

**Robinson+Cole**

**Government Control of  
Electronic Info:  
The Finer Line Between Serving and  
Suppressing the Public Interest**

**WORLD JURIST ASSOCIATION  
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# Justice and Technology

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## **USING TECHNOLOGY TO ENHANCE ACCESS TO JUSTICE**

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Bonnie Rose Hough, Linda Rexer, Jane Ribadeneyra & Richard Zorza*



**Report of**

## **The Summit on the Use of Technology to Expand Access to Justice**

# TECHNOLOGY FOR JUSTICE

How Information Technology  
can support Judicial Reform

DORY REILING

A faint, light-colored graphic of the scales of justice is visible in the bottom right corner of the orange cover.

# Balancing It All

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“What finally emerges from the ‘clear and present danger’ cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. . . . It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.”

-Justice Hugo L. Black

*Bridges v. California*, 314 U.S. 252, 263 (1940)

# Free (Electronic) Speech Rights in the U.S.

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“[T]he content on the Internet is as diverse as human thought.’ . . . [O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.”

*Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997).

# Clarifying (Re-Defining?) “Content Based”

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- Under the First Amendment, the government “has no power to restrict expression because of its message, its ideas, its **subject matter**, or its content.” *Reed v. Gilbert*, 135 S. Ct. 2218, 2226 (2015) (citing *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).
- Content based = “the law applies to a particular speech because of the **topic** discussed or the idea or message expressed.” *Id.* at 2227.

# Clarifying (Re-Defining?) “Content Based”

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“The majority opinion in *Reed* effectively abolishes any distinction between content regulation and subject-matter regulation. Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification.”

*Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. Aug. 7, 2015).

# “Content Based”: A Two-Step Analysis

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- First, does the regulation of speech “on its face” draw distinctions based on the message conveyed?
  - If yes → Strict Scrutiny
- If not, look to the reason for the regulation:
  - Must the law be justified by referencing the content of the regulated speech?
  - Was it adopted because the government disagreed with the message conveyed?
  - If yes → Strict Scrutiny

# Regulation of Social Media as Speech

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- *Rideout v. Gardner*, 2015 U.S. Dist. LEXIS 105194 (D.N.H. Aug. 11, 2015): State law that makes it unlawful for voters to take and disclose digital images or photos of their completed ballots unconstitutional as a content-based restriction on free speech.
- Failed strict scrutiny:
  - Alleged purpose was not substantiated.
  - Voter coercion already illegal.
  - Over-inclusive so not narrowly tailored.



# Regulation of Social Media as Access

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- *State v. Packingham*, 777 S.E.2d 738 (N.C. 2015), *petition for cert. filed*, No. 15-1194 (Mar. 21, 2016):

NC Supreme Court upheld a statute banning registered sex offenders' use of commercial social networking websites accessible to minors.

- Passed strict scrutiny:
  - Regulated conduct, not speech.
  - Content neutral.
  - Narrowly tailored.

# Regulation of Social Media as Speech

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- *Garden Dist. Book Shop, Inc. v. Stewart*, 2016 U.S. Dist. LEXIS 57623 (E.D. La. April 29, 2016) - enjoined enforcement of Louisiana's law that criminalized the publication of "material harmful to minors" on the Internet by anyone in Louisiana.
- Likely to fail strict scrutiny:
  - Regulated speech (publication).
  - Content based regulation.
  - Not the least restrictive means.

# Regulation of Social Media Usage

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- Conduct v. Speech
- Restricting access to social media forums may be more likely upheld in the face of First Amendment challenges than regulating online postings.
- Prohibiting access is more likely to be content neutral, in which case a lower standard of review would apply.

# Government Use/Abuse of the Internet

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“Censorship reflects a society’s lack of confidence in itself. It is a hallmark of an authoritarian regime.”

—Supreme Court Justice Potter Stewart, dissenting  
*Ginzburg v. United States*, 383 U.S. 463, 498 (1966).

# Government Use of the Internet

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- Transparency
- Accountability
- Civic Engagement
- Access to Justice



# Government Use/Abuse of the Internet

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“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

United Nations Universal Declaration of Human Rights

# Increasing Accountability

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- Journalism
- Judiciary
- International Community



“The very problems that democratic change brings – social tension, heightened expectations, political unrest – are also strengths. Discord is a sign of progress afoot; unease is an indication that a society has let go of what it knows and is working out something better and new.”

-Sandra Day O'Connor



# Thank You

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