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The Impact of Cyberspace on the First Amendment

by Mark S. Kende[1] [2]

I. Introduction

1. On March 19, 1997, the U.S. Supreme Court heard oral argument in its first case involving cyberspace. The issue in the case, *A.C.L.U. v Reno*, [3], was whether the Communication Decency Act, [4] a federal law that bans the communication of indecent speech aimed at children on the Internet, violates the First Amendment's freedom of speech guarantee.

2. The question of what free speech rights exists in cyberspace has been aptly described as a "battle of the analogies." Under the U.S. Supreme Court's First Amendment jurisprudence, free speech rights vary with the technological medium through which the speech is expressed. The Court has been the most solicitous of speech from the print media (like newspapers and magazines) and the least respectful of broadcast speech (from television or radio). [5] The question then becomes: Is expression on the Internet more like print, or like a T.V. broadcast, or some other medium, such as telephones? Many commentators and some courts have discussed this issue. The Supreme Court may well analyze it in the pending case.

3. This commentary deals with a different yet related question that has not been examined as frequently, namely: What impact is cyberspace likely to have on how the Supreme Court views the First Amendment? For example, one of the qualities of cyberspace that distinguishes it from other technologies is its chameleon-like nature. Thus, although most individuals who use the Internet today do so through a computer, many people may soon use their television sets to access

the Internet. This technological change could in turn effect the Court's legal analyses of the Internet.

4. My thesis is that the Supreme Court will likely be distracted by this dynamic new technology and lose sight of the normal categorical standards governing free speech, thus creating further doctrinal confusion in the First Amendment area. This thesis is supported by a Supreme Court decision last term involving indecent speech on cable television, *Denver Area Education Telecommunications Consortium, Inc. v. F.C.C.*, [6]. In Denver, Justice Stephen Breyer wrote a plurality opinion advocating a non-categorical "wait and see" approach to free speech cases involving new technologies.

II. The *Denver* Case

5. The *Denver* case examined the constitutionality of three provisions of a federal law regulating cable television. [7] The first provision authorized operators to ban indecent programming on their leased access channels (the "ban" provision). [8] The second provision required those cable operators who permit such indecent programming to segregate it onto one channel, and to block its availability until the cable subscriber submits a written request to have it unblocked (the "segregate and block" provision). [9] Finally, the law permitted cable operators to prohibit indecent programming on public access channels (the "public access" provision). Indecent speech was defined in the law as programming depicting "sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." [10]

6. The Court upheld the constitutionality of the "ban" provision, but struck down the "segregate and block" and the "public access" provisions. In upholding the provision that lets cable operators ban indecent material, Justice Breyer wrote a plurality opinion that was extraordinary in several respects. For one, he explicitly refused to select a definitive level of scrutiny or category of cases in which to place free speech regulations of indecent material on cable television. [11] For another, he based this refusal on the dynamic nature of modern telecommunications technologies, which led him to conclude that any decision made today, regarding what First Amendment category should apply to this dynamic technology, would likely be based on assumptions that would quickly be rendered obsolete by further innovations. [12]

7. Moreover, despite saying that he was not selecting a definitive level of scrutiny or category of case, Breyer employed a brand new default standard of review called "close scrutiny" which he said underlay the Court's various speech cases. [13] Using this approach, he said that the cable law could not be sustained unless the government could demonstrate that the law "properly addressed an extremely important problem without imposing an unnecessarily great restriction on speech." [14]

8. Breyer upheld the ban provision by reasoning that it restored to private cable operators some

limited editorial freedom and authority over indecent programming -- authority they would possess in the absence of governmental cable regulations. [15] Thus, it was a flexible law, not a mandatory governmental prohibition. He further found the state had a powerful interest in preventing children from seeing this material and that the provision was not vague. [16]

9. Breyer then struck down the segregate and block provision as being too rigid and burdensome. [17] The segregate and block provision limited cable operators to showing this material on one channel and required blocking regardless of the circumstances of the customer. Under this provision, a customer who wrote to his cable company seeking to view the indecent leased access channel might also have to wait up to 30 days for no good reason before the cable company unblocked that channel. Breyer said this waiting period was too restrictive given the availability of other technologies, such as the V-Chip. [18] Breyer also struck down the third provision, which permitted cable operators to ban indecent programming on public access channels. Breyer reasoned that this provision was not necessary since there was insufficient evidence to prove that indecent programming was a problem on such channels, especially since municipal governments or their agents usually regulate the content of the material on such channels anyway. [19]

10. Justice David Souter wrote a concurrence indicating that the Court should not yet decide on a definitive standard for newer technologies in order to "do no harm." [20] To support his position, Souter explained that the court sowed the seeds of great confusion by stumbling around for 16 years in the obscenity area before settling on the *Miller v. California* standard. [21] Souter said that the Court should not create the same problem with these newer technologies by prematurely adopting an incorrect standard. Souter said that Breyer was therefore right to rely heavily for support on "direct analogies" to other specific cases, rather than taking a categorical approach. [22]

11. Justice Anthony Kennedy (concurring in part and dissenting in part) strongly disagreed with Breyer's refusal to adopt a clear standard and stated that Breyer was overly "distracted" by these dazzling new telecommunications technologies. [23] Kennedy said that the Court should not abandon its First Amendment jurisprudence in such a context, but should instead try to apply established First Amendment principles to the case. [24]

12. Kennedy then explained that government regulations of cable television systems had made the leased access channels into a "designated public forum." [25] Thus, the content-based restrictions of indecent speech on cable, at issue in *Denver*, should receive the strictest scrutiny and be struck down. Kennedy's public forum analogy could be applied to the Internet as well.

III. Legal Analysis

13. I believe that Justice Breyer's non-categorical approach in the *Denver* case is the likely immediate legacy of cyberspace to First Amendment law. Breyer's flexible approach may seem appealing

because it resembles the boundary-less and quickly changing world of cyberspace. It is no accident that the annual Harvard Law Review article authored by Professor Cass Sunstein, which surveys last year's Court term and discusses the *Denver* case, is titled "Leaving Things Undecided." [26]

14. Although I concur with the result arrived at by Breyer regarding the constitutionality of each provision, I also agree with Justice Kennedy's statement that Breyer has unfortunately been "distracted" by the new telecommunication technologies.[27] Breyer's approach is a mistake for at least five reasons.

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

16. Second, Breyer's statement that he could not select a definitive standard to govern cable in the *Denver* case [28] was strange since only two years earlier, in a case called *Turner Broadcasting Systems, Inc. v. F.C.C.* [29], the Court decided on an intermediate standard of review to govern a structural access regulation aimed at cable. That lesser standard would seem appropriate for the ban provision in the *Denver* case because that provision did not totally prohibit indecent speech -- the government gave private operators the authority to make that decision.

17. Third, Breyer's deliberately indecisive opinion resembles the Supreme Court's much-criticized 1967 obscenity decision in *Redrup v. New York* [30], when the heavily divided Court began a period of ruling on obscenity cases without agreeing on any standard. The Court in those cases simply counted hands, after viewing the allegedly obscene films, and if five of the justices felt that they "knew it when they saw it" then the conviction was upheld. The Redrup period was one of the Court's darkest and most lawless days. Breyer's refusal to adopt a standard when the Court is again divided over sexually explicit speech sounds eerily familiar.

18. Thus, Justice Souter's attempt to contrast his and Breyer's supposedly prudential "do no harm" approach here, with the Supreme Court's 16 year record of flip-flops on an obscenity standard, actually ignores the striking similarity between the decisions. The obscenity cases also demonstrate that the only way the Court can sometimes arrive at a consensus is by initially establishing a standard, and then revising that standard over time based on how the test works in the lower courts. This valuable testing and refining, however, cannot take place if the constitutional standard is deliberately left up in the air.

19. Fourth, Breyer's technology-dependent approach has many of the weaknesses that led the Court only a few years ago to repudiate the trimester framework for assessing the constitutionality of abortion regulations established in *Roe v. Wade*. [31] That trimester approach was often criticized as being more like a medical code contingent on the latest trends in medical technology, rather than being constitutional law. Thus, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court upheld a woman's right to an abortion, but repudiated the trimester system. [32] The Court said instead that laws restricting abortion before viability would be permissible if they are not an "undue burden." [33]

20. The Court also stated that the reasoning of the *Casey* decision, by not being technologically dependent, would hopefully end the uncertainty that has existed as long as *Roe* was the major precedent. [34] In contrast, the fact that the Court in *Denver* was distracted by the new telecommunications technologies and that the Court has refused to adopt a clear standard has only created great uncertainty for lower courts and lawyers. The myriad opinions in this case will only worsen the uncertainty.

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

22. Two defenses of Breyer's approach deserve mention. The first is from Professor Cass Sunstein, author of the Harvard Law Review article summarizing the Supreme Court's last term. [35] Sunstein essentially argues that the Court best preserves its legitimacy in a democratic society by not deciding questions that are unessential to a case. [36] To some extent, this could explain Breyer's opinion.

23. But the Court's refusal to decide on a generally applicable standard in *Denver*, and the Court's divided opinions there, provide little useful guidance to lower courts and lawyers. Thus, over time, the *Denver* decision is likely to diminish the Court's legitimacy in the public eye.

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

IV. Conclusion

25. During the 21st Century, the U.S. Supreme Court will face difficult First Amendment questions regarding cyberspace, such as the meaning of contemporary local community standards in obscenity cases and the applicability of the current tests for subversive advocacy. The Denver case suggests the Court may abandon established First Amendment doctrine in these cases because of the dynamic technologies involved. This "wait and see" approach would be a mistake and would turn the promise of cyberspace into an age of darkness for First Amendment doctrine. The Court should apply current doctrines as effectively as possible to this new technology.

Footnotes

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[2] This commentary is based on an address that was presented at: The Michigan Academy of Science, Arts & Letters Annual Meeting, Calvin College, March 22, 1997.

[3] No. 96-511.

[4] 47 U.S.C. S. 223(a)- (h) (1996).

[5] Compare Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (Florida's right to reply statute requiring newspapers to give political candidates a right to respond to criticism was struck down under the First Amendment) with Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969) (F.C.C. fairness doctrine requiring T.V. broadcasters to permit politicians an opportunity to respond to criticism from a T.V. station is upheld under the First Amendment). There is also a lengthy discussion of the reasons why restrictions on broadcast get more lenient First Amendment scrutiny in Turner Broadcasting System, Inc. v. F.C.C., 114 S.Ct. 2445 (1994). See also Norman Redlich, et al., UNDERSTANDING CONSTITUTIONAL LAW 349 (1995) ("At the very least, the cases reaffirm that the Court treats the broadcast media and print media differently...").

[6] 116 S.Ct. 2374 (1996).

[7] Cable Television Consumer Protection and Competition Act of 1992, 106 Stat. 1460, 10(a), 10(b), and 10(c).

[8] Id. at 10(a).

[9] Id. at 10(b).

[10] Id. at 10(c).

[11] Denver Area Education Telecommunications Consortium, Inc. v. F.C.C., 116 S.Ct. 2374, 2385 (1996).

[12] Id.

[13] Id. at 2384-85.

[14] Id. at 2385.

[15] Id. at 2387.

[16] Id. at 2387-88.

[17] Id. at 2394.

[18] Id. at 2392.

[19] Id. at 2397.

[20] Id. at 2403.

[21] Miller v. California, 413 U.S. 15 (1973).

[22] Denver, 116 S.Ct. at 2402.

[23] Id. at 2406.

[24] Id. at 2404.

[25] Id. at 2409.

[26] Cass R. Sunstein, The Supreme Court 1995 Term: Forward: Leaving Things Undecided, 110 HARV.L.REV. 6 (1996).

[27] Denver, 116 S.Ct. at 2406.

[28] Id. at 2391.

[29] Turner Broadcasting Systems, Inc. v. F.C.C., 114 S. Ct. 2445 (1994).

[30] Redrup v. New York, 386 U.S. 767 (1967).

[31] Roe v. Wade, 410 U.S. 113 (1973).

[32] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 873 (1992).

[33] Id. at 874.

[34] Id. at 872.

[35] Sunstein, supra note 26.

[36] Sunstein, supra note 26 at 30-33.