SHOW & TELL ON THE INTERNET: WILL JANET & GEORGE SET THE STANDARD? FCC CENSORSHIP & CONVERGING TECHNOLOGIES

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INTRODUCTION

In 2004, rock singer Janet Jackson boosted yet another comeback by briefly baring a breast on television. Thirty years earlier, rising comic star George Carlin recorded a monologue that featured several words banned from radio. Both performers escaped unscathed, while the broadcasters in question were found in violation of the Federal Communications Commission (FCC) indecency standard. In *FCC v. Pacifica Foundation*, the United States Supreme Court sustained the FCC indecency provisions because broadcasts enter the home and provide content that may not have been requested and that may be objectionable to some adults and harmful to children. In the thirty years since *Pacifica* was decided, the Internet has become a primary vehicle for content dissemination, including both radio and television program streams, which it delivers to millions of homes throughout America. Will the FCC be allowed to apply its indecency standard to the Internet? The answer to that question turns upon the ability of Congress and the courts to

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rationally regulate converging technologies.

I. COMMUNICATIONS TECHNOLOGIES

In the United States, the regulation of converging technologies is becoming increasingly problematic. Historically, each new technology was treated as a distinctive subject for regulation. While that model worked tolerably well when technologies diverged, it is rapidly becoming insupportable as technologies instead converge. The technologies at issue here concern the communication and dissemination of information.[1] Communication technologies emphasize reliable delivery to selected recipients by an agent that is unaware of content, with the expectation of a response. Early communications technologies include first class mail and telephone conversations. Dissemination technologies, on the other hand, entail broad distribution to general classes of recipients by a resource that knows the content, and may control or even create that content. Early dissemination technologies include bulk mail and broadcast transmission of radio and television.

In that context, the appropriate regulatory regime was one that best served the function the technology was to serve. However, extraneous factors were quite often the cause of dysfunctional results. When the telephone was first deployed, heroic capital investment was required to provide an enormous new infrastructure that would provide communications cables in every part of the nation, from the most densely populated cities to the far flung rural areas that made up most of the country. Whereas the mail delivery system was exclusively entrusted to the Federal Government under the Constitution, the new technology of the telephone evolved into a single nationwide private monopoly, "Ma Bell," which was subject to extensive government regulation at both the federal and state level, including strict rate regulation and universal access requirements. For a very long initial period, the overriding emphasis was on local telephone service within each state, provided by an individual Bell Telephone company. Long distance service, handled through the American Telephone and Telegraph Company, was extremely

1. Data collection, analysis & retrieval are also enormously important and problematical, but will be omitted from this brief discussion.

expensive and seldom used. Analog signals were employed, and significantly hampered the reliability of the system. Moreover, each call was placed through a cumbersome and complex configuration of cables and switches; the notion of using telephone technology for mass communication was unimaginable. It was therefore perhaps not surprising that the legal focus fell initially on the huge intricate system that carried the communication rather than upon the citizens who utilized it. Whereas the Fourth Amendment guarantee against unreasonable searches of homes had readily been extended to include the contents of first class mail,[2] the Court initially refused to recognize any zone of privacy for telephone calls,[3] so that government wiretaps were essentially unrestricted for a period of nearly forty years. It was not until 1968 that the Court recalled the reasoning of *Jackson* and held that a telephone user who had a reasonable expectation of privacy should be protected against government eavesdropping even if the call was made from a public telephone.[4] Happily, at the time Congress was of a like mind, and obligingly adopted wiretap legislation which provided the most far reaching privacy protections ever applied in this country to any form of technology.[5]

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2. *Ex Parte* Jackson, 96 U.S. 727, 732 (1878) ("Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, *as if they were retained by the parties forwarding them in their own domiciles.* The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be." (emphasis added)).

3. Olmstead v. United States, 277 U.S. 438 (1928). Those years encompassed World War II and the beginning of the Cold War.

4. *See* Katz v. United States, 389 U.S. 347 (1967) (recognizing that the Fourth Amendment protects persons in situations where they have a reasonable expectation of privacy even though the seizure might not constitute a trespassory taking).

5. *See* The Safe Streets Omnibus Crime Control Bill of 1968, 18 U.S.C. §§ 2510-2522 (1968). The application of these principles to online communications, particularly those in storage, is currently under review in the Sixth Circuit. *See* Warshak v. United States, 2006 U.S. Dist. LEXIS 50076 (S.D. Ohio July 21, 2006), appeal pending pursuant to 28 U.S.C. § 1292(a), after trial court granted preliminary injunction on grounds that plaintiff had a Fourth Amendment right to prevent seizure of emails from ISP without notice to subscriber and without probable cause, which right was violated by less stringent requirements for stored emails contained in the ECPA, 18 U.S.C. § 2703.

II. DISSEMINATION TECHNOLOGIES

Dissemination technologies have presented unique regulatory challenges, which often reflect their enormous social and political potential. With the invention of the printing press, skilled artisans could, with relatively modest resources, provide a means for conveying information to anyone who had the requisite technology. Henry VIII, no fool, saw the enormous danger of adverse publicity and almost at once created a printing monopoly so that the monarch had control over what was disseminated.[6] With this stroke the twin foundations for centuries of dissemination technology policy emerged: the offer of monopoly power in return for the promise to censor content.

Initially, the American Constitution addressed these issues in a very different way. The new federal government would have exclusive jurisdiction over copyright, but the monopoly was to be granted to "authors" as opposed to printers, and the purpose was to further "science and the useful arts."[7] Moreover, the evils of censorship under British rule were countered with the First Amendment's guarantee of freedom of the press,[8] although it would be nearly two centuries before those rights would extend beyond purely political expression.[9]

The crucial role of the First Amendment in curbing censorship is manifest in the prior restraint doctrine: government efforts to prevent speech are limited to narrowly defined situations.[10] On the other hand, subsequent sanctions may be visited on those who publish information which is

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6. *See* RICHARD BOWKER, COPYRIGHT, ITS HISTORY AND ITS LAW 21 (Houghton Mifflin Co.) (1912) ("The Stationiers's Company ... though the development of an earlier guild dating from 1403, was in part a device to prevent seditious printing, by prohibiting any printing in England except by those registered in its membership.").

7. U.S. CONST., art. I, § 8, cl. 8.

8. U.S. CONST., amend. I.

9. Commonwealth v. Delacey, 271 Mass. 327, 171 N.E. 455 (1930); United States v. One Book Entitled Ulysses by James Joyce, 72 F.2d 705 (2d Cir. 1934).

10. *Compare* N.Y. Times v. United States, 403 U.S. 713 (1971) (insufficient showing of direct threat to national security to support injunction against publication of the Pentagon Papers); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (improper to enjoin publication of facts regarding highly publicized criminal trial) *and* Young v. Am. Mini Theatres, 427 U.S. 50 (1976) (zoning ordinance directed at adult movie theaters was intended to curb higher crime rates and lower property values found to be caused by such establishments rather than at the content of their product).

obscene,[11] defamatory,[12] dangerous to national security,[13] or in violation of appropriate restrictions on commercial speech.[14] Prior to the elimination of the phrase "suitable for publication" from the 1856 version of the Copyright Act, it had been suggested that enforcement of a copyright by means of an injunction and seizure may be denied where the work is indecent.[15] At least one court has denied relief under the 1976 Copyright Act to a work that was "clearly obscene."[16] However, the Fifth Circuit has held that copyright protection extends to material which is obscene.[17] In reaching that conclusion, the court stated: "The all-inclusive nature of the . . . [the Copyright] Act reflects the policy judgment that encouraging the production of wheat also requires the protection of a good deal of chaff . . . We conclude that the protection of all writings, without regard to their content, is a constitutionally permissible means of promoting science and the useful arts." [18]

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11. Miller v. California, 413 U.S. 15 (1973) (criminal conviction).

12. Gertz v. Welch, 418 U.S. 323 (1974).

13. Snepp v. United States, 444 U.S. 507 (1980).

14. Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (commercial advertisement). In commercial speech cases prior restraint may be approved to prevent harm to the public. *See also* Aaron v. SEC, 446 U.S. 680 (1980) (securities fraud).

15. Martinetti v. Maguire, 16 F.Cas. 920 (C.C.D. Cal. 1867) (copyright infringement injunction denied on grounds that copyrighted play was actually a display of bare naked ladies and accordingly not a work "suitable for publication." *See also* Broder v. Zeno Mauvais Music Co., 88 F. 74 (C.C.N.D. Cal. 1898) (use of "hottest" to describe woman in song rendered the work "indelicate and vulgar" and accordingly not protected by copyright).

16. In *Devils Films, Inc. v. Nectar Video*, 29 F.Supp. 2d 174, 176 (S.D.N.Y. 1998), the court viewed three adult videos and found them hardcore pornography and obscene under *Miller v. California*, 413 U.S. 15 (1973). The court noted the distribution was likely criminal under 18 U.S.C. § 1467. The plaintiff's motion for injunction and impoundment were denied: "It strains credulity that Congress intended to extend the protection of the copyright law to contraband... [While] requiring the Copyright Office to decide whether a work is obscene might... amount to a prohibited prior restraint, the considerations are entirely different when the matter reaches the courts and a judicial determination that the material is obscene can be made." *Devil Films*, 29 F.Supp.2d at 176.

17. Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852 (5th Cir. 1979). The decision has been blessed. *See* NIMMER ON COPYRIGHT, § 2.17, p. 2-197 (2005).

18. *Mitchell Bros. Film Group*, 604 F.2d at 860. The Ninth Circuit accepted this principle by way of dicta in another action brought by the Mitchell Brothers. However, in that case the alleged infringers were investigators who surreptitiously captured still frames from allegedly obscene movie showings as part of an effort to secure nuisance abatement orders against the theaters, and the jury's special finding that this activity was a fair use provided the basis for denying relief under the copyright statute. *See*

The robust protection of the First Amendment for disseminated information employing print technology would be sorely tested as new dissemination technologies emerged, beginning with the broadcast revolution of the Twentieth Century. Just as the telephone had revolutionized private communications, the broadcast of radio and television signals brought huge new regulatory challenges to content dissemination. Telecommunications carriers, like their mail courier forebears, studiously avoided any involvement with the content of their transmissions,[19] much less any interest in creating content. On the other hand, the broadcasters were, like printers, from the earliest stages interested in not just delivering content created by other industries (phonorecords, movies), but also in creating their own content in order to maximize their economic gain from the enterprise. Implementation of this new technology did not require the expensive construction of a network infrastructure. In fact, deployment was too easy, so that in short order many broadcasters occupied the same channels, so that listeners could never be sure what would be received on a particular channel at any given time. Moreover, only a relatively small number of channels were available, and more powerful transmissions would occupy more frequencies as they strove to dominate the airwaves.

This early "bandwidth" problem also prompted government oversight, although, from the outset, the focus of regulation was at the national level. The Federal Radio Commission, created in 1927, was soon supplanted by the FCC, created during the era of the New Deal and charged with the allocation of the scarce resource by means of broadcast licenses, limited in number, to private companies. The licenses were monopolies, because unlicensed broadcasters on the same channel were in violation of the law. In evaluating competing license applications, the FCC would choose the candidate which was best qualified in a number of areas.[20] Financial responsibility and technical proficiency were only part of the profile. Aspiring broadcasters would also

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Jartech, Inc. v. Clancy, 666 F.2d 403 (9th Cir. 1982).

19. Indeed, the value of mail and messenger services was their complete ignorance of contents. Royal messengers were highly paid to maintain confidences, and most of them violated that trust. *See* FREDERIC MORTON, THE ROTHSCHILDS: PORTRAIT OF A DYNASTY 103 (Kodansha Globe 1998).

20. 47 U.S.C.S. § 309 (2007).

be required to provide plans for serving their communities in various ways, including a guaranteed quota of news and other public service programming.

Although the First Amendment guaranteed freedom of the press and free speech, the FCC was given authority to limit these rights by considering the "public interest".[21] Thus, for example, the FCC has long enforced the equal time doctrine, which required a broadcaster who provided airtime for one candidate for public office to grant equal time to all other candidates for that office.[22] Again, the FCC promulgated a fairness doctrine, which mandated that the subject of a negative broadcast be given a right of reply in the form of an equivalently distributed response.[23] The Supreme Court, while holding that a newspaper had no similar duty,[24] upheld the authority of the FCC to restrict broadcasters in this manner in *Red Lion.*[25] However, *Red Lion* was based upon the need to *protect* First Amendment rights, that is, the right of one who had been subject to attack in a previous broadcast to provide a response likely to reach the same audience: "No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because 'the public interest' requires it 'is not a denial of free speech.' There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others...."[26] The Court went on to observe that the First Amendment would be thwarted by any monopoly on speech, whether a government or private monopoly.[27] Moreover, the *Red Lion* decision explicitly recognizes the statutory prohibition against censorship by the FCC.[28]

21. 47 U.S.C. § 307 (grant of license and renewal).

22. 47 U.S.C. § 315 (2007).

23. 24 P & F Radio Reg. 404 (1962), implementing 47 U.S.C. § 315.

24. Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo, 418 U.S. 241(1974).

25. Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969). The court relied on *Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (statute banning showing of "sacrilegious" movie violated First Amendment) for the proposition that different media technologies could be subject to differing First Amendment standards. *See also* Kovacs v. Cooper, 336 U.S. 77 (1949) (sound trucks).

26. *Red Lion*, 395 U.S. at 389 (citation omitted).

27. *Id.*

28. "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station ..." *Red Lion*, 395 U.S. at 384 (*quoting* 47 U.S.C. § 326). *See also Red Lion*, 395 U.S. at 389.

Less than ten years after *Red Lion*, the Supreme Court opened the door to content censorship by the FCC. In *FCC v. Pacifica Foundation*,[29] a young comedian named George Carlin found a new vehicle for the tried and true formula every two-year old discovers: dirty words make people giggle. Carlin's gambit was simple: whereas the Supreme Court was struggling with the complex notion of obscenity as a nuanced consideration of context and community, Hollywood (the Motion Picture Association of America (MPAA) and its Code of Decency) and Washington (FCC)) had a simpler approach: some words could never be spoken in a movie or broadcast. Although the FCC had never fully enumerated the culprits,[30] Carlin discerned from the industry that there was indeed a list: seven to start, but it would grow with the gag. That theme became the basis for a night club monologue in which the words were delivered with a repetitive driving beat accompanied by riffs on the absurdity of it all. The twelve minute routine[31] was then refined and recorded. Trouble reared its ugly head when the Pacifica Foundation played the record for its afternoon broadcast audience,[32] and a listener complained that his child heard it on the family car radio.[33] It has not often been remembered that the radio program in question was devoted to commentary and analysis of contemporary attitudes toward language, with call-in

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29. 438 U.S. 726 (1978).

30. The FCC had previously ruled that the repeated use of variants of 'fuck' and 'shit' by Jerry Garcia in a taped radio interview constituted a violation warranting a $100 fine. In Re WUHY-FM, 24 F.C.C.2d 408 (1970). Commissioner Cox, although dissenting on the merits, stated: "At least the majority are now listing the words, and the usage of those words, which they regard as contrary to the public interest. I think that is desirable, although I am sure that broadcasters are going to worry about other words which they feel may be added to the list later on. And I applaud the majority for indicating that licensees will not be punished for presenting works of art or on-the-spot coverage of bona fide news events which may contain these words or others like them. I am glad they restrict their action to gratuitous use of words in circumstances where the offensive language has no redeeming social value." *Id.* at 417.

31. In Re Pacifica Found., 56 F.C.C.2d 94, 95 (1975). A "bleeped" version is available at http://www.albany.edu/talkinghistory/pacifica-archives/pacifica-ftv-the-carlin-case-024(part2).mp3 (last visited Dec. 5, 2006).

32. Carlin would subsequently be arrested after giving a live performance in the Midwest, *see* Wikipedia: George Carlin, http://en.wikipedia.org/wiki/George_Carlin (last visited Mar. 20, 2007).

33. The actual allegation, as reported by the FCC, was less than definitive: "Any child could have been turning the dial, and tuned to that garbage," and that "Incidentally my young son was with me when I heard the above..." 56 F.C.C.2d at 95. The FCC noted that this was the only complaint received from any source. *Id.*

discussion, and ran nearly fifty minutes.[34] Moreover, the Carlin segment was preceded by an explicit warning that the Carlin routine "included language that might be regarded as offensive to some; those who might be offended were advised to change the station and return to WBAI in 15 minutes."[35] WBAI's submission to the FCC noted that "George Carlin is a significant social satirist of American manners and language in the tradition of Mark Twain and Mort Sahl."[36]

The FCC proceeded cautiously, recognizing that Congress had explicitly denied it the power to censor or to interfere with free speech.[37] Although it had statutory power to deal with indecent broadcasts by imposing fines, denying licenses, or even seeking criminal proceedings, the agency conducted a hearing and then issued a "declaratory order"[38] ruling that the Carlin broadcast was indecent, and warning the Pacifica Foundation that a repetition could affect future proceedings involving Pacifica, such as license renewal. The finding of indecency was based upon the FCC determination that the term "is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."[39] Moreover, such indecent language ". . .. . .cannot be redeemed by a claim that it has literary, artistic, political or scientific value," unless the broadcast occurs after the magic hour of 10:00 P.M. [40] The FCC concluded by specifically listing the words that, as Carlin had predicted, could henceforth "never" be uttered during a broadcast.[41]

34. *Id.* Paul Gorman, the host of the program, was a graduate of Yale and Oxford universities, served as press secretary and speechwriter to U.S. Sen. Eugene McCarthy in the 1968 presidential campaign, and was later vice president for community based initiatives at the Cathedral of St. John the Divine in New York City. He founded the National Religious Partnership for the Environment in 1993. He hosted "Lunch Pail" on WBAI-FM in New York City for 29 years. Noah Alliance: Press speakers, *available at* http://www.noahalliance.org/speakers.htm#gorman (last visited Mar. 20, 2007).

35. 56 F.C.C.2d at 95-6.

36. *Id.* at 96.

37. *Id.* (*citing* 47 U.S.C. § 326).

38. 56 F.C.C.2d at 94.

39. *Id.* at 98.

40. *Id.*

41. Carlin's list differed from the FCC's, but only in minor aspects. *Id.* at 99.

The Supreme Court agreed with the FCC that Carlin was not funny. Although apparently rejecting the premise that the individual words were sufficient to trigger sanctions,[42] the Court sustained the agency conclusion that the entire monologue was shocking, patently offensive, and constituted a nuisance in the same manner as would "a pig in a parlor."[43] Thus was born the notion that the First Amendment meant different things for different technologies.

The FCC has gone far beyond the *Pacifica* decision, and has now achieved virtual censorship of content through a combination of factors. The FCC issued indecency guidelines in 2001.[44] Under the guidelines, any description or depiction of sexual or excretory organs or activities may be found indecent depending upon whether the content is explicit or graphic, repeats the offending content at length, or appears to pander or titillate or be presented for shock value.[45] The FCC directive states that enforcement proceedings are commenced only if a complaint is made.[46] The maximum fine for each violation was drastically increased by Congress in 2005.[47] The effect of the new fines was further leveraged by the FCC practice of imposing multiple penalties whereby each program generates a fine for each station which broadcasts it.[48]

The effect of these factors is that unelected officials respond to random complaints [which may be anonymous] by making post hoc determinations based upon exceedingly

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42. The Court stated "We have not decided that an occasional expletive ... would justify any sanction ... The Commission's decision rested on a nuisance rationale under which context is all important." Pacifica, 488 U.S. at 750. In this regard Carlin was prescient. *See* Elizabeth Jensen, *Early Hour for War Series, Salty Language and All*, N.Y TIMES, Nov. 6, 2006 [three clear-cut uses of obscenity in the series's 14 1/2 hours].

43. *Pacifica*, 488 U.S. at 750. The Court reproduced the full transcript of Carlin's routine in an appendix to the opinion, as had the FCC in its directive. It is not clear whether this was meant to demonstrate that the Court could do so without blushing, that the publication was in this context perfectly permissible, or that the routine was indeed patently offensive, is not clear. It is unlikely that the Court meant to signal approval. *Id.*

44. In the Matter of Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding the Broadcast Industry, 16 F.C.C.R. § 7999 (2001).

45. 16 F.C.C.R. § 7999(III)(B)(10).

46. 16 F.C.C.R. § 7999(IV)(24).

47. The Broadcast Decency Enforcement Act, Pub. L. No. 109-235, amending 47 USC § 503(b)(2) (increased the fine from $32,500 to $325,000 per broadcast).

48. *See, e.g.*, In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, FCC 06-17 (2006).

vague standards and imposing Draconian financial penalties or in extreme cases loss of the broadcast license. The most celebrated recent example of this broad ranging threat was the notorious and politically charged Super Bowl XXXVIII episode, an S&M fiasco in which one rock star removed a panel from his co-star's costume[49] and the FCC spanked CBS and several affiliates within an inch of their lives.[50] The FCC dismissed the CBS contention that it had no advance warning that Ms. Jackson's breast would be bared as irrelevant because the broadcaster "had full advance notice of the sexually provocative nature of the segment, including the choreography, the songs and their lyrics"[51] (albeit apparently not the exposure of Ms. Jackson's breast). That is, because CBS set out to "pander, titillate and shock"[52] the audience, they were strictly liable even if the performers went off script. Thus, the FCC sent its chilling message to the industry: if we think you are deliberately playing close to the line, we are going to fine you even if somebody sneaks up behind and pushes you over it.

While the decision to fine CBS in the Super Bowl Janet Jackson case is insupportable, there are many who would defend it on the ground that the entertainment industry has been far too aggressive in conveying sexual messages and therefore should be more circumspect. However, as the FCC becomes increasingly aggressive, its actions have had a profoundly chilling effect on the decisions of all broadcasters. Even PBS lives in fear of the FCC censor. After the San Mateo Community College affiliate in California affiliate rebroadcast "The Blues," an acclaimed documentary about

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49. It has been reported that the breast was not fully bared, but was veiled by a "pastie." Michael C. Dorf, *Does the First Amendment Protect Janet Jackson and Justin Timberlake?*, *available at* http://writ.news.findlaw.com/dorf/20040204.html (last visited Jan. 21, 2007). The FCC decision calls it "a bare breast." 19 F.C.C.R. 19230(13). That distinction may prove crucial if and when the Supreme Court takes a look. See *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), in which a badly fractured court sustained a municipal ban on nude dancing in a public establishment set forth in an ordinance which permitted dancing in pasties and G-String.

50. In the Matter of Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII, 19 F.C.C.R. § 19230 (2004), *reconsideration denied*, 21 F.C.C.R. § 2760. The then maximum $550,000 fine was imposed on CBS. The fine was an aggregate of $27,500 for each Viacom affiliate that broadcast the material.

51. 21 F.C.C.R. § 2760(18).

52. 21 F.C.C.R. § 2760(23).

music which featured historical interviews with early blues singers who used salty language, the FCC imposed a stiff fine as part of an aggregate proceeding that included a large number of broadcasts from many stations over a three year period.[53] Noted documentary filmmaker Ken Burns has produced a 14 hour work on World War II which includes three obscenities spoken by combat troops in the course of describing their experience. Burns insisted the show run at 8:00 P.M. so that viewers far too young to remember the War can learn about it. Although PBS agreed with Burns' decision, individual stations may start the program at the later hour for fear of reprisal from the FCC if they show it before the 10:00 P.M. safe harbor kicks in.[54] Burns summed up his attitude this way: "In order to save the world, these guys sometimes had to use language we sometimes wouldn't use in our daily discourse," he said. "I forgive them, and I hope others will too." [55]

The willingness of the Supreme Court to recognize the FCC's authority to narrow the basic scope of the First Amendment by banning indecent as well as obscene content may be partially explained by the development of yet another dissemination technology in the 1930's: the motion picture industry. Movies had been around since the late Nineteenth century, and pornography emerged early in the game. While ordinarily this emerging technology would also have presented a novel challenge to the courts, the debate was fundamentally affected by the decision by the Hollywood studios, confronted with strong community pressure from the Catholic Church and other religious and social organizations, to defuse the situation by adopting a voluntary censorship program that was stricter than any the government would devise. This extraordinary step was only possible because of

53. In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. § 2664 (2006). The sanction for showing "The Blues" was levied on the PBS affiliate in San Mateo, California after the FCC received a single complaint from an audience estimated at over 150,000 viewers. *Id.*

54. Elizabeth Jensen, *Early Hour for War Series, Salty Language and All,* N.Y. TIMES, Nov. 6, 2006. Congress unsuccessfully undertook to push back the safe harbor to midnight. The effort was ultimately rebuffed in *Action for Children's Television v. FCC,* 58 F.3d 654 (D.C. Cir. 1995), *cert. denied* 1216 S. Ct. 701 (1996) (ACT III).

55. *Id.* The same article reports that re-broadcasts of the acclaimed civil rights documentary, "Eyes on the Prize," are optionally available with offending words bleeped out.

the nearly total control that Hollywood enjoyed over the movie theatre distribution network.[56] The original Hayes Code of 1938 has evolved through the years to become the MPAA Ratings system, but until movie production costs plummeted in the 1960s, only a few isolated "art house" theaters had the temerity to show films that did not adhere to the MPAA requirements.[57] The movie theater "technology" also had the advantage of gate keeping, which controlled the audience for certain conduct by age grouping. [58] Like the FCC censorship of broadcast content, the movie ratings go far beyond the prohibition of obscene content to restrict material that in many instances would not even qualify as indecent under the FCC definitions. Although the MPAA cannot actually prohibit or penalize a film, a film's rating may curtail or virtually eliminate its market.

III. TECHNOLOGY CONVERGENCE

The distinction between communications technologies and dissemination technologies has become increasingly blurred, as illustrated by two examples: the Internet and the cable television network.

Although the very first computers stood alone in sealed chambers, the emergence of the personal computer in 1980[59] rapidly gave rise to the need for communication with other computers.[60] The first important deployment of this

56. *See generally* U.S. v. Paramount Pictures, Inc., 334 U.S. 131 (1948) (the culmination of actions by the Department of Justice against the major motion picture studios resulted in the breakup of the studios and the forced sale of their theater chains).

57. Official Code Objectives, Motion Picture Association of America, http://teaching.arts.usyd.edu.au/history/hsty3080/3rdYr3080/3080site/the%20code (last visited Jan. 21, 2007).

58. This notion of voluntary censorship was revisited by Congress when it passed the Communications Decency provisions of the 1996 Telecommunications Act: the safe harbor provision exempts ISPs from liability for publishing content if they voluntarily adopt controls on content which is indecent. The gate keeping function was adopted by parental controls offered by AOL and other ISPs.

59. The IBM PC was not the first, but its emergence signaled the transition from occasional hobbyist to broad market deployment. The IBM XT booted with a date of January 1, 1980, and the actual date was entered by hand.

60. The Defense Department sponsored ARPANET, a network linking several major universities to further collaboration on defense research. This primitive network pioneered the technologies that evolved into today's Internet. *See generally* Reno v. ACLU, 521 U.S. 844, 850 (1997).

technology took the form of a telephone connection.[61] Initially the purpose of the connection was to give a client computer access to a server with large processing and storage capacity. More recently the topology has emphasized peer to peer connections. In both models there is a targeted communication between two individual users designed to achieve a specific purpose. One of many examples of this convergence is the Slingbox, which seamlessly relays received television signals to any computer on the Internet, and which is the subject of other articles in this issue.[62]

A similar convergence has marked the development of cable television transmissions. Although cable carriers were granted geographical monopolies based upon a licensing process, once the franchise was granted the carrier delivered all of its content to all of its subscribers. Moreover, cable was a one-way street: subscribers could not communicate with the carrier unless they wrote or made a telephone call. In these aspects, cable and broadcast were the same. However, all of that changed when major cable carriers began to offer premium subscription services. Although basic cable was delivered to every subscriber, each household could control much of the content it received by subscription selection. The process became even more refined as cable companies recovered from their initial horrendous blunder and converted their systems to communications networks, which allowed subscribers to make more individualized programming selections by ordering content "on demand."

At the same time, the Internet expanded to include many new technologies that emphasized the broadcasting of content to users who had not specifically requested it. These new technologies include popup ads, which used to flicker and fade but now stay and play until the user finds the barely observable click zone that completes the original linking transaction. Unwanted advertising and solicitation also flourish in the sprawl of SPAM, which has doubled in the last

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61. The earliest devices were acoustic modems, with cups that fit over the mouthpiece and earpiece of a conventional telephone handset to carry acoustic tones between computer and telephone.

62. *See* Jessica L. Talar, Comment, *My Place or Yours*, SETON HALL J. OF SPORTS & ENT. L. (2007) (expose on Slingbox arguing for further legislation); *see also* Adi Schnaps, Comment, *Do Consumers Have the Right to Space-Shift, as They do Time-Shift, Their Television Content?*, SETON HALL J. OF SPORTS & ENT. L. (2007) (expose on Slingbox arguing the marketplace will adequately address the issue).

six months of 2006 and now accounts for 80% of all email. RSS feeds have succeeded in delivering push technology, which is a voluntary subscription service, but which nevertheless provides content on an ongoing basis without user initiative. Finally, the rapid deployment of high bandwidth always-on connections means that in many American homes the Internet is as much a presence as the television and more of a presence than the radio.

Thus, the distinction between broadcast and communications technologies will soon be eliminated as a practical matter. The question becomes whether the legal traditions originating with mail/messaging on the one hand, and copyright/censorship on the other, will continue to be applied individually according to the function being performed, or whether there will be a synthesis of principles to form a new paradigm. The following sections explore some of the pitfalls that await by examining the case study of censorship.

IV. TECHNOLOGY CONVERGENCE AND THE LAW

The Internet was treated as a communications technology by Congress when it enacted the Electronic Communications Privacy Act of 1986, which centered on critical amendments to the wiretap statute.[63] Congress took the same approach ten years later while adopting the 1996 telecommunications reforms,[64] when the bill was amended in conference to include the provisions of the Communications Decency Act (CDA),[65] which prohibited the knowing Internet transmission "of obscene or indecent messages to any recipient under 18 years of age,"[66] as well as the "knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age."[67]

In addition, the CDA gave ISP's a safe harbor that treated

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63. 18 U.S.C. § 2510 (2006).

64. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). The 1996 Act affected two major areas: (1) a major rewrite of telecommunications policy reflecting the total market realignment caused by the breakup of AT&T and the emergence of cellular telephones; and (2) the elimination of most media ownership restrictions for multi-channel video and over-the-air broadcast.

65. *Id.* at Title V. These provisions, unlike the rest of the Act, were added on the floor and were not the subject of Congressional hearings. *Reno*, 521 U.S. at 857.

66. 47 U.S.C. § 223(a) (2006).

67. 47 U.S.C. § 223(d).

them much like communications carriers: they were not liable absent specific knowledge, and they were not obliged to monitor content provided by subscribers.[68] While this portion of the law affected defamation litigation involving ISPs,[69] their liability for indecent content was mooted by the Supreme Court's first venture in Internet censorship, *Reno v. ACLU.*[70]

In *Reno*, the government relied heavily upon the Court's decision in *Pacifica*. However, the Court found a world of difference between broadcast radio and the Internet, noting that the former technology "had received the most limited First Amendment protection . . . in large part because warnings could not adequately protect the listener from unexpected program content," while on the Internet ". . .the District Court found that the risk of encountering indecent material by accident is remote because *a series of affirmative steps is required to access specific material*."[71] The Court, while noting that each medium of expression merits separate evaluation, went on to single out "broadcast media" as being particularly subject to regulations that are not suitable to "other speakers,"[72] and concluded, "[t]hose factors are not present in cyberspace . . . [t]he Internet is not as 'invasive' as radio or television."[73] The District Court specifically found that "communications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'"[74] The Court also noted that in *Pacifica* the FCC had agreed that the offending content could be broadcast after 10:00 P.M.,[75] a compromise that had no Internet counterpart. The Court in *Reno* also found that bandwidth scarcity was a unique characteristic of broadcasting, distinguishing the Internet which "can hardly be considered a "scarce' expressive

68. 47 U.S.C. § 230 (2006). In doing so, Congress undertook to preempt a healthy effort by the courts to hold content providers liable in the same manner as publishers while immunizing content carriers in the same manner as book sellers.

69. *See generally* Batzel v. Smith, 333 F.3d 1018 (9th Cir. Cal. 2003).

70. *See generally Reno*, 521 U.S. 844.

71. *Id.* at 867 (internal quotations omitted) (citation omitted) (emphasis added).

72. *Id.* (citing *Red Lion*, 355 U.S. at 399-400; *Pacifica*, 438 U.S. 726; Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637-38 (1994); and Sable Commc'n of Cal., Inc., v. FCC, 492 U.S. 115, 128 (1989)).

73. *Id.* (internal citation omitted).

74. *Reno*, 521 U.S. at 867 (internal citation omitted).

75. *Id.*

commodity."

Thus, in *Pacifica*, the Court had seen the technology as a unilateral incursion into the home of virtually all Americans, capable of furnishing unrequested content that would be perceived by anyone in front of the receiver, including the youngest children, with no mechanism for blocking unwanted or objectionable content.[76] On the other hand, in *Reno* the Court saw the technology as an individual communication session with a pre-planned purpose to seek specific content using a technology that was for the most part not readily available in most homes.[77] This model was adhered to by the Court almost ten years later in *National Cable & Telecommunications Assoc. v. Brand X Internet Services*,[78] when Justice Thomas, writing for the Court, stated "[t]he traditional means by which consumers in the United States access the. . . Internet is through "'dial up'" connections provided over local telephone facilities."[79]

Although the Court has since revisited congressional regulation of Internet content, it has retained the communications-technology approach adopted in *Reno*. In both *U.S. v. American Libraries Assoc.*,[80] and *Ashcroft v. ACLU*,[81] the Court considered the possibility that children could be protected from indecent Internet content by means of filtering software that would automatically block their access to offending web sites. In *American Libraries Assoc.*, the Court did not really focus on the Internet at all, but rather devoted most of the opinion to a thoughtful explication of the unique role played by public libraries in the American culture. The Court concluded that a public library, unlike the Internet itself, does not exist to provide universal access to all content, but rather exercises a crucial selective function to insure that patrons, and the parents of child patrons, may feel that available content has been screened for a variety of

76. *Pacifica*, 438 U.S. at 731 n.2. The Court drew this model even though in *Pacifica* the sole complainant was an adult driving a car with a young child in it. The complaint nowhere states the child actually heard any of the broadcast, and the father as driver could presumably have mooted the case by changing the station.

77. *See generally Reno*, 521 U.S. 844.

78. *See generally* Nat'l Cable & Telecomm. Assoc. v. Brand X Internet Services, 545 U.S. 967 (2005).

79. *Id.* at 974.

80. *See generally* United States v. Am. Library Assoc., 539 U.S. 194 (2003).

81. *See generally* Ashcroft v. ACLU, 542 U.S. 656 (2004).

purposes. In *Ashcroft*, the Court affirmed the continuance of a preliminary injunction barring enforcement of criminal provisions while the lower court explored the plaintiffs' contentions that the purposes of the Child Online Protection Act could be as well or better served by using filtering, which the Court characterized as a less restrictive alternative than total prohibition of designated content.[82] The crucial point about both decisions is their reliance upon the model of an Internet that involves individual communications sessions triggered by a user in a manner that affords an opportunity for an intermediary to intervene in cases where the transaction is harmful to one of the parties.

The communications-oriented approach had also earlier led the Court to hold that restrictions on so-called "dial a porn" services could restrict obscene, but not merely indecent content, because affirmative action by the listener was required to receive the communication.[83] The Court utilized an analogous approach in dealing with subscription cable television service, striking down a statute which required adult video providers to scramble or block all signals, which had forced content providers to withhold programming entirely until after 10:00 P.M. The Court based its decision on the premise that the selective veto available to cable subscribers gave premium carriers broader free speech protection than broadcasters, and that accordingly Congress was required to adopt the least restrictive alternative in requiring them to block content.[84]

Thus, at the moment the Court is holding to a model of the Internet that is based upon a model of individual communications for specific purposes, even though, as it acknowledged in *Ashcroft,* that model is unlikely to suffice much longer. As the new model emerges, that is as broadcast technologies become significant and even dominant factors, and as the Internet becomes a fixture in the home, replacing the radio[85] and maybe the television, will the FCC be able to

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82. COPA was held unconstitutional after trial on the ground that it did not comprise the least restrictive alternative to achieve the permissible Congressional purpose. ACLU v. Gonzalez, No. 98-5591, (E.D. Pa. Mar. 22, 2007).

83. *See Sable Commc'n.*, 492 U.S. 115.

84. U.S. v. Playboy Entm't Group, 529 U.S. 803 (2000).

85. WBAI Online, http://stream.wbai.org/ (last visited Dec. 8, 2006) (the online stream for WBAI radio, which in lower Manhattan the author can no longer tune on his FM radio).

convince the Court that it can regulate indecency on the new medium?

V. THE FUTURE ROLE OF THE FCC

Historically, the FCC played an important role in both communications technology and broadcast technology, two major information distribution networks which entailed centralized control. A crucial question becomes what if any role the FCC will play in the Internet, which has now clearly emerged as the third, and perhaps ultimately the dominant network. As the earlier discussion has shown, the FCC has gone far beyond what the Court sanctioned in *Pacifica*, and has become a censor: all broadcasters modify program content to avoid specific words no matter how appropriate they might be unless the broadcast airs after 10:00 P.M. The aggressive enforcement approach of the FCC in the broadcast arena leaves no doubt that the agency believes it has a mission to protect the American public, and particularly children, against content it deems indecent, even though most citizens find its position ludicrous.

There is also no doubt that the FCC has aspirations to expand its regulatory reach to include the Internet, as illustrated by the broadcast flag campaign. When the United States enacted a legal expectancy that Digital Television [DTV] would become the preferred mode of transmission by the end of 2006,[86] the primary concern was signal quality. However, the digital signal raises other important issues as well, including the specter of piracy, just as it did in the case of audio recording.[87] The television industry suffered a setback in *Sony*,[88] when the Supreme Court held that the manufacturer of a video recording device for use with a home television was not a contributory copyright infringer because

86. 47 U.S.C. § 309(j)(14). The deadline has now been extended until at least 2009.

87. The explosive popularity of online file swapping followed directly upon the successful compression of digital audio content and the resultant ability to quickly download files with even moderate bandwidth. Although compressed mp.3 [mpeg audio standard level 3] is not perfect by any means, it removes the pops and crackles of analog copies and is good enough for most ears. See generally *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), in which Justice Souter, writing for the majority, noted, "[the recording industry contends that] digital distribution of copyrighted material threatens copyright holders as never before: because every copy is identical to the original, copying is easy." *Grokster*, 545 US at 929.

88. Sony Corp. of Am. v. Universal Studios, Inc., 464 U.S. 417 (1984).

the viewer had a fair use privilege to use the recorder to "time-shift" a program for later viewing.[89] The effect of the decision was blunted by the relatively low quality of the program signal and of the resultant recording, both of which were analog. With the advent of digital signals and digital video recorders, the opportunity for both rebroadcast and perfect copying have arrived, and the industry has responded with the "broadcast flag," more properly called the Redistribution Control Descriptor, a digital code in a broadcast stream which prevents a properly configured digital television receiver from rebroadcasting the program. The "flag" is a data string that works only if the receiver in question is configured to react in a specified manner when the flag is detected. The FCC promulgated a regulation that would have required that all receivers made after July 1, 2005, be configured to detect the flag and, while allowing the recipient to make use of the content, prevent its distribution over the Internet or to other mass audiences.[90]

In promulgating this regulation, the agency relied upon its ancillary authority over matters pertaining to broadcasts.[91] The agency's jurisdiction to issue the regulation was challenged in *American Library Association*,[92] on the grounds that the agency lacked statutory authority and that the regulation conflicted with copyright law. The core of the challengers' argument is that "[t]he FCC claims no specific authority allowing it to meddle so radically in the nation's processes of technological innovation. . ."[93] Although the authority of the major federal agencies is breathtakingly broad, such authority must always be traced to a statutory authorization.[94] No matter how compelling the policy need, or how great the expertise of the agency, there is no common law power to act.[95] Thus, the normal deference to the expertise of

89. *Id.*

90. Flag Order: 18 F.C.C.R. §§ 23570, 23576, 23590-91 (2003). *See* Rojas, *The Clicker: Demystifying the Broadcast Flag, available at* http://hdtv.engadget.com/entry/1234000717032165/ (last visited May 12, 2006).

91. 47 U.S.C. § 336. Opponents of FCC jurisdiction contended that 47 U.S.C. § 336, which defines the FCC's authority to issue license for advanced television services, including DTV broadcast licenses and the quality of broadcast signals, did not extend to receivers handling post-transmission routines.

92. *See generally Am. Library Ass'n.*, 406 F.3d 689.

93. *Id.* at 695.

94. *See* La. Public Service Comm'n v. FCC, 476 U.S. 355 (1986).

95. Michigan v. EPA, 268 F.3d 1075 (D.C. Cir. 2001). *See generally* Chevron USA

an agency is obviated if that agency had no jurisdiction to regulate.[96] The ancillary jurisdiction of the FCC may be invoked if the subject of regulation is interstate or foreign communication by wire or radio and the regulation is reasonably ancillary to the agency's effective performance of its statutory duties. However, the U.S. courts have persistently refused to recognize FCC jurisdiction beyond actual signal transmission,[97] and the United States Court of Appeals for the District of Columbia Circuit concluded that the FCC lacked ancillary jurisdiction to regulate how consumer electronics equipment could handle program content after the transmission process had been completed.[98] The Court sustained this result even though the Communications Act specifically defines radio and wire communications to include "all instrumentalities, facilities, apparatus, and services (. . .the receipt, forwarding, and delivery of communications) incidental to. . . transmission," [99] reasoning that receivers processing signals that had already been delivered were not "incidental" to transmission. The Court noted that Congress had previously extended FCC jurisdiction to receivers in a limited context,[100] but concluded that these specific grants of authority did not confer blanket jurisdiction over receiver design and function.[101]

CONCLUSION

The FCC has had enormous influence on the content of broadcast radio and television programs. As the Internet becomes a major, if not the preferred, vehicle for content distribution to American homes, Congress will be pressed to define the jurisdiction of the FCC in terms of the newly converged technology. Those who favor greater content

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Inc. v. Natural Res. Def. Council Inc., 467 U.S. 837 (1984); United States v. Mead Corp., 533 U.S. 218 (2001).

96. Motion Picture Ass'n. of Am. v. FCC, 309 F.3d 796 (D.C. Cir. 2002).

97. Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943); Accuracy in Media, Inc. v. FCC, 521 F.2d 288 (D.C. Cir. 1975).

98. *Am. Library Ass'n.*, 406 F.3d 689.

99. 47 U.S.C. §§ 153(33) and (52).

100. The All Channel Receiver Act, 47 U.S.C. § 303(s) (allowing the FCC to require television receivers sold in interstate commerce to be capable of adequately receiving all frequencies allocated to television broadcasting by the FCC).

101. *See* Elec. Indus. Ass'n. Consumer Elec. Groups v. FCC, 636 F.2d 689 (D.C. Cir. 1980).

regulation will in turn exert pressure on Congress to continue and expand its efforts to control the new technology. Possible responses include expanded FCC jurisdiction to regulate content broadcast by FCC licensees which is replicated by Internet streaming, mandated filtering requirements to block specified content from children, or even authorization to expand the FCC forfeiture model to Internet broadcasts. The Court has continued to recognize FCC powers even where it has become clear that bandwidth scarcity, the original impetus for regulation, is no longer a factor. The Court now will have the opportunity to explicitly recognize that early radio and television broadcast technology was sui generis, with none of the defining characteristics shared by the Internet. The Court will have the further, but separate opportunity to declare that Internet speech is free speech notwithstanding its pervasive presence in American homes. If it does, then only obscene speech may be forbidden. However, it is quite plausible that the Court will extend *Pacifica* to other technologies which permeate American homes and reach children in large numbers, and accordingly will allow the FCC or some other agency to employ decency standards on the Internet.

Internet bandwidth has become so formidable and accessible that it embodies all of the technologies that have come before it and converges them into a single overarching communications and distribution medium. Whether by satellite or transmitter content can be provided wirelessly to isolated and mobile receivers. Content can travel by telephone cable, cable television networks, fiber optic cable, or even by electric power cable, as well as by twisted pair, because all are moving toward the digital domain and the IP protocol. Most radio broadcasters now have a parallel Internet stream. Television broadcasters in the U.S. have limited offerings, but the limitations are more likely the result of legal concerns rather than technology constraints. Voice Over Internet Protocol (VOIP) has arrived. The commercial music business has already been deeply changed by the advent of online music services such as iTunes, which make blockbuster hits, as well as more obscure works, instantly available in multiple delivery modules at lower prices which reflect both the cheaper costs of production and distribution and the competition from illegal but still very popular file swapping. Movies, television programs, concerts, and software have

already joined the online shipping lanes.

The problem now is that the Court's reasoning in *Reno* is based upon a communications technology model of the Internet that it no longer obtains.[102] A whole series of Internet phenomena have become dominant just within the past few years: pop-ups and targeted advertising, RSS "push" feeds of subscription content, spam, full length high quality video, and MySpace meeting rooms have combined to deliver huge quantities of content *into the home*, the very haven the Court found itself bound to protect in *Pacifica* (even though the offended listener was in his car at the time).

Traditional print media in the United States have enjoyed extensive protection under the First Amendment, which specifically countered censorship that had subsisted under the British regime. Communications technologies have maintained a theme of privacy notwithstanding the change from print to electronic format. Dissemination technologies have not enjoyed the same continuity: the FCC has successfully exercised government censorship powers not found in any other area of activity. Although this extraordinary power emanated from the need to allocate limited bandwidth, the rationale has shifted to the power of broadcast media to enter private homes. Strong political interests favor censorship, and will undoubtedly undertake to expand FCC powers to include Internet transmissions. If that effort succeeds, only the Supreme Court can avoid the emasculation of the First Amendment in its role as media disseminator, and in the long run the emasculation of the right to privacy in its role as a communications network.

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102. The Court had expressed its awareness that the pace of technology may outstrip the judicial process for gathering information in Ashcroft II. *See Ashcroft*, 542 U.S. 656.