

**THE DAY THE INTERNET MET THE FIRST AMENDMENT:  
TIME AND THE COMMUNICATIONS DECENTRY ACT**

*Charles Nesson\* and David Marglin\*\**

TABLE OF CONTENTS

I. INTRODUCTION .....	113
II. <i>PACIFICA</i> AND <i>SABLE</i> : (WHEN) IS THE INTERNET A PERVASIVE MEDIUM? .....	115
III. IF THE LAW FITS: NARROW TAILORING, TECHNOLOGY, AND FREE SPEECH .....	122
IV. FACTS IN FLUX: HOW THE SUPREME COURT DEALS WITH CHANGING FACTS .....	125
V. AS THE WORLD WIDE WEB TURNS ON ITS ACCESS .....	130
VI. CONCLUSION: COMING OF AGE IN AN ERA OF INCREASING ACCESS .....	134

---

I. INTRODUCTION

Courts are currently addressing the constitutionality of the Communications Decency Act of 1996 ("CDA" or "Act")<sup>1</sup>—specifically its regulation of indecency on the Internet. Two district courts have determined that there is a substantial likelihood that an ultimate challenge to the constitutionality of the Act will succeed on the merits, and they have issued preliminary injunctions against enforcement of the CDA.<sup>2</sup> At least one of

---

\* William F. Weld Professor of Law, Harvard Law School.

\*\* J.D., 1996, Harvard Law School; clerk to the Honorable Nancy Gertner, U.S. District Court for the District of Massachusetts.

1. The CDA is part of the Telecommunications Act of 1996, Pub. L. No. 104-104, tit. 5, 110 Stat. 56, 133-43 (1996) (to be codified in scattered sections of 47 U.S.C. and 18 U.S.C.).

2. See *Shea ex rel. Am. Rep. v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996), appeal docketed, 65 U.S.L.W. 3362 (U.S. Nov. 12, 1996) (No. 96-595) [hereinafter *Shea*]; *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), review granted, 65 U.S.L.W. \_\_\_\_ (U.S. Dec. 10, 1996) (No. 96-511) [hereinafter *ACLU*]. Pursuant to the requirements of the CDA,

these district court rulings will ultimately be reviewed by the Supreme Court<sup>3</sup> — in its first encounter with the Internet.

The constitutional challenges to the CDA require, in several instances, application of constitutional standards that depend on facts about the nature of the medium. While courts ponder, technology progresses. The real-world medium that frames the legal questions, the Internet, is rapidly developing and changes daily. This essay addresses the following question: What is the relevant moment in time at which facts about the Internet are determined? The question is not *when* is the statute being reviewed by the courts, but rather on what moment in time do these courts focus? Now? The day the law was enacted? The future? How can a court render an enduring judgment about the constitutionality of a statute when the very weights on the scales used in the constitutional balancing test are in rapid flux? Are there any enduring facts about the Internet upon which opponents of the CDA can depend as they pursue their attack on the Act?

This essay seeks specifically to examine the following issues:

- (1) Constitutional challenges to the CDA may require consideration of whether the Internet is more like broadcast (radio and television) than telephony, broadcast being a medium that courts have given Congress more leeway to regulate. Whether the Internet is more like broadcast or more like telephony depends on what the Internet is at the relevant moment of assessment. What moment is that?
- (2) Constitutional challenges to the CDA may require consideration of whether the statute is narrowly tailored to accomplish its objective. This may depend on whether there are technologically feasible methods by which content providers can restrict access by children to indecent material, and thereby escape criminal prosecution; otherwise the statute amounts to an outright ban on Internet indecency. In reference to what point in time is such technology assessed?
- (3) Constitutional challenges to the CDA may require judging the effectiveness of the statute in accomplishing its objective. The CDA's objective ostensibly is to protect

---

these cases were heard by special three judge panels, each including two district court judges and a circuit court judge. See 110 Stat. at 142-43; *ACLU*, 929 F. Supp. at 827.

3. The CDA provides for direct appeal to the Supreme Court. See 110 Stat. at 143. The government has filed its appeal in both *Shea* and *ACLU*. See 65 U.S.L.W. 3362 (U.S. Nov. 12, 1996) (No. 96-595); 65 U.S.L.W. 3318 (U.S. Oct. 22, 1996) (No. 96-511), and the Supreme Court has granted review in *ACLU*. See 65 U.S.L.W. \_\_\_\_ (U.S. Dec. 10, 1996) (No. 96-511).

minors from exposure to indecent materials on the Internet. The Internet is global, while the CDA's reach is limited to the jurisdictional boundaries of the United States; if the global Net remains awash in indecency accessible to minors, then the CDA will be ineffective. If the CDA is ineffective, then its burdens on protected speech may be unjustified and the statute thus unconstitutional. Is this ineffectiveness a more trustworthy hook on which to hang a constitutional challenge to the CDA, or is it subject to changing facts as well?

The novelty exemplified by the CDA litigation is the prospect of technology giving us change at such a rapid pace that questions about the point in time at which constitutionality is to be assessed come sharply into focus. Today's fictions may turn out to be tomorrow's facts.

## II. *PACIFICA* AND *SABLE*: (WHEN) IS THE INTERNET A PERVASIVE MEDIUM?

In general, the Supreme Court has applied a "strict scrutiny" test to laws regulating the content of speech — requiring that such laws be "narrowly tailored" or the "least restrictive means" to serve "compelling" governmental interests.<sup>4</sup> There are many exceptions to and variations on this general rule, however. Some types of speech, including obscenity, have been categorically denied protection.<sup>5</sup> (Indeed, the plaintiffs in the two suits challenging the CDA have not quarreled with the law to the extent that it limits the transmission of obscenity, but focus on its regulation of indecent speech,<sup>6</sup> which has been accorded First Amendment protection).<sup>7</sup> In other cases, regulation of otherwise fully protected speech has been subject to less than strict scrutiny because of the setting in which the speech has occurred or the medium by which it has been transmitted.<sup>8</sup> Most notably, for the purposes of this discussion, the Supreme Court has tended to permit regulations of broadcast content that would not be permitted if they applied

---

4. See RODNEY A. SMOLLA, *SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT* § 3.03[1][a] (1994); see also, e.g., *Sable Comms. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

5. See, e.g., *Sable*, 492 U.S. at 124.

6. See *Shea*, 930 F. Supp. at 922 (indicating that the plaintiffs' challenge was to § 223(d) of the CDA, which does not mention obscenity); *ACLU*, 929 F. Supp. at 829.

7. See, e.g., *Sable*, 492 U.S. at 126; see also SMOLLA, *supra* note 4, §14.02[4] (discussing the difference between indecency and obscenity).

8. See SMOLLA, *supra* note 4, § 3.04[3] (explaining that reduced scrutiny applies, for example, to speech in public schools, speech by government employees, and speech funded by the government).

to other media.<sup>9</sup> The fate of the CDA depends to some extent on whether the Internet resembles broadcasting in ways relevant to the Supreme Court's rationale for this lower scrutiny of broadcasting content regulations.

In the seminal case of *FCC v. Pacifica Foundation*,<sup>10</sup> the Supreme Court held that the FCC could use administrative penalties to regulate indecent speech in radio programming.<sup>11</sup> The nature of the medium regulated was crucial to the Court's reasoning. The Court noted that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection."<sup>12</sup> Previous cases had used a scarcity rationale to justify regulation of the content of broadcasting.<sup>13</sup> The logic of those cases was that because there was not enough spectrum space to go around the FCC could put conditions on broadcast licenses, including some regulation of content.<sup>14</sup> The *Pacifica* Court proffered two new reasons for special limited First Amendment protection for broadcasting. First, broadcasting is pervasive; it confronts people — even in their own homes — with material they do not necessarily desire to see. As the Court explained:

[The] broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.<sup>15</sup>

Second, the Court observed that "broadcasting is uniquely accessible to children."<sup>16</sup> Unlike written indecency that young children might not be able to read, "Pacifica's broadcast could have enlarged a child's vocabulary in an instant."<sup>17</sup> Given these special characteristics, the Court was willing to

9. See *id.* § 14.01; *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386-90 (1969).

10. 438 U.S. 726 (1978).

11. The Court held that the FCC had the statutory authority to require that George Carlin's now famed "seven dirty words" monologue not be played on the radio in the middle of the day, and the exercise of that authority did not violate the First Amendment. See *id.* at 738, 744-51.

12. *Id.* at 748.

13. See, e.g., *Red Lion Broad.*, 395 U.S. at 386-90.

14. See, e.g., *id.* "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Id.* at 388.

15. *Pacifica*, 438 U.S. at 748.

16. *Id.* at 749.

17. *Id.*

approve of regulation of indecent speech that might otherwise be protected.<sup>18</sup> In contrast, the Supreme Court's more recent decision in *Sable Communications of California, Inc. v. FCC*,<sup>19</sup> struck down legislation outlawing telephonic indecency (so-called "dial-a-porn" services).<sup>20</sup> Explicitly applying strict scrutiny to the challenged legislation, the Court asked whether the content restrictions were the "least restrictive means" to serve a compelling government interest.<sup>21</sup> The Court held that Congress was not justified in imposing a total ban on indecent telephone messages, since such a ban went far beyond that which was necessary to protect minors from being exposed to indecent messages.<sup>22</sup> *Pacifica* was distinguishable, said the *Sable* Court, because broadcast radio is uniquely accessible to children and intrudes into the privacy of the home without any effective warning of its content.<sup>23</sup> Telephony, the Court explained, is a fundamentally different medium: callers have to take active and "affirmative steps" in order to access phone-sex services and "will generally not be unwilling listeners" unable to prevent exposure to unexpected messages.<sup>24</sup> Moreover, the regulations in *Pacifica*, unlike those in *Sable*, did not involve a total ban, but only time-restrictions on when indecent material could be broadcast.<sup>25</sup>

*Pacifica* and *Sable* suggest that the proper approach to a First Amendment challenge to restrictions on indecent content in a new medium is to apply strict scrutiny unless the medium is as pervasive and accessible to children as broadcasting. The Supreme Court's 1994 decision in *Turner Broadcasting System, Inc. v. FCC*,<sup>26</sup> however, could be interpreted to have undermined the pervasiveness and accessibility rationales altogether.<sup>27</sup> *Turner* was a First Amendment challenge brought by cable operators and programmers opposed to the provisions of the 1992 Cable Act that required cable operators to carry local broadcast stations.<sup>28</sup> The Court rejected the Government's argument that cable television should be analyzed under the same First Amendment standard

---

18. *See id.* at 750.

19. 492 U.S. 115 (1989).

20. *See id.* at 131 (leaving intact provisions of the challenged legislation banning telephonic obscenity).

21. *Id.* at 126.

22. *See id.* at 128, 131.

23. *See id.* at 127-28; *see also* *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) (refusing to extend *Pacifica* to a law prohibiting the unsolicited mailing of contraceptive advertisements, as "[t]he receipt of mail is far less intrusive and uncontrollable [than broadcasting]. Our decisions have recognized that the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication." (footnote omitted)).

24. *Sable*, 492 U.S. at 128.

25. *See id.* at 127.

26. 114 S. Ct. 2445 (1994).

27. *See ACLU, supra* note 2, 929 F. Supp. at 876-77 (opinion of Dalzell, J.).

28. *See Turner*, 114 S. Ct. at 2452-55.

that applies to regulation of broadcast television, finding that cable television does not suffer from the same scarcity problems that afflict the broadcast media; the Court did not address the other rationales in *Pacifica*.<sup>29</sup> As cable television is arguably as pervasive and accessible from a potential viewer's point of view as broadcast television,<sup>30</sup> the fact that *Turner* failed to extend the reduced scrutiny of *Pacifica* to cable<sup>31</sup> could suggest that the true underlying rationale of *Pacifica* was the rationale for regulation of broadcasting content that had been used in the past: the scarcity of broadcast frequencies. Judge Dalzell<sup>32</sup> took this view of the *Turner* precedent in his opinion in *ACLU v. Reno*, the first district court challenge to the CDA: "*Turner*'s holding confirms beyond doubt that the holding in *Pacifica* arose out of the scarcity rationale unique to the underlying technology of broadcasting, and not out of the end product that the viewer watches."<sup>33</sup> But it seems equally plausible that the *Turner* Court failed to extend *Pacifica*'s pervasiveness and accessibility rationales not because the scarcity rationale is the only one in *Pacifica* that really counted, but because the other two rationales make sense only, as in *Pacifica*, when the Government is restricting speech in order to keep potentially offensive material away from children — not when, as in *Turner* and the pre-*Pacifica* scarcity rationale cases, the Government is requiring that certain speech be carried.<sup>34</sup>

The most recent Supreme Court case to address the issue of *Pacifica*'s applicability and rationale was *Denver Area Educational Telecommunications*

---

29. See *id.* at 2456-57.

30. See *ACLU*, 929 F. Supp. at 876 (opinion of Dalzell, J.) (stating that "[f]rom the viewer's perspective, cable and broadcast television are identical: moving pictures with sound from a box in the home.") On the other hand, one has to take the affirmative step of subscribing to a cable service.

31. While refusing to extend reduced scrutiny from the broadcast context, the *Turner* Court did not apply strict scrutiny, but rather "the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech." *Turner*, 114 S. Ct. at 2469.

32. The *ACLU* court issued joint findings of fact and conclusions; each judge issued a separate supporting opinion. See *ACLU*, 929 F. Supp. at 849.

33. *ACLU*, 929 F. Supp. at 876 (opinion of Dalzell, J.).

34. See, e.g., *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969). The theory that there are two parallel sets of rationales operating in the two types of cases is bolstered by the fact that the *Turner* Court never mentioned *Pacifica*. See *Turner*, 114 S. Ct. 2445. Furthermore, Justice Brennan's interpretation, in his *Pacifica* dissent, of the majority and concurring opinions in *Pacifica* was that "[t]he opinions of my brothers Powell and Stevens rightly refrain from relying on the notion of 'spectrum scarcity' to support their result." *FCC v. Pacifica Found.*, 438 U.S. 726, 770 n.4 (1978) (Brennan, J., dissenting). Moreover, "although scarcity has justified increasing the diversity of speakers and speech, it has never been held to justify censorship." *Id.* (quoting *Pacifica Found. v. FCC*, 556 F.2d 9, 29 (D.C. Cir. 1977) (Bazelon, C.J., concurring)).

*Consortium, Inc. v. FCC*.<sup>35</sup> In a decision issued after *ACLU*, but before *Shea v. Reno* (the second district court challenge to the CDA), the Court addressed provisions of the Cable Act of 1992 that allowed cable system operators to refuse to carry indecent material on their "leased access" and "public access channels" and required them to segregate indecent programming on a single channel and to block viewer access to that channel unless a viewer had made an advance written request.<sup>36</sup> While refusing to conclude that cable should always be considered in the same category with broadcast, Justice Breyer held for a plurality of the Court that "the problem Congress addressed here is remarkably similar to the problem addressed by the FCC in *Pacifica*, and the balance Congress struck is commensurate with the balance we approved there."<sup>37</sup> He explicitly tied the holding in *Pacifica* to the pervasiveness and accessibility of broadcast and observed that "[a]ll these [pervasiveness and accessibility] factors are present here."<sup>38</sup>

The *ACLU* and *Shea* courts both applied a strict scrutiny test to the CDA.<sup>39</sup> In his *ACLU* opinion, Judge Dalzell dismissed the possibility that *Pacifica* could limit scrutiny of the CDA — concluding, as discussed, that the pervasiveness rationale had been invalidated by *Turner*, and observing that the scarcity rationale did not apply because "plaintiffs and the Government agree that Internet communication is an abundant and growing resource."<sup>40</sup> But for good measure, Judge Dalzell noted:

[W]e have found as a fact that operation of a computer is not as simple as turning on a television, and that the assaultive nature of television is quite absent in Internet use. . . . The Government may well be right that sexually explicit content is just a few clicks of a mouse away from the user, but there is an immense legal significance to those few clicks.<sup>41</sup>

Chief Judge Sloviter likewise explained:

---

35. 116 S. Ct. 2374 (1996).

36. Leased access channels and public access channels are spaces on a cable operator's system that they are required by federal law and their local franchise agreements, respectively, to set aside for use by entities with which they have no affiliation. Cable operators would normally have no content control over these channels. See *id.* at 2380-81.

37. *Id.* at 2386 (Breyer, J., plurality opinion).

38. *Id.*

39. See *ACLU*, *supra* note 2, 929 F. Supp. at 851 (opinion of Sloviter, C.J.); *Shea*, *supra* note 2, 930 F. Supp. at 940.

40. *ACLU*, 929 F. Supp. at 877 (opinion of Dalzell, J.).

41. *Id.* at 876 n.19 (opinion of Dalzell, J.) (citations omitted).

[T]he evidence and our Findings of Fact based thereon show that Internet communication, while unique, is more akin to telephone communication, at issue in *Sable*, than to broadcasting, at issue in *Pacifica*, because, as with the telephone, an Internet user must act affirmatively and deliberately to retrieve specific information online.<sup>42</sup>

The *Shea* court saw the need to address the pervasiveness and accessibility issues directly, "in light of the Supreme Court's recent decision in *Denver Area Consortium*."<sup>43</sup> The court considered the pervasiveness and accessibility rationales and found strict scrutiny appropriate for the Internet, because:

As our findings of fact make clear, it takes several affirmative steps for a user to gain access to material through an interactive communications service. Indecent content on the Internet ordinarily does not assault a user without warning: a child cannot gain access to Internet content with the touch of a remote control, and while accidental viewing of indecent content is possible, there is no evidence in this record to suggest that it is likely.<sup>44</sup>

So the CDA was submitted to strict scrutiny in the district courts at least in part because both courts made findings of fact that the Internet, unlike broadcasting, is not pervasive or especially accessible to children. But the crucial question for the future of the challenges to the CDA is: pervasive or accessible as of when? The two district courts both, without analysis, took the relevant time period to be the "present" (which apparently should be taken to mean the date their opinions were issued). They said, in effect, the Internet is not *now* pervasive or especially accessible.

The *Shea* court referred to its view of the relevant time: "Of course, our findings of fact are necessarily time-bound. We can only determine whether the statutory provision at issue here, *in light of the technology available during the pendency of this case*, comports with the First Amendment."<sup>45</sup> The *ACLU* court likewise made the time-bound nature of its findings clear, through

---

42. *Id.* at 851-52 (opinion of Sloviter, C.J.). Judge Buckwalter, focusing on the vagueness of the term "indecent," did not address the *Pacifica* rationale so explicitly. He did clearly apply strict scrutiny, however (*see id.* at 859 (opinion of Buckwalter, J.)); and he noted that the *Pacifica* Court "emphasized that its narrow holding applied only to broadcasting." *Id.* at 862 (opinion of Buckwalter, J.).

43. *Shea*, 930 F. Supp. at 939-40.

44. *Id.* at 940.

45. *Id.* at 930 (emphasis added).



repeated use of words like “currently” and “now,”<sup>46</sup> and frankly acknowledged at one point that “[b]ecause of the rapidity of developments in this field, some of the technological facts we have found may become partially obsolete by the time of publication of these Findings.”<sup>47</sup>

Indeed, while to the *ACLU* and *Shea* courts the Internet seemed closer to dial-up telephone services than to broadcast media in terms of pervasiveness and accessibility, that situation is changing by the day, with companies hotly competing to find ways to ease entry to the Internet, and even to integrate Internet and broadcast media into a single user-interface. Cable modems are becoming available that bring the Internet into the home through the family television set.<sup>48</sup> Technologies like Pointcast software are delivering content to users’ screens unbidden.<sup>49</sup> Furthermore, the Court’s emphasis on pervasiveness and accessibility to children seems to reflect a sensitivity to the relative potential impact of different media on children, along a spectrum from motion video at one end to text at the other.<sup>50</sup> The Internet at present is mostly text and still photo, but again, the situation is changing daily. Its future promises the supercharged impact of virtual reality and interactivity.<sup>51</sup>

At what point will the Supreme Court freeze *its* framing of the crucial factual question: Is the Internet pervasive and accessible enough to not require strict scrutiny? If the Internet has changed drastically enough over the past several months, will the Supreme Court apply a different level of scrutiny than the district courts did? Before we address that question, it is worth discussing another element of the district courts’ analyses that was based on a set of facts subject to rapid change.

---

46. “Although parental control software *currently* can screen for certain suggestive words or for known sexually explicit sites, it cannot *now* screen for sexually explicit images unaccompanied by suggestive text. . . .” *ACLU*, 929 F. Supp. at 842 (emphasis added). “The types of content *now* on the Internet defy easy classification.” *Id.* (emphasis added).

47. *Id.* at 838, n.12.

48. *See, e.g., Continental Cablevision Inc.: New Cable Modems Offer High-Speed Internet Access*, WALL ST. J., Sept. 24, 1996, at B13.

49. *See, Walter S. Mossberg, Now Even Home PCs Can Get Web News, Data Automatically*, WALL ST. J., Oct. 10, 1996, at B1 (observing that the Pointcast product — the first to demonstrate the idea of “‘broadcasting’ the content of World Wide Web sites to users’ computers continuously without requiring the recipient to navigate to a Web site manually” — “constantly pumps news headlines and other material from Web sites onto a screen saver on your PC.”).

50. *See FCC v. Pacifica Found.*, 438 U.S. 726, 741 n.16 (1978); *cf. Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1234 (7th Cir. 1993) (“Photographic invasions of privacy usually are more painful than narrative ones. . . .”).

51. *See, e.g., John Markoff, The Internet, in Three Dimensions*, N.Y. TIMES, Nov. 25, 1996, at D1.

### III. IF THE LAW FITS: NARROW TAILORING, TECHNOLOGY, AND FREE SPEECH

"[T]he government may not 'reduce the adult population . . . to reading only what is fit for children.'"<sup>52</sup>

While government is usually barred from creating restrictions on speech, it does have limited authority to do so to serve important government interests, including the protection of minors.<sup>53</sup> Even to protect minors, however, government is strictly limited in its abilities to curb protected speech. When applying a strict scrutiny standard to speech restrictions, the Supreme Court has asked whether the challenged laws are "narrowly tailored" or the "least restrictive means" to serve "compelling" governmental interests.<sup>54</sup> Regardless of whether it has applied strict scrutiny or some lower standard, however, the Court has consistently analyzed restrictions on indecent speech to determine whether their benefits are outweighed by their impact on adults' access to protected speech.<sup>55</sup> If the district court opinions are any guide, how the CDA will fare under such an analysis by the Supreme Court depends on how the Court views the so-called "safe harbor" provisions of the Act. The CDA provides content providers with two affirmative defenses to criminal prosecution under the Act: restricting access to indecent material by "requiring use of a verified credit card, debit account, adult access code, or adult personal identification number" or taking "in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors . . . including any method which is feasible under available technology."<sup>56</sup> If it is impossible for content providers to steer themselves into these safe harbors, then the

52. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983) (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)).

53. See, e.g., *Sable Comms. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Pacific*, 438 U.S. at 749.

54. See *supra* note 4.

55. See, e.g., *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2385 (1996) (Breyer, J., plurality opinion) (observing that "[t]his Court, in different contexts, has consistently held that the Government may directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech"); *Sable*, 492 U.S. at 131 (1989) (concluding that an anti dial-a-porn statute's "denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages.").

56. Communications Decency Act of 1996, included in the Telecommunications Act of 1996, Pub. L. No. 104-104, §502, 110 Stat. 56,134 (1996) (to be codified at 47 U.S.C. 223).

CDA is, in effect, a complete ban on indecent content on the Internet — likely to fail to survive either strict or reduced First Amendment scrutiny.<sup>57</sup>

Both the *ACLU* and *Shea* courts made findings of fact that undermined the Government's argument that the CDA's safe harbor provisions make its restrictions on speech narrower than a total ban. In her *ACLU* opinion, Chief Judge Sloviter dismissed both safe harbors as technologically unfeasible. Regarding the credit card and adult verification methods, she reiterated the court's findings of fact that "these defenses are not technologically or economically feasible for most providers."<sup>58</sup> And as to other technological methods by which content providers might satisfy the "good faith" safe harbor, "the evidence made clear, there is no such technology at this time."<sup>59</sup> The *Shea* court made similar findings, determining that the credit card and adult verification methods were not feasible options for many on-line providers.<sup>60</sup> The *Shea* court then addressed the Government's contention that "[u]nder present technology" registering one's Internet site with the providers of blocking software or the browser companies, or taking some similar affirmative step — such as inserting a "tag" into a site's name or address — to advise users of potentially indecent or offensive materials on one's site, would suffice to allow one to enter the safe harbor of good faith efforts to restrict access to minors.<sup>61</sup> Addressing the "tagging" suggestion, the court stated:

To put the matter simply, unless and until blocking software is widely in place, or unless and until those who produce and market browsers — on whom Congress placed no obligations in the CDA — configure those browsers to recognize particular labels, tagging to prevent minors' access to material available on the Web cannot be "effective."<sup>62</sup>

And regarding the site registration suggestion, the court observed:

[T]he Government has offered no evidence . . . that the products and services that offer to block site access cover even a significant portion of the available market. If that portion were not significant, site registration would

---

57. The Government has conceded that the statute would be unconstitutional without the defenses. See *Shea*, *supra* note 2, 930 F. Supp. at 941.

58. *ACLU*, *supra* note 2, 929 F. Supp. at 856 (opinion of Sloviter, C.J.).

59. *Id.*

60. See *Shea*, 930 F. Supp. at 942-43.

61. See *id.* at 944.

62. *Id.* at 946.

accomplish little, and would certainly not serve as an "effective" means to restrict the access of minors to Internet content.<sup>63</sup>

But what happens to these decisions if blocking technology suddenly becomes available? Chief Judge Sloviter continuously referenced the immediacy of her opinion: "'tagging' . . . is purely hypothetical and offers no *currently* operative defense"; "[a]t this time, there is no agreed-upon 'tag' *in existence*, and no web browsers or user-based screening systems are *now* configured to block tagged material"; "I can imagine few arguments less likely to persuade a court to uphold a criminal statute than one that depends on *future* technology to cabin the reach of the statute within constitutional bounds."<sup>64</sup> The *Shea* court similarly observed that "there is *currently* no tag . . . widely recognized as signaling that content falls within the scope of the CDA."<sup>65</sup>

Just as the Internet is becoming more pervasive and accessible, threatening to render the district courts' findings on that score obsolete, technological developments are making the safe harbors in the CDA more viable. On May 9, 1996, just two days before the closing arguments in *ACLU*, many of the most powerful players in the Internet world, including Microsoft, Netscape, America Online, and CompuServe, joined forces to inaugurate the Platform for Internet Content Selection ("PICS") — a set of industry standards specifically designed to establish a value-neutral labeling infrastructure for the Internet that will allow computer users to filter out objectionable materials.<sup>66</sup> Internet browsers that incorporate PICS will be able to implement the PICS rating system (or combination of ratings systems) of the user's choice. If all major software programs recognize the PICS standard, and all ratings services use it, content providers may be able to successfully steer into the CDA's good faith safe harbor by putting appropriate PICS-compliant labels on indecent material. At what point will the Supreme Court freeze *its* examination of the viability of the CDA's safe harbors?

---

63. *Id.* at 947.

64. *ACLU*, 929 F. Supp. at 856-57 (opinion of Sloviter, C.J.) (emphasis added).

65. *Shea*, 930 F. Supp. at 945 (emphasis added).

66. See, e.g., Jon Auerbach, *Voluntary Internet Ratings System Launched: On-line Firms Say It'll Help Parents Filter Out Obscene Material*, BOSTON GLOBE, May 10, 1996, at 39; *ACLU*, 929 F. Supp. at 838-39.

#### IV. FACTS IN FLUX: HOW THE SUPREME COURT DEALS WITH CHANGING FACTS

Mike Godwin, a lawyer for the plaintiffs in *ACLU*, thinks that their victory calls for “[d]ancing in the [s]treets.”<sup>67</sup> He is confident that “overruling the lower court’s findings of fact would require a degree of jurisprudential hubris that the Supremes detest when other appellate courts demonstrate it. There’s little chance that the justices will resort to such second guessing in our case. . . . We won a lasting victory in Philadelphia.”<sup>68</sup> We are not so confident that the district courts’ findings of fact sounded the death knell for the CDA. In the past the Supreme Court has not hesitated to take a fresh look at facts central to determinations of constitutional rights. Furthermore, when facts have changed over time, courts have been willing to revive statutes that earlier seemed to have been doomed.

Although appellate courts’ review of facts is generally proscribed both by respect for the fact-finding process of trial courts<sup>69</sup> and the requirement in Federal Rule of Civil Procedure 52 that “[f]indings of fact . . . shall not be set aside unless clearly erroneous,”<sup>70</sup> the Supreme Court has felt not only free, but *bound* to conduct a searching review of facts on which constitutional rights turn. Thus, in *Bose Corp. v. Consumers Union of United States, Inc.*,<sup>71</sup> the Court independently reviewed a lower court’s finding of “actual malice” in a defamation case involving a magazine article.<sup>72</sup> More recently, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,<sup>73</sup> the Court independently reviewed a state court finding that a parade lacked the element of expression necessary for First Amendment protection, stating that:

This *obligation* rests upon us simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near

---

67. Mike Godwin, *Dancing in the Streets: Why the Philly CDA Decision Really Matters*, WIRED, Sept. 1996 at 92, 92.

68. *Id.*

69. See, e.g., *Anderson v. City of Bessemer City*, North Carolina, 470 U.S. 564, 574-75 (1984).

70. Fed. R. Civ. P. 52(a).

71. 466 U.S. 485 (1984).

72. See *id.* “[J]udges—and particularly Members of this Court—must exercise such [independent appellate] review in order to preserve the precious liberties established and ordained by the Constitution.” *Id.* at 510-11.

73. 115 S. Cl. 2338 (1995).

or far side of the line of constitutional protection. Even where a speech case has originally been tried in a federal court . . . we are obliged to make a fresh examination of crucial facts.<sup>74</sup>

Although language in some Court opinions suggests that the rationale for re-examining findings of fact is strongest when — unlike in *ACLU* and *Shea* — the lower court has *not* protected First Amendment rights,<sup>75</sup> several courts of appeals have interpreted *Bose* to extend to cases in which lower courts have granted First Amendment protection.<sup>76</sup>

Even if the Court is willing to look at the facts again to determine whether the Internet is pervasive and accessible enough to justify reduced scrutiny of the CDA, might it look only at the facts in existence when the facts surrounding the Act were first documented (found) by the lower courts? *Bose* and *Hurley* dealt with distinct historical events — the publication of a magazine article and the organization of a holiday parade — well-defined in time. There may have been doubt and ambiguity about the facts but the facts, whatever they were, were not changing. In those cases the Supreme Court could ensure that myopic or errant fact-finding would not erode First Amendment protections by re-examining the evidence on the record to determine whether the lower courts “got their facts straight.” Where the facts *are* changing over time, there is no possibility of the Supreme Court in its de novo review “getting it straight” by looking at the whole record, because the changed facts will not be reflected in the record developed by the lower court. At the same time, if significant changes have occurred, the Supreme Court is unlikely simply to review lower court findings to determine whether they were correct at the time they were made. In a wide variety of circumstances, the Supreme Court and federal courts of appeals have recognized that changes — in fact or in law — since the original disposition of a case can make remand preferable to review of the lower court’s initial findings of fact and

---

74. *Id.* at 2344 (emphasis added) (citations omitted).

75. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) (“We must ‘make an independent examination of the whole record’ so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.” (emphasis added) (citation omitted) (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963))).

76. There is a split among the federal courts of appeals over whether independent appellate review of factual findings should be applied in a case in which a lower court accepts a First Amendment argument, as well as in cases like *Bose* where a First Amendment argument is initially rejected. See Alice N. Lucan et al., *Defining Appellate Review: Bose’s Problems and Opportunities*, in *Libel Litigation 1988*, at 311, 347-57 (PLI Patents, Copyrights, Trademarks, & Literary Property Course Handbook Series No. 252, 1988); *Don’s Porta Signis, Inc. v. City of Clearwater, Florida*, 485 U.S. 981, 981-82 (1988) (White, J., dissenting from denial of certiorari).

conclusions of law. Many of these remanding courts have borrowed language used by the Supreme Court in *Patterson v. Alabama*:<sup>77</sup>

We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered.<sup>78</sup>

In *Concerned Citizens of Vicksburg v. Sils*,<sup>79</sup> the Fifth Circuit cited many of the cases following *Patterson*,<sup>80</sup> observing that:

It is well established that an appellate court "is obligated to take notice of changes in fact or law occurring during the pendency of a case on appeal which would make a lower court's decision, though perhaps correct at the time of its entry, operate to deny litigants substantial justice." In such cases, "where circumstances have changed between the ruling below and the decision on appeal, the preferred procedure is to remand to give the district court an opportunity to pass on the changed circumstances".<sup>81</sup> [sic]

We suspect that if the Court anticipates that its legal analysis will turn on facts that have changed since trial, rather than affirming or reversing the lower courts' decisions granting preliminary injunctions, it will instead remand the cases for further findings of fact.

Even if the Supreme Court ultimately upholds the district courts' rulings, perhaps because the Internet, though changing, will not have changed enough to make the CDA constitutional by the time of the Supreme Court's review, there remains the possibility that subsequent changes might save the CDA. Even a Supreme Court declaration on the merits that the CDA is unconstitutional may not drive a permanent stake through its heart. History suggests that statutes that were unconstitutional when written, even those declared

---

77. 294 U.S. 600 (1935).

78. *Id.* at 607.

79. 567 F.2d 646 (5th Cir. 1978).

80. *See id.* at 649-50 & n.5.

81. *Id.* at 649-50 (footnote and citation omitted) (quoting *Hawkes v. IRS*, 467 F.2d 787, 793 (6th Cir. 1972); and *Korn v. Franchard Corp.*, 456 F.2d 1206, 1208 (2d Cir. 1972)).

unconstitutional by the Supreme Court, can be revived if the original constitutional analysis is undermined. For example, in 1918 Congress enacted a law fixing minimum wages for women and children in the District of Columbia.<sup>82</sup> In 1923 the Supreme Court, in *Adkins v. Children's Hospital*, held this law unconstitutional.<sup>83</sup> Fourteen years later, in 1937, the Supreme Court in *West Coast Hotel Co. v. Parrish*, held a similar law of the State of Washington to be constitutional, expressly overruling *Adkins*.<sup>84</sup> President Roosevelt proceeded to request an opinion of his Attorney General as to the status of the District of Columbia minimum wage law, and in reply Attorney General Homer Cummings stated:

The decisions are practically in accord in holding that the courts have no power to repeal or abolish a statute, and that notwithstanding a decision holding it unconstitutional a statute continues to remain on the statute books; and that if a statute be declared unconstitutional and the decision so declaring it be subsequently overruled the statute will then be held valid from the date it became effective.

It is, therefore, my opinion that the District of Columbia minimum-wage law is now a valid act of the Congress and may be administered in accordance with its terms.<sup>85</sup>

When subsequent enforcement of the District of Columbia minimum wage statute was challenged on the ground that the effect of *Adkins* was to nullify the statute, the Municipal Court of Appeals for the District of Columbia<sup>86</sup> upheld enforcement in *Jawish v. Morlet*,<sup>87</sup> citing cases "unanimous in holding that a law once declared unconstitutional and later held to be constitutional does not require reenactment by the legislature in order to restore its operative force."<sup>88</sup> Those cases, the court explained:

proceed on the principle that a statute declared unconstitutional is void in the sense that it is inoperative or unenforceable, but not void in the sense that it is repealed or abolished; that so long as the decision stands

82. See *Adkins v. Children's Hosp.*, 261 U.S. 525, 539 (1923).

83. See *id.* at 562.

84. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937).

85. 39 *Cp. Atty. Gen.* 22, 22-23 (1937) (citations omitted).

86. The Municipal Court of Appeals was then the highest District of Columbia court.

87. 86 A.2d 96, 97 (D.C. 1952).

88. *Id.* at 97.



the statute is dormant but not dead; and that if the decision is reversed the statute is valid from its first effective date.<sup>89</sup>

Although the Supreme Court has not directly addressed the issue, other state courts have similarly held that a statute that has been held unconstitutional can be revived by subsequent judicial action.<sup>90</sup>

If the revivability doctrine applies to the CDA, the statute's unconstitutionality according to the facts that existed at its initial review does not necessarily settle its fate if the facts change thereafter. The precedents of *Adkins* and *West Coast Hotel* may not be completely on point, however. Although the Supreme Court later claimed in *Planned Parenthood v. Casey*<sup>91</sup> that the justification for reversing *Adkins* in *West Coast Hotel* was an intervening change in facts, or at least the Court's understanding of the facts,<sup>92</sup> other jurists and commentators have argued that a more accurate explanation for the holding in *West Coast Hotel* was that the Court itself and its views of the law had changed.<sup>93</sup> Even the *Casey* Court conceded that the Supreme Court's ultimate conclusion in *West Coast Hotel* was that *Adkins* had been wrongly decided;<sup>94</sup> hence the statute in question was never truly unconstitutional,<sup>95</sup> but only mistakenly thought to be so. We are posing the possibility of a factual change subsequent to the initial declarations of unconstitutionality of the CDA by the lower courts, from which it follows that the first declarations of unconstitutionality may have been correct when made. The question for us is whether a truly unconstitutional statute can

---

89. *Id.*

90. See William M. Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 COLUM. L. REV. 1902, 1908-15 (1993). Furthermore, "Supreme Court case law . . . weighs in favor of revival." *Id.* at 1911.

91. 505 U.S. 833 (1992).

92. See *id.* "*West Coast Hotel* and *Brown* each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions." *Id.* at 863. The Court was explaining the reversal of *Plessy v. Ferguson*, 163 U.S. 537 (1896), in *Brown v. Board of Education*, 347 U.S. 483 (1954), as well as the reversal of *Adkins* in *West Coast Hotel*. See *id.* at 862-63.

93. See, e.g., *Casey*, 505 U.S. at 962 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (stating that "the theme of the [*West Coast Hotel*] opinion is that the Court had been mistaken as a matter of constitutional law"); see also Michael Ariens, *A Thrice Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 630-34 (1994) (discussing various explanations proffered for Justice Roberts' changed position on the minimum-wage issue, including that his deciding vote — known as the "switch in time that saved nine" — was a political response to President Roosevelt's court-packing scheme).

94. See *Casey*, 505 U.S. at 864 (describing *West Coast Hotel* as a "repudiation" of *Adkins*).

95. By "truly unconstitutional" we mean that a court has correctly applied the law to the facts before it.

spring back to life because the facts have become different, in contrast to the *Adkins* situation where a statute that was mistakenly believed to be unconstitutional was revived.

The logic of the *Jawish v. Morlet* opinion and of Attorney General Cummings' opinion suggests that the revivability doctrine could apply to the CDA despite this difference. The opinions both insist that the courts have no power to remove a statute from the books.<sup>96</sup> If the courts' power is only to enjoin a statute's enforcement, then it follows that even if circumstances did indeed warrant an injunction at one time (in the CDA's case, when it was reviewed by the district courts), once those circumstances no longer exist the injunction may be lifted and the statute enforced.<sup>97</sup>

## V. AS THE WORLD WIDE WEB TURNS ON ITS ACCESS . . .

Mike Godwin is probably right to think that the Supreme Court will not explicitly overrule the lower courts' findings of fact. Even if those facts are undermined by rapid changes in the nature of the Internet, there will be insufficient evidence on the record to establish that such is the case. As the foregoing discussion illustrates, however, when considering important constitutional questions, the Supreme Court has not felt bound to act blindly based on findings that are wrong or obsolete. This suggests the desirability, from the challengers' point of view, of finding a basis for asserting the CDA's unconstitutionality that will remain stable over time.

One fact unlikely to change anytime soon is the global and decentralized nature of the Internet. While *time* poses a problem for the opponents of the CDA — undermining some of the findings of fact most favorable to their case — *space* is on their side. As John Perry Barlow of the Electronic Frontier Foundation points out, "in Cyberspace, the First Amendment is a local ordinance."<sup>98</sup> The same may be said of the CDA. The Internet was created to be a many-headed hydra, such that the flow of information could not be stopped.<sup>99</sup> Even if the CDA were to be effective in discouraging creators of content in the United States from putting indecent material on accessible areas on the Internet, the CDA offers no means to block access to sites in other parts of the world where pornography is and will be stored, accessible from the United States though beyond the reach of our laws. The impossibility of enforcing

---

96. See *supra* notes 85-89 and accompanying text.

97. Cf. Treanor & Sperling, *supra* note 90, at 1908-17 (cataloging case law and commentators supporting revival of statutes, but arguing that such revival can be undesirable).

98. John Perry Barlow, *Leaving the Physical World* (visited Nov. 26, 1996) <[http://www.eff.org/pub/Publications/John\\_Perry\\_Barlow/HTML/leaving\\_the\\_physical\\_world.html](http://www.eff.org/pub/Publications/John_Perry_Barlow/HTML/leaving_the_physical_world.html)>.

99. See, e.g., *ACLU*, *supra* note 2, 929 F. Supp. at 831.

the CDA outside of our borders raises unsettling questions about its constitutionality, even beyond the knotty issues of pervasiveness, accessibility, and unsafe harbors.

At first blush the implicit question may seem naive: Can a law that will not work be found unconstitutional precisely because of its ineffectiveness? Certainly many laws (perhaps even most) are capable of only partial enforcement. Yet this does not impugn their lawfulness. Those who supported passage of the CDA would certainly regard any decrease in the amount of indecency on the Internet to be a step in the right direction. But in our country and in our legal system, speech is different. A law that restricts protected speech while failing actually to accomplish its legitimate purpose may be doomed by its impotence.<sup>100</sup>

Two aspects of the CDA make this issue particularly relevant. First, the justifying purpose of the CDA is not to cut down on the total quantity of indecent material on the Internet, but rather to protect children from the totality of indecency and obscenity that is out there.<sup>101</sup> If children searching the Web can come up with fat, juicy lists of indecent sites, what significant gain can there be from having merely cut the list down in size? It is the first exposure that counts most when the concern is protecting the innocence of children, as Justice Stevens recognized in *Pacifica*—observing that the broadcast indecency at issue there “could have enlarged a child’s vocabulary in an instant.”<sup>102</sup>

Also, the CDA significantly burdens adult access to protected speech in order to accomplish its asserted goal of protecting children from the effects of accessing indecency on the Internet.<sup>103</sup> If the CDA is ineffective in accomplishing that goal, its burden on protected speech may be unjustified. Unlike statutes that are, for a variety of reasons, differentially enforced in different areas, yet are still justified because they limit harm to some extent in the local areas in which they are actively enforced (e.g., anti-drug laws), the CDA applies to the Internet, which by its nature has no local areas. Any point of access to the Internet reaches everywhere. So while

---

100. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2470 (1994); *Florida Star v. B.J.F.*, 491 U.S. 524, 540-41; *id.* at 541-42 (Scalia, J., concurring in part and concurring in the judgment) (agreeing with the majority’s underinclusiveness analysis and stating that “a law cannot be regarded as protecting an interest ‘of the highest order,’ and thus justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited.” (citation omitted) (quoting *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979))).

101. See *ACLU*, 929 F. Supp. at 852 (opinion of Sloviter, C.J.).

102. *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978).

103. See *ACLU*, 929 F. Supp. at 855 (opinion of Sloviter, C.J.) (“It would appear that the extent of the abridgment of the protected speech of adults that it has been shown the CDA would effect is too intrusive to be outweighed by the government’s asserted interest, whatever its strength, in protecting minors from access to indecent material.”).

enforcement of the CDA within the bounds of the United States may serve to diminish the total amount of indecent materials available on the Internet, it *cannot* create any clean *local* areas. Because the effectiveness of the Act must be measured by how much it decreases the likelihood of a minor accessing indecent material over the Internet, it is bound to fail in this objective unless it totally (or near-totally) cleans the Internet. If the CDA is congenitally doomed to be ineffective in accomplishing this end, then perhaps the burdens it places on the dissemination of protected indecent materials to *adults* are unjustified.<sup>104</sup>

Neither the *Shea* nor the *ACLU* courts explicitly reached this issue (and its bearing on the Act's constitutionality) in preliminarily enjoining the CDA, though both touched briefly upon it. The *Shea* court said:

Because the CDA only regulates content providers within the United States, while perhaps as much as thirty percent of the sexually explicit material on the Internet originates abroad, the CDA will not reach a significant percentage of the sexually explicit material currently available. Considering . . . that the CDA can be expected to chill the First Amendment rights of adults to engage in the kind of expression that is subject to the CDA's criminal penalties, the apparent ineffectiveness of the CDA underscores our holding today that the Government has failed to demonstrate that the CDA does not "unnecessarily interfere[e] with First Amendment freedoms."<sup>105</sup>

The *ACLU* court also dealt with the inescapable problem of offshore content in both its findings of fact, and then again in Judge Dalzell's supporting opinion. In its findings of fact, the *ACLU* court found:

---

104. Supporters of the CDA might be tempted to advance another even more far-fetched argument that directly addresses the global nature of the Internet. Although the United States acting alone in passing a law such as the CDA may be ineffective, its effectiveness would be greatly increased if the major nations of the world all passed similar anti-indecency laws. The United States is a leader in the development of regulation of the Internet, and other countries will look to our legislation as a model for their own. With leadership by and encouragement from the United States, numerous countries around the globe might be expected to adopt legislation similarly regulating obscene and indecent materials, thus giving the CDA a global deterrent effect great enough to accomplish the purposes of the Act. Would this argument be sufficient to forestall attack on the CDA's otherwise inherent ineffectiveness? This is, so far as we know, uncharted territory.

105. *Shea*, 930 F. Supp. at 941 (quoting *Sable Comms. of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)) (internal quotation marks and citation omitted).

A large percentage, perhaps 40% or more, of content on the Internet originates outside the United States. At the hearing, a witness demonstrated how an Internet user could access a Web site of London (which presumably is on a server in England), and then link to other sites of interest in England. A user can sometimes discern from a URL that content is coming from overseas, since InterNIC allows a content provider to embed a country code in a domain name. Foreign content is otherwise indistinguishable from domestic content (as long as it is in English), since foreign speech is created, named, and posted in the same manner as domestic speech. There is no requirement that foreign speech contain a country code in its URL. It is undisputed that some foreign speech that travels over the Internet is sexually explicit.<sup>106</sup>

Judge Dalzell ultimately concluded:

[T]he CDA will almost certainly fail to accomplish the Government's interest in shielding children from pornography on the Internet. Nearly half of Internet communications originate outside the United States, and some percentage of that figure represents pornography. Pornography from, say, Amsterdam will be no less appealing to a child on the Internet than pornography from New York City, and residents of Amsterdam have little incentive to comply with the CDA.<sup>107</sup>

Even if the Supreme Court ultimately reviews the challenges to the CDA based on updated findings of fact, this inability of the CDA to block foreign content will likely endure. Thus, while time plays a major role in determining the factual nature of the Internet and the corresponding protections afforded speech rights by the Constitution, the spatial conundrum of an Internet that is everywhere at once, in actual and practical terms, may be the CDA's enduring Achilles heel.

---

106. *ACLU*, 929 F. Supp. at 848 (footnote omitted).

107. *Id.* at 882-83 (opinion of Dalzell, J.) (footnote omitted).

## VI. CONCLUSION: COMING OF AGE IN AN ERA OF INCREASING ACCESS

Time will tell. There is potential for an increasing misfit between law and technology,<sup>108</sup> law moves slowly, while technology can move with stunning speed. The law will be hard pressed to catch up with all the changes.

The Supreme Court is not unaware of the pace of change. As Justice Breyer recently wrote when assessing restrictions on cable television indecency, "aware as we are of the changes taking place in the law, the technology, and the industrial structure, related to telecommunications, we believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now."<sup>109</sup> This awareness suggests that the Supreme Court will not necessarily rely on time-bound lower court findings that the Internet should be subject to standards developed for telephony and not for broadcast, or that it is technologically impossible to make indecent content identifiable to Internet browsers. We hope, however, that the Court's awareness of technological change will also lead it to recognize that the Internet is unlike other media in its global, decentralized power, and that rather than trying to stem the tide of indecency by damming it at its sources, truly effective regulation will be that which allows users to defend against indecency at its *destinations*.<sup>110</sup> In targeting Internet content providers, Congress has failed to recognize the fact that each computer is a border; the harm sought to be prevented occurs when indecent content is *received*, and *not* as it is being created and made available. Unlike some of the factual findings underlying the heretofore successful constitutional challenges to

---

108. See, e.g., *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807, 820 (1st Cir. 1995) (Boudin, J., concurring) ("Applying copyright law to computer programs is like assembling a jigsaw puzzle whose pieces do not quite fit."), *aff'd by an equally divided court*, 116 S. Ct. 804 (1996). *But cf. ACLU*, 929 F. Supp. at 865 n.9 (opinion of Buckwalter, J.) ("As I have noted, the unique nature of the medium cannot be overemphasized in discussing and determining the vagueness issue. This is not to suggest that new technology should drive constitutional law. To the contrary, I remain of the belief that our fundamental constitutional principles can accommodate any technological achievements, even those which, presently seem to many to be in the nature of a miracle such as the Internet.")

109. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2385 (1996) (Breyer, J., plurality opinion) (citation omitted); see also Cass R. Sunstein, *Forward: Leaving Things Undecided*, 110 HARV. L. REV. 6, 30-33 (1996) (approving of Justice Breyer's refusal to lay down a broad rule in *Denver Area Consortium* as an example of a reasonable, "minimalist" judicial approach to a contentious question regarding rapidly changing technology).

110. See, e.g., Solveig Bernstein, *Beyond the Communications Decency Act: Constitutional Lessons of the Internet*, POLICY ANALYSIS (Cato Inst., Washington, D.C.), Nov. 4, 1996, at 29 (arguing that content blocking software is more effective than the CDA).

the CDA, this aspect of the Internet is not in flux. It should not be neglected by CDA opponents anxious to begin dancing in the streets.<sup>111</sup>

---

111. *See supra* note 67.

