

The First Amendment in Cyberspace

Purpose:

The breadth of information provided by the Internet's electronic community is enormous. For many it demonstrates the importance of the First Amendment's guarantee of a "marketplace of ideas." Yet the unique features of this interactive electronic network also present many challenges that have important First Amendment implications for citizens and policymakers. Debates about the content and services available on the Internet have occurred in many forums, including Congress, state legislatures, public schools, libraries, and not surprisingly, online. Government regulation of online providers and the content of material transmitted through various Internet communication services (e-mail, bulletin boards, chat rooms, etc.) have stirred much controversy. The glut of information and the variety of information sources has posed a fundamental challenge: How can government protect children from harmful materials without abridging the First Amendment rights of others?

In this lesson, students consider the First Amendment implications of recent legislation intended to regulate the Internet by criminalizing the transmission of indecent material to minors by online providers. Students also consider previous Supreme Court rulings about obscene materials. These rulings have attempted to "balance" the First Amendment rights of adults to receive indecent material against the state's interest in regulating indecent material for minors. However, since the enactment of the Child Online Protection Act (COPA) in 1996, and the Children's Internet Protection Act (CIPA) in 2000, many challenges have been made by various groups to the effect of these laws on First Amendment protection of free speech. In fact, the federal district courts and the Supreme Court itself have frequently weighed in on both sides of this issue.

Procedure:

1. Project a transparency of the First Amendment (**Attachment 1**). Make sure students understand the various forms of expression protected by the First Amendment. Review and discuss the benefits of the First Amendment with students (**Attachment 2**). Ask students why they think so many scholars consider the First Amendment to be the "cornerstone of democracy."

Possible answers: *People can freely choose from many different competing ideas, enabling them to make better and more informed choices. If ideas are suppressed, they could turn into dangerous movements. By allowing such unpopular ideas an outlet the First Amendment provides a "safety valve" against violence. Popular ideas don't really need protection, so the First Amendment provides protection for the speech rights of people who hold minority viewpoints. The richness of our society is enhanced through the expression of many varied ideas. Finally, the First Amendment allows us to criticize the actions of public officials, thus improving our government and limiting its power.*

2. Next, ask students to brainstorm the ways in which the Internet furthers any of these goals. Do students think that some goals of the First Amendment are enhanced by the Internet more than others? Which ones?

3. Discuss as a class the questions:

- a. What limits, if any, should we have on free speech?
- b. Should those limits change when the speech has the potential to be heard/seen by children?"
- c. What do you think is the best approach to take in dealing with obscenity and pornography on the Internet? Why?
 - punish the distributors of it
 - block both adult and child user access
 - block only child user access
 - let the traditional "anything goes on the Internet" rule

4. What kinds of information and images on the Internet do you think would be harmful to minors? Why or why not?

5. As a class, develop a list of other questions students have related to the First Amendment and the Internet. Some sample questions might be:

- *Should the federal government create laws to protect minors from indecency and other harmful materials on the Internet?*
- *Should service providers be held liable for the content of messages posted by their users?*
- *Should anonymity and pseudonyms be allowed on the Internet? (For example the recent case of some Oklahoma middle school students placing blogs on MySpace in the name of some of their middle school teachers.)*
- *Which community's standards should prevail for obscenity transmitted over the Internet? (Keep in mind the Internet is a global phenomenon.)*
- *Given the international nature of the Internet, should the United States and other nations create laws that would make certain material illegal on line? Whose laws should prevail?*

6. Explain to the class that until very recently, the federal government had not regulated extensively to protect children from inappropriate material because it had been considered primarily a matter of local concern. However beginning in the 1990's, many came to believe that increasing use of Internet technology and the worldwide web had changed the environment so substantially that Congress began to attempt to regulate the Internet to protect minors from exposure to indecent materials

7. When concerns over infringement of First Amendment rights to freedom of speech arose from these laws, it was found that no established case law existed to direct the debate over Internet censorship, the way it does for publishing, broadcasting, and speech. As a result the issue of censoring the Internet to prevent minors from acquiring access to indecent materials frequently ended up in the Supreme Court as a First Amendment issue. (See **Attachment 3** – *Background Essay: Congress and the Information Age*).

8. Divide the class into three groups. Using the information in **Attachment 3**, each group will be responsible for analyzing one of the three laws that Congress has passed in an attempt to protect children from obscenity and pornography on the Internet: *Communications Decency Act (CDA) 1996*, *Child Online Protection Act (COPA) 1998*, and the *Children’s Internet Protection Act (CIPA) 2000*. Each group will report to the class their findings using the following questions:

- a. How did the act attempt to protect children from obscenity and pornography on the Internet?
- b. When the act was brought to the Supreme Court, what was the Supreme Court’s decision on its constitutionality?
- c. What reasons did the Supreme Court give?
- d. What other problems did the Supreme Court see in the act?

9. As a result of the dispute over government attempts to protect children from pornography on the Internet and the worldwide scope of the problem, some are suggesting alternatives such as self-regulation rather than government regulation of the Internet. One suggestion has been that interested private stakeholders could enter into initiatives and/or agreements to limit obscenity and pornography on the Internet.

10. Divide the class into five groups: Internet providers, parents, librarians, authors and booksellers, health educators. Using the *Further Resources on These Issues* list have students research the positions and suggestions for action these groups have on efforts to limit obscenity and pornography for children on the Internet.

Using information from these sources and brainstorming in their group, students will report their findings to the class:

- What positions does their group take on the issues?
- What suggestions does their group have for addressing the issue of obscenity and pornography on the Internet in relation to children, adults?

As a class discuss the pros and cons of the suggestions offered. Do the arguments given change students’ views on these issues?

Further Resources on These Issues

www.aclu.org/freespeech/internet/index.html - American Civil Liberties Union

www.fosi.org/icra - Family Online Safety Institute

www.fcc.gov/cgh/consumerfacts/cipa - Federal Communications Commission, Consumer and Governmental Affairs Bureau

www.FreedomMuseum.us – The McCormick Tribune Freedom Museum

www.GetNetWise.org – A site funded by AOL, AT&T, Yahoo and others to provide educational resources for parents to monitor their children’s Internet use.

www.oag.state.ok.us – Oklahoma Office of the Attorney General: “50 States Reach Agreement with MySpace”, January 14, 2008

www.oyez.org/cases/1990-2008 – U.S. Supreme Court Cases: Reno v. ACLU (1997), Ashcroft v. ACLU (2002 and 2004), U.S. v. American Library Association (2003). Gonzales v. ACLU (2004)

www.safekids.com – a website with information on internet safety for families.

Attachment 1

The First 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 people peaceably to assemble, and to petition the government for a redress of grievances.

Attachment 2

U. S. Society benefits from the First Amendment's protection of free speech in many ways. Below are listed a few of the Free Speech clause's benefits. You may be able to think of others.

- **Marketplace of Ideas – All ideas have a chance to be heard.**
- **Enrichment of Society – Our culture is richer because we have access to a broad range of ideas.**
- **Safety Valve -- People whose ideas are radically different from those of most other people are free to say what they please. This freedom may help them “let off steam” and thus avoid violence or disruption.**
- **Protection of Minority Rights – The Majority opinion often rules in our society. Because of the Free Speech Clause, however, those holding minority opinions can still make their ideas heard.**
- **Check on Government – Because people can criticize the government, they can help prevent government from misusing its power.**

Attachment 3

Background Essay: Congress and the Information Age

In the past the Supreme Court has ruled that free speech is protected on the Internet just as it is in newspapers, magazines, and other public forms of expression. But one challenge that has come out of the internet's capacity to bring seemingly unlimited information to an unlimited audience is the delivery of pornographic materials to children.

The *Communications Decency Act* (CDA) of 1996 was Congress' first attempt to provide protection for children accessing Internet material. It criminalized the display or transmission to a minor of material that was violent or pornographic. It used what some believed were vague terms, like "indecent" and "patently offensive," to define materials that would be illegal.

In 1997, the Supreme Court overturned CDA in *Reno v. ACLU*. The Court held that the law was unconstitutional because it was "a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech."

The Court acknowledged that the law would restrict the availability of medical information online to anyone. Further, "In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and address to one another."

The *Child Online Protection Act* (COPA) of 1998 was Congress' next attempt to protect minors from Internet pornography. Lawmakers responded to objections to CDA by narrowing the scope of speech that would be criminalized. Commercial distributors of "material harmful to minors" were required to protect their sites from access by minors. The harmful material was to be defined by "contemporary community standards." Again, federal courts blocked the enforcement of COPA, ruling that "contemporary community standards" were not feasible for the Internet.

In *Ashcroft v. ACLU* (2004), the Supreme Court instructed the lower court to investigate whether the use of Internet filters might be a preferable way to block access to pornography by minors.

In 2000, Congress wrote the *Children's Internet Protection Act* (CIPA), which required public schools and public libraries receiving federal funds to install Internet filtering programs to prevent patrons from viewing pornography. Failure to install the filters would result in the loss of federal money. An adult patron could ask library staff to disable the filtering program. The American Library Association challenged the constitutionality of CIPA as it applied to libraries, believing that the law infringed on the First Amendment rights of adult patrons of the library. They maintained that current blocking software is ineffective because it does not block all pornographic sites and it "over blocks" some sites that are not pornographic.

On March 22, 2007, in a continuation of *Ashcroft v. ACLU* (2004), a federal district court ruled that the *Child Online Protect Act* (COPA) of 1998 violates the constitutional right to free speech. Clearly, this is still an ongoing issue.