1997

The Supreme Court's Approach to the First Amendment in Cyberspace: Free Speech as Technology's Hand-Maiden.

Mark S. Kende

THE SUPREME COURT'S APPROACH TO THE FIRST AMENDMENT IN CYBERSPACE: FREE SPEECH AS TECHNOLOGY'S HAND-MAIDEN

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I. INTRODUCTION

On June 26, 1997, the U.S. Supreme Court decided its first case involving cyberspace, *Reno v. ACLU*.[1] The Court ruled that the Communication Decency Act (CDA),[2] a federal law that bans the communication on the Internet of indecent speech aimed at children, violates the First Amendment's guarantee of freedom of speech.

The question of what free speech rights exist in cyberspace has been aptly described as a "battle of the analogies." Under the U.S. Supreme Court's First Amendment jurisprudence, free speech rights vary with the technological medium through which the speech is expressed. The Court has been the most solicitous of speech from the print media (like newspapers and magazines) and the least respectful of broadcast speech (from television or radio).[3] The question then becomes: Is expression on the Inter-

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1. 117 S. Ct. 2329 (1997).

2. 47 U.S.C.S. § 223(a)-(h) (1995 & Supp. 1997).

3. Compare *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (Florida's right to reply statute requiring newspapers to give political candidates a right to respond to criticism was struck down under the First Amendment) with *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (FCC fairness doctrine requiring T.V. broadcasters to permit politicians an opportunity to respond to criticism from a T.V. sta-

net more like print, or like T.V. broadcasts, or like some other medium, such as telephones? The Supreme Court discussed this issue in *ACLU*.

This commentary deals mainly with a different but related question that is less examined: What effect will cyberspace have on how the Supreme Court views the First Amendment? One way to start answering that question is to compare *ACLU* with a Supreme Court decision from the 1995-96 term involving indecent speech on cable television, *Denver Area Education Telecommunications Consortium, Inc. v. FCC*[4]

At first glance, the two decisions appear to conflict. In *Denver*, Justice Stephen Breyer wrote a plurality opinion advocating a non-categorical "wait and see" approach to free speech cases involving new technologies. In *ACLU*, however, the Court ruled decisively that the CDA's restriction on Internet indecency was subject to strict scrutiny which it failed to pass.

Moreover, none of our current free speech theories seem able to reconcile these cases. These include the marketplace, self-fulfillment, social outlet, and political theories of free speech. My view, however, is that these two cases can be reconciled once it is understood that the Supreme Court is developing a new model of free speech analysis in Internet-related cases.

The Court's new model can best be described as the "technology-driven" First Amendment because it is more concerned with preserving the development of new telecommunication technologies like the Internet than with the niceties of First Amendment doctrine. This commentary shows how the Court has started to develop this new First Amendment model, and offers several criticisms of how the Court is employing the new model.

II. THE DENVER CASE

The *Denver* case examined the constitutionality of three provisions of a federal law regulating cable television.[5] The first

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tion is upheld under the First Amendment). There is also a lengthy discussion of the reasons why restrictions on broadcast get more lenient First Amendment scrutiny in *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2456-57 (1994). See also Norman Redlich, et. al., *Understanding Constitutional Law* 349 (Matthew Bender, 1995) ("At the very least, the cases reaffirm that the Court treats the broadcast media and print media differently . . . .").

4. 116 S. Ct. 2374 (1996).

5. Cable Television Consumer Protection and Competition Act of 1992, Pub. L.

provision authorized cable operators to ban indecent programming on their leased access channels (the "ban" provision).[6] The second provision required those cable operators who permit such indecent programming to segregate it onto one channel, and to block its availability until the cable subscriber requests it (the "segregate and block" provision).[7] Finally, the law permitted cable operators to prohibit indecent programming on public access channels (the "public access" provision). Indecent speech was defined in the law as programming depicting "sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards."[8]

The Court upheld the constitutionality of the "ban" provision, but struck down the "segregate and block" and the "public access" provisions. In upholding the provision that lets cable operators ban indecent material, Justice Breyer wrote a plurality opinion that was extraordinary in several respects. He explicitly refused to select either a definitive level of scrutiny or a category in which to place free speech regulations of indecent material on cable television.[9] He based this refusal on a view that any choice of a First Amendment category today for this dynamic technology would be based on assumptions that will be rendered obsolete by further innovations.[10] He did not want the Court inadvertently to block these innovations.

Moreover, despite saying that he was not selecting a level of scrutiny or a category, Breyer created a new default standard of review called "close judicial scrutiny," which he said underlay the Court's various speech cases.[11] Using this approach, he said that the cable law could not be sustained unless the government could demonstrate that the law "properly addresse[d] an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech."[12]

Breyer upheld the ban provision by reasoning that it restored to private cable operators some limited editorial freedom

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No. 102-385, 106 Stat. 1460, § 10(a), 10(b), and 10(c), codified at 47 USC §§531 note, 532 (1994).

6. Id. at § 10(a).

7. Id. at § 10(b).

8. Id. at § 10(a)(2).

9. *Denver Area Education Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. 2374 (1996).

10. Id. at 2384-85.

11. Id.

12. Id. at 2385.

and authority over indecent programming—authority they would possess in the absence of governmental cable regulations.[13] Thus, the ban was a flexible law, not a mandatory governmental prohibition. He further found the state had a powerful interest in preventing children from seeing this material and that the provision was not vague.[14]

Breyer then struck down the segregate and block provision as being too rigid and burdensome.[15] The segregate and block provision limited cable operators to showing indecent material on one channel and required blocking regardless of the circumstances of the customer. Under this provision, a customer who wrote to his cable company seeking to view the indecent leased access channel might also have to wait up to 30 days for no good reason before the cable company unblocked that channel. Breyer said this waiting period was too restrictive given the availability of other technologies, such as the V-chip.[16]

Breyer also struck down the third provision, which permitted cable operators to ban indecent programming on public access channels. Breyer reasoned that this provision was not justified since there was insufficient evidence to prove that indecent programming was a problem on such channels, especially since municipal governments or their agents usually regulate the content of the material on such channels anyway.[17]

Justice David Souter wrote a concurrence indicating that the Court should not yet decide on a definitive standard for newer technologies in order to "do no harm" to technological innovation.[18] To support his position, Souter explained that the Court had caused great confusion by stumbling around for 16 years in the obscenity area before settling on the *Miller v. California* standard.[19] Souter said that the Court should not create the same problem with these newer technologies by prematurely adopting an incorrect standard. Souter said that Breyer was therefore right to rely heavily for support on "direct analog[ies]"

13. Id. at 2387.
14. Id. at 2387-88.
15. Id. at 2394.
16. Id. at 2392. The V-chip is a device that can be installed in a TV to enable parents to block out indecent programming.
17. Id. at 2397.
18. Id. at 2403 (Souter, J., concurring).
19. *Miller v. California*, 413 U.S. 15 (1973).

to other specific cases, rather than taking a categorical approach.[20]

Justice Anthony Kennedy (concurring in part and dissenting in part) strongly disagreed with Breyer's refusal to adopt a clear standard and stated that Breyer was overly "distracted" by these dazzling new telecommunications technologies.[21] Kennedy said that the Court should not abandon its First Amendment jurisprudence in such a context but should instead try to apply established First Amendment principles to the case.[22]

Kennedy then explained that government regulation of cable television systems had made the leased access channels into a "designated public forum."[23] Thus, the content-based restrictions of indecent speech on cable, at issue in *Denver*, should receive the strictest scrutiny and be struck down. Kennedy's public forum analogy could be applied to the Internet as well.

Justice Stevens authored a concurring opinion that criticized Justice Kennedy's public forum analogy. Stevens reasoned that if a medium became an irreversible public forum every time the government opened it up to the public, that would actually deter the government from opening the medium and reduce free speech. Justice Thomas, concurring and dissenting in part, rejected the view that cable programmers or viewers had any free speech rights at stake in the case. He said that the only parties with free speech rights were the cable operators, who owned these systems, and that their rights were not violated because the law restored their editorial authority.

III. LEGAL ANALYSIS

Although I agree with the result arrived at by Breyer in *Denver* regarding the constitutionality of each provision, I believe that Justice Breyer's non-categorical approach reflects how distracted he is by the Internet, as Justice Kennedy asserted. Breyer's flexible approach may seem appealing because it resembles the quickly changing world without boundaries of cyberspace, and seems to facilitate that development. It is no accident that the Harvard Law Review *Foreword* by Professor Cass Sunstein, which discusses the *Denver* case, is titled *Leaving*

20. *Denver*, 116 S. Ct. at 2402.
21. Id. at 2406 (Kennedy, J., concurring in part and dissenting in part).
22. Id. at 2404.
23. Id. at 2409.

Things Undecided.[24] But Breyer's approach is mistaken for at least five reasons.

First, the new and changing nature of this technology does not diminish Breyer's obligation to decide the case or controversy before him on the facts in existence at that time. It seems as though Breyer was more worried about how his decision would affect the Internet than he was about the ordinary cable television case before him. Moreover, the Court cannot wait, in these technology cases, until some definite moment in the future when these technologies will stop changing and then suddenly announce a perfect standard. Technology never stops changing. And any standard will be imprecise until it is applied in actual cases.

Second, Breyer's statement that the Court could not select a definitive standard to govern cable in the Denver case was strange since only two years earlier, in *Turner Broadcasting Systems, Inc. v. FCC*,[25] the Court applied an intermediate standard of review to a structural access regulation of cable television. That decision was reaffirmed earlier last term.[26] That lesser standard would seem appropriate for the ban provision in the Denver case because that provision did not totally prohibit indecent speech—the government gave private operators the authority to make that decision.

Third, Breyer's deliberately indecisive opinion resembles the Supreme Court's much-criticized 1967 obscenity decision in *Redrup v. New York*,[27] when a badly divided Court began a period of ruling on obscenity cases without agreeing on any standard. The Court in those cases simply counted hands, after viewing the allegedly obscene films, and if five of the justices felt that they "knew it when they saw it" then the conviction was upheld. The *Redrup* period was one of the Court's darkest and most lawless days. Breyer's refusal to adopt a standard when the Court is again divided over sexually explicit speech sounds eerily familiar.

Ironically, Justice Souter's attempt to distinguish his own and Breyer's purportedly prudential "do no harm" approach

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24. Cass R. Sunstein, *The Supreme Court 1995 Term: Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4 (1996).

25. 114 S. Ct. 2445 (1994).

26. *Turner Broadcasting Systems, Inc. v. FCC*, 117 S. Ct. 1174 (1997). The case returned to the Court after having been remanded.

27. *Redrup v. New York*, 386 U.S. 767 (1967).

here from the Supreme Court's 16-year record of flip-flops on an obscenity standard ignores the striking similarity between the decisions. The obscenity cases also demonstrate that the Court can sometimes only arrive at a consensus by initially establishing a standard, and then revising that standard over time based on how the test works in the lower courts. This valuable testing and refining, however, cannot take place if the constitutional standard is left up in the air.

Fourth, Breyer's technology-driven approach has many of the weaknesses that led the Court only a few years ago to repudiate the trimester framework for assessing the constitutionality of abortion regulations established in *Roe v. Wade*.[28] The trimester approach was often criticized as more like a medical code contingent on the latest trends in medical technology than like constitutional law. Thus, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[29] the Court upheld a woman's right to an abortion but repudiated the trimester system. The Court said instead that laws restricting abortion before viability are permissible unless they impose an "undue burden."[30] The Court also reasoned that the *Casey* standard, by avoiding a technology-driven approach, would end the uncertainty generated by *Roe*.[31] In contrast to *Casey*, the Court's refusal to adopt a clear standard in *Denver* will only create uncertainty for lower courts and lawyers. The myriad opinions in this case will exacerbate the problem.

Fifth, Justice Breyer's reliance on direct analogies to other cases, rather than on categorical standards, provides little guidance as to why certain speech cases with similar facts are supposedly different. Apparently aware of this problem, Breyer adopts a default standard of review. But the meaning of this temporary new standard is quite uncertain, unlike the well-established categorical standards that the Court could have relied upon. Breyer's use of this default standard is also paradoxical because he maintains that he is not really adopting a standard.

Two defenses of Breyer's approach deserve mention. The first is from Sunstein's article summarizing the Supreme Court's

28. *Roe v. Wade*, 410 U.S. 113 (1973).
29. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 873 (1992).
30. Id. at 874.
31. Id. at 872.

1995-96 term.[32] Sunstein essentially argues that the Court best preserves its legitimacy in a democratic society by not deciding questions beyond those essential to a case.[33] To some extent, this could explain Breyer's opinion. But the *Denver* Court's refusal to decide on a generally applicable standard and its divided opinions, provide little guidance to lower courts and lawyers. Thus, over time, the *Denver* decision is likely to *diminish* the Court's legitimacy in the public eye.

A second defense is that Justice Breyer was simply more honest and candid than most Justices because he admitted that he was not sure how to decide this question, rather than definitively adopting vague standards. While Breyer may have been unusually candid, that does not satisfy his expected job requirements. He is expected to establish meaningful legal rules or standards that lower courts can follow on a consistent basis.[34] He did not do that.

IV. THE ACLU CASE

The ACLU case assessed the constitutionality of two statutory provisions that criminalized indecent speech on the Internet aimed at minors. The first provision prohibited the knowing transmission of obscene or indecent messages to any recipient under age 18 (the "indecent transmission" provision).[35] The second section outlawed the knowing sending or displaying of patently offensive messages in a manner available to a person under 18 (the "patently offensive" display provision).[36] Patently offensive speech was defined almost identically to indecent speech in the *Denver* case. Indecent speech was not defined in the so-called transmission section.

Congress also established two affirmative defenses. One protected indecent speakers who took good faith, reasonable, effective actions to restrict minor access.[37] The other protected those who required proof of age, such as by credit card verification.[38]

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32. Sunstein, 110 Harv.L.Rev. 4 (cited in note 24).

33. Id.

34. See, e.g., Walter F. Murphy, *Elements of Judicial Strategy* 91-122 (U. of Chicago Press, 1984); American Bar Association, *Judicial Opinion Writing Manual: A Product of the Appellate Judges Conference* (West, 1991).

35. 47 U.S.C.A. § 223(a) (1995 & Supp. 1997).

36. 47 U.S.C.A. § 223(d) (1995 & Supp. 1997).

37. 47 U.S.C.A. § 223(e)(5)(A) (1995 & Supp. 1997).

38. 47 U.S.C.A. § 223(e)(5)(B) (1995 & Supp. 1997).

Justice Stevens began his majority opinion by essentially repeating the findings of fact made by the three-judge district court as to the dynamic power of the global Internet.[39] He said that "[t]he Internet is a unique and wholly new medium of worldwide human communication."[40] Its content "is as diverse as human thought," and "is thus comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services."[41] He further found that cyberspace is "located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet."[42] He also described the Internet as the most participatory medium in history given the low barriers to access and the parity of speaker and listener.

Justice Stevens' principle reason for finding the CDA unconstitutional was that it "suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another."[43] The CDA's bar on indecent speech aimed at minors chills adult free speech because it is technologically impossible for adults to ensure that minors are not able to see their speech on the boundaryless Internet.

Justice Stevens also ruled that: (1) the case precedents relied on by the government were inapposite; (2) the Internet is not as invasive and dangerous as broadcast media, and functions more like telephones; (3) the CDA had vagueness problems; (4) the CDA was not well crafted to achieve its asserted goals; (5) the affirmative defense provisions were essentially useless because feasible low-cost technology to keep children from being exposed to adult sites does not yet exist; and (6) the CDA could not be severed to uphold a subpart.

Justice Stevens further acknowledged applying the "most stringent review of [the CDA] provisions"[44] possible because he saw the CDA functioning as a content-discriminatory speech ban.[45] His opinion reads much like an endorsement of the marketplace theory of unrestricted free speech for adults. He did not, however, rule that the CDA was unconstitutionally vague

39. *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996).
40. *Reno v. ACLU*, 117 S. Ct. 2329, 2334 (1997).
41. Id. at 2335.
42. Id. at 2335.
43. Id. at 2346.
44. Id. at 2343.
45. Id. at 2346.

or substantially overbroad. Justices Breyer, Kennedy, and Souter were among those joining his majority.

Justice O'Connor authored a concurring and dissenting opinion in which Chief Justice Rehnquist joined. She agreed with the majority that the CDA burdened too much adult speech. But she dissented because she viewed the CDA as a form of "cyberzoning" akin to a time, place, and manner restriction, not as a content-discriminatory ban.[46] She concluded that the law was constitutional in part "as applied to a conversation involving only an adult and one or more minors—e.g. when an adult speaker sends an e-mail knowing the addressee is a minor."[47]

V. LEGAL ANALYSIS

At first glance, it is hard to reconcile the positions of Justices Stevens, Breyer, and Souter in support of *ACLU*'s definitive use of strict scrutiny with their support for *Denver*'s philosophy of leaving things undecided. Based on their *Denver* opinions, it seems that they should have voted to strike down the CDA for overbreadth or vagueness, rather than select a rigid scrutiny level. Three ways to reconcile the *Denver* and *ACLU* cases, however, come to mind. The most persuasive is that the Court is developing a technology-driven free speech model.

The first explanation is that several members of the Court changed their views from *Denver* to *ACLU* because they were confronted in *ACLU* with the district court's detailed findings of fact about the Internet's operation and its social benefits. In fact, the *ACLU* opinion actually reads as if the Court adopted Justice Kennedy's *Denver* opinion. The *ACLU* opinion used strict scrutiny and treated the Internet like a new public forum. This explanation has potential, but nowhere in *ACLU* do these justices suggest that they were mistaken in *Denver*.

A second approach is to distinguish the cases factually. The Court in *Denver* assessed the constitutionality of a law that restored editorial discretion (a part of free speech) to a heavily regulated cable industry. By contrast, the Court in *ACLU* dealt with an Internet medium that had little history of government

46. Id. at 2351 (O'Connor, J., concurring in part an dissenting in part) ("I write separately to explain why I view the (CDA) as little more than an attempt by Congress to create 'adult zones' on the Internet.")

47. Id. at 2355.

regulation, as well as with a CDA law that was unusually heavy-handed and content discriminatory. It is therefore natural that the Court would reject Internet censorship. Undoubtedly, these distinctions help explain the different case results, but they seem inadequate to explain the similarities.

A third possibility, however, is that the Court in both cases was driven by the Internet's brilliant capabilities to insulate technology from government restraint. Thus, unlike earlier Court decisions that limited regulation of the media, like print, in order to protect free speech, the Court in the Internet cases uses free speech principles to protect the medium.

In *Denver*, for example, the Court disregarded traditional First Amendment principles by refusing to choose a definite scrutiny level so as not to curb the dynamism of new telecommunication technologies. In *ACLU*, the Court chose the most speech-protective standard possible in order to foster the same goal. Three factors further support this conclusion: (a) the Court's emphasis on the facts; (b) the conflict between Justice Stevens' majority opinion in *ACLU* and his prior jurisprudence; and (c) the flawed legal arguments in *ACLU*.

A. THE SUPREME COURT'S EMPHASIS ON THE FACTS

It is impossible to overstate the importance of the district court's factual findings to the Supreme Court's decision in *ACLU*. The Supreme Court gave an encyclopedic recitation of these findings, embracing the Internet as a positive social force. This obsession with the facts was unusual because the Court was ruling on a facial challenge to the law, and facial constitutional challenges usually are not fact-dependent.

Interestingly, the district court made its findings after having its courtroom wired and after having various experts give it extended lessons on "surfing the net." Press accounts suggest the district court judges were dazzled by this display and the judges' strong sentiments clearly affected the Supreme Court too.[48] Indeed, the district court opinion read more like a manual on "How to Use the Internet," than like a judicial opinion.[49]

48. The New York Times ran an article on the hearings in district court and on how the courtroom was "wired." Pamela Mendels, *Judges Visit Cyberspace Sites in Suit Over an Indecency Law*, New York Times sec. 1 at 12 (May 12, 1996).

49. For example, the district court opinion cited the prices of specific commercial software options for blocking indecent Internet messages. *ACLU v. Reno*, 929 F. Supp. 824, 841 (E.D. Pa. 1996).

The Supreme Court even highlighted, without explanation, an extraordinary passage of law from Judge Dalzell's district court opinion in which he said that "Congress may not regulate indecency on the Internet at all."[50]

B. JUSTICE STEVENS' PRIOR JURISPRUDENCE

Justice Stevens' role as author of the *ACLU* opinion also demonstrates that technology was on his mind. Stevens has authored several First Amendment opinions suggesting that a category of "low-value" speech should be established that would permit greater government restriction than for high value political speech.[51] His low-value category would cover sexually explicit speech aimed at minors.

How can one reconcile his *ACLU* marketplace opinion with his other opinions recommending a low-value speech category? The answer is that his *ACLU* opinion is driven by his obvious admiration for this new technology. That admiration is the most logical explanation for why he uses the strict scrutiny standard in *ACLU* for sexually explicit speech, which he had previously treated as low value. The majority's desire to protect the Internet with strict scrutiny also explains why the Court did not merely strike down the law as vague or overbroad.

C. THE PROBLEMS IN THE *ACLU* OPINION

Although Justice Stevens was quite justified in emphasizing the Internet's important social benefits and in his assessment of the CDA's many flaws, he makes three problematic legal arguments which also seem technology-driven.

1. THE VAGUENESS ISSUE

The Court's reasoning on the vagueness issue was bizarre. Though disclaiming any intent to find the CDA vague, the Court relied heavily on the supposed ambiguities in the CDA's defini-

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50. 117 S. Ct. at 2340 n.30, citing, 929 F. Supp. at 877.

51. See, e.g., *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70-71 (1976):

> But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.

FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

tion of "patently offensive" to conclude that the CDA chills great amounts of speech and therefore acts as a content-discriminatory ban, not as a time, place, and manner restriction.[52]

Yet the CDA's definition of "patently offensive" was upheld by the U.S. Supreme Court in both *FCC v. Pacifica Foundation*[53] and *Denver*. As the district court found in *Shea v. Reno*[54], the *Denver* decision does not permit a vagueness finding here. The Court's bootstrapping by finding a law to be content-discriminatory, because of vagueness issues, without actually finding the law to be constitutionally vague is disturbing.

2. UPHOLDING PART OF THE CDA

Stevens also mistakenly rejects the dissent's argument that the law can constitutionally prohibit an adult from sending an indecent Internet message solely to a known, specific minor. Stevens said the dissent's view "would confer broad powers of censorship in the form of a 'heckler's veto,' upon any opponent of indecent speech who might simply log on and inform the would-be discoursers that his 17-year-old child . . . would be present."[55]

Yet Stevens' response makes little sense because it advocates striking down a restriction on indecent speech because of the putative actions of an opponent to indecent speech. Moreover, the dissent's position, that the law is constitutional in part, is supported by several decisions where the Court found a compelling interest in banning indecent speech directed at minors, such as in the *Denver* case and in *Ginsberg v. New York*.[56]

3. COMPARING THE INTERNET TO OTHER MEDIA

The Court's ruling that speech on the Internet deserves more First Amendment protection than broadcast speech is also troubling. For example, regarding sexually explicit speech, the Court said that Internet users "seldom encounter such content

52. In discussing the vagueness issue, the Court said that, "Regardless of whether the CDA is so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render it problematic for purposes of the First Amendment." *ACLU*, 117 S. Ct. at 2344.

53. 438 U.S. 726 (1978).

54. 930 F. Supp. 916, 938 & n.16 (S.D.N.Y. 1996).

55. *ACLU*, 117 S. Ct. at 2349.

56. 390 U.S. 629 (1968). The Court there upheld a law banning the sale to minors under age 17 of material considered obscene as to minors, though not for adults.

accidentally"[57] since the Internet requires affirmative steps to access material, as compared to simply switching on a television or radio broadcast. In addition, the Court said that sexually explicit Internet sites typically have warnings that prevent a viewer from accidental exposure. The Court then indicated that gaining access to sexual material on the Internet was more like using a phone-sex line because affirmative steps are needed for both.

Yet children surfing the net do come across sexually explicit speech by accident. Some of the most notorious examples involve sexually crude web locations that hide their content by using perfectly innocent—and appealing—site names to draw unsuspecting kids. But the real problem with the Internet is not accidental discoveries.

The real problem is that bright and curious children, who are often more skilled at computers than their parents, do not have the willpower to suppress their curiosity and avoid surveying all sorts of inappropriate material that is seductively displayed on the Internet. In addition, many children "surf the net" on computers located in their bedrooms where their parents cannot effectively monitor what is being viewed.[58] By contrast, the television is generally watched in an open family area where any effort by children to watch sexual material can more easily be stopped. Justice Stevens is also somewhat inconsistent in ruling that the warnings on Internet sites are effective at keeping children out, but that age and other screening devices (the CDA's affirmative defenses) are not effective.

Moreover, the Court does not meaningfully address the specific dangers posed by the Internet that are not present with other media. For example, the interactive nature of the Internet makes it far more dangerous than either broadcast or phone sex lines. There are stories of children being lured to meet people they speak with on the Internet only to be injured or killed.[59] Indeed, a television reporter in 1997 pretended to be a child on a chat line and numerous pedophiles tried to solicit a meeting.[60]

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57. *ACLU*, 117 S. Ct. at 2336.

58. Anyone who has teenage children knows it is a myth to say that it is easy for the parent to restrict what the teenager does with the computer in the bedroom.

59. Drake Witham, *Kids Easy Prey On-Line, FBI Director Says*, Detroit Free Press 18A (April 10, 1997); George Johnson, *Old View of Internet: Nerds. New View: Nuts.*, New York Times sec. 4 at 1 (March 30, 1997) ("Come visit my web site, kiddies, and I'll give you some candy.")

60. The reporter's experiment was carried out on the television show "Good Morning America."

Sexual "speech" is also cruder on the Internet than on broadcast television. And the explicit visual element of Internet sexual material makes it far more problematic than phone-sex lines. Given the likely dynamic convergence of the various mediums over time, the Court might do better to worry about the special dangers posed by the Internet's multi-dimensional interactive nature rather than obsess about whether affirmative acts are needed to log on.

D. A RESPONSE

One response to my theory, that the Court has become technology-driven in the Internet related cases, is that the Court should have used strict scrutiny in *Denver* because that would be more protective of technology than a "wait and see" approach. Yet this objection actually supports the technology-driven model.

Use of such a rigid standard there could have potentially endangered the constitutionality of a law requiring television manufacturers to install the V-chip; a law designed to ensure parents can control what their kids watch. Under strict scrutiny, such a law could be struck down as not being narrowly tailored to ensuring that children are not exposed to this material.[61] *Denver*'s more flexible approach, however, would seem to facilitate government's role in encouraging technology innovations that permit private actors, like parents and cable operators, to decide whether to permit this speech.

VI. CONCLUSION

In the 21st Century, the U.S. Supreme Court will face difficult First Amendment questions regarding cyberspace, such as the meaning of contemporary local community standards in obscenity cases and the applicability of the current tests for subversive advocacy. The *Denver* and *ACLU* cases suggest that the Court may permit the First Amendment to be a hand-maiden to this new technology. The flaws in the Court's reasoning in those cases, however, show that a technology-driven approach would be a mistake. The Court should instead remain faithful to sound First Amendment standards. Given the Internet's dynamism,

61. Benjamin M. Dean, *The Age-Based Ratings System: An Unfortunate Response to the V-Chip Legislation*, 4 Va. J. of Soc. Pol. & L. 743, 791 (1997) (discussing the constitutional issues posed by the V-chip law).

the unprincipled modification of such standards would create chaos.