

Bridging the Analogy Gap: The Internet, the Printing Press and Freedom of Speech

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In June of 1996, a three-judge federal court issued a decision in *ACLU v. Reno*¹ holding that the Communications Decency Act, barring indecency on the Internet, was unconstitutional. Although all three judges concurred in the result, each rendering separate opinions containing some fascinating discussion of the correct analogy to apply to the Internet, there is virtually no agreement: one judge never discusses the issue;² one thinks the Internet could be comparable with either the telephone system or print;³ and the third compares the Internet both to a printing press⁴ and to a "worldwide conversation."⁵

Without judicial constraint and adherence to overarching principles of free speech, courts are likely to create a crazy quilt of First Amendment jurisprudence pertaining to the Internet, driven by the emotions and contingencies of the moment. The best proof of this danger is the patchwork of laws that the courts have already created where other electronic media are concerned. Laws pertaining to radio, television, cable, and the telephone are inconsistent and also contradict some basic First Amendment values.

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1. 929 F. Supp. 824 (E.D. Pa. 1996).

2. Judge Buckwalter, in a passing comment, slightly touched on the differences in regulating various mediums of communications. "Prior cases have established that government regulations to prevent access by minors to speech protected for adults, even in media considered the vanguard of our First Amendment protections, like print, may withstand a constitutional challenge." *Id.* at 859. Even if Judge Buckwalter didn't attempt to categorize the Internet, at least he agrees that print holds a special or "vanguard" position within the Constitution.

3. *Id.* at 852.

4. *Id.* at 878.

5. *Id.* at 883.

The Supreme Court will bring the highest degree of clarity to the Internet freedom of speech debate if, in *ACLU v. Reno*, it sets forth the operative metaphor for freedom of speech and applies the metaphor in conjunction with an appropriate analogy for the technology.⁶

Part I of this Article discusses judicial decision-making tools with an emphasis on the use of analogy and the importance of applying legal precedents in a manner which is consistent and logical. Part I also discusses the use of metaphor in judicial decisionmaking and illustrates how operative metaphors for free speech have served to provide judges with guiding principles in applying the law. Part II of this Article discusses the use of analogical reasoning in cases involving technological media of communications. It points out that where courts do not analogize new technology to old, they fail in their decisionmaking capacity and therefore create confusing precedent. This Part concludes that, in determining the proper First Amendment treatment of new technologies, courts must apply the operative freedom of speech metaphor as well as determine the correct analogy for the technology. Part III of this Article examines the patchwork of laws which exist in First Amendment cases pertaining to technological media. This Part will explain the use of terms such as "spectrum scarcity" and "pervasiveness" which courts have used to rationalize different levels of governmental intrusion into speech. Part III will also look at the case of *Denver Area Educational Technological Consortium v. FCC*⁷ and argue that it is an illustration of the confusion that is created when courts fail to find technological analogies in free speech cases.

Part IV of this Article addresses how courts can best understand the Internet. It lists metaphors which have developed for the Internet and explains how they can be considered by courts to help understand the technology from a user's perspective. Finally, this Part concludes that the Internet is most similar to the printing press for free speech purposes. By recognizing the Internet as similar to the printing press, the courts should feel compelled to permit the least amount of governmental intrusion into content.

6. This Article concentrates on the proper analogy for the Internet. However, we also believe (as does Ithiel Pool, *infra* note 15) that the printing press is the correct analogy for all communications media.

Editor's note: On June 26, 1997, just prior to publication of this Article, the Supreme Court ruled on *ACLU v. Reno*, holding that the "indecent transmission" and "patently offensive display" provisions of the Communications Decency Act were unconstitutional infringements on freedom of speech. The opinion can be found at 1997 WL 348012 (1997).

7. 116 S. Ct. 2374 (1996).

I. JUDICIAL DECISION-MAKING TOOLS

A. *Analogy and Adherence to Precedent*

In his lectures on the judicial process, Judge Benjamin Cardozo seven decades ago acknowledged that a judge does not find law in the same way that a scientist discovers a law of nature.⁸ Judges make law, much as a legislator does, and in so doing, they must search history for rulings on similar subject matter:

I do not mean that the directive force of history, even when its claims are most assertive, confines the law of the future to uninspired repetition of the law of the present and the past. I mean simply that history, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future.⁹

And he quoted Maitland: "“Today we study the day before yesterday, in order that yesterday may not paralyze today, and today may not paralyze tomorrow.””¹⁰

Cardozo urged that judges begin by first asking *what the subject matter resembles*:

The first thing he does is to compare the case before him with the precedents, whether stored in his mind or hidden in the books. I do not mean that precedents are ultimate sources of the law, supplying the sole equipment that is needed for the legal armory, the sole tools, to borrow Maitland's phrase, "in the legal smithy." Back of precedents are the basic juridical conceptions which are the postulates of judicial reasoning, and further back are the habits of life, the institutions of society, in which those conceptions had their origin, and which, by a process of interaction, they have modified in turn.¹¹

Once the precedents have been collected and sorted so as to "separate the accidental and the non-essential from the essential and inherent," there is much more to the work.¹² The judge must effectively apply precedent to the contemporary state of facts before her, selecting from, or blending, the following approaches:

8. See generally BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

9. *Id.* at 53.

10. *Id.* at 54 (quoting FREDERIC MAITLAND, *COLLECTED WORKS VOLUME III* 438 (H.A.L. Fisher ed., 1911)).

11. CARDOZO, *supra* note 8, at 19.

12. *Id.* at 30.

The directive force of a principle may be exerted along the lines of logical progression; this I call the rule of analogy or the method of philosophy; along the line of historical development; this I will call the method of evolution; along the line of the customs of the community; this I will call the method of tradition; along the lines of justice, morals and social welfare, the *mores* of the day; and this I will call the method of sociology.¹³

Each of Cardozo's pathways stresses the importance of adhering to precedent in resolving the issue at hand. The path which leads there most directly is what he calls "the rule of analogy." Analogy is a "logic[al] . . . inference that certain admitted resemblances imply probable further similarity."¹⁴ In cases dealing with a new medium, analogical reasoning involves the selection of a model from prior media. This is the thought process which, for example, led courts in the nineteenth century to recognize that the telephone was effectively like the telegraph.¹⁵

The other three methods provide alternative routes to the same result. The method of history involves reviewing history in search of similar things and events, any of which may become the analogy if logic confirms its applicability. The third method, custom, is similar to history: one might call custom a subset of the precedent you find in history. Finally, the sociological method, as Cardozo explains it, involves determining the "social value" of a proposed ruling,¹⁶ or rather, its fairness and consistency with contemporary mores.

Of Cardozo's four pathways, the sociological method relies least on analogy to reach a result. Nevertheless, a result which determines the social value of the ruling may be best cemented with a good analogy. After all, a well-reasoned ruling may be of little continuing value if courts fail to recognize it as a precedent in a future case where it would otherwise have provided guidance. Analogies can therefore

13. *Id.* at 30-31.

14. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 64 (1975).

15. See ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 100 (1983). Cass Sunstein notes approvingly that analogical reasoning

does not require people to develop full theories to account for their convictions; it promotes moral evolution over time; it fits uniquely well with a system based on principles of *stare decisis*; and it allows people who diverge on abstract principles to converge on particular outcomes. . . . A notable aspect of analogical thinking is that people engaged in this type of reasoning are peculiarly alert to the inconsistent or abhorrent

Cass R. Sunstein, On Analogical Reasoning, 106 HARV. L. REV. 741, 790-91 (1993).

16. CARDOZO, *supra* note 8, at 73.

serve as the thread connecting a sociological result to future controversies.

Because of its lack of adherence to precedent, Cardozo notes that the sociological method may only be freely used within the gaps left by prior rulings:

We must not throw to the winds the advantages of consistency and uniformity to do justice in the instance. We must keep within those interstitial limits which precedent and custom and the long and silent and almost indefinable practice of other judges through the centuries of the common law have set to judge-made innovations. But within the limits thus set, within the range over which choice moves, the final principle of selection for judges, as for legislators, is one of fitness to an end.¹⁷

Cardozo also quotes Saleilles: "The goal is the internal life, the hidden but fruitful soul, of all law."¹⁸ Ultimately, the judicial process involves "search and comparison, and little else."¹⁹ The law which results "is not found, but made."²⁰ Cardozo sums up by saying:

My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law.²¹

The judicial process, as Cardozo describes it, is similar to the taxonomy pioneered by Cuvier: compare a new animal to familiar animals to determine the one to which it is most similar. Then analyze the differences.²² The judicial process even has its echo in modern object-oriented software analysis, where the analyst names classes of objects and creates a hierarchy of "inheritance" based on their relationships to one another.²³ Adjudication, to put it simply, is no more than another form of human work; like all others, it benefits from a careful use of analogical reading.

17. *Id.* at 103.

18. *Id.* (quoting RAYMOND SALEILLES, ON JURIDICAL PERSONALITY 497 (1911) (translation by Jonathan Wallace)).

19. CARDOZO, *supra* note 8, at 163.

20. *Id.* at 115.

21. *Id.* at 112.

22. See generally GEORGES CUVIER, THE ANIMAL KINGDOM, ARRANGED IN CONFORMITY WITH ITS ORGANIZATION (Kier B. Sterling, ed., Ayer Co. Pub. 1978).

23. See generally PETER COAD & ED YOURDON, OBJECT ORIENTED ANALYSIS (1991).

B. Use of Metaphor

A metaphor is "a figure of speech in which one thing is likened to another, different thing by being spoken of as if it were that other. . . ." ²⁴ It is a profoundly important concept for freedom of speech in general because it creates consistency and gives direction to policy, legislation, and adjudication. ²⁵

The importance of analogy and adherence to precedent in the judicial process is demonstrated by a host of authors who have developed metaphors for the judicial process. For example, constitutional scholar Ronald Dworkin has suggested a chain novel to describe the process, where judges are the authors who each write a chapter of the story. ²⁶ The idea of a "chain novel" is marvelously tactile. The character who was cruel and selfish in chapter one may, through personal growth caused by hard experience, become compassionate in chapter ten; but he should not sprout wings and fly. The "chain novel" metaphor is perfectly consistent with Cardozo's view of the constraints judges must respect in their decisionmaking role. Dworkin's chain novel metaphor brings to life Cardozo's theory and illustrates it in a manner which is both accessible and entertaining.

Michael Kammen, in his metaphorically-titled book on the Constitution, *A Machine That Would Go of Itself*, ²⁷ discusses shifting metaphors for our Constitution:

The most common way of referring to the Constitution—the oldest as well as the most enduring—is simply as an "instrument," often preceded by such modifiers as "written," "practical," "sacred" and "wonderful"

During the second half of the nineteenth century another metaphor came into vogue, more vivid than instrument but also more ephemeral: the analogy to an anchor. . . . It recurred from time to time during the next half century, but essentially was supplanted by two others that gained even wider currency

The first of these, the notion of a constitution as some sort of machine or engine, had its origins in Newtonian science. . . .

24. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 1132 (1975).

25. While the line between metaphor and analogy is not precise, Sunstein states that metaphors are comparisons, while analogies are more literal. See Sunstein, *supra* note 15, at 748 n.26.

26. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 10 (1996).

27. MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF 16-19 (1986).

[After 1888], a cultural transition took place that leads us to the last of the major constitutional metaphors. We may exemplify it with brief extracts from three prominent justices: Holmes, who wrote in 1914 that "the provisions of the Constitution are not mathematical formulas . . . they are organic, living institutions"; Cardozo, who observed in 1925 that "a Constitution has an organic life"; and Frankfurter, who declared in 1952 that "The Constitution is an organism."²⁸

The power of metaphors for the Constitution has increased over time and has greatly impacted decisionmaking. For example, if the policy question on the table is "How frequently should we amend the Constitution?" each metaphor could give a different answer to the question. With Kammen's first metaphor, an instrument is merely amended, which is easy to do and unproblematic. With the second, an anchor is modified, which is almost as easy and is unlikely to interfere with its efficiency. With the third, a machine is redesigned, which may be somewhat more laborious than changing an anchor and may possibly break it, or at least cause it to run less efficiently. However, with the last metaphor, an organism is subjected to radical surgery—something that should almost never be done except in a great emergency.

The operative metaphor for freedom of speech in the United States was created by Justice Oliver Wendell Holmes, writing in 1919, in the following famous words:

[T]he ultimate good desired is better reached by free trade in ideas [T]he best test of truth is the power of the thought to get itself accepted in the competition of the market²⁹

Courts since then, when in need of a metaphor for freedom of speech, have usually reached for Holmes's "marketplace of ideas." Courts' adherence to Holmes's phrase illustrates the important benefits of a strong metaphor. Once courts decide that free speech is a marketplace of ideas, many questions are answered. Under First Amendment jurisprudence, when judges ask themselves "Under what circumstances should speech be prevented from entering the marketplace?" they immediately consider the circumstances under which they would enjoin the distribution of a product. A strong American interest in the freedom of commerce dictates that a product will not be banned

28. *Id.* at 16-19 (citing *Gompers v. United States*, 233 U.S. 604, 610 (1914) (Holmes quote); *Browne v. City of New York*, 149 N.E. 211, 214 (N.Y. 1925) (Cardozo quote); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 518 (1952) (Frankfurter quote)).

29. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

merely because judges do not approve of it. Thus, the choice of a metaphor immediately provides insight to resolve disputes relating to the subject matter.

Similarly, a court may be concerned with the ultimate fate of good speech and bad speech: Will the former be drowned out while the latter triumphs? The marketplace of ideas metaphor, founded on optimism, reassures us that good speech will triumph because it is the better product. Once again, the metaphor guides us rapidly to the right philosophical and sociological answer to our question.³⁰

Not all metaphors are equal. A bad metaphor can, of course, lead to bad decisionmaking. Cass Sunstein believes that the "marketplace of ideas" metaphor has literally turned the freedom of speech into a degraded form of commerce. He characterizes the "system of free expression in America" as a "system of unregulated private markets," similar to "cars, brushes, cereal and soap." In this system, an individual could only be heard by persuading a newspaper or broadcast station to allow it, unless she was wealthy enough to purchase the space. Free speech is a "commodity in a free market economy" with economic value and protected by antitrust law.³¹

Sunstein explicitly blames Justice Holmes for the cheapened commercial conception of free speech:

Holmes' opinion builds strong protection for speech on two foundations: skepticism about prevailing understandings of truth and the metaphor of "competition in the market." Truth itself is defined by reference to what emerges through "free trade in ideas." For Holmes, it seems to have no deeper status. The competition of the market is the governing conception of free speech. On his view, politics itself is a market, like any other.³²

Sunstein prefers a "town meeting" concept of freedom of speech, in which the First Amendment is intended to solely protect democratic

30. I have always been among those who believed that the greatest freedom of speech was the greatest safety, because if a man is a fool, the best thing to do is to encourage him to advertise the fact by speaking. It cannot be so easily discovered if you allow him to remain silent and look wise, but if you let him speak, the secret is out and the world knows that he is a fool. So it is by the exposure of folly that it is defeated; not by the seclusion of folly, and in this free air of free speech men get into that sort of communication with one another which constitutes the basis of all common achievement.

See *Thomas v. Collins*, 323 U.S. 516, 546 n.1 (1945) (Jackson, J., concurring) (quoting Woodrow Wilson, Address at the Institute of France (May 10, 1919), in *SELECTED LITERARY AND POLITICAL PAPERS AND ADDRESSES OF WOODROW WILSON* 333 (1926)).

31. CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 17-18 (1993).

32. *Id.* at 25.

deliberation, and not degraded matters such as advertising or pornography. The importance, according to Sunstein, is to encourage debate among varying cultures. Further, people should be "open to the force of argument" in an effort to "give up their initial views when shown the general benefit of the whole community." This, he concludes, will produce better public decisions because "there is a great deal of empirical evidence that deliberation can have a transformative function on beliefs."³³

Again, the choice of the metaphor can determine the outcome. Sunstein, contrary to the opinions of First Amendment analysts supporting the marketplace of ideas metaphor, believes that government should intervene in speech where necessary to promote democratic deliberation. For example, you cannot run an efficient town meeting if people are waving pornography. He calls our lack of substantive discussion on public issues and diversity of views in decisionmaking a "Madisonian failure" and argues that, in some cases, government intrusion can "actually improve free speech processes."³⁴

Steven H. Shiffrin proposes a different approach. He wants our symbol of freedom of speech to be the romantic dissenter, an Emerson, Whitman or Thoreau:

If the first amendment is to have an organizing symbol, let it be an Emersonian symbol, let it be the image of the dissenter. A major purpose of the first amendment, I will claim, is to protect the romantics—those who would break out of classical forms: the dissenters, the unorthodox, the outcasts. The First Amendment's purpose and function in the American polity is not merely to protect negative liberty, but also affirmatively to sponsor the individualism, the rebelliousness, the anti-authoritarianism, the spirit of nonconformity within us all.³⁵

Shiffrin's dissenter is an appealing figure, but it cannot function as a metaphor for freedom of speech. It can be said that the American system of freedom of expression is a marketplace or a "town hall," but not that it is a dissenter. The dissenter stands at one remove, a symbol of the individual the First Amendment is intended to protect, not a symbol of the system itself. Nevertheless, the dissenter as a symbol also serves the purpose of helping to determine outcomes. In answering a question like, "may we ban demonstrations in public

33. *Id.* at 241-43.

34. *Id.* at 251.

35. STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY AND ROMANCE* 5 (1990).

parks?" the metaphor pointing out the need to protect dissent provides more guidance than the "marketplace of ideas" metaphor.

It is beyond the scope of this Article to recommend an appropriate metaphor for the freedom of speech itself. Instead, these examples are given to illustrate the importance of metaphor to free speech determinations. In what follows, it is assumed that the "marketplace of ideas" is the prevailing metaphor, as it is the one that the Supreme Court has chosen in those cases in which a metaphor is mentioned at all.

II. USE OF ANALOGICAL REASONING IN TECHNOLOGICAL CASES

Analogical reasoning plays a profoundly important role whenever a court must decide the proper legal rules to apply to a new technology. Sadly, however, courts usually stumble before they find the correct analogy for new technologies. The law of copyright has provided several notorious examples. Piano rolls were not originally understood to be analogous to sheet music.³⁶ Software stored in read only memory was not understood to be the same as software stored on disk.³⁷

Communications scholar Ithiel de Sola Pool published his remarkable *Technologies of Freedom* in 1983.³⁸ Subtitled "Of Free Speech in an Electronic Age," the book forecasts many of the dangers and disputes that we are encountering fourteen years later in determining which rules to apply to electronic media. Following Cardozo's injunction to study the past for its applicability to the future, Pool gives an incomparable historical account of the legal confusion surrounding the introduction of telegraphy and the telephone:

Courts like to treat new phenomena by analogy to old ones. When the telephone was invented, the question was whether, at law, the telephone was a new kind of telegraph or something different. If the phone was a telegraph, a body of law already existed that would apply. The decisions sometimes went one way, sometimes the other; but the model of the telegraph was always there to be considered.³⁹

Pool cites a classic Supreme Court failure of imagination. In 1899, the Supreme Court denied telephone companies use of the public

36. See *White-Smith Music Publ'g Co. v. Apollo Composers*, 209 U.S. 1, 10 (1908).

37. See *Apple Computer, Inc. v. Franklin Computer Corp.*, 545 F. Supp. 812, 813 (E.D. Pa. 1982), *rev'd*, 714 F.2d 1240 (3rd. Cir. 1983).

38. POOL, *supra* note 15.

39. *Id.* at 100.

right of way for their wires, which had been granted to telegraph companies by the 1866 Post Roads Act:

[G]overnmental communications to all distant points are almost all, if not all, in writing. The useful Government privileges which formed an important element in the legislation would be entirely inapplicable to telephone lines, by which oral communications only are transmitted.⁴⁰

When a court fails to use analogical reasoning and attempts to regulate a new technology without the guidance of history, it risks creating bad law. Although such determinations are almost always eroded over time or reversed later, they may cause harm in the intervening years. When determining First Amendment applicability to new technologies, a court must consider not only the technology itself, but also principles of free speech. Determinations as to the proper First Amendment treatment of new technologies should be influenced by the operative freedom of speech metaphor as well as the correct analogy for the technology.

An example of the early use of analogy is *Primrose v. Western Union Telegraph Co.*,⁴¹ in which the Court faced the question of whether a telegraph company could refuse to transmit a telegram based on its content. Prior to the *Primrose* decision, telegraph companies sometimes provided their own journalistic wire service and refused to carry dispatches from reporters to their newspapers, viewing these as competition.⁴²

In 1866, Congress included in the Post Roads Act⁴³ a requirement that telegraph companies provide service, to all customers without discrimination like a common carrier. The Supreme Court agreed and held that "[t]elegraph companies resemble railroad companies and other common carriers, in that they are instruments of commerce"⁴⁴ and therefore, must provide services without discrimination. The Court selected the railroad as the appropriate analogy for the telegraph and determined that services must be similarly provided.⁴⁵

40. *Id.* (quoting *City of Richmond v. S. Bell, Tel. & Tel. Co.*, 174 U.S. 761, 776 (1899)).

41. 154 U.S. 1 (1893).

42. POOL, *supra* note 15, at 92-95.

43. 19 Stat. 319 (1877).

44. POOL, *supra* note 15, at 95-96 (quoting *Primrose*, 154 U.S. at 14 (1893)).

45. See also *Northwestern Tel. Exch. Co. v. Chicago, M. & St. P. Ry. Co.*, 79 N.W. 315, 317 (Minn. 1899) ("The rule is well established that in applying the principles of the common law or in construing statutes the telephone is to be considered a telegraph . . ."); *Hudson River Tel. Co. v. Watervliet Turnpike & Ry Co.*, 32 N.E. 148, 149 (N.Y. 1892) (applying statutes

Selection of an operative metaphor for freedom of speech to be used in conjunction with the telegraph analogy would have aided the Court in deciding this case. Holmes's "marketplace of ideas," for example, would have supported the conclusion that the telegraph company's ban on journalistic dispatches was an unfair ban on entry into the marketplace by a company which enjoyed a public monopoly or use of the public right of way.⁴⁶

The danger in technological freedom of speech cases is that courts tend to regard each new communications technology as *sui generis*, not relevant to anything which came before it. Zechariah Chafee, in his seminal *Free Speech in the United States*,⁴⁷ observed that for centuries newspapers, books, pamphlets and large meetings were the only means of public discourse, and the need for their protection was obvious. When new methods of discourse developed, writers and judges were not versed in protecting freedoms. This led to the "censorship of the mails, the importation of foreign books, the stage, the motion picture and the radio."⁴⁸

Models for new technology, and analogical reasoning, help us avoid such *sui generis* determinations in several ways. A persuasive analogy is similar to an intuitive rule in that it is simple, appeals to the imagination, and is easy to apply.⁴⁹

authorizing telegraph transmission to telephone); *Attorney General v. Edison Telephone Co.*, 6 Q.B.D. 244 (1880) (same); see also *Duke v. Central New Jersey Telephone Co.*, 21 A. 460 (N.J. 1891) ("The telephone is a 'novel method of accomplishing the object for which telegraphs were erected'); but see, *Chicago Telephone Co. v. Postal Telegraph-Cable Co.*, 120 N.E. 795, 799 (Ill. 1918) (Carter, J., dissenting) ("Telegraph companies are as distinct from telephone companies as a railroad company is distinct from a steamboat company.").

46. Holmes, of course, described the marketplace of ideas in the *Abrams* decision some twenty-six years after the Court decided *Primrose*.

47. ZECHARIAH CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1941).

48. *Id.* at 381.

49. Philosopher Peter Singer draws a distinction between "intuitive" and "critical" rules of ethics. Intuitive rules are simpler, broader, more appealing to the imagination and easier to remember and apply. See PETER SINGER, *PRACTICAL ETHICS* 92-93 (1993) (citing R.M. HARE, *MORAL THINKING* (1981)). Singer discusses the distinction between critical and intuitive moral reasoning:

To consider, in theory, the possible circumstances in which one might maximize utility by secretly killing someone who wants to go on living is to reason at the critical level . . . Everyday moral thinking, however, must be more intuitive. In real life we usually cannot foresee all the complexities of our choices. . . . Hare suggests, it will be better if, for our everyday ethical life, we adopt some broad ethical principles and do not deviate from them.

Id. See also Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 471-72 (1985). Arguing that First Amendment jurisprudence should create rules that will stand up in pathological times such as the McCarthy era, Blasi notes that courts should

Since an analogy innately makes a comparison between two things, it reminds us that the subject matter before us is likely not *sui generis* and is probably similar to something else. At the same time, a metaphor like the "marketplace of ideas" is a useful image for the values to apply in making the determination. Most importantly, strong metaphors and logical analogies deter bad outcomes in hard cases, when more subtle doctrines would be easily overlooked. These judicial tools "keep[] the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said."⁵⁰

III. FIRST AMENDMENT JURISPRUDENCE PERTAINING TO COMMUNICATIONS: A PATCHWORK OF CONFLICTING LAWS

A common complaint of First Amendment law is that it is a patchwork, devoid of any guiding moral principle. This patchwork has generated legislative confusion, incongruous decisions and judicial inefficiency. Each time courts are required to rule on an issue they are forced to repeat the same work. Although this problem has spawned a move toward creating a single standard for all communications media, agreement as to what that standard should be is not likely to be created soon. Until that time, courts will continue to add discrepant standards. For example, Shiffrin notes:

First amendment law now is, if nothing else, a complex set of compromises. Sometimes speech that presents a clear and present danger is protected; sometimes it is not; sometimes speech is not protected even though it presents no clear and present danger of any ordinarily recognizable evil. The Court periodically formulates exquisitely precise rules; it settles at other times for the most generally phrased standards; often it opts for hazy formulations and relies on the lower courts to fill in the details; sometimes the Court stays its hand and says nothing. The result is a body of law

search for methods of justifying their judgments that appeal to the common, unsophisticated understanding of what law is. . . . From the standpoint of influencing attitudes regarding the desirability of free speech, we might begin the quest for simplicity by recognizing the valuable role played by some of the simple precepts of the judicial heritage. . . . [citing the marketplace of ideas, among others]. [S]imple precepts can have a strong intuitive appeal, and it is just that kind of emotional force that may be most effective in reversing or containing the dangerous attitude shifts that take place in pathological periods.

Id.

50. *Denver Area Educ. Telecomm. Consortium, Inc. v. Fed. Communications Comm'n*, 116 S. Ct. 2374, 2401 (1996) (Souter, J., concurring).

complicated enough to inspire comparisons with the Internal Revenue Code.⁵¹

Shiffrin calls First Amendment law a "[c]ommittee product," created by "[n]ine independent social engineers," and adds that committee products are "notoriously schizophrenic."⁵²

Professor Eric M. Freedman adopted a marvelous metaphor to describe the plight of First Amendment law today:

Current free speech law resembles the Ptolemaic system of astronomy in its last days. Just as that theory grew increasingly incoherent in an attempt to incorporate new empirical observations that were inconsistent with its basic postulates, so is First Amendment doctrine disintegrating as cases reviewing restraints on speech strive to paper over the fact that analyses based on presuppositions as to the value of particular kinds of expression are inconsistent with the premises of the First Amendment itself.⁵³

For example, in 1915, the Supreme Court held that movies were not protected expression under the First Amendment because they are "a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded . . . as part of the press of this country, or as organs of public opinion."⁵⁴ However, in 1952 the Court reversed itself on this point, holding that operation for profit has no effect on whether the freedom of expression should be protected.⁵⁵ The Court added sensibly that "each method [of communication] tends to present its own peculiar problems. But the basic principle of freedom of speech and of the press, like the First Amendment's command, do not vary."⁵⁶

In *Leathers v. Medlock*,⁵⁷ Justices Marshall & Blackmun expressed a similar view: "Although cable television transmits information by distinctive means, the information service provided by cable does not differ significantly from information services provided by . . . newspapers, magazines, television broadcasters, and radio stations."⁵⁸

51. SHIFFRIN, *supra* note 35, at 2-3.

52. *Id.* at 3.

53. See Eric M. Freedman, *A Lot More Comes Into Focus When You Remove the Lens Cap: Why Proliferating New Communications Technologies Make It Particularly Urgent for the Supreme Court to Abandon its Inside-Out Approach to Freedom of Speech and Bring Obscenity, Fighting Words and Group Libel Within the First Amendment*, 81 IOWA L. REV. 883, 885 (1996).

54. *Mutual Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 244 (1915).

55. *Joseph Burstyn, Inc.*, 343 U.S. at 502.

56. *Id.* at 503.

57. 499 U.S. 439 (1991).

58. *Id.* at 457 (Marshall, J., dissenting).

In other words, to attain consistency of First Amendment outcomes, the courts and the legislatures should treat the method of storage or transmission as irrelevant and focus instead on the information itself. Contrast this, however, with *Red Lion Broadcasting v. FCC*,⁵⁹ where the Supreme Court found that "it is able to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish."⁶⁰

A. Spectrum Scarcity and Persuasiveness

A string of broadcast cases from *National Broadcasting Co. v. United States*⁶¹ through *Federal Communications Commission v. Pacifica Foundation*,⁶² cable cases such as *Turner Broadcasting Systems, Inc. v. Federal Communications Commission*⁶³ and *Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission*,⁶⁴ as well as telephone cases such as *Sable Communications v. Federal Communications Commission*⁶⁵ are examples of Shiffrin's committee-based social engineering. In reading these cases, one looks in vain for an operative metaphor for free speech. Because of the lack of a "fruitful soul" in the Supreme Court's electronic media jurisprudence, these decisions fail to recognize the parallels with prior media, and instead become caught up in technological details which an overarching metaphor might subsume.⁶⁶

For example, the doctrine of "spectrum scarcity" allowed Congress to make rules for broadcast media that would be unconstitutional if applied to print. In *National Broadcasting Co. v. United States*, the Communications Act of 1934 was upheld by the Court

59. 395 U.S. 367 (1969).

60. *Id.* at 388.

61. 319 U.S. 190 (1943).

62. 438 U.S. 726 (1978).

63. 512 U.S. 622 (1994).

64. 116 S. Ct. 2374 (1996).

65. 492 U.S. 115 (1989).

66. The Court's mistake in regulating electronic media has not been in recognizing the First Amendment interests of viewers and the potential defects in the marketplace of ideas; rather, it has been in grounding those timeless concerns in the transient nature of the technologies involved. Early on, the Court seized upon frequency scarcity as a justification for regulating the electronic media in order to increase viewpoint diversity. The ensuing debate about the regulation of new communications technologies has too often focused on a comparison of technologies instead of on the underlying question of how a regulatory regime can assure that First Amendment values—which involve the interests of both speakers and listeners—can best be served.

Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1076-77 (1994).

because the radio was not available to everyone, or "scarce," which distinguished it from other modes of expression.⁶⁷

The Court could have reached a different result either by analogizing the radio to the telephone or by applying the generic "marketplace of ideas" metaphor. For the first, broadcasters, rather than providing their own content, might have been treated as common carriers like the telephone or telegraph companies, forced to lease bandwidth to any customer requesting it.⁶⁸ For the second, instead of being given away free to licensees, the rights to broadcast on the various available frequencies might have been divided up and sold to the highest bidder. This would have created an incentive to the owner to sublicense or resell smaller parts or time slots of spectrum that would, in the long run, have been fairer and created a more diverse dialog on the airwaves than that which exists today.⁶⁹ Either approach would have resulted in a more permissive application of free speech principles, and accordingly would have allowed for less restrictions on speech.

Due to the lack of an anchoring metaphor and failure to analogize consistently, the technical distinction of spectrum scarcity was soon forgotten and new bases for government intervention were identified. Later, the censorship originally justified on scarcity grounds was applied to other, nonscarce electronic media.

For example, in *Federal Communications Commission v. Pacifica Foundation*, a case which Pool called a "legal time bomb" because it "could be used to justify quite radical censorship,"⁷⁰ the Court identified an alternative excuse for censorship: the "pervasiveness" doctrine. *Pacifica*, known as the "Seven Dirty Words" case, involved an afternoon broadcast on public radio of comedian George Carlin's monologue about the seven words "you cannot say on the air."⁷¹ The Court upheld the Federal Communications Commission's sanction of the station but neglected to mention spectrum scarcity as the foundation of broadcast regulation. Instead, it referred to the "uniquely pervasive presence" of broadcasting to justify the sanction. Conservative groups have since leaped on "pervasiveness" as an important source of government authority to censor the Internet, arguing

67. *Nat'l Broad. Co.*, 319 U.S. at 226.

68. POOL, *supra* note 15, at 136.

69. *Id.* at 138.

70. *See Pacifica*, 438 U.S. at 748; POOL, *supra* note 15, at 134.

71. *Pacifica*, 438 U.S. at 751-55.

forcefully in Congress and the courts that it can be regulated because, though not scarce, it is "pervasive."⁷²

Persuasiveness is both a misleading and dangerous argument for regulation of indecent Internet content. It is misleading because of what almost everyone concedes is a compelling government interest in protecting children from sexual material.⁷³ Yet it is dangerous because it still does not provide any substantive basis for distinguishing between electronic media and print. A child is just as likely, if not more likely, to stumble upon indecent content by flipping through a copy of *Playboy* found in the bottom of a closet, discover a copy of *National Geographic* in the library, or indeed, to find a rape or dismemberment scene in the Old Testament⁷⁴ as he is to find similar content on the Internet. The Bible may reasonably be called "pervasive" in the sense that it is probably still found in more American households than are television sets.

Likewise, there is no "spectrum scarcity" argument in the telephone cases. In fact, in the last century the telephone company was declared a common carrier which could not intervene in the content of its customers' speech.⁷⁵ Then, in the 1980s, Congress passed legislation regulating telephone "dial-a-porn." The Court upheld the

72. See generally 142 CONG. REC. H1145, H1175 (daily ed. Feb. 1, 1996) (comments of Rep. Goodlatte).

73. The ACLU, however, does not concede this point. During the *ACLU v. Reno* trial, it introduced as a witness sex expert Dr. Slayton, who testified that his five year old son had watched videos of oral sex without incurring any harm.

Q And these films that you've been talking about that do have the explicit depictions of sexual activity, you believe that it would be—that it would not be harmful to show those to minors, right?

A No, right.

Q And so you believe it would be appropriate to show those films—or would not be harmful to show those films to a 12-year-old.

A Right, or if a 12-year-old saw them. I don't think it would do harm.

Q And it would be all right —

A I don't think I would take 12-year-olds to a show, in fact, it's against the law. I wouldn't do it.

Q But you think it would do no harm if they did see it?

A Absolutely it wouldn't.

Q And you think it would be appropriate for a 10-year-old to see those films?

A Yeah. My five-year-old saw them, when he was five years old.

Cross Examination of Dr. William R. Stayton By Ms. Russotto, *ACLU v. Reno* (No. 96-963-M) (United States District Court for the Eastern District of Pennsylvania March 21, 1996). Also available at <<http://www.aclu.org/issues/cyber/trial/trial.htm>>.

74. See, e.g., *Judges* 19:22, 29. For a collection of violent and sexual excerpts from the Bible, see, Tanith Tyrr, *The Indecent Bible* (visited June 12, 1997) <<http://www.spectacle.org/cda/bible.html>>.

75. POOL, *supra* note 16, at 100-01.

"reverse blocking" of telephone indecency in *Sable Communications v. FCC*.⁷⁶ The Court failed to reveal the legal source of its ability to regulate the content of telephone speech. It held that the government had a compelling state interest in protecting children from indecent speech and that the legislation was narrowly tailored because adults could still obtain "dial-a-porn" if they wished. No one has yet explained why the same constitutional test, applied to print, could not be used to justify the banning of *Catcher in the Rye* from bookstores or libraries and forcing adults to send for it by mail.⁷⁷

There is also no argument of spectrum scarcity in cable television cases, as cable does not travel over the airwaves and the number of channels that can be brought into the home is limited only by the ever-increasing bandwidth of the cable itself. Nevertheless, the Court has declined the invitation to hold cable as free as the press or to hold cable as restricted as broadcast. The Court has not elucidated the bizarre treatment of cable as a fluctuating hybrid, nor has it explained why the FCC has any influence over it. The results of the hybrid are often untenable. For example, cable stations are prohibited from carrying shows available in the same marketplace via broadcast stations, while at the same time they can be compelled to carry the local broadcast stations under the "must-carry" rules.⁷⁸

Rationales proffered by the Court for government intervention in cable originally included that cable is "ancillary to" television; that it competes with television; and that some cable channels are broadcast via the airwaves to the local facility that sends them over the cable into peoples' homes.⁷⁹ In *Turner v. Federal Communications Commission*,⁸⁰ a "must carry" case, the Court gave some indication that it might be preparing to free cable from television-style restrictions when it finally distinguished cable television from the broadcast medium.⁸¹

76. 492 U.S. at 118 ("reverse blocking" involves providing access to a service only if a customer requests it, typically in writing).

77. However, note the argument of Congressman Goodlatte (R. Va.) in support of the CDA, on the day that it cleared Congress in its final version:

Some have even claimed that an indecency standard will keep great literary works such as "Catcher in the Rye" off the Internet. I strongly disagree. . . . The context of the material cannot be disregarded when making a determination of indecency. Therefore, if someone transmits the entire novel "Catcher in the Rye" they would not be violating an indecency standard, but if they transmit only certain passages out of context they might.

142 CONG. REC. at 1175.

78. *Turner*, 512 U.S. at 666.

79. See Pool, *supra* note 15, at 160-66.

80. 512 U.S. at 666 (1994).

81. *Id.* at 639.

B. *Denver Area Educational Telecommunications v. FCC*

In *Denver Area Educational Telecommunications Consortium v. Federal Communications Commission*,⁸² Pool's ticking time bomb finally exploded. In *Denver*, the Court considered federal legislation affirming a cable provider's right to ban indecency on leased access channels;⁸³ requiring the "reverse blocking" of indecent content if not banned;⁸⁴ and allowing the provider to block indecent content on public access channels.⁸⁵ The Court upheld the first provision and held the other two unconstitutional.

Before *Denver*, many believed that the *Pacifica* court had not intended "pervasiveness" to be meaningful in the absence of "scarcity." But in *Denver*, four justices explicitly endorsed "pervasiveness" as a rationale to justify government intervention in speech, even if spectrum scarcity was inapplicable to the medium in question. *Denver*, decided in June of 1996, is the ultimate example of the First Amendment doctrinal drift: it is a confusing, fragmented decision, without a majority opinion. The decision, though somewhat contradictory, substantively tilts in favor of freedom of expression. Procedurally, however, it achieves its goals via a dangerous pathway because of the plurality's failure to analogize. Justice Breyer, writing on behalf of three other justices, complained:

Like the petitioners, Justices Kennedy and Thomas would have us decide this case simply by transferring and applying literally, categorical standards this Court has developed in other contexts. For Justice Kennedy, leased access channels are like a common carrier. . . . For Justice Thomas, the case is simple because the cable operator who owns the system over which access channels are broadcast, like a bookstore owner with respect to what it displays on the shelves, has a predominant First Amendment interest. . . . Both categorical approaches suffer from the same flaws: they import law developed in very different contexts into a new and changing environment, and they lack the flexibility necessary to allow government to respond to very serious practical problems without

82. 116 S. Ct. 2374 (1996).

83. *Id.* at 2380. Cable providers are required to set aside a certain number of channels to lease to other content providers.

84. *Id.* at 2381.

85. *Id.* at 2380. Most municipalities, in granting cable franchises, require providers to set aside one or more channels for noncommercial programming provided by nonprofit and individual members of the public.

sacrificing the free exchange of ideas the First Amendment is designed to protect.⁸⁶

Justice Breyer's opinion says that "rigid" judicial formulae will act as a "straight jacket" which "disables government from responding to serious problems":

[N]o definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes. . . . [A]ware 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 to pick one analogy or one definitive set of words now.⁸⁷

Applying a "balancing" approach and citing *Pacifica's* "pervasiveness" doctrine approvingly, the plurality held that granting cable providers the right to ban indecent programming on leased channels partly restored their prior right to select programming.⁸⁸ On the other hand, "reverse blocking" requirements were onerous and expensive. Finally, the right to interfere in public access programming violated the discretion of local municipalities, which might view the content differently than the cable provider.

Justice Souter, who joined in the plurality opinion, also wrote a concurrence. He agrees with Justice Kennedy that a strict categorical approach "keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said."⁸⁹ He therefore felt it necessary to explain why he joined the Court's unwillingness to prescribe a category. He explained that the cable industry, like the rest of the telecommunications industry, is in a state of flux, and the possibility looms that the separate electronic media will converge. Rules for one medium which ignore the potential effects on others would soon be antiquated.⁹⁰

Noting that it is likely that media will "become less categorical and more protean,"⁹¹ Justice Souter concludes that the proper doctrinal category is not yet clear.⁹² With a strange pride, Justice Souter points out that it took fifty years for the clear and present

86. *Id.* at 2384.

87. *Denver*, 116 S. Ct. at 2385.

88. *Id.* at 2398. Prior to the passage of the Cable Television Consumer Protection and Competition Act, cable providers had no obligation to lease channels to other content distributors.

89. *Id.* at 2401 (Souter, J., concurring).

90. *Id.* at 2402.

91. *Id.*

92. *Denver*, 116 S. Ct. at 2402.

danger test in *Schenk v. United States*⁹³ to evolve into the modern incitement rule of *Brandenburg v. Ohio*.⁹⁴ Finally, with misplaced confidence, he quotes from the Hippocratic oath: "First, do no harm."⁹⁵ He is apparently unaware of the serious harm potentially inflicted on the freedom of speech by the plurality's endorsement of "pervasiveness" and its refusal to establish the correct analogy.

Justice Kennedy, joined by Justice Ginsburg, dissenting in part, recognizes that "the plurality opinion . . . is adrift."⁹⁶

The opinion treats concepts such as public forum, broadcaster, and common carrier as mere labels rather than as categories with settled legal significance; it applies no standard, and by this omission loses sight of existing First Amendment doctrine. When confronted with a threat to free speech in the context of an emerging technology, we ought to have the discipline to analyze the case by reference to existing elaborations of constant First Amendment principles.⁹⁷

He concludes that adherence to standards "even when it means affording protection to speech unpopular or distasteful, is the central achievement of our First Amendment jurisprudence."⁹⁸ The use of analogy is "a responsibility," rather than the "luxury" that the plurality considers it to be.⁹⁹

Another troubling aspect of the plurality's approach is its suggestion that Congress has more leeway than usual to enact restrictions on speech when emerging technologies are concerned, because we are unsure what standard should be used to assess them. Justice Souter recommends to the Court the precept, "'First, do no harm'". . . . The question, though, is whether the harm is in sustaining the law or striking it down. If the plurality is concerned about technology's direction, it ought to begin by allowing speech, not suppressing it.¹⁰⁰

Justice Kennedy is correct. The approach followed by the plurality would have been shocking to Justice Cardozo because the plurality is saying that history is unclear, the method of analogy is too confusing, we are uncertain about applicable customs, and social values give uncertain guidance. Therefore, rather than pursuing these

93. 249 U.S. 47, 51 (1919).

94. 395 U.S. 444, 449 (1969).

95. *Denver*, 116 S. Ct. at 2402.

96. *Id.* at 2404 (Kennedy, J., concurring, dissenting in part).

97. *Id.*

98. *Id.* at 2406.

99. *Id.* at 2407.

100. *Denver*, 116 S. Ct. at 2407.

analyses, we'll just balance the interests and hope we did the right thing.

When a ship loses its anchor, it may drift away, or it may drift back over you. As Congress legislates, and the Court upholds, broader exceptions to the freedom of speech, the question becomes why print should even be exempt. In *Tornillo v. Miami Herald*,¹⁰¹ professor Jerome Barron, who had written articles calling for broadcast treatment of the press, asked the Court to apply the FCC's "fairness doctrine" to newspapers.¹⁰² Barron wanted to force the Miami Herald to publish a reply to an editorial it had printed about his client. The Supreme Court refused to take the bait, though Barron persuasively argued that newspapers have monopoly power.¹⁰³

IV. UNDERSTANDING THE INTERNET: HOW BEST TO DETERMINE THE APPLICABILITY OF FREE SPEECH PRINCIPLES

The dispute over regulation of indecent speech on the Internet, culminating in the *ACLU v. Reno* decision, is a battle between two analogies, broadcast and the printing press. The statute at issue, the Communications Decency Act (CDA),¹⁰⁴ amalgamated broadcast language from the Communications Act of 1934¹⁰⁵ and more recent FCC regulations¹⁰⁶ to fashion a regulatory scheme for the Internet. Supporters of the CDA argued that, though the Internet might lack scarcity, it was pervasive as required by the Court in *Pacifica*, and therefore its content was subject to government regulation. The ACLU and other free speech proponents argued that the Internet, like the printing press, should be free of any regulation of content.

A. *The Use of Metaphor to Understand the Technology*

Emerging technologies have relied on metaphor to explain their uses. Metaphor allows us to understand new modes of communication by offering us vivid images of the technology's power and utility.

101. 418 U.S. 241 (1974).

102. *Id.* at 247.

103. *Id.* at 252. See also LEE C. BOLLINGER, IMAGES OF A FREE PRESS 94-95 (1991). Bollinger, playing devil's advocate, argues that newspapers may not be more restricted than broadcast stations, as a community usually has one newspaper but several radio and television stations, and there are roughly 1,700 daily newspapers in the country and 13,000 broadcast stations. Becoming very devilish indeed, he concludes that "it is reasonably arguable that broadcast regulation may well be the relevant analogy for print." *Id.* at 95. See also 142 CONG. REC. at 1175.

104. 47 U.S.C. §§ 230, 560-561 (1997).

105. Communications Act of 1934, 47 U.S.C. § 151 (1994).

106. See generally 47 C.F.R. §§ 73.4170, 76.701 (1997).

Marshall McLuhan may be called the patron saint of communications metaphor. In addition to his famous description of television as "the global village,"¹⁰⁷ he also called the telegraph "the social hormone"¹⁰⁸ and radio "the tribal drum."¹⁰⁹

In fact, the instrumentality by which we access the Internet—the computer—utilizes an interface based on metaphors. You click on a garbage can icon to delete a file, drag an image to drop it into your text, and open an in-box to read your mail. The computer screen simulates a desktop. Calling the Internet the "Net" is itself a metaphor, as are the phrases "cyberspace" (the network simulates geographical space) and the "information superhighway" (which makes the geographical metaphor more concrete by describing the kind of physical space the system emulates—a highway). The Internet is an exciting new medium, and writings about it by journalists, sociologists, and users overflow with metaphor.

William Mitchell, in the metaphorically-titled *City of Bits*,¹¹⁰ says:

The network is the urban site before us, an invitation to design and construct the City of Bits (capital of the twenty-first century), just as, so long ago, a narrow peninsula beside the Maeander became the place for Miletos. But this new settlement will turn classical categories inside out and will reconstruct the discourse in which architects have engaged from classical times until now.

This will be a city unrooted to any definite spot on the surface of the earth, shaped by connectivity and bandwidth constraints rather than by accessibility and land values, largely asynchronous in its operation, and inhabited by disembodied and fragmented subjects who exist as collections of aliases and agents. Its places will be constructed virtually by software instead of physically from stones and timbers, and they will be connected by logical linkages rather than by doors, passageways and streets.¹¹¹

Other authors choose metaphors for the computer based on human communities and interactions. Howard Rheingold, in the metaphorically-titled *The Virtual Community*,¹¹² said:

107. MARSHALL McLuhan, *THE GLOBAL VILLAGE: TRANSFORMATIONS IN WORLD LIFE AND MEDIA IN THE 21ST CENTURY* (1989).

108. MARSHALL McLuhan, *UNDERSTANDING MEDIA* 248-49 (1995).

109. *Id.* at 302.

110. WILLIAM J. MITCHELL, *CITY OF BITS* (1995).

111. *Id.* at 24.

112. HOWARD RHEINGOLD, *THE VIRTUAL COMMUNITY* (1993).

There's always another mind there. It's like . . . the corner bar, complete with old buddies and delightful newcomers and new tools waiting to take home and fresh graffiti and letters. . . . It's a place.¹¹³

For Allucquere Rosanne Stone, the operative metaphor is the computer as a human prosthesis, and the most resonant image is her two year old daughter merged with a computer:

In the image a two-year-old sits at an ancient 8086 clone, her tiny hands on the keyboard, a huge grin on her face. The screen radiates a brilliant yellow glow that illuminates her face and arms. Suffused with that electronic glow, her face almost seems to be taking on an illumination of its own. She seems to evince a generous permeability, an electronic porosity that is pathognomic of the close of the mechanical age. . . and as I glance up at the image I can see the machine doing it too, as they both hover on the brink of collapsing into each other. This implosion is her moment.¹¹⁴

Sherry Turkle sees the Internet as a personal movie:

[I]t is computer screens where we project ourselves into our own dramas, dramas in which we are producer, director and star. Some of these dramas are private, but increasingly we are able to draw in other people. Computer screens are the new location for our fantasies, both erotic and intellectual.¹¹⁵

Although these metaphors were not conceived by lawyers and are not dedicated to legal outcomes, they have profound significance for Cardozo's "sociological method" of judicial analysis. One cannot regulate a medium of expression, any more than one can a medium of commerce such as the stock exchange or the international letter of credit system, without first understanding what it means to its users and what they derive from it. Cardozo comments:

The triers of the facts. . . must consult the habits of life, the everyday beliefs and practices, of the men and women about them. Innumerable, also, are the cases where the course of dealing to be followed is defined by the customs, or, more properly speaking, the usages of a particular trade or market or profession. . . . Life casts the moulds of conduct, which will some day become fixed as law.

113. *Id.* at 24.

114. ALLUCQUERE ROSANNE STONE, *THE WAR OF DESIRE AND TECHNOLOGY AT THE CLOSE OF THE MECHANICAL AGE* 166 (1995).

115. SHERRY TURKLE, *LIFE ON THE SCREEN* 26 (1995).

Law preserves the moulds, which have taken form and shape from life.¹¹⁶

Cardozo recommends that, where there is a conflict, the judge should typically apply the mores of the community in question, not his own:

Let us suppose, for illustration, a judge who looked upon theatre-going as a sin. Would he be doing right if, in a field where the rule of law was still unsettled, he permitted this conviction, though known to be in conflict with the dominant standard of right conduct, to govern his decision? My own notion is that he would be under a duty to conform to the accepted standards of the community, the *mores* of the times.¹¹⁷

Before creating a rule for the Internet, a judge ought to consult, among others, Rheingold, Mitchell, Stone and Turkle, in order to understand the custom and usage of the Internet. The metaphors which these authors adopt for the Internet communicate a massive amount of information compressed into a small package, facilitating efficient analysis.

A striking example of such a consultation occurred at the Philadelphia trial of *ACLU v. Reno*, where sociologist Donna Hoffman of Vanderbilt University testified on behalf of the plaintiffs. Hoffman explained her theory of "flow": the psychological satisfaction we derive from the uninterrupted, improvisatory movement of the World Wide Web.¹¹⁸ Technological solutions which require a human action, such as password screens, or which slow down the network, such as ratings systems in which your software must check the rating of every screen it accesses, interrupt the flow. The government's expert, Dr. Olsen, agreed that even "a minute is [an] unreasonable [delay] . . . [P]eople will not put up with a minute."¹¹⁹ The court combined these statements in its findings of fact.¹²⁰

Nonspontaneous, carefully described metaphors proposed by lawyers or judges also have an important role in First Amendment

116. CARDOZO, *supra* note 8, at 63-64.

117. *Id.* at 108.

118. Testimony of Donna Hoffman in Hearing Before the Honorable Delores K. Sloviter, *ACLU v. Reno* (No. 96-963-M) (United States District Court for the Eastern District of Pennsylvania, March 22, 1996) also available at <http://205.177.10.31/ciec/transcripts/Mar_22_Hoffman.html> (visited Jun. 5, 1997). For an index of articles by Donna Hoffman, see <<http://www2000.ogsm.vanderbilt.edu>>.

119. *ACLU v. Reno*, 929 F. Supp. 824, 846 (E.D. Pa. 1996).

120. *Id.* (the findings of fact were based on mutual stipulations agreed upon during pretrial meetings between the ACLU, the Government, and Judge Dalzell).

jurisprudence. The successful "marketplace of ideas" metaphor is an obvious example. While metaphors offered by users inform judges following the "sociological method" of the boundaries and mores of the subject matter, legal analogies bind a court's thinking and provide a flag to be saluted in future cases.

B. Analogizing the Internet for First Amendment Jurisprudence

Legal analogies for the Internet tend to be more restrained than the users' images of computers as self-created movies or prostheses. In the field of Internet law and its predecessor, the law applicable to bulletin board systems (BBSs) and on-line services such as CompuServe and Prodigy, a legal dialog dating back to the mid-1980s, has produced many analogies to other modes of communications. Lance Rose summarizes these in his book entitled *Netlaw*, which contains sections titled "The Online System as Print Publisher," "The Online System as Telephone Service," "The Online System as Bookstore," and (shades of Rheingold) "The Online System as Local Bar."¹²¹ Rose's exegesis in this last section illustrates the utility of a good legal analogy:

If a bar patron spouts slanderous falsehoods about his boss, its obvious the words are his, not the bar owner's. If another customer keeps stolen software under his trench coat and sells it in the back room outside the bar keep's notice, that activity is the software seller's alone, and cannot imaginably be blamed on the owner of the bar.¹²²

Naturally, proponents of Internet regulation have no shortage of analogies of their own. Besides the broadcast analogy, which is innate in the CDA itself,¹²³ the rhetoric of CDA supporters is well-represented by Senator Daniel R. Coats's statement that "[t]he Internet is like taking a porn shop and putting it in the bedroom of your children and then saying, 'Do not look.'"¹²⁴ Again, analogies determine outcomes: If the Internet is a porn shop in a child's bedroom, the only conceivable reaction of a civilized human being would be to get it out of there.

Some judges have analogized electronic media to print. A key precedent from libel law proposes a library or bookstore model for on-line services that distribute other people's text. In *Cubby, Inc. v.*

121. See generally LANCE ROSE, *NETLAW* (1995).

122. *Id.* at 27.

123. As discussed *infra*, the language of the CDA is borrowed from broadcast regulations.

124. 141 CONG. REC. S8310, S8333 (daily ed. June 14, 1995) (comments of Sen. Coats).

CompuServe, Inc.,¹²⁵ the court considered whether to hold CompuServe Information service liable for an alleged defamatory statement made on-line by a user of the service. The court held:

CompuServe's CIS product is in essence an electronic, for-profit library that carries a vast number of publications and collects usage and membership fees from its subscribers in return for access to the publications. . . . While CompuServe may decline to carry a given publication altogether, in reality, once it does decide to carry that publication, it will have little or no editorial control over that publication's contents.¹²⁶

The court concluded that CompuServe had no more control over the content of the messages and files it carries than a "public library, book store or newsstand . . ." and that it would be no more feasible for CompuServe to examine the contents of every file it carries "than it would be for any other distributor to do so."¹²⁷

However, when Prodigy relied upon *Cubby* in *Stratton Oakmont, Inc. v. Prodigy Services Co.*,¹²⁸ to avoid defamation liability, the court rejected the defense ostensibly because Prodigy was more like a publisher that makes editorial decisions than a bookstore or library that merely distributes publications.¹²⁹ This was due to Prodigy "[holding] itself out to the public and its members as controlling the content of its computer bulletin boards."¹³⁰ Significantly, both *Cubby*

125. 776 F. Supp. 135, 137 (S.D.N.Y. 1991).

126. *Id.* at 139 (Computer bulletin board system is analogous to a library or bookstore and is thus not liable for defamatory material it had no notice it possessed). See also *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995). In *Stratton*, Judge Ain rejected Prodigy's reliance on *Cubby* by denying Prodigy's motion for summary judgment because he considered Prodigy more of a publisher than a bookstore or library due to Prodigy "[holding] itself out to the public and its members as controlling the content of its computer bulletin boards." *Stratton*, 1995 WL at *4. Judge Ain explained that what led him to distinguish *Cubby* were statements by Prodigy such as

[w]e make no apology for pursuing a value system that reflects the culture of the millions of American families we aspire to serve. Certainly no responsible newspaper does less when it chooses the type of advertising it publishes, the letters it prints, the degree of nudity and unsupported gossip its editors tolerate.

Stratton, 1995 WL at *2. Nevertheless, both courts agree with the underlying premise of this article, that on-line services are more analogous to a printing press, a bookstore, or a library than any other communications medium.

127. *Cubby*, 776 F. Supp. at 140. In reaching this conclusion, the court relied heavily on *Smith v. California*, 361 U.S. 147, 152-53 (1959), which held that a bookstore owner could not be held liable for the contents of an obscene book of which he was not personally aware.

128. 1995 WL 323710 (N.Y. Sup. Ct. 1995).

129. *Stratton*, 1995 WL at *4.

130. *Id.*

and *Stratton* used a print medium as the analogy for on-line services.¹³¹

Justice Thomas, in his partial dissent in the *Denver* case, also opted for print as the appropriate analogy for cable. He argued that cable providers, like book or magazine editors, should have unfettered discretion to decide which speech to present to their customers.¹³²

In *ACLU v. Reno*, Judges Sloviter and Judge Dalzell chose two different analogies, while Judge Buckwalter never discussed analogy at all.¹³³ Chief Judge Sloviter compared the Internet to the telephone system: "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."¹³⁴ This apparently means that, according to Sloviter, the Internet could be regulated as a common carrier, which guarantees greater protection from restriction than broadcasting, but would still subject the Internet to more regulation than print.

Judge Sloviter, however, also compared the Internet to print:

When Congress decided that material unsuitable for minors was available on the Internet, it could have chosen to assist and support the development of technology that would enable parents, schools, and libraries to screen such material from their end. It did not do so, and thus did not follow the example available in the print media where non-obscene, but indecent and patently offensive books and magazines abound.¹³⁵

Judge Dalzell's views are more expansive. He argued that the Internet is a "new medium of mass communication,"¹³⁶ and that

131. See also *It's In The Cards, Inc., v. Fuschetto*, 535 N.W.2d 11 (Wis. Ct. App. 1995) (holding that posting a message to an on-line bulletin board is a "random communication of computerized messages analogous to posting a written notice on a public bulletin board . . .").

132. *Denver*, 116 S. Ct. at 2421 (Thomas, J., concurring in part, dissenting in part) ("In *Turner*, by adopting much of the print paradigm, and by rejecting *Red Lion*, we adopted with it a considerable body of precedent that governs the respective First Amendment rights of competing speakers. . . . Drawing an analogy to the print media, for example, the author of a book is protected in writing the book, but has no right to have the book sold in a particular book store without the store owner's consent. Nor can government force the editor of a collection of essays to print other essays on the same subject.").

133. See *supra* note 2 and accompanying text.

134. *ACLU v. Reno*, 929 F. Supp. at 851.

135. *Id.* at 857.

136. *Id.* at 872.

First Amendment jurisprudence requires consideration of its special qualities to determine if the CDA is constitutional.¹³⁷

Dalzell recited an impressive list of Supreme Court opinions, explaining that the "medium-specific approach to mass communication examines the underlying technology of the communication to find the proper fit between First Amendment values and competing interests."¹³⁸

Dalzell rejected the notion that the Internet resembles broadcasting. He argued that the Internet is a unique medium for mass communication and may be protected even more than print because it overcomes many of the failures of print:

First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers.¹³⁹

137. *Id.* See also *Shea v. Reno*, 930 F. Supp. 916, 922 (S.D.N.Y. 1996) ("We are encountering a communications medium unlike any we have ever known.").

138. *ACLU v. Reno*, 929 F. Supp. at 873. Judge Dalzell's amazingly articulate analysis deserves repeating. "Nearly fifty years ago, Justice Jackson recognized that '[t]he moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each . . . is a law unto itself.'" *Id.* (quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring)). The Supreme Court has expressed this sentiment time and again since that date, and differential treatment of the mass media has become established First Amendment doctrine. See, e.g., *Turner* 114 S. Ct. at 2456 ("It is true that our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media"); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) (Blackmun, J., concurring) ("Different communications media are treated differently for First Amendment purposes."); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 500 (1981) ("This Court has often faced the problem of applying the broad principles of the First Amendment to unique forums of expression"); *Pacifica*, 438 U.S. at 748 ("We have long recognized that each medium of expression presents special First Amendment problems"). Thus, the Supreme Court has established different rules for print, *Tomillo*, 418 U.S. at 258, broadcast radio and television, *Red Lion*, 395 U.S. at 400-01, cable television, *Turner*, 114 S. Ct. at 2456-57, and even billboards, *Metromedia*, 453 U.S. at 501, and drive-in movie theaters, *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975). This medium-specific approach to mass communication examines the underlying technology of the communication to find the proper fit between First Amendment values and competing interests. In print media, for example, the proper fit generally forbids governmental regulation of content, however minimal. See *Tomillo*, 418 U.S. at 258. In other media (billboards, for example) the proper fit may allow for some regulation of both content and of the underlying technology (such as it is) of the communication. See, e.g., *Metromedia*, 453 U.S. at 502. Radio and television broadcasting present the most expansive approach to medium-specific regulation of mass communication. As a result of the scarcity of band widths on the electromagnetic spectrum, the Government holds broad authority both to parcel out the frequencies and to prohibit others from speaking on the same frequency.

139. *ACLU v. Reno*, 929 F. Supp. at 877.

He pointed out that print media, by comparison, accomplish none of these elements. Restrictions on the Internet will actually "reduce" it to the level of print media: "In this respect, the Internet would ultimately come to mirror broadcasting and print, with messages tailored to a mainstream society from speakers who could be sure that their message was likely decent in every community in the country."¹⁴⁰ And again, "this change would result in an Internet that mirrors broadcasting and print, where economic power has become relatively coterminous with influence."¹⁴¹ Earnestly, Dalzell cautioned that "[w]e should also protect the autonomy that such a medium confers to ordinary people as well as media magnates."¹⁴²

Dalzell, therefore, would put the Internet on a higher pedestal than print and certainly higher than broadcast. He concluded:

My examination of the special characteristics of Internet communication, and review of the Supreme Court's medium-specific First Amendment jurisprudence, lead me to conclude that the Internet deserves the broadest possible protection from government-imposed, content-based regulation. If "the First Amendment erects a virtually insurmountable barrier between government and the print media, " . . . even though the print medium fails to achieve the hoped-for diversity in the marketplace of ideas, then that "insurmountable barrier" must also exist for a medium that succeeds in achieving that diversity. If our Constitution prefer[s] "the power of reason as applied through public discussion, . . . [r]egardless of how beneficent-sounding the purposes of controlling the press might be," . . . even though "occasionally debate on vital matters will not be comprehensive and . . . all viewpoints may not be expressed," . . . a medium that does capture comprehensive debate and does allow for the expression of all viewpoints should receive at least the same protection from intrusion.¹⁴³

In determining an analogy for the Internet, Dalzell declared that, "[t]he Internet is a far more speech-enhancing medium than print, the village green, or the mails."¹⁴⁴ He concluded:

Cutting through the acronyms and argot that littered the hearing testimony, the Internet may fairly be regarded as a never-ending worldwide conversation. The Government may not, through the

140. *Id.* at 878.

141. *Id.* at 878-79

142. *Id.* at 882.

143. *Id.* at 881 (quoting *Tornillo*, 418 U.S. at 259-60).

144. *ACLU v. Reno*, 929 F. Supp. at 882.

CDA, interrupt that conversation. As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion.¹⁴⁵

Judge Dalzell described the Internet as a "world wide conversation," realizing that a conversation could take place over a conference table, over a phone line (including a video conference transmitted via a phone line or the Internet), through the mail (or e-mail), by typing a message to another person in an on-line chatroom, or even while sitting under an old oak tree distributing copies of ideas to discuss with acquaintances.¹⁴⁶

The First Amendment to the Constitution provides all Americans with three basic, yet extremely important, protections: freedom of

145. *Id.* at 883. Dalzell further states:

True it is that many find some of the speech on the Internet to be offensive, and amid the din of cyberspace many hear discordant voices that they regard as indecent. The absence of governmental regulation of Internet content has unquestionably produced a kind of chaos, but as one of plaintiffs' experts put it with such resonance at the hearing: "What achieved success was the very chaos that the Internet is. The strength of the Internet is that chaos." Just as the strength of the Internet is chaos, so the strength of our liberty depends upon the chaos and cacophony of the unfettered speech the First Amendment protects. For these reasons, I without hesitation hold that the CDA is unconstitutional on its face.

Id. (quoting Testimony of March 22, 1996, at 167).

146. The latter is much like the concept of the "liberty trees" or "town hall" meetings of colonial America, where individual free thinkers conceived ideas and philosophies, set them to paper and then met to distribute, discuss and debate them with each other. In fact, the town meeting, coupled with the rapid growth of the printing press produced the very seed which spawned this country, our Constitution, and most importantly, the First Amendment.

Again following Boston's lead, virtually every town that conducted protests against the Stamp Act dedicated a Liberty Tree. Over the years most pre-Revolutionary events gravitated to the tree: ritualized stampmaster resignations, repeal celebrations, commemorations of August 14, celebrations of Wilke's election to Parliament, later protests against customs duties and the Tea Act, intimidation of loyalists, and the *ushering in of independence*. The trees were pruned, fitted out with commemorative plaques, and decorated with lanterns and flags. The pruning was to bring the number of branches to match such popularly celebrated totals as the ninety-two who voted against the governor (in support of the legislature's right to circulate a petition to other colonies). To signal meetings of the Sons of Liberty "they erected a flagstaff, which went through the tree, and a good deal above the top of the tree." In New York City and elsewhere Liberty Poles were erected for similar purposes and with similar ceremony. British soldiers and loyalists responded to the symbolism of the trees and poles by cutting them down. New York's largest riot, in 1770, erupted as the result of repeated attacks by British soldiers on the Liberty Pole.

PETER SHAW, *AMERICAN PATRIOTS AND THE RITUALS OF REVOLUTION* 182 n.12 and 14 (1981) (emphasis added). Indeed, these trees were usually tacked with signs, advertisements, political doctrines, messages, etc. Pamphlets printed by hand and by printing press, such as *The Federalist Papers*, *Common Sense* and the *Declaration of Independence* were now able to be distributed en masse.

speech, freedom of the press and the right to assemble peacefully.¹⁴⁷ The rationale for guaranteeing one of these rights can usually be applied to the others. Indeed, "[i]t was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people to peaceably assemble. . . ." ¹⁴⁸

As the Supreme Court has stated over the years,

Those who won our independence believed . . . [t]hat freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; . . . and that this should be a fundamental principle of the American government.¹⁴⁹

Further, "'the right of the people peaceably to assemble' . . . along with religion, speech, and press are preferred rights of the Constitution, made so by reason of that explicit guarantee . . . ,"¹⁵⁰ and "the premise that the right to assemble peaceably . . . [is] among the most precious of the liberties safeguarded by the Bill of Rights. Moreover, [this right is] . . . intimately connected both in origin and in purpose, with the other First Amendment rights of free speech and free press."¹⁵¹ Ultimately, "[n]o one can read the long history which records the stern and often bloody struggles by which these cardinal rights were secured, without realizing how necessary it is to preserve them against any infringement, however slight."¹⁵²

Precious, preferred, indispensable, cardinal. These are the operative words used by the court in an effort to hold the First Amendment as one of the most sacred clauses in the Constitution. Each stirs a certain emotion that confirms the validity of the statement it surrounds. If each of the rights provided by the First Amendment is given supreme authority separately, then surely a communications medium that combines all three should be given special consideration and deference when determining how much regulation, if any, should

147. U.S. CONST. amend. I.

148. *Thomas*, 323 U.S. at 530. See also *De Jonge v. State of Oregon*, 299 U.S. 353, 364 (1937) ("The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.").

149. *Whitney v. People of State of California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

150. *Adderly v. State of Florida*, 385 U.S. 39, 48 (1966) (quoting U.S. CONST. amend. I).

151. *United Mine Workers of America, Dist. 12 v. Illinois State Bar Assoc.*, 389 U.S. 217, 222 (1967).

152. *Associated Press v. Nat'l Labor Relations Bd.*, 301 U.S. 103, 135 (1937).

be allowed. Not since the era of the town hall and the printing press has another form of mass communication so revolutionized public discourse by providing both speaker and listener with relative parity.

Indeed, the Internet could be analogized to either a virtual printing press or a virtual town hall. It is a place where people from many cultures, backgrounds and descents can interact with others with common threads and attachments. They can type their ideas in a text file and post it on-line, the equivalent of nailing a newsletter to a tree. The three judge panel of *ACLU v. Reno* seemed to agree that,

[The Internet] . . . links people, institutions, corporations, businesses, and governments around the world. . . . This communications medium allows any of the literally tens of millions of people with access to the Internet to exchange information. These communications can occur almost instantaneously, and can be directed either to specific individuals, to a broader group of people interested in a particular subject, or to the world as a whole.¹⁵³

The court's findings of fact characterized the Internet as "interactive," where the user becomes both the "listener" and "content provider." This makes the Internet a "unique and wholly new medium of worldwide human communication."¹⁵⁴

Interactivity may be the missing link between the Internet and other mediums. Other than a conversation, there is no completely interactive medium. One can write a letter to the editor of a newspaper, but the newspaper will never print all the letters it receives. One can call into a radio station, but only a select few callers will be put on the air. And one may get fifteen minutes of fame on television, but most of us do not have this opportunity. In contrast, the Internet, as Dalzell argued, could be considered a worldwide conversation. If the Internet is restricted, he predicted that many Internet users will either drop out or censor their information. Therefore, "[s]ince much of the communication on the Internet is participatory, i.e., is a form of dialogue, a decrease in the number of speakers, speech fora, and permissible topics will diminish the worldwide dialogue that is the strength and signal achievement of the medium."¹⁵⁵

The court in *Shea v. Reno*,¹⁵⁶ the sister case to *ACLU v. Reno*, agreed.

153. *ACLU v. Reno*, 929 F. Supp. at 831.

154. *Id.* at 843.

155. *Id.* at 879.

156. 930 F. Supp. 916 (S.D.N.Y. 1996).

As the growth in Internet use and the wide availability of tools and resources to those with access to the Internet suggest, the Internet presents extremely low entry barriers to those who wish to convey Internet content or gain access to it. In particular, a user wishing to communicate through e-mail, newsgroups, or Internet Relay Chat need only have access to a computer with appropriate software and a connection to the Internet, usually available for a low monthly fee. The user then in a sense becomes a public "speaker," able to convey content, at relatively low cost, to users around the world to whom it may be of interest. . . . The ease of entry of many speakers sets interactive computer systems apart from any other more traditional communications medium that Congress has attempted to regulate in the past. With one-way media such as radio and television broadcasting or cable programming, a user is merely a listener or viewer; in the CDA, Congress sought to target "interactive" computer systems through which a listener or viewer, by definition, has the power to become a speaker. The relative ease of speaker entry and the relative parity among speakers accounts for the unprecedented and virtually unlimited opportunities for political discourse, cultural development, and intellectual activity that Congress found to characterize emerging communication technologies.¹⁵⁷

The idea that a communications medium can be a "public forum" is not new. For example, in *Denver*, Justice Kennedy argued that "[p]ublic access channels meet the definition of a public forum."¹⁵⁸ Although the "most familiar . . . traditional forums [are] . . . streets, sidewalks and parks, which by custom have long been open for public assembly and discourse, . . . [p]ublic forums do not have to be physical gathering places . . . nor are they limited to property owned by the government."¹⁵⁹ Justice Kennedy argued that "[a] common carriage mandate . . . serves the same function as a public forum. It ensures open, nondiscriminatory access to the means of communication. . . . Once a forum is opened up to some groups for assembly or speaking, the government may not prohibit other groups from assembling or speaking on the basis of what they intend to say."¹⁶⁰

157. *Shea*, 930 F. Supp. at 929-930.

158. *Denver*, 116 S. Ct. at 2409 (Kennedy, J., concurring).

159. *Id.* (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 115 S. Ct. 2510, 2516-17 (1995) ("physical gathering places") and *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) ("government property")).

160. *Denver*, 116 S. Ct. at 2412 (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972)).

Regardless of whether the Internet is compared to broadcast, cable, common carriage, print or even a "worldwide conversation," the Internet can still be considered a public forum not only for its open and nondiscriminatory access, but also for its open and nondiscriminatory content. As a society we are less likely to drive to the library to do research, or attend a local meeting of a hobby group to seek out others with mutual interests; increasingly, we are a society that clicks on an Internet search engine to find the information we need, browses websites, or converses in newsgroups with a diverse group of people with mutual interests. Justice Kennedy agreed that there is a shift in public discourse; therefore, narrowing the definition of a public forum "would have [a] pernicious [effect] . . . in the modern age. Minds are not changed in the streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media."¹⁶¹ This is evident in the increasing number of "on-line" versions of "paper" magazines and newspapers.

*C. The Internet is Analogous to the Printing Press for
Free Speech Purposes*

As we move into the twenty-first century, incidents will occur on the Internet that will require the courts to either create brand new law in a vacuum or to look for analogies in prior cases for guidance. We conclude that the town meeting, as expressed in Dalzell's "worldwide conversation," and the printing press, are the leading speech enhancing analogies for the Internet. In order to decide which analogy is superior, we should first examine the criteria for selecting an analogy. First, the analogy, in accordance with Cardozo's "sociological method," should be consistent with Internet custom and usage, facilitating the workings of the Internet and the benefits that its users expect to derive from it. Second, it should further the dominant "marketplace of ideas" metaphor for freedom of speech, and incorporate overarching speech values tailored to the actual circumstances of the Internet. Third, the analogy should be derived from history to promote familiarity and ease of use in future decisionmaking. Finally, it should be simple, expressive and easy to understand in order to facilitate its use by laypeople, legislators, lawyers, and judges who are involved in Internet free speech issues.

161. *Denver*, 116 S. Ct. at 2414 (citing *United States v. Kokinda*, 497 U.S. 720, 737 (1990) (Kennedy, J., concurring in judgment)).

Under these criteria, the Internet is more analogous to the printing press than the town hall. The Internet, for free speech purposes, should be regarded as a "*constellation of printing presses and bookstores.*"¹⁶²

Every computer attached to the Internet simultaneously utilizes its capability to create text (acting as a printing press), distribute text created by other people (acting as a bookstore) or store text (acting as a library). Although pictures, animations, and sound files are also speech, the primary use of the Internet today is to distribute and receive text—e-mail messages, Usenet and listserv discussions, electronic newsletters and other files. Use of the Internet, and of the World Wide Web in particular, has created a new public interest in literacy and a corresponding concern with such matters as typography, layout, graphics and hypertext links.

Most commentators agree with Judge Dalzell that a major importance of the World Wide Web is that it makes an international audience available at minimal cost to amateur speakers. According to a Cato Institute policy analysis, "computer networks, particularly the Internet, offer the casual, noninstitutional user a unique new opportunity to reach a wide audience for his or her speech. . . ."¹⁶³ This leads to "a view [of] the significance of computer networks in the marketplace of ideas . . . through the lens of analogy. One could say that computer networks have the power to transform the ordinary person into a publisher, a broadcaster, a newspaper editor."¹⁶⁴

Also, the printing press metaphor stresses the importance of free speech. Both spirited discussions via on-line message boards and the widespread availability of archived information on the Internet promote not only literacy, but also the dissemination of individual ideas. The power to set your thoughts and ideas to paper (or on-line text) and distribute them is rewarding to human development and autonomy, and therefore more supportive of liberty than the town hall, which addresses political discourse.

Therefore, we reject the town hall and endorse the "constellation of printing presses and bookstores" for two reasons. First, it is more consistent with Holmes's "marketplace of ideas." Printing presses supply bookstores, and bookstores are the marketplace of ideas. A town hall analogy for the Internet would make sense only if the town

162. JONATHAN WALLACE & MARK MANGAN, *SEX, LAWS AND CYBERSPACE* 228 (1996).

163. SOLVEIG BERNSTEIN, CATO INSTITUTE POLICY ANALYSIS NO. 262: BEYOND THE COMMUNICATIONS DECENCY ACT: CONSTITUTIONAL LESSONS OF THE INTERNET 4 (1996).

164. *Id.* at 6.

hall was the operative metaphor for freedom of speech itself. Second, the town hall analogy is frequently used (as Sunstein uses it) to justify government intervention in speech which does not directly advance the interests of deliberative democracy. Ultimately, the town hall as a model may lead to the Meiklejohnian ideal: that the First Amendment is only intended to protect political speech. This ideal detracts from First Amendment protections and is contrary to its historical jurisprudence.¹⁶⁵ Therefore, because we believe that a broader range of speech than the political is important, rewarding to human development and autonomy, and supportive of liberty, we reject the town hall analogy and endorse the "constellation of printing presses and bookstores."

V. CONCLUSION

In the nineteenth century, faced with a confusing array of new technologies, courts soon selected the correct analogy to resolve doubtful legal issues: by comparing the telegraph to prior methods of common carriage, and the telephone to the telegraph, they established the correct legal treatment for each technology.

As the twenty-first century approaches, courts are once again faced with a similar challenge and must accomplish the same mission for the Internet. The selection of an analogy should be accomplished with the operative freedom of speech metaphor—Justice Holmes' "marketplace of ideas"—in mind. The analogy selected should not only resolve legal confusion about the Internet, but should further the American marketplace of ideas.

The printing press, if selected as the correct analogy for the Net, will further both these goals. It will establish the highest level of First Amendment protection for the Net, while assuring the untrammelled and unmediated competition of ideas in cyberspace.

Finally, a thought experiment: posit that before the end of the next century, the quantity of text available electronically will be one thousand times that which is available on paper. Adoption of the printing press as the correct analogy for the Internet will ensure that

165. It is not even clear that the CDA would have been held unconstitutional under a town hall metaphor. *But see United Mine Workers*, 389 U.S. at 223. The Court states:

[B]ut the First Amendment does not protect speech and assembly only to the extent it can be characterized as political. Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest.

Id.

electronic text and paper text are treated consistently.¹⁶⁶ A rule which permits stricter regulation of electronic text will result in the full protection of the First Amendment becoming an anomaly, merely a historical survival for an ever-dwindling amount of speech.

The Internet and World Wide Web, although young, already offer a rich tradition of conversation, advocacy, dreams, stories, metaphor and debate. To preserve and foster the growth of this inherently democratic medium, the Supreme Court should analogize the Internet to a "constellation of printing presses and bookstores."

166. Laurence Tribe has said that

the Constitution's norms, at their deepest level, must be invariant under merely technological transformations. Our constitutional law evolves through judicial interpretation, case by case, in a process of reasoning by analogy from precedent. At its best, that process is ideally suited to seeing beneath the surface and extracting deeper principles from prior decisions.

As a result, he proposed a 27th amendment to the Constitution:

This Constitution's protections for the freedoms of speech, press, petition, and assembly, and its protections against unreasonable searches and seizures and the deprivation of life, liberty, or property without due process of law, shall be construed as fully applicable without regard to the technological method or medium through which information content is generated, stored, altered, transmitted, or controlled.

Laurence H. Tribe, *The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier*, Keynote Address at the First Conference on Computers, Freedom and Privacy (Mar. 26, 1991), available at <<http://www.cpsr.org/ftp/cpsr/conferences/cfp91/papers/tribe>> (visited June 5, 1997).