open access, decentralized, interactive nature of the Internet.\footnote{See Berman & Weitzner, supra note 9, at 1620 (positing that the best way to serve First Amendment values is to preserve the Internet's "decentralized open access and user control over content," as well as minimizing government control).} Justice Breyer in Denver Area also found significance in the permissive, rather than prohibitory, nature of section 10(a). The three judges in ACLU found that the CDA effectively created an absolute ban on "indecent" speech on the Internet for many content providers. The Denver Area plurality's rationale for finding section 10(a) constitutional is not applicable to the Internet.

The Court's section 10(b) analysis also makes a poor analogy because that section does not parallel the CDA. Section 10(b) is an absolute command to a central authority to "segregate and block" patently offensive programming. No central authority exists on the Internet. Requiring individual content providers to perform that function would require many speakers to be silent because of the financial and administrative burdens. Also the speech of many ACLU plaintiffs is a mixture of political and allegedly "indecent" speech. The ACLU court found it was technologically infeasible to segregate only part of a site.

Justice Breyer's treatment of section 10(c) is also too fact specific to the cable context to be applicable to the Internet context. The Internet's wide-open architecture\footnote{See Berman & Weitzner, supra note 9, at 1628.} belies the existence of a central authority such as a cable operator.\footnote{There is no parallel on the Internet to a preexisting monitoring authority for the community which could achieve the government's interest of protecting children more efficiently and locally than the federal statute's program. Accordingly, using Denver Area's section 10(c) analogy, the CDA might pass constitutional muster because there is no alternative authority to control patently offensive material on the Internet. The networking community, however, has developed informal methods of control including "flaming," "bombing," and "stick to the point." See Branscomb, supra note 179, at 1639, 1656-59 (describing the hostile response to a flood of "junk mail" attorney advertising on the Internet); id. at 1659-60 (describing the debate regarding anonymous remailers that were viewed as a threat to "civility" on the Internet); Kay, supra note 100, at 385-387. See also Allegations of Child Porn Close E-mail Operation, BOSTON GLOBE, Aug. 31, 1996, at A2 (an anonymous remailer relay service was forced to close due to apparently false allegations that the service provided child pornography).} Therefore, the Internet context does not encounter the issue of the government seizing or restoring editorial control to a

\footnote{See Branscomb, supra note 179, at 1652-53.}
central authority such as a cable operator. In *Denver Area*, Justice Thomas foresaw conflicts due to the government usurping the First Amendment editorial rights of cable operators by favoring access rights of cable programmers. No such editorial interests are at stake in the Internet context.

Further, the administrative nature of the *Denver Area* statute is different from the CDA, which imposes criminal sanctions on any user of the Internet who engages in "patently offensive" speech. The difference between criminal sanctions and a civil penalty imposed by the FCC is significant. Forcing individuals to choose between their liberty and their right to express otherwise protected speech is qualitatively different from requiring a corporate cable operator to choose between forgoing potential leased channel revenue and having the FCC place a note in the operator’s file for future licensing/franchising decisions.185

B. INTERNET ACCESS BY CHILDREN AND IN THE HOME

The *Denver Area* plurality looks to the rationale for the rule, not a blind adherence to a category. One must find the proper analogies for the government’s regulatory interest and the speaker’s free speech interest. Applying this approach to ACLU and the CDA’s Internet regulation, the government has a compelling interest in protecting children from indecent and patently offensive material, particularly when sent directly into the home without the parents’ ability to effectively screen the material. In opposition to the government interest are adult speakers’ and listeners’ interests in not having all Internet communications reduced to that acceptable to a child, and being free of the threat of prosecution and the chill on speech that a vague statute imposes on speakers.

Though analogies may be made to *Pacifica*, *Denver Area*, and *Sable*, they are ultimately unsatisfactory. The context of the indecent language in *Pacifica* centered on the intrusive nature of the broadcast media that “confronts the citizen, not only in public, but also in the privacy of the home.”186 Prior warnings were of no avail to a listener who tuned in

---

185 See *Pacifica*, 438 U.S. 726 (re administrative penalty to broadcaster). In *ACLU*, Judge Buckwalter found that the CDA’s criminal sanctions implicate the Fifth Amendment’s Due Process clause as well as the First Amendment. The government cannot take away a person’s liberty or property without precisely defining what behavior violates the statute and invokes the penalty. “Distilled to its essence, due process, is, of course, nothing more and nothing less than fair play. If our citizens cannot rely on fair play in their relationship with their government, the stature of our government as a shining example of democracy would be greatly diminished.” *ACLU*, 929 F. Supp. at 859. In the First Amendment context, government’s failure to define precisely prohibited speech has consequences beyond those for the particular individual jailed for his speech. Others will censor their own protected speech for fear of prosecution. The rough and tumble of the contest among ideas will be diminished. The CDA’s language need not be perfect, but it fell far short of satisfying the First Amendment.

186 438 U.S. at 748.
after the warnings were given. Furthermore, "broadcasting is uniquely accessible to children, even those too young to read." The FCC did not ban indecent language in broadcast media, but merely relegated it to late night time slots when children were presumably asleep.

Cable television, like the radio broadcast in *Pacifica*, intrudes directly into the home and is accessible to the youngest and most vulnerable children. Unlike *Pacifica*, however, Justice Souter in *Denver Area* determined that in the cable television context, technology provides greater control over the flow of information into the home (i.e., the V-Chip).

Like cable, telephone dial-a-porn is less intrusive than radio. In *Sable* the government was concerned with protecting children and unwilling listeners from indecent and pornographic language available through a dial-a-porn telephone business. The statute’s total ban was too extreme a remedy where callers to the service were willing listeners who were not being surprised by intrusive broadcasts in their home, and most services required use of a credit card or some other identifier that presumably limited a child’s access.

Justice Breyer specifically distinguished *Sable* from the cable television context because in *Sable* there “was not only a total governmentally imposed ban on a category of communications, but also involved a communications medium, telephone service, that was significantly less likely to expose children to the banned material, was less intrusive and allowed for significantly more control over what comes into the home than either broadcasting or the cable transmission service before us.”

*Sable*’s reasoning transfers readily to the Internet context. Justice Breyer’s description of the unconstitutional regulation of pornographic speech over the telephone fits the challenged regulation of indecent speech over the Internet. “Going on-line” is volitional, and finding an indecent site on the Internet is not as simple as flipping a switch on the

---

187 Id. at 749.
188 *Denver Area*, 116 S. Ct. at 2401 (Souter, J.).
189 Id. at 2402. Justice Souter cites Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 114 S. Ct. 2445 (1994), as an example of how cable television defies neat categories. In *Turner*, the Court found that cable television was not like broadcast television “with respect to the factors justifying intrusive access requirements under the rule in *Red Lion*.” *Denver Area*, 116 S. Ct. at 2401 (Souter, J., concurring). But cable television is like broadcast television and radio when viewed using the *Pacifica* rationale for regulation. See Kay, *Sexuality on the Internet*, supra note 100, at 383.
190 *Denver Area*, 116 S. Ct. at 2388 (Breyer, J., plurality opinion).
191 Kay, supra note 100. But see Berman & Weitzner, supra note 9, at 1632 (analysis of telephone system speech regulation is not an appropriate model for Internet speech regulation because the interactive nature of the Internet “offers users the ability to exercise control over precisely what information they access.”).
radio or television dial (or remote control).\textsuperscript{192} Rather, it is more akin to selecting a phone number, dialing it, and then staying on the line after the dial-a-porn provider has identified itself, but before the pornographic language begins. The "listener" in the Internet and dial-a-porn contexts are not unwilling listeners, captive audiences, nor victims of an unannounced assault in their homes.

The telephone analogy breaks down, however, because the danger to children is dramatically reduced in the context of the Internet. The child "too young to read," who is affected by the language in the \textit{Pacifica} or \textit{Sable} contexts is most likely not at risk on the Internet because to gain access to indecent language one must be able to send, receive, or select a written message. Even children who can read must possess a certain level of verbal sophistication to navigate to a site containing indecency.\textsuperscript{193} Furthermore, while the Internet is different from cable and radio for the same reasons that telephone service is distinguishable from cable and radio, most pornography businesses' sites also display their message only after warnings that the site contains adult content.\textsuperscript{194} One cannot just "tune in" to an Internet source without catching the warning as can be done in the cable and radio contexts.

\section*{C. Applying the Public Forum Approach}

Justice Kennedy's public forum, content-based First Amendment analysis may be applied to government restrictions on Internet speech. Like the plurality in \textit{Denver Area}, Justice Kennedy recognized the power that new means of communication have in shaping ideas, debate and access to information. Justice Kennedy anticipated the complexities sure to attend application of the Court's First Amendment jurisprudence to Internet speech restrictions. He stated the following:

Minds are not changed in streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media. The extent of public entitlement to participate in those means of communication may be changed as technologies change; and in expanding those entitlements the Government has no greater right to discriminate on suspect grounds than it does when it effects a ban on speech against the backdrop of the entitlements to which we have been more

\begin{itemize}
\item \textsuperscript{192} \textit{ACLU}, 929 F. Supp. at 844, 876 n.19 (Judge Dalzell noted that "we have found as a fact that operation of a computer is not as simple as turning on a television, and that the assautive nature of television is quite absent in Internet use.") (internal citations omitted).
\item \textsuperscript{193} \textit{Id.} at 844, 876.
\item \textsuperscript{194} \textit{Id.} at 844.
\end{itemize}
accustomed. It contravenes the First Amendment to give Government a general license to single out some categories of speech for lesser protection so long as it stops short of viewpoint discrimination.  

Justice Kennedy would not find the government's discrimination against "patently offensive" and indecent speech on the Internet any more agreeable than the government's restrictions on "patently offensive" cable programming. In both cases the government has placed special burdens on communicating a type of speech whose content it disfavors. Accordingly, if cable television speech restrictions are subject to strict scrutiny then Internet speech restrictions must also be subject to strict scrutiny.

In Lee, Justice Kennedy set forth a method for determining when an area is a public forum. In discussing the public forum attributes of a government-owned airport terminal he stated:

our public forum doctrine must . . . allow the creation of public forums which do not fit within the narrow tradition of streets, sidewalks, and parks. Under the proper circumstances I would accord public forum status to other forms of property, regardless of its ancient or contemporary origins and whether or not it fits within a narrow historic tradition. If the objective, physical characteristics of the property at issue and the actual public access and uses . . . indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum.

The Internet meets Justice Kennedy's test of a public forum based on its architecture and the enormous degree of public access and participation. It is an open meeting place for all members of the public.

---

195 Denver Area, 116 S. Ct. at 2415-16 (Kennedy, J., concurring in part and dissenting in part).
197 International Soc'y, 505 U.S. at 698.
198 The telecommunications ancestors of the Internet were originally organized by the government to create communications links for the military in the event of disruption of normal means of communications during war time. Though the entity that we call the "Internet" has grown dramatically and is different from its initial scope, it was still created by the government as a speech forum and therefore is subject to the public forum doctrine.

If one views changes in the nature of the Internet as too dramatic to categorize it as the same entity as originally created, it nevertheless may be subject to the public forum doctrine. Justice Kennedy in Denver Area characterized public access channels on cable television as public fora. This was true "even though they operate over property to which the cable operator holds title." Denver Area, 116 S. Ct. at 2409 (Kennedy, J. concurring (citing Cornelius v.
where ideas are exchanged, issues are debated, and self expression flourishes. Justice Kennedy also found public access cable channels to be government designated public forums because the government created and dedicated them to public speech. No entity need dedicate the Internet to free communication of ideas because that has been its purpose from its inception.

Applying Justice Kennedy's use of the common carrier analogy to the Internet has support at the policy level for at least four reasons. First, under the common carrier approach, efficiency of service would suffer if bulletin board operators or other systems operators were required to monitor messages. Second, the approach properly adopts the idea that it is unfair to hold common carriers to knowing what constitutes an indecent message in communities around the country. Third, the approach accepts that monitoring of messages invades an individual's privacy. Finally, this approach correctly understands the difficulty of packet switching technology. Although this technology routes messages and parts of messages through various networks, the operator of that network may only have "possession" of the indecent message for a moment, making criminal liability problematic.\(^1\) If private, "indecent" speech over a common carrier such as a telephone can not be restricted, then the same speech on the Internet can not be regulated.

D. The Village Green Analogy

The Internet has become the new "village green" for voicing ideas and persuading one's listeners.\(^2\) The village green was traditionally a central meeting place of universal access, like a town square or park, where different views might be aired by any speaker. The Internet fits this model by providing dramatic opportunities for access and expression for the common citizen.

Other mediums of communication do not provide an adequate analogy. The interactive, wide-open Internet communication system clearly is not analogous to the hierarchical "bottleneck" of corporate-controlled television communication systems (broadcasting being the medium the Court has been most willing to allow the government to regulate). The Internet's text-driven content and its infinite number of potential speakers is not analogous to cable or broadcast television's easily accessible visual content and its limited spectrum or number of cable channels.

\(^{199}\) NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 800 (1985). Applying the public forum doctrine to the Internet, which is not "owned" by anyone, would be less intrusive than applying it to privately owned property.

\(^{200}\) ACLU, 929 F. Supp. at 882 (Dalzell, J.) ("The Internet is a far more speech enhancing medium than print, the village green, or the mails.").
Although the Internet is, in some ways, as accessible as a telephone, the comparison does not fit when considering the Internet’s ability to communicate ideas to a mass audience.

The best analogy is to the village green or town square. There, speakers and listeners congregated to exchange ideas on matters of interest to them. The potentially large number of participants and the fluid manner in which their roles changed, from speaker to listener and back to speaker again, mirror Internet communication. On the village green, obscene speech is outside the protection of the First Amendment and may be prohibited and prosecuted. Indecent and offensive speech, however, are protected and the listener’s recourse is to avert one’s eyes or avoid that part of the discussion. If a parent wishes to shield a child from that form of speech, the parent can supervise the child to assure that the child does not enter the “adult bookstore” of the village green.

The parent should likewise be responsible for monitoring the child’s behavior or blocking the child’s access to such materials available on the Internet. This leads to the quite unrevolutionary observation that the proper parties to raise children and monitor their behavior are the children’s parents, not the government.

Justice Breyer’s concern that the government not be left defenseless to solve problems associated with new media would not be left unaddressed. The government can still restrict the time, place, and manner of speech in a content-neutral manner, provided it advances an important government interest while restricting speech no more than necessary and leaving open alternate channels of communication. This is true of any speech regulation case, even those on the traditional public fora of streets, parks, and village greens.

An additional advantage of employing the village green analogy is that it allows the four justices in the Denver Area plurality opinion to find common ground with the public forum approach advocated by Justice Kennedy in his Denver Area opinion. The village green is the classic public forum “held in trust for the use of the public and, time out of mind, . . . used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”

Though the newest forum for communication, the Internet is the functional equivalent of the traditional village green. Justice Kennedy stated that public access chan-
VII. CONCLUSION

Justice Breyer preferred a "go-slow" approach in the regulation of the cable television context. He searched case precedent for analogies to other communications systems' attributes, and hesitated to bind the development of the new media by forcing it into a pre-existing strict category of speech analysis. In the rapidly evolving technology communications context he preferred a case-by-case analogy approach rather than handcuffing the technology with inappropriate rules. Indeed, in this era of deregulation, differing communications technologies are converging into one system. There may be a day in the not too distant future where telephone, television, and computer services all reach the home through the same technology system. Speech regulation may warp and shift the potential of the new medium in unanticipated ways.

Using Denver Area as a guide, Justice Kennedy would apply a more categorical approach. He would find the Internet to be a public forum, and that the CDA discriminated against indecent speech based on its content. Therefore, he would apply strict scrutiny and find that the CDA was not narrowly tailored to serve a compelling government interest.

If the four Justices in the plurality opinion along with Justice Kennedy and Justice Ginsburg (who concurred in Justice Kennedy's opinion) would all employ the village green analogy, the Court would produce a majority opinion striking down the regulation of indecent speech on the Internet. This would provide clear guidance to lower courts, potential regulators and prosecutors, and Internet speakers. It would also prevent a chilling silence from falling over the electronic village green.