

## Technology and 1st Amendment

CIS 381

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## 1st Amendment

- Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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## Values Served by the Protecting Free Speech (1/2)

- 1. The Discovery of Truth**
  - This value was first suggested by Milton, who first suggested that when truth and falsehood are allowed to freely grapple, truth will win out.
- 2. Facilitating Participation by Citizens in Political Decision-Making**
  - It has been suggested that citizens will not make wise and informed choices in elections if candidates and proponents of certain policies are restricted in their ability to communicate positions.
- 3. Creating a More Adaptable and Stable Community (The "Safety Valve" Function)**
  - It has been suggested that a society in which angry and alienated citizens are allowed to speak their mind--"vent"--will be more stable, as people will be less likely to resort to violence. It has also been pointed out that allowing the alienated and discontented to speak freely enables government to better monitor potentially dangerous groups who would otherwise act more clandestinely.

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## Values Served by the Protecting Free Speech (2/2)

### 4. Assuring Individual Self-Fulfillment

- Free speech enables individuals to express themselves, create and identify--and, in the process perhaps, find kindred spirits. Freedom of speech thus becomes an aspect of human dignity.

### 5. Checking Abuse of Governmental Power

- As Watergate, Irangate, Clintongate (and all the other "gates") demonstrate, freedom of the press enables citizens to learn about abuses of power--and then do something about the abuse at the ballot box, if they feel so moved.

### 6. Promoting Tolerance

- It has been argued that freedom of speech, especially through our practice of extending protection to speech that we find hateful or personally upsetting, teaches us to become more tolerant in other aspects of life--and that a more tolerant society is a better society.

### 7. Creating a More Robust and Interesting Community

- A community in which free speech is valued and protected is likely to be a more energized, creative society as its citizens actively fulfill themselves in many diverse and interesting ways.

<http://www.law.umkc.edu/faculty/projects/frtrial/conlaw/firstaminto.htm>

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## Ways of Thinking

### 1. The Absolutist Approach

- The Absolutist Approach is most often associated with Justice Black, who held that the First Amendment meant exactly what it says: that Congress shall make NO law abridging the freedom of speech. Under this approach, the only question is whether the action in conduct is truly "speech" (and therefore protected) or "conduct" (and therefore subject to reasonable governmental regulation. Even absolutists such as Justice Black recognized that words might be so closely connected with producing a specific action (such as entering into a contract with a hitman or yelling "Fire!" in a crowded theater) as to be unprotected.

### 2. The Categorical Approach

- The Categorical Approach would protect or not protect speech based on the label that is attached to the speech in question. Certain categories of speech are seen (such as, for example, obscenity or "fighting words" or--at one time--commercial speech) as falling entirely outside of First Amendment protection, whereas most other categories of speech are either highly protected or protected absolutely.

### 3. The Balancing Approach

- Balancers believe that in every case courts should weigh the individual's interest in free expression against the government's interest in restricting the speech in question. Most balancers hold that the presumption should be in favor of free expression--that there is a thumb on that side of the scale--which can only be overcome with a showing of an especially strong governmental interest.

<http://www.law.umkc.edu/faculty/projects/frtrial/conlaw/firstaminto.htm>

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## Radio and Television

- Limited number of broadcast frequencies for radio and non-cable television use
- Federal Government licenses access to these frequencies
  - permitting some applicants to utilize them and
  - denying the greater number of applicants such permission.
- the Court has held that it does not present a First Amendment issue because of the unique characteristic of scarcity.
- Federal Communications Commission has broad authority to determine the right of access to broadcasting
  - exercised in a manner that is neutral with regard to the content.

<http://caselaw.lp.findlaw.com/data/constitution/amendment01/17.html#6>

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### Red Lion (1969)

- **Red Lion Broadcasting v FCC**, considers the constitutionality of a rule requiring broadcasters to notify individuals who have been personally attacked in their programming, and to offer the attacked individual a chance to respond over the airwaves.
- The Supreme Court unanimously upheld the FCC rule, concluding that scarcity of available spectrum space justified regulating broadcasting to ensure a diversity of voices. The Court viewed broadcast licensees as trustees who take licenses with certain public interest obligations--obligations that may include complying with content-based regulations that could not be applied to other media.

<http://www.law.umkc.edu/faculty/projects/trials/conlaw/mediatests.htm>

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### FCC v. League of Women Voters (1984)

- Struck down a total ban on editorializing by stations receiving public funding
- Holding unconstitutional Sec. 399 of the Public Broadcasting Act of 1967, as amended.

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### Contrast

- Red Lion shows the Court's insistence on fair and equitable treatment by broadcast media.
- Miami Herald Pub. Co. v. Tornillo, (1974) held that state law cannot mandate equal time in the paper.
- Print media, press, responsibility, while desirable, "is not mandated by the Constitution," while freedom is.

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### **Airing Dirty Words**

- George Carlin records "Filthy Words"
- WBAI in New York airs "Filthy Words" (1973) in the early afternoon.
- FCC issues declaratory order to Pacifica
- Pacifica sues

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### **FCC v. Pacifica Foundation (1978)**

- The Court considered whether the Federal Communications Commission could, consistent with the First Amendment, punish a broadcaster who chose to play over the air at 2 o'clock on a weekday afternoon a twelve-minute "Filthy Words" monologue by George Carlin.
- In a 5 to 4 decision, the Court upheld the FCC's authority to channel broadcasts containing indecent words to late-night broadcast hours when children are unlikely to comprise much of the audience.
- The Court based its holding on the lower level of First Amendment protection extended to broadcasting, the ability of broadcasts to zap listeners without warning in the privacy of their own living rooms, and the need to protect children from harmful speech.

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### **More of the Story**

- With support from both Republicans and Democrats, the Federal Communications Commission is poised to get even more aggressive about enforcing moral values throughout broadcasting, even putting cable television in its cross hairs and taking aim at Howard Stern's right to talk dirty on satellite radio.
- After rejecting 83 percent of indecency complaints received in 2002, the FCC burst out of its cocoon in January after singer Janet Jackson's "wardrobe malfunction" on national television. CBS eventually got socked with a \$550,000 fine, and a slew of other radio and TV stations found themselves under fire. Even PBS began leaning heavily on the bleep button, and last week, several ABC stations refused to air an uncut broadcast of *Saving Private Ryan* for fear that the FCC would issue fines for indecency.

[http://www.wired.com/news/politics/0,1283,65734,00.html?w=wn\\_story\\_page\\_prev2](http://www.wired.com/news/politics/0,1283,65734,00.html?w=wn_story_page_prev2)

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- **Fried is part of a growing, nationwide movement of individuals establishing small, "micro-radio" stations. Micro-radio stations run the gamut from Fried's dance music station to talk radio in North Dakota, from Spanish language shows in Cleveland and Miami to a Christian Rock station in Connecticut. They broadcast diverse, mostly community-based programming using relatively inexpensive and therefore widely accessible broadcasting equipment.**
- **The FCC points out that it is illegal to broadcast without a license from the agency, but since 1978 the FCC has refused to license micro-broadcasters—individuals who operate small, low power radio stations of less than 100 watts.**
- **The United States government in November 1996 confiscated his broadcasting equipment and brought a civil forfeiture action against it. In response to the FCC's suit, Fried explained that he was unable to obtain a license for his radio station because the FCC did not issue licenses for micro-radio stations.**

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### **Cable**

- **Cable is not limited by "scarce" broadcast frequencies and does not require the same standard of review that the Court applies to broadcast media.**
- **Cable does, however, have unique characteristics that justify regulations that single out cable for special treatment.**

<http://caselaw.lp.findlaw.com/data/constitution/amendment01/17.html#6>

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- **The Court has recognized that cable television "implicates First Amendment interests," since a cable operator communicates ideas through selection of original programming and through exercise of editorial discretion in determining which stations to include in its offering**

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### Turner Broadcasting v. FCC (1996)

- The Court in **Turner Broadcasting System v. FCC** upheld federal requirements that cable systems carry local commercial and public television stations.

<http://case.law.jp.fndlaw.com/data/constitution/amendment01/17.html#6>

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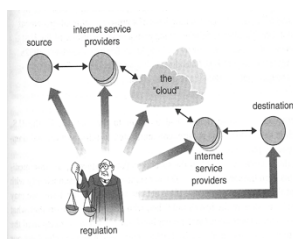
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### Internet Regulation



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### Cubby v. CompuServe (1991)

- Court decision in the United States District Court for the Southern District of New York which suggests that online companies would not be liable for the acts of their customers.
- CompuServe exerted no control whatsoever over the presumably false and defamatory statements which were the subject of the suit.

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### Oakmont v. Prodigy (1995)

- Prodigy assumed some control over the content of their service (they had filtering software that prevented posts containing certain language, and had people who removed offensive content from their service) the court held that Prodigy had assumed responsibility for the content.

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### Common Carriers

- Common Carriers, telephone and telegraph, have been held to not have any control over the content of the material and therefore are not liable.

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### Nastiest Place on Earth

- In California, Bob and Carleen Thomas ran a bulletin board called Amateur Action. For a fee, anyone could download images. The images were the same as those found in magazines available in nearby cities (San Jose and San Francisco).
- The Thomases were raided by police who thought they might have been distributing obscene materials. The police concluded "Amateur Action BBS is operating in a legal manner."

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- In February 1994, the Thomases were raided again. This time by a Postal Inspector from western Tennessee. The postal inspector, using an assumed name, had paid to join the BBS and had downloaded images to his computer in Memphis.
- The Thomases were arrested and tried in Memphis on federal charges of transporting obscene material via common carrier.
- The Thomases were convicted and incarcerated. Their appeals were denied.

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### Miller Test

- **Miller v. California (1973)**
  - the average person, applying contemporary community standards (not national standards, as some prior tests required), must find that the work, taken as a whole, appeals to the prurient interest;
  - the work depicts or describes, in a patently offensive way, sexual conduct or excretory functions specifically defined by applicable state law; and
  - the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

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### Communications Decency Act

- The Communications Decency Act of 1996 (CDA) was the first notable attempt by the United States Congress to regulate pornographic material on the Internet.

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• **Section 230 added protection for online service providers and users from action against them for the actions of others.**

• **Effectively, this section immunizes ISPs and other service providers from torts committed by users over their systems, even if the provider fails to take action after actual notice.**

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• **Through the so-called Good Samaritan provision, this section also protects ISPs from liability for restricting access to certain material or giving others the technical means to restrict access to that material.**

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• **As a result of the Seigenthaler incident, and other incidents where individuals have been allegedly libeled by anonymous or judgment-proof parties, this section of the Act has come under fire, with numerous calls for revisions to the Act to restore service provider liability in some cases.**

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### Seigenthaler Incident

- A series of events that began in May 2005 when Brian Chase anonymously posted a hoax article in the online encyclopedia Wikipedia about John Seigenthaler, a well-known writer and journalist. The post was not discovered and corrected until more than four months later.

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- The incident raised questions about the reliability of Wikipedia and other websites with user-generated content that lack the accountability of traditional news sites.
- After the incident, Wikipedia co-founder Jimmy Wales stated that the encyclopedia had barred unregistered users from creating new articles and taken other unspecified steps to prevent a recurrence.

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### *Reno v ACLU (1997)*

- **The** Court considers what level of scrutiny should apply to content regulation of the Internet. The Court decides the the medium deserves the highest level of First Amendment protection, noting that anyone and everyone can develop a website—the scarcity rationale of *Red Lion* for greater regulation therefore has no application. Applying strict scrutiny, the Court proceeds to strike down as vague and unconstitutionally overbroad the Communications Decency Act of 1996.

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### **Never Stays Simple**

- Good Samaritan clause envisioned a sharp line between “service providers” (immunity) and “content providers” (no immunity). A room-mate matching service was sued on the basis it invited users to discriminate. A court ruled operators were immune as service providers. Appeals court reversed saying the operators “filtered” information to match requests, hence were content providers.

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### **Children’s Online Protection Act**

- COPA (1998) required all commercial distributors of “material harmful to minors” to restrict their sites from access by minors. “Material harmful to minors” was defined as material that by “contemporary community standards” was judged to appeal to the “prurient interest” and that showed sexual acts or nudity (including female breasts). This is a much broader standard than obscenity.

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### ***Ashcroft v ACLU (2004)***

- The Court concluded that a federal law attempting to protect minors from online pornography probably was unconstitutional, and sent the case back to a lower court with guidance suggesting that parent-installed filtering software probably constituted a less restrictive alternative to Congress’s approach of criminalizing commercial pornographic content that is not restricted by the requirement of an adult credit card or a digital certificate verifying that the material is being accessed by an adult.

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### **Children's Internet Protection Act**

- CIPA is an attempt to limit children's exposure to pornography and explicit content online. Signed into law December 2000.
- Requires schools and libraries using E-Rate discounts to operate "a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are obscene, child pornography, or harmful to minors..."

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### ***U.S. v. American Library Association***

- The law was upheld as constitutional as a condition imposed on institutions in exchange for government funding.

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### **DOPA (2006)**

- **Deleting Online Predators**
  - "MySpace.com and other networking web sites have become new hunting grounds for child predators. At least let's give parents some comfort that their children won't fall prey while using the Internet at schools and libraries that receive federal funding for Internet services."

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- Lawsuit against MySpace.com was filed by parents of a 13-year-old girl that was molested by someone she met on the world's most popular social.
- Parents argue MySpace provided the communications path between the girl and the alleged assailant.

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**Note**

- *Stanley v Georgia* (1969), is remarkable for its unanimity. In Stanley, the Court concludes that Georgia cannot, consistent with the First Amendment, criminalize the private possession of pornography--even if the sale and distribution of that same material would not be constitutionally protected. The Court found that an individual has "a right to satisfy emotional needs in the privacy of his own house." (In 1990, however, the Court--in a 6 to 3 decision--found that constitutional protection for private possession of pornography does not extend to pornography involving children.)

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