Richmond Journal of Law and Technology

Volume 3 | Issue 1 Article 4

1997

THE COMMUNICATIONS DECENCY ACT: ABORTING THE FIRST AMENDMENT?

Sheryl L. Herndon L. Herndon

THE COMMUNICATIONS DECENCY ACT: ABORTING THE FIRST AMENDMENT?

BY Sheryl L. Herndon[*]

October 24, 1997

Cite as: Sheryl L. Herndon, *The Communications Decency Act: Aborting the First Amendment?*, 3 RICH. J.L. TECH. 2 (1997) <http://www.richmond.edu/~jolt/v3i1/herndon.html>[**].

Editor's Note: Since the time that this article was written and edited, the United States Supreme Court has decided the validity of portions of the Communications Decency Act in *Reno v. ACLU* (Slip Opinion: 521 U.S.). Readers may want to review the Court's ruling after reading this article in order to have a better understanding of the impact that the Court's ruling has on the issues discussed by Ms. Herndon. The decision is available on-line at:
http://www.eff.org/pub/Legal/Cases/ACLU_v_Reno/HTML/970626_aclu_v_reno_decision.html

---

{1}On February 8, 1996, President Clinton signed the Telecommunications Act of 1996[1] into law and explained that the legislation would "stimulate investment, promote competition, [and] provide open access for all citizens to the Information Superhighway."[2] However, contrary to the goal of "opening wide the door to the Information Age,"[3] provisions of the Act violate the Constitution's First Amendment guarantee of freedom of speech by imposing far-reaching new federal criminal liabilities on Americans who exercise their free speech rights on the Internet. In particular, a little-noticed provision of the Act, which expands an 1873 law banning abortion-related speech by criminalizing Internet discussion and information about abortion, continues to be a source of concern among pro-choice activists, First Amendment scholars, and electronic providers and users.

I. INTRODUCTION

{2}Section 507 of the Telecommunications Bill, inserted by Representative Henry J. Hyde, (R-Ill.), a longtime abortion foe, amends and updates 18 U.S.C. §§ 1462-1462, commonly known as the Comstock Act, to ban distribution of abortion-related information on computer networks. Passed in 1873 at the urging of Anthony Comstock, Secretary of the Committee for the Suppression of Vice,[4] the Comstock Act was enacted "for the suppression of Trade in and Circulation of obscene Literature and articles of immoral Use." [5] The Act defined contraceptive information as "obscene" and forbade its dissemination,[6] making it a crime to send material on birth control and abortion through the mail.[7] As a special unpaid agent of the Post Office Department, Comstock prosecuted people like Margaret and William Sanger because they campaigned for accurate birth control information.[8] As a result of the Comstock Act, publishers censored their scientific and physiological works, druggists were punished for providing information about contraception, and Americans were subjected to censorship of their mail and denied access to reliable information.[9] In 1971, Congress deleted the prohibition on birth control, but left the ban on abortion information.[10] In 1994, the maximum fine for violating the Act increased from $5,000 to $250,000 for a first offense.[11] As amended by § 507 of the Telecommunications Act, the applicable provision of 18 U.S.C. § 1462 reads:

> Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier or <interactive computer service (as defined in § 230 (e)(2) of the Communications Act of 1934>], for carriage in interstate or foreign commerce - . . .
>
> (C) any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or
>
> Whoever knowingly takes <or receives>, from such express company or other common carrier <or interactive computer service (as defined in § 230(e)(2) of the Communications Act of 1934)> any matter or thing the carriage <or importation> of which is herein made unlawful -
>
> Shall be fined under this title or imprisoned not more than five years, or both, for the

first such offense and shall be fined under this title or imprisoned not more than ten years, or both, for each such offense thereafter.[12]

{3}It is unclear why § 507 of the Telecommunications Act was inserted into the bill. During House discussions of the Telecommunications Bill, Representative Hyde said that "nothing in the [bill] should be interpreted to inhibit free speech about . . . abortion."[13] However, when he later inserted the passage into the Congressional Record, Representative Hyde said that the provision would restrict "commercial activities" concerning abortion on-line.[14] His contradictory statements have been attributed to "bad staff work."[15] The general counsel to the House Judiciary Committee, Alan Coffey, has said that Representative Hyde included the amendments to the Comstock Act for its effect on indecent materials, not to criminalize abortion discussion.[16] Additionally, Mr. Coffey said that the abortion language in the Comstock Act has not been enforced for many years and is probably unconstitutional because of the scope of the Supreme Court's decision in *Roe v. Wade*[17] legalizing abortion.[18] Others also have been quick to dismiss the provision as having no effect. Almost immediately after it was signed into law, sponsors of the provision insisted that it would not affect discussion about abortion, and U.S. Attorney Zachary Carter gave assurances that "the government would not prosecute people who discussed abortion on-line."[19]

{4}For many, however, government assurances that the law will not be enforced are insufficient.[20] Immediately upon passage, numerous pro-choice groups joined forces and filed lawsuits seeking temporary restraining orders to block the criminal ban on abortion-related speech on the Internet. The plaintiffs in *Sanger v. Reno*[21] filed suit in the Eastern District of New York alleging that 18 U.S.C. § 1462 (c), as amended by § 507 of the Telecommunications Act violates the First Amendment rights to freedom of speech and freedom of the press.[22] The plaintiffs participated in two hearings: the first on February 8, 1996, and the second on November 13, 1996. The Justice Department assured the court that there would be no prosecution under § 1462. Persuaded that there was no immediate threat of enforcement, the District Court denied the temporary restraining order but asked the U.S. Court of Appeals for the Second Circuit to convene a three-judge district court panel to decide the case.[23] The District Court has yet to issue an opinion on the case.

{5}One day after pro-choice groups filed *Sanger*, the American Civil Liberties Union [hereinafter ACLU] moved for a temporary restraining order to enjoin enforcement of provisions of the Communications Decency Act, including the Comstock Act.[24] The ACLU sought and won[25] protection from provisions which prohibited transmission of "obscene or indecent"[26] or "patently offensive"[27] material to minors. The ACLU was, however, denied a restraining order based on the Comstock Act in which it alleged that 18 U.S.C. § 1462 violated the First Amendment, both before and after the § 507 amendments. In successfully opposing the plaintiff's motion for a temporary restraining order, the Government noted that in reference to 18 U.S.C. § 1462(c), "'the Department has a long-standing policy that such previous provisions are unconstitutional and will not be enforced.'"[28] The Government also assured the Court that both President Clinton and Attorney General Janet Reno clearly stated that no one would be "prosecuted under 'the abortion-related provision of newly-amended 18 U.S.C. § 1462(c).'"[29] The Government contended that, in view of its long-standing position, the Plaintiffs had no realistic fear of prosecution and, therefore, needed no equitable relief.[30] Although the Court granted the temporary restraining order to the Plaintiffs for provisions of the Communications Decency Act involving "obscene or indecent" and "patently offensive" materials, it determined that, regarding 18 U.S.C. § 1462, "it seems clear that no irreparable harm will befall the plaintiffs"[31] and, therefore, did not award the temporary restraining order with regard to the Comstock Act.[32]

{6}In its subsequent action for preliminary injunction before a three-judge panel district court, the ACLU determined that in view of the Government's assurances that there would be no prosecution under the provision, it no longer needed to seek a preliminary injunction against enforcement of 18 U.S.C. § 1462(c).[33] Therefore, the Court made no ruling on that issue.

{7}The organizations filing suit have not asserted that the law is constitutional or that it is certain to be enforced in the imminent future. They simply sought to have the Court declare the provision unconstitutional. Although the President, the Justice Department, and essentially everyone who has spoken publicly about the provision have deemed it unconstitutional, the current Supreme Court is not likely to make such a finding. Since the District Court in *ACLU v. Reno* did not rule on the constitutionality of § 1462 and it appears that the Court in *Sanger* is awaiting the *ACLU v. Reno* decision on appeal before releasing its decision, the Supreme Court is likely to leave the issue of the newly-amended Comstock Act unresolved. Despite the Act's overwhelming appearance of unconstitutionality, there is ample room to question the possible result of a current or future Supreme Court ruling.

{8}The First Amendment to the United States Constitution commands that "Congress shall make no law . . . abridging the freedom of speech."[34] Although the language of the First Amendment appears to impose an absolute and direct ban on governmental regulations that restrict free speech, the United States Supreme Court has not applied such a literal ban. Rather, the Court has employed a number of tests to determine "whether the government has violated the First Amendment commands when regulating speech."[35] In developing the parameters of the First Amendment, the Court has given little "attention to the language or history of the First Amendment and [is] without a commitment to any general theory. Rather it has sought to develop principles on a case-by-case basis and has produced a complex and conflicting body of constitutional precedent."[36] "[W]hile the Supreme Court has relied on various doctrines to resolve First Amendment issues, 'it has totally failed to settle on any coherent approach or to bring together its various doctrines into a consistent whole.'"[37]

{9}In addition to the Court's "difficulties and sharp differences of opinion in deciding the precise boundaries dividing what is constitutionally permissible and impermissible in [the First Amendment] field"[38], a constitutional analysis of § 507 is further complicated by two issues. First, the Internet is a new medium with rapid developments and little well-defined First Amendment interpretation. Second, the Court has invoked a unique standard in cases involving abortion regulations under which it is "painfully clear that no legal rule or doctrine is safe from ad hoc nullification . . . when an occasion for its application arises in a case involving . . . abortion."[39] These factors create significant uncertainty in what should otherwise be a predictable ruling whether from the current or a future Court.

II. DETERMINING THE LEVEL OF SCRUTINY

{10}The Court applies different tests to different forms of communication and different types of speech depending on the type of speech being regulated and the type of regulation at issue.[40] In a First Amendment analysis, the critical elements are both the content and the context of the speech.[41] "In the context of the electronic media, however, the permissible extent of government regulation often hinges on the medium of communication."[42] Although there is no Supreme Court precedent for First Amendment issues involving the Internet, *ACLU v. Reno* and traditional First Amendment cases provide insight into how the Supreme Court may rule.[43]

A. EXAMINING THE MEDIUM

{11}To properly analyze the First Amendment considerations of computer networks and electronic information services, it is helpful to understand the medium. The parties in *ACLU v. Reno* filed extensive stipulations outlining the nature and creation of cyberspace and the creation of the Internet.[44] Although the District Court's determination regarding the Internet may be helpful in subsequent litigation, the Supreme Court will not be bound by its filings. In addition, as the District Court noted, "[b]ecause of the rapidity of the developments in this field, some of the technological facts . . . may become partially obsolete [even] by the time of publication [of this decision]. . . ."[45]

{12}Networks connect computers to each other. Accessing a computer network requires a computer, a modem and a telephone line. The user dials the "host" computer of the service or network and, once connected, can communicate over the network through the modem. An individual can create a bulletin board service with just a couple hundred dollars, basic computer hardware and some fundamental computer knowledge.[46] Creation of a Web site can cost between $1,000 and $15,000, and monthly operating costs vary depending on the goals and the Web site's traffic.[47] The best known example of a computer network is the Internet, a noncommercial information highway of computers and computer networks connecting universities, laboratories, government bodies, and individuals with millions of users in 102 countries.[48] The parties in *ACLU v. Reno* stipulated that the Internet has as many as 40 million users and projected that the number would grow to 200 million Internet users by the year 1999.[49] No one owns the Internet, and no single government, company, or individual controls it.[50]

> It exists and functions as a result of the fact that hundreds of thousands of separate operators of computers and computer networks independently decided to use common data transfer protocols to exchange communications and information with other computers . . . . 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.[51]

{13}Most online services offer a number of services that can include "electronic mail to transmit private messages to one or a group of users or to an established mailing list on a particular topic; chat rooms that allow simultaneous online discussions; discussion groups in which users post messages and reply to online 'bulletin boards'; informational databases;"[52] and Internet access. Online communications are interactive. This means, in part, that users of online systems must seek out the specific information they wish to retrieve and the types of communications in which they wish to engage. Online communication provides forums for both 'public' and 'private' communication. E-mail and online mailing lists share private communications between specified persons or groups and, as with regular mail, only the intended recipients of an e-mail message will receive it. Similarly, only subscribers to an online mailing list should receive messages posted to that mailing list. By contrast, Web sites, gopher sites, online discussion groups, and chat rooms are public because anyone with online access can reach them or participate in them at any time. These forums are similar to public libraries and public squares.[53]

{14}The Court has determined that each medium of expression presents unique First Amendment problems.[54] Accordingly, despite the similar First Amendment interests of broadcasters and those of print publishers, the Court has not extended the two groups similar First Amendment protection.[55] "This emphasis on the medium has created a fragmented First Amendment with a trifurcated communications regulatory structure that has traditionally consisted of print, common carriage, and broadcasting. In the past decade, new branches have begun to sprout for cable television and computer networks as well."[56] This fragmentation has resulted in less protection for electronic media than for print media. The rationale asserted for reduced protection are frequency scarcity and "pervasiveness."[57] Such rational should not apply to the Internet.

1. Frequency Scarcity

{15}Regulations affecting both radio and cable television have been proposed under the theory that absent regulation, there will not be adequate service for all listeners, viewers and speakers. Significant broadcast regulation is permitted on the grounds that the electromagnetic spectrum is a scarce public resource.[58] "As a result of this scarcity, broadcasters [are given] the exclusive right to use a frequency . . . in exchange for accepting regulations which ensure that they operate in the public interest."[59] In *National Broadcasting Co. v. United States*,[60] the Court noted that "[radio broadcasting] facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody."[61] Furthermore, the Court held that because of these limitations, the FCC could allocate scarce

broadcasting frequencies to avoid interference and could consider the content of broadcasters' transmissions in its licensing decisions.[62]

{16}In *Turner Broadcasting Systems, Inc. v. FCC*[63], the Court refused to expand the scarcity justification to cable television, explaining that cable television does not suffer from the inherent limitations characteristic of the broadcast medium.[64] The *Turner* Court examined the technology of cable television and found that soon there might be no limit to the number of speakers who can use cable television, and there is no danger of physical interference between two speakers who try to share the same channel.[65] Based on these findings, the Court determined that the scarcity rationale was inapplicable to cable.[66] Therefore, in cases involving First Amendment challenges, there was no reason to apply the more relaxed scrutiny that has been applied in broadcast cases.[67] Rather, still focusing on the unique physical characteristics of cable transmission, the Court found that must-carry provisions[68] are justified by special characteristics of the medium: "the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television."[69]

{17}The *Turner* holding suggests that new technologies, such as the Internet, should be subject to ordinary free speech standards rather than the relaxed standards applied to broadcasters.[70] Scarcity is not a problem for the Internet. Similarly, there is practically no limit to the number of users and no risk of physical interference between two users trying to share the same "space." Anyone with a computer, a modem and a phone line can communicate over the Internet. There is no justification for a low degree of First Amendment protection on the Internet.

2. Pervasiveness

{18}When a speaker's interests clash with those of a listener's or viewer's, the speaker's First Amendment rights may be limited by the privacy rights of the viewers or listeners.[71] In public, a speaker's rights typically prevail, and viewers and listeners are expected to avert their eyes or cover their ears to protect their own privacy.[72] The government may limit a speaker's rights only when viewers and listeners are a "captive audience" and cannot avoid the undesired speech.[73] To the contrary, in the home, the speaker must typically avoid intruding on the privacy of the viewers and listeners[74]. However, when viewers and listeners can choose whether and how they receive speech, "the government may not make [their] viewing and listening decisions for them."[75]

{19}In justifying the limited First Amendment protection for broadcast media, the Court has said that broadcast media has a "uniquely pervasive presence in the lives of all Americans"[76] and is "uniquely accessible to children."[77] Patently offensive, indecent material on the radio confronts people, "not only in public, but also in the privacy of [their] homes."[78] There, a person's right to be left alone plainly outweighs the First Amendment rights of an intruder. Because radio audiences constantly tune in and out, "prior warnings cannot completely protect . . . listener[s] . . from unexpected program content."[79] "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow."[80]

{20}Courts have applied the pervasiveness analysis even more narrowly in cases involving cable television and the use of telephones. Regarding cable, the Court has reasoned that because the viewer must choose to subscribe, pay monthly fees, and may discontinue a subscription at any time, cable is more likely to be an "invited guest" than an "intruder."[81] Further, concerns about accessibility to children is less of a concern because parents have control with lockboxes and other such devices.[82] Similarly, in *Sable Communications, Inc. v. FCC*,[83] the Court refused to uphold a prohibition of indecent interstate telephone messages aimed at restricting access by children to "dial-a-porn" services.[84] The Court determined that " [i]n contrast to . . . means of expression which the recipient has no meaningful opportunity to avoid, the dial-it medium requires the listener to take affirmative steps to receive the communication . . . . Placing a

telephone call is not the same as turning on a radio and being taken by surprise by an indecent message."[85]

{21}Essentially, the pervasiveness analysis boils down to "[t]he less control the individual has over the receipt of speech, the greater room government has to make some of the individual's choices for her."[86] Like the scarcity analysis, the pervasiveness argument does not support reduced First Amendment protection for the Internet. The Court in *ACLU v. Reno* concluded that the evidence at the hearing indicated significant differences between Internet communications and those of television and radio.[87] The Internet is naturally unobtrusive. Users "must take the affirmative steps of subscribing to a service [and] paying a service fee." [88] Usually they must then usually offer proof of age to access bulletin board systems and other online services.[89] They must look for something in order to find it -- like looking for a book in a library. While local broadcast television and radio programs pervade the home at the push of a button, information online does not just appear. People must seek it out. The Court found that "[a] child requires some sophistication and some ability to read to retrieve material and thereby use the Internet unattended."[90] Interestingly, although the FCC has determined that credit card and access code rules sufficiently protect children from indecent messages, the *ACLU v. Reno* Court found these were economically and practically unavailable for many plaintiffs.[91]

B. EXAMINING THE RESTRICTIONS

{22}Under the amended 18 U.S.C. § 1462, the Government seeks to forbid all discussion of abortion on the Internet. As a general matter, "the First Amendment means that government [cannot] restrict expression because of its message, . . . ideas, . . . subject matter, or . . . content."[92] "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."[93] Most of the Justices agree that statutes referring to a publication's content should be subject to strict scrutiny since content-based distinctions threaten the underlying interests of the First Amendment. The Court describes these interests as: the preservation of free debate necessary to promote self-government; the protection of the individual and the communal search for truth; and the guarantee of an individual's right to free expression.[94] According to the Court, all of the interests, but especially the first, may be harmed if the government is allowed to promote or suppress particular views .[95]

{23}The Court uses a functional test to decide if a regulation of speech is "content-based." If it is necessary to look at the content of the communication in order to determine into which category the communication falls, then the distinction is "content based."[96]

{24}§ 507's ban on all Internet abortion-related material suppresses debate on the. entire subject of abortion. Enforcement would criminalize the posting of any information about abortion on the Internet, from discussions between doctors about an abortion to save a woman's life to the downloading of information about RU-486, a nonsurgical abortion method.[97] Similarly, under § 1462(c) no one may shop for, or order through, the Internet medical and surgical equipment and drugs used in performing abortions. Under the amended Comstock Law, all Internet cites providing information about abortion services must be deleted.

C. SPECIAL CONSIDERATIONS IN ABORTION RELATED CASES

{25}The status of abortion has changed dramatically over the past 25 years. Originally a criminal act in most states, the status was changed in 1973 by the Supreme Court's decision in *Roe v. Wade*,[98] which held that a woman's right to terminate her pregnancy was a fundamental constitutional right. Initially, in applying the standards established by *Roe*, the Court tried to protect women from laws that unnecessarily interfered with the physician's independent medical judgment about abortion and laws which seemed to single out abortion for burdensome requirements.[99] Recently, however, the Court has retreated from its *Roe* holding, "leaving [abortion] some, but not much, constitutional protection" and permitting greater regulations and restrictions

on abortion-related matters.[100] Further, it has not been just the act of abortion that has lost protection. Although the constitutionality of an act should not affect the First Amendment protection of speech about that act, there are indications that when the subject is abortion, the Court has not always recognized the difference between abortion and abortion-related speech. The unique treatment of cases dealing with abortion matters may be attributable to the Justices' personal feelings about abortion.[101] As some on the Court have stated, "[s]ome of us as individuals find abortion offensive to our most basic principles of morality."[102] Many scholars have noted that despite the continuing belief that judges are neutral arbiters of justice, their personal views often affect judicial decision making.[103] As Justice O'Connor summarized:

> The permissible scope of abortion regulation is not the only constitutional issue on which this Court is divided, but -- except when it comes to abortion -- the Court has generally refused to let such disagreements, however longstanding or deeply felt, prevent it from evenhandedly applying uncontroversial legal doctrines to cases that come before it.[104]

{26}Regardless of the reason, regulations concerning abortion and abortion-related speech are arguably afforded diminished First Amendment protection. Examples of such situations include *Harris v. McRae*,[105] *Rust v. Sullivan*,[106] and *Planned Parenthood v. Casey*.[107]

{27}In *Harris*, the Court upheld the Hyde Amendment's denial of Medicaid funding for most abortions.[108] The Court reasoned that "[t]he financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally-protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency."[109] The *Harris* Court's assertion that the state did nothing to interfere with a woman's choice is "abstract logic, not real life."[110] Even more doubtful is the Court's conclusion that the gag rule had no constitutionally meaningful affect on women's choices regarding abortion. "Surely poor women who are in effect bribed to choose childbirth over abortion reasonably feel that the state has done something tangible and substantial to them."[111]

{28}In *Rust*, the Court reviewed a regulation that doctors at federally funded family planning clinics could not discuss abortion with pregnant patients.[112] If a client asked about abortion, the regulations permitted the doctor to say only that the facility did not consider abortion an appropriate method of birth control.[113] In upholding the regulation, the court treated abortion counseling as a form of activity rather than a form of speech which "allowed the Court to overlook the free speech implications of abortion counseling and to forego any meaningful First Amendment analysis."[114] In rejecting a First Amendment challenge to the gag rule, the Court determined that the regulations did not censor disfavored ideas but rather merely defined the purpose of Title X as limited to health and family planning issues separate from abortion.[115] Further, the Court denied that the regulations censored unpopular ideas or mislead women "into thinking that the doctor does not consider abortion an appropriate option for her."[116]

{29}The Court reasoned that, "[t]he Government can . . . selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."[117] The Court further explained that the regulations do not infringe a woman's reproductive freedom because the gag rule "leaves her in no different position than she would have been if the government had not enacted Title X."[118] As in *Harris*, the Court's asserted reasoning is a fallacy. In reality, women are not in the same position that they would have been if Title X did not exist. The imposed gag rule, "distorted communication between women and their doctors by providing ideologically slanted medical information for Title X clients to rely upon."[119] As Justice Blackmun noted in his dissent, "the regulations impose viewpoint-based restrictions upon protected speech and are aimed at a woman's decision whether to continue or terminate her pregnancy."[120] They "are clearly restrictions aimed at the suppression of 'dangerous ideas'."[121]

{30}The petitioners in *Planned Parenthood v. Casey* were health care providers who challenged several provisions of Pennsylvania's abortion statue, including one which required them to provide to their patients information discouraging abortion.[122] Specifically, physicians were required to provide patients seeking abortions with certain information including that about the risks of and alternatives to abortion, the medical risks of carrying a child to full term and the probable gestational age of the "unborn child" at the time the abortion would be performed.[123] A physician's failure to comply with the statute subjected her to criminal penalties and suspension or revocation of her license. The petitioners challenged the provision compelling them to "act as mouthpieces for the state in discouraging abortion."[124] Relying on the fact that the statute required them to provide specific, detailed information about alternatives to abortion to every patient, the physicians asserted that the requirements forced them "to act in a manner inconsistent with their professional judgment and training"[125] and forced them to "convey the state's message at the cost of violating their own conscientious beliefs and professional commitments."[126]

{31}As in *Rust*, despite the fact that both Petitioners and Respondents briefed the free speech issues of abortion counseling, the *Casey* joint opinion rejected this argument and dismissed it. The Court found that abortion counseling was part of the practice of medicine, subject to reasonable licensing and regulation by the state.[127]

> That the joint opinion lumped together all of the challenged statutory provisions, referring to them as 'health regulations' involving 'medical procedure[s],' further evidences its confusion of speech and conduct. There was no recognition that one of those medical procedures primarily involved speech.[128]

{32}After *Casey*, the abortion right is no longer a right to decide whether to have an abortion "without interference from the State"; rather, it is a right to decide whether to have an abortion despite state interference.[129]

{33}The treatment of abortion counseling as activity demonstrates the Court's tendency to dilute abortion rights. By classifying the issues in *Rust* and *Casey* as conduct rather than as speech, the Court was able to apply less rigorous standards of protection.

III. APPLYING SCRUTINY

{34}Despite the Court's difficulty and sharp differences of opinion in establishing boundaries regarding what is constitutionally permissible and impermissible under the First Amendment,[130] "it has long been a basic tenet of national communications policy that 'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'"[131] If the Court considers this tenet, it will find Section 507 of the Telecommunications Act of 1996 unquestionably violates it. However, although Section 507 unquestionably limits communication, expression, and information about abortion, the result of its judicial resolution is uncertain in light of the current state of First Amendment law, the indefinite status of abortion rights and the lack of precedent regarding online technology.

{35}In a Constitutional analysis of § 507, the Court's first determination should be whether § 507 regulates speech or activity. Generally, the Court provides First Amendment protection to "the direct communication of ideas."[132] The Government has acknowledged that online communication, through the use of the printed word, voice, data, image or video, enables users "to access information and communicate with each other."[133] Additionally, the communication at issue is expansive. It involves private communication between individuals, bulletin boards with public information, ordering products, medical research results and much more. § 507 extends the Comstock Act to make it illegal for anyone to use any interactive computer service to provide or receive information which directly or indirectly tells where, how, of whom, or by what means

an abortion may be obtained. No one has denied that the Comstock Act as amended by the Act does not regulate speech. In fact, "[a] broader 'gag' rule is hard to imagine."[134] Since online communication has expression as its very essence, all indications are that it would be absurd for the Court to treat it as anything other than speech as the Court did in *ACLU v. Reno*. However, as this online communication includes abortion counseling similar to that of *Rust* and *Casey*, such absurdity is not impossible.[135]

{36}If the Court does not avoid the First Amendment challenges and agrees that the government is regulating speech, it must determine whether the speech is content-based or content-neutral. Generally, if the terms of a law distinguish favored speech from disfavored speech on the basis of the ideas expressed, the law is considered content-based.[136] A regulation is not protected merely because it does not favor one side of a political controversy over another.[137] "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of the entire topic."[138]

{37}If the Court follows logical process and determines that the regulation is content-based, it will likely apply strict scrutiny (as did the District Court in *ACLU v. Reno*) under which the regulation will not be upheld unless the state shows that it "is necessary to serve a compelling [government] interest and . . . is narrowly drawn to achieve that end."[139] If the Court should somehow determine that the government is not regulating the speech because of its content, but is only attempting to regulate the time, place or manner of the speech, restrictions are "valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[140] In determining the level of government interest in regulation, the Court must examine the technology issues created by the nature of online communications for which it can either create a new First Amendment standard for online communications or analogize online communications to "existing technologies for which [it has] already developed First Amendment models."[141]

{38}The Government has asserted no interest in criminalizing all discussion about abortion and it is difficult to imagine any interest that would justify an outright ban on discussion. Despite Representative Hyde's contradictory statements about the effect of the bill on online discussions about abortion, he offered no valid governmental interest which would justify such regulation. Nor is there likely to be one. Even if the government can proffer an interest, such as protection of children from obscenity, this outright ban on all Internet discussion by all persons can certainly not be deemed as narrowly drawn under either a strict or intermediate scrutiny analysis as it is not the least restrictive means to enforce the government's objectives, particularly considering the nature of the medium.[142]

{39}"[W]hile technology adds a new twist to the process, it does not make the information communicated any different nor any less entitled to protection than the more established means of news distribution."[143] Further, under any view, the characteristics of online communication do not justify any additional regulations of communication, particularly a regulation such as that of the Comstock Act. The frequency scarcity and pervasiveness rational asserted for reduced protection of broadcast medium do not apply. First, the Internet can accommodate a virtually infinite number of users without any adverse effects. Second, online communication is not an invasive medium which "the recipient has no meaningful opportunity to avoid."[144] It does not confront people and invade their privacy at the push of a button. Users must sign on to the computer and enter commands to seek out information. They have control over the receipt of speech. Finally, there are readily available mechanisms (and laws) to protect children and others from information that they should not or do not wish to access.

{40}Even if the Court determines that § 507 furthers a compelling or significant governmental interest, an outright ban on all abortion-related communication cannot be deemed narrowly tailored.

IV. CONCLUSION

{41}Although the Supreme Court's decision on the constitutionality of "indecency"and "patently offensive" provisions will clear up some uncertainty surrounding First Amendment issues on the Internet, significant questions will remain regarding abortion-related information. Those concerned have good reason to seek court assurance of the Comstock Act's unconstitutionality. As Representative Schroeder emphasized, even if the legislation fails a court challenge, someone will have to sacrifice time and money to prove the point. Similarly, in responding to the President's and Justice Department's promise not to prosecute under § 507, Kate Michelman, president of the National Abortion and Reproductive Rights Action League (NARAL) said that her organization is not satisfied with a promise that extends only through the end of this administration and has no guarantees under future administrations.[145] Simon Heller, attorney for The Center for Reproductive Law and Policy said, "[w]e are extremely pleased that the Clinton administration has recognized the invalidity of the law. However, we believe a court ruling against the provision barring receipt provision of abortion information is still necessary to prevent a future administration or radical right-wing members of Congress from wielding it against women's health care providers and advocates."[146] As stated by the Chief Circuit judge in *ACLU v. Reno*:

> the bottom line is that the First Amendment should not be interpreted to require us to entrust the protection it affords to the judgment of prosecutors. Prosecutors come and go. Even federal judges are limited to life tenure. The First Amendment remains to give protection to future generations as well.[147]

{42}"To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth."[148] Congress passed § 507 of the Telecommunications Act, and the President signed it. Eventually the Court must determine whether it is constitutional. If the Court were simply to apply a traditional First Amendment analysis to the regulation which makes it illegal to communicate about a legal act, the law would be struck down as an unconstitutional gag order on the American people. However, in this particular decision, the analysis is more complicated and thus more uncertain because the Court must juggle its fragmented First Amendment analysis, the implications of new technology and each judges' own principles of morality.

{{END}}

Footnotes

[*]Sheryl L. Herndon is a 1996 graduate of the T.C. Williams School of Law at the University of Richmond. She is currently working as an attorney at the law offices of Wein & McDonald, PC in Richmond, Virginia.

[**]**NOTE:** All endnote citations in this article follow the conventions appropriate to the edition of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION that was in effect at the time of publication. When citing to this article, please use the format required by the Seventeenth Edition of THE BLUEBOOK, provided below for your convenience.

Sheryl L. Herndon, *The Communications Decency Act: Aborting the First Amendment?*, 3 RICH. J.L. TECH. 2 (1997), *at* http://www.richmond.edu/~jolt/v3i1/herndon.html.

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

2. Statement on Signing the Telecommunications Act of 1996, 32 WEEKLY COMP. PRES. DOC. 6 (Feb. 12, 1996)
<http://www1.whitehouse.gov/WH/EOP/OP/telecom/pres-stmt-bill-passage.html>.

3. White House Statement on Telecom Law, "A Short Summary of the Telecommunications Reform Act of 1996" (Feb. 8, 1996) <http://www1.whitehouse.gov/WH/EOP/OP/telecom/summary.html>.

4. The Committee for the Suppression of Vice is/was a part of the Young Men's Christian Association (YMCA).

5. Act of March 3, 1873, ch. 258, § 2, 17 Stat. 599 (1873) (*quoted in* Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 77 (1983)).

6. *See* Planned Parenthood Federation of America News Release, *Planned Parenthood Joins Lawsuit to Prevent Health Information Censorship*, Statement by Roger Evans, Litigation Director, Legal Action for Reproductive Rights (LARR) (Feb. 7, 1996).

7. *See* 142 CONG. REC. H10796-05, *H10770 (1996) (Statement of Representative Pat Schroeder) (hereinafter Schroeder Letter].

8. *See id*. Margaret Sanger was arraigned on eight counts of violating the Comstock Law for publishing newspaper articles on birth control and William Sanger was convicted for selling one copy of a pamphlet on birth control. *Id*.

9. *See id*.

10. *See id*.

11. *See id*.

12. 18 U.S.C. § 1462 (Supp. 1995) (*amended by* the Telecommunications Act of 1996) (The 1996 amendments are in <>).

13. *See* John Schwartz, *Abortion Issue Makes its Way into Telecom Law*, SEATTLE TIMES, Feb. 9, 1996, at A1.

14. *Id*.

15. *Id*.

16. John Schwartz, *Abortion Provision Stirs On-Line Furor*, WASH. POST, Feb. 9, 1996, at C01.

17. *See* 410 U.S. 113 (1973).

18. *See* Schwartz, *supra* note 16, at C01.

19. *See id*.

20. Representative Patricia Schroeder (D-Col.) and Sen. Frank Lautenberg (D-N.J.) introduced legislation, the Comstock Clean-up Act to amend Title 18 to eliminate the prohibitions on the transmission of abortion-related materials. H.R. 3057, 104th Cong., 2d Sess. (1996); S. 1592, 104th Cong., 2d Sess. (1996). This

legislation died in committee without consideration. Sen. Lautenberg's office, telephone conversation (Jan.13, 1997).

21. 966 F. Supp. 151 (E.D.N.Y., 1997).

22. The Plaintiffs also allege Fifth Amendment violations. The Plaintiffs in *Sanger* are Alex Sanger, of Planned Parenthood of New York City; Rhonda Copelon; Adam Guasch-Melendez; California Abortion and Reproductive Rights Action League (North); National Abortion and Reproductive Rights Action League; Feminist Majority; Medical Students for Choice; and National Abortion Federation, on behalf of themselves and all similarly-situated persons.

23. *See* Press Release prepared by The Center for Reproductive Law and Policy, "Women's Health Care Advocates Win Government Assurance that Internet Abortion Gag Won't Be Enforced," (Feb. 8, 1996).

24. *See* ACLU v. Reno, 929 F. Supp. 824, 827 n.2. (E.D. Pa. 1996) (*aff'd*117 S.Ct. 2329 (1997)). The plaintiffs in this action are the ACLU; Human Rights Watch; Electronic Privacy Information Center; Electronic Frontier Foundation; Journalism Education Association; Computer Professionals for Social Responsibility; National Writers Union; Clarinet Communications Corporation; Institute for Global Communications; Stop Prisoner Rape, AIDS Education Global Information System; Bibliobytes; Queer Resources Directory; Critical Path AIDS Project, Inc.; Wildcat Press, Inc.; Declan McCullagh d/b/a Justice on Campus; Brock Meeds d/b/a Cyberwire Dispatch; John Troyer d/b/a The Safer Sex Page; Jonathon Wallace d/b/a The Ethical Spectacle; and Planned Parenthood Federation of America, Inc.

25. *See id*. at 883.

26. 47 U.S.C. § 223(a)(1)(B) states:

> (a) Whoever--
> (1) in interstate or foreign communications--
> (B) by means of 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 the age of 18, regardless of the whether the maker of such communication placed the call or initiated the communication . . . shall be fined under Title 18, or imprisoned not more than two years or both.

27. 47 U.S.C. § 223(d) provides:

> (d) Whoever--
> (1) in interstate commerce knowingly--
> (A) uses an interactive computer service to send to a specific person or persons under 18 years of age,
> or
> (B) uses an interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or
> (2)knowingly permits any telecommunications facility under such person's control to

be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under
Title 18, or imprisoned not more than two years, or both.

28. *Reno*, 929 F. Supp. at 829 n.7 (E.D. Pa.1996).

29. *Id*. (*quoting* Govt's Opposition to Plaintiff's motion for a temporary restraining order, at 19, n.11 (Feb. 14, 1996)).

30. *See id*.

31. 24 Media L. Rep. 1379 (BNA) (E.D. Pa. Feb. 15, 1996).

32. *See id*.

33. *See Reno* 929 F. Supp. at 829, n.7 (*quoting* Post-Trial Brief of ACLU Plaintiff).

34. U.S. CONST. amend. I.

35. *See* Carney R. Shegerian, *A Sign of the Times: The United States Supreme Court Effectively Abolishes the Narrowly Tailored Requirement for Time, Place and Manner Restrictions,* 25 LOY. L.A. L. REV. 453, 468 (1992).

36. STEVEN H. SHIFFRIN & JESSE H. CHOPER, THE FIRST AMENDMENT: CASES-COMMENTS-Q3 (1991).

37. Susan Jill Rice, *The Search for Valid Governmental Regulations: A Review of the Judicial Response to Municipal Policies Regarding First Amendment Activities*, 63 NOTRE DAME L. REV. 561, 562 (1988) (*quoting* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 16 (1970)). Professor Emerson summarizes the Supreme Court's major approaches to first amendment analysis:

> The outstanding fact about the First Amendment today is that the Supreme Court has never developed any comprehensive theory of what that constitutional guarantee means and how it should be applied in concrete cases. At various times the Court has employed the bad tendency test, the clear and present danger test, an incitement test, and different forms of the ad hoc balancing test. Sometimes it has not clearly enunciated the theory upon which it proceeds. Frequently it has avoided decision on basic First Amendment issues by invoking doctrines of vagueness, overbreadth, or the use of less drastic alternatives. Justice Black, at times supported by Justice Douglas, arrived at an 'absolute' test, but subsequently reverted to the balancing test in certain types of cases. The Supreme Court has also
> utilized other doctrines, such as the preferred position of the First Amendment and prior restraint.

Id. at n.5.

38. *See* Gregory v. City of Chicago, 394 U.S. 111, 114 (1969).

39. *See* Madsen v. Women's Health Center, 512 U.S. 753, 785 (1994) (*quoting* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 814 (1986)(O'Connor, J., dissenting)) (Scalia, J., dissenting).

40. *See* Shegerian, *supra* note 35, at 468-69.

41. *See* FCC v. Pacifica, 438 U.S. 726, 744 (1978) (citing Schenck v. U.S., 249 U.S. 47, 52 (1919)).

42. Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1069 (1994).

43. *See* Shea v. Reno, 930 F. Supp. 916 (S.D.N.Y. 1996). Here the Court also examined the level of scrutiny to be applied to provisions of the Communications Decency Act and determined, like the Court in *ACLU v. Reno*, that strict scrutiny was the correct standard.

44. *See also id*. at 926 (providing extensive stipulations regarding the Internet).

45. ACLU v. Reno, 929 F. Supp. 824, 838, n.12 (E.D. PA. 1996).

46. *See* Donna A. Gallagher, *Free Speech on the Line: Modern Technology and The First Amendment*, 3 Comm. Law Conspectus 197, 198 (1995).

47. *See Reno,* 929 F. Supp. at 842.

48. *See* Note, *supra* note 42, at 1066.

49. *See Reno,* 929 F. Supp. at 831.

50. *See* Paul H. Arne, *New Wine in Old Bottles: The Developing Law of the Internet*, 416 PLI/ Patents, Copyrights, Trademarks and Literary Property Course Handbook Series 9, 14 (1995).

51. William W. Burrington, *False Advertising and the Law: Coping with Today's Challenges*, 954 PLI/Corp. Law and Practice Handbook Series 369, 390 (1996).

52. Plaintiff's Complaint, ACLU v. Reno, No. 96-963 (E.D. Va. filed Feb. 8, 1996).

53. *See id*.

54. *See* FCC v. Pacifica, 438 U.S. 726, 748 (1978) (*citing* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502-503).

55. *See* Note, *supra* note 42, at 1071.

56. *Id*. at 1069.

57. *Id*. at 1070.

58. *See id*. at 1072.

59. *See id*.

60. 319 U.S. 190 (1943).

61. *See id*. at 213.

62. *Id*. at 215-17.

63. 114 S.Ct. 2445 (1994).

64. *See id*. at 2456.

65. *See id*. at 2457.

66. *See id*.

67. *See id*.

68. Must-carry provisions require cable operators to carry local broadcast stations because of the likelihood that a shift in the market shares from broadcast television to cable would erode the advertising revenue base upon which local broadcast television relies and that would jeopardize free local broadcast television and local programming. *Id*. at 2453-55.

69. *See id*. at 2468.

70. Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1769 (1995).

71. *See* Note, *supra* note 42, at 1077.

72. *See id*.

73. *See id*.

74. *See id*.

75. *See id*.

76. *See* FCC v. Pacifica, 438 U.S. 726, 748 (1978).

77. *Id*. at 749.

78. *See id*. at 748.

79. *Id*.

80. *Id*. at 748-49.

81. Note, *supra* note 42, at 1079.

82. *See id*.

83. 492 U.S. 115 (1989).

84. *See id*. at 127.

85. *Id*. at 127-28.

86. Note, *supra* note 42, at 1080.

87. *See* ACLU v. Reno, 929 F. Supp. 824, 845 (E.D. Pa. 1996).

88. Gallagher, *supra* note 46, at 205.

89. *Id*.

90. *Reno*, 929 F. Supp. at 845.

91. *See id*. at 846-49.

92. *See* Laura V. Farthing, Note, *Arkansas Writers' Project v. Ragland: The Limits of Content Discrimination Analysis*, 78 GEO. L. J. 1949, 1949 n.2 (1990).

93. Consolidated Edison Co. v. Public Service Comm., 447 U.S. 530, 537 (1980) (*quoting* Police Department of Chicago v. Mosley, 408 U.S. 92, 95 (1972)).

94. Farthing, supra note 92, at 1953.

95. *See id*.

96. *See id*. at 1960

97. *See* National Abortion and Reproductive Rights Action League News Release, *NARAL Files Suit to Block Abortion "Gag Rule" on Internet,* (Feb. 7, 1996).

98. 410 U.S. 113 (1973).

99. *See* Donald P. Judges, *Taking Care Seriously: Relational Feminism, Sexual Difference, and Abortion*, 73 N.C. L. Rev. 1323, 1459 (1995).

100. Christina E. Wells, *Abortion Counseling as Vice Activity: The Free Speech Implications of Rust v. Sullivan and Planned Parenthood v. Casey*, 95 COLUM. L. REV. 1724, 1751 (1995).

101. *See id*. at 1760.

102. Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992).

103. *See* Wells, *supra* note 100, at 1760.

104. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting).

105. 448 U.S. 297 (1980).

106. 500 U.S. 173 (1991).

107. 505 U.S. 833 (1992).

108. Harris v. McRae, 448 U.S. 297 (1980).

109. *Id*. at 316.

110. Judges, *supra* note 99, at 1435.

111. *Id*.

112. Rust v. Sullivan, 500 U.S. 173 (1991).

113. *Id*. at 217.

114. *See* Wells, *supra* note 100, at 1726. The Court's treatment of abortion counseling as a form of activity "has much to do with the Court's emerging view that abortion is no longer a fundamental right; instead, the Court's current jurisprudence implicitly equates abortion with less-protected economic activities such as gambling. With abortion no longer a fundamental right, the Court more easily manages to lump abortion and abortion counseling together, treating both as part of the same activity under a questionable and largely abandoned commercial speech doctrine." *Id*. at 1725-26.

115. Judges, *supra* note 99, at 1434.

116. *See Rust*, 500 U.S. at 200.

117. *Id*. at 193.

118. *Id*. at 202.

119. Judges, *supra* note 99, at 1435.

120. *Rust*, 500 U.S. at 205 (Blackmun, J., dissenting).

121. *Id*. at 210.

122. 505 U.S. 833 (1992). The Court previously had held that Roe v. Wade barred states from requiring specific information be given to the woman "designed to influence the woman's informed choice between abortion or childbirth." City of Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416, 444,450 (1983).

123. *Casey*, 500 U.S. at 881.

124. See Wells, *supra* note 100, at 1735.

125. Planned Parenthood v. Casey, 744 F. Supp. 1323, 1354 (1990).

126. *See* Brief for Petitioners and Cross-Respondents at 54-55, Planned Parenthood v. Casey, 505 U.S. 833 (1990).

127. *Casey,* 505 U.S. at 883-84.

128. Wells, *supra* note 100, at 1739.

129. *Casey,* 505 U.S. at 875 (*quoting* Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 61 (1976)).

130. Gregory v. City of Chicago, 394 U.S. 111, 114 (1969)(Black, J., concurring).

131. U.S. v. Midwest Video Corp., 406 U.S. 649, 668 n.27 (1972)(plurality opinion) (*quoting* Assoc. Press v. U.S., 326 U.S. 1, 20 (1945)).

132. *See* Wells, *supra* note 100, at 1741.

133. The National Information Infrastructure: Agenda for Action, 58 Fed. Reg. 49025, 49026 (1993).

134. Schroeder Letter, *supra* note 7.

135. The Court has ignored First Amendment challenges to government abortion-related regulations and treated speech as an activity, thereby avoiding the application of traditional speech jurisprudence. Wells, *supra* note 100, at 1734. "[A]lthough the Court has held that speech can occasionally amount to conduct for First Amendment purposes, it has done so only in narrowly defined circumstances inapplicable to abortion counseling." *Id*. at 1739-40 (*See e.g*., Texas v. Johnson, 491 U.S. 397, 402-03 (1989) (flag burning); International Longshoremen's Ass'n v. Allied Int'l, Inc. 456 U.S. 212, 214 (1982) (boycotts)).

136. Turner Broadcasting Sys. Inc. v. FCC, 114 S.Ct. 2445, 2459 (1994).

137. *See* Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York, 447 U.S. 530, 537 (1980).

138. *Id*.

139. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

140. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

141. *See* Note, *supra* note 42, at 1062.

142. *See* City of Watseka v. Illinois Pub. Action Council, 796 F.2d 1547, 1553 (7th Cir. 1986) (*aff'd mem*. 479 U.S. 1048 (1987)).

143. Note, *Recent Developments in First Amendment Law*, 19 J. CONTEMP. L. 251, 315 (1993).

144. Sable Communications, Inc. v. FCC 492 U.S. 115, 127-28 (1989).

145. *See* Schwartz, *supra* note 13, at A3.

146. RLP Press Release, "Women's Health Care Advocates Win Government Assurances that Internet Abortion Gag Won't Be Enforced," (Feb. 8, 1996).

147. ACLU v. Reno, 929 F. Supp. 824, 857 (E.D. Pa. 1996).

148. Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York, 447 U.S. 530, 538, 533 (1980).
