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Cyberporn and Censorship: Constitutional Barriers to Preventing Access to Internet Pornography by Minors

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CYBERPORN AND CENSORSHIP: CONSTITUTIONAL BARRIERS TO PREVENTING ACCESS TO INTERNET PORNOGRAPHY BY MINORS

Reno v. ACLU, 117 S. Ct. 2329 (1997)

I. INTRODUCTION

In *Reno v. ACLU*,[1] the Supreme Court ruled on the constitutionality of two provisions of the Communications Decency Act of 1996.[2] Congress enacted the Communications Decency Act (CDA) in order to curtail the dissemination of pornography to minors via the Internet.[3] The Court found two provisions of the CDA to be unconstitutional due to their vagueness and the chilling effect their application would have on Internet communications.[4]

This Note concludes that the Court's holding was correct in light of established First Amendment precedent. The Court's application of strict scrutiny[5] was proper given the importance of the right to free expression. While the Government has a legitimate and compelling interest in protecting minors from sexually explicit material that may be harmful to them,[6] the CDA was not narrowly tailored to conform to the Government's narrow prerogative in this area.[7]

This Note argues that any future attempt to regulate sexually explicit Internet transmissions must be drafted with sufficient specificity such that no ambiguity exists as to the scope of its enforcement.[8] This Note also rejects the Government's stance that regulation of Internet pornography is justified as an

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[1] 117 S. Ct. 2329 (1997).

[2] 47 U.S.C. §§ 223 (a), (d) (Supp. 1997).

[3] *See* 141 CONG. REC. S8088 (daily ed. June 9, 1995) (statement of Sen. Exon) ("The fundamental purpose of the Communications Decency Act is to provide much-needed protection for children.").

[4] *Reno*, 117 S. Ct. at 2346.

[5] *Id.* at 2344.

[6] *Id.* at 2346.

[7] *Id.* at 2348.

[8] *See infra* Part V.B.

exercise of its zoning power. The interpretation of the CDA under a zoning paradigm undermines the foundations of free expression and violates the Equal Protection Clause of the Fourteenth Amendment.[9]

II. BACKGROUND

In recent years, the Supreme Court has struggled to prevent access by minors to speech that may harm them, while safeguarding the First Amendment right of adults to engage in non-obscene speech. The Court has addressed the constitutionality of restricting the rights of minors to access constitutionally protected speech[10] in a variety of fora.[11] Generally, the Court measures the Government's interest in protecting minors from harmful speech relative to the ease with which minors can access that speech.

A. RELEVANT PRECEDENT

1. Unprotected Speech

It is well established that the Government lawfully may impose different regulations on minors than it does on adults. In *Ginsberg v. New York*,[12] the Court upheld the constitutionality of a New York statute[13] forbidding the sale to minors under age seventeen of material considered obscene as to them, although not necessarily obscene for adults.[14] However, the Government does not have unlimited regulatory powers to protect minors. When a statute has the effect of restricting adults to viewing only material suitable for children, it will be stricken down.[15]

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[9] *See infra* Part V.D.

[10] Protected speech is that which is normally entitled to the protection of the First Amendment. Expression such as obscenity, Miller v. California, 413 U.S. 15, 23 (1973), "fighting words," Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942), or speech that creates a "clear and present danger," Schenck v. United States, 249 U.S. 47, 52 (1919), traditionally lacks constitutional protection, and thus may be regulated.

[11] *See, e.g.*, Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 131 (1989) (telephone communications); FCC v. Pacifica Found., 438 U.S. 726, 750 (1978) (radio transmissions); *Miller*, 413 U.S. at 18 (unsolicited mail).

[12] 390 U.S. 629 (1968).

[13] N.Y. PENAL LAW § 484-h (McKinney 1909).

[14] *Ginsberg*, 390 U.S. at 631-33.

[15] *See, e.g.*, Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 73 (1983) (holding that a statute prohibiting mailing of unsolicited advertisements for birth control was

Although Congress cannot prevent adults from viewing material inappropriate for minors, it does have the authority to limit adult access to material that is obscene,[16] transmitted in an inappropriate context,[17] or that creates harmful secondary effects.[18] For example, in *Miller v. California*,[19] the Court reviewed the conviction of an individual who mailed unsolicited, sexually explicit material in violation of California law.[20] The Court in *Miller* constructed the modern definition of "obscene"[21]:

> [t]he basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[22]

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unconstitutional as applied to producer of contraceptives) (citing Butler v. Michigan, 352 U.S. 380, 383 (1957)).

[16] *See Miller*, 413 U.S. at 23 (upholding conviction of individual who mailed unsolicited, sexually explicit material); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413 (1966) (declaring an eighteenth century book with some social value not obscene) [hereinafter *Memoirs*]; Roth v. United States, 354 U.S. 476 (1957) (upholding conviction of California man who mailed sexually explicit circulars and advertisements).

[17] *See* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 130-31 (1989) (finding a ban on indecent "dial-a-porn" telephone messages to be overbroad); FCC v. Pacifica Found., 438 U.S. 726, 742 (1978) (upholding a ban on radio broadcasts when indecent "as aired").

[18] *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (upholding zoning regulation directed at adult movie theaters); Young v. American Mini Theatres, Inc., 427 U.S. 50, 62-63 (1976) (same).

[19] 413 U.S. 15 (1973).

[20] *Id.* at 16-18.

[21] In *Miller*, the Court refined the previous tests set out in *Roth v. United States*, 354 U.S. 476 (1957), and *Memoirs*, 383 U.S. 413 (1966). In *Roth*, the Court noted that obscene material: (1) lacks redeeming social importance; and (2) to the average person, applying contemporary community standards, appeals to the prurient interest. *Roth*, 354 U.S. at 484, 489. The *Memoirs* Court interpreted *Roth* as requiring that:

> Three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to the prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

Memoirs, 383 U.S. at 418.

[22] *Miller*, 413 U.S. at 23-24 (quoting *Roth*, 354 U.S. at 489) (other citations omitted). The *Miller* standards apply to federal legislation as well as state laws. *See* United States v. 12 200-ft. Reels of Super 8mm. Film, 413 U.S. 123 (1973) (upholding California's seizure of obscene material pursuant to the Tariff Act of 1930, 19 U.S.C. § 1305(a)).

The Supreme Court views obscenity as completely outside the scope of the First Amendment's protection, and the Government may regulate speech freely as long as the *Miller* test is fulfilled.[23]

2. *Regulation of Speech on Particular Media*

Furthermore, the fact that speech is not obscene is not necessarily sufficient to preclude Government regulation. The Supreme Court has allowed the Government to restrict speech in various media where the fundamental nature of the media make such restrictions acceptable.[24] In *FCC v. Pacifica Foundation*,[25] the Court held that the radio broadcast of a monologue entitled *Filthy Words*, previously delivered to a live audience by comedian George Carlin, "'could have been the subject of administrative sanctions.'"[26] The Federal Communications Commission (FCC) determined that the monologue was patently offensive and indecent as aired,[27] because it involved the repeated use of words referring to excretory or sexual activities or organs "in an afternoon broadcast when children are in the audience."[28]

The *Pacifica* plurality stated that regulation dependent on the content of speech does not violate the First Amendment *per se*.[29] Instead, the context of the broadcast is critical in determining the scope of constitutional protection.[30] Noting that broadcasting traditionally has received the most limited First Amendment protection,[31] the Court concluded that the ease with which children may listen to the radio weighed against the constitutional protection of indecent broadcasts.[32] It is there-

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[23] *Miller*, 413 U.S. at 23-24.

[24] *See, e.g.*, Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2386-87 (1996) (leased cable television channels may be regulated, but not public access channels); FCC v. Pacifica Found., 438 U.S. 726, 748-50 (1978) (radio). *But see* Sable Communications of Cal. v. FCC, 492 U.S. 115, 126-28 (1989) (nature of telephone makes indecent recorded messages protected against regulation).

[25] 438 U.S. 726 (1978).

[26] *Id.* at 730 (quoting Citizen's Complaint Against Pacifica Found. Station WBAI (FM), 56 F.C.C.2d 94, 99 (1975)).

[27] The FCC did not determine that the Carlin monologue itself was obscene. *Id.* at 731.

[28] *Id.* at 739.

[29] *Id.* at 742-44.

[30] *Id.* at 744-48.

[31] *Id.* at 748.

[32] *Id.* at 749-50.

fore constitutional to proscribe indecent, non-obscene speech when such speech is transmitted through a medium readily accessible to children.

However, in *Sable Communications of California, Inc. v. FCC*,[33] the Supreme Court refused to uphold a ban on indecent "dial-a-porn" telephone communications.[34] Sable Communications, a provider of sexually oriented prerecorded messages, brought suit to enjoin enforcement of 47 U.S.C. § 223(b).[35] The 1988 amendment to § 223(b) of the Communications Act of 1934 created an outright ban on indecent or obscene interstate commercial telephone messages.[36] Applying strict scrutiny, the Court found that the statute was not sufficiently narrowly drawn to serve the Government's compelling interest in protecting minors.[37] Furthermore, the Court distinguished *Pacifica* on the basis that it involved the unique attributes of broadcasting, and did not mandate a complete ban.[38] In *Pacifica*, there was a risk that listeners would hear Carlin's monologue by accident. In contrast, the probability that one would fortuitously encounter an indecent telephone message is reduced substantially by the affirmative steps one must take to access those messages.[39]

Most recently, in *Denver Area Education Telecommunications Consortium, Inc. v. FCC*,[40] the Supreme Court considered the constitutionality of three portions of the Cable Television Consumer Protection and Competition Act of 1992,[41] each attempting to regulate programming on cable television.[42] The first of these regulations, § 10(a), allowed cable operators to ban patently offensive material on leased access channels.[43] The second, § 10(c), authorized the same bans for public access channels.[44] If cable operators did not take advantage of these

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[33] 492 U.S. 115 (1989).

[34] *Id.* at 131.

[35] *Id.* at 117-18.

[36] *Id.* at 117.

[37] *Id.* at 126.

[38] *Id.* at 127.

[39] *Id.* at 127-28.

[40] 116 S. Ct. 2374 (1996).

[41] 106 Stat. 1486 §§ 10(a)-(c) (1992) (codified at 47 U.S.C. §§ 532(h), 532(j), and note following § 531 (Supp. 1997)).

[42] 116 S. Ct. at 2380.

[43] *See* 47 U.S.C. § 532(h) (Supp. 1997).

[44] *See* note following 47 U.S.C.A. § 531 (West Supp. 1997).

provisions, § 10(b) mandated that they place all patently offensive programming on a single channel, and only allow customers to access that channel after providing written authorization.[45]

The *Denver Area* Justices could not settle upon a single level of scrutiny to apply, and the Court's decision came down as a patchwork of shifting pluralities. When the dust settled, the leased access provision (§ 10(a)) was held constitutional,[46] the public access provision (§ 10(c)) was held unconstitutional,[47] and the provision mandating segregation of patently offensive material (§ 10(b)) also was held unconstitutional.[48] *Denver Area* clearly illustrates the Court's continuing willingness to engage in medium-specific analysis—evaluating regulations within the context of the medium affected and adjusting the standard of review accordingly.[49]

3. Content-Neutral Regulations

Using a wholly different mode of analysis, the Court upheld a zoning ordinance that prevented adult movie theaters from opening in residential neighborhoods in *City of Renton v. Playtime Theatres, Inc.*[50] The Court acknowledged the district court's finding that the ordinance was aimed not at the content of the films shown in the theaters, but rather at the impact such establishments have on their surrounding neighborhood, including rising crime rates and deteriorating property values.[51] The Court upheld the statute, holding that a state has a legitimate

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[45] *See* 47 U.S.C. § 532(j) (Supp. 1997).

[46] *Denver Area*, 116 S. Ct. at 2390 (Breyer, J., plurality opinion); *id.* at 2417 (Kennedy, J., concurring in part and dissenting in part).

[47] *Id.* at 2394 (Breyer, J., plurality opinion); *id.* at 2417 (Kennedy, J., concurring in part and dissenting in part).

[48] *Id.* at 2394 (Breyer, J., plurality opinion).

[49] *See id.* at 2385 (Breyer, J., plurality opinion) ("This Court, in different contexts, has consistently held that the government may directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech."); *see also* Christopher M. Kelly, Note, *"The Spectre of a 'Wired Nation'":* Denver Area Educational Telecommunications Consortium v. FCC *and First Amendment Analysis in Cyberspace*, 10 HARV. J.L. & TECH. 559, 578 (1997).

[50] 475 U.S. 41, 54-55 (1986). *See also* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (upholding two Detroit zoning laws preventing adult theaters from being constructed near each other or residential neighborhoods).

[51] *Renton*, 475 U.S. at 48.

interest in protecting property values and discouraging crime, and therefore may proscribe speech to serve these interests as long as the content of the restricted speech is not considered.[52] The Court was explicit in limiting its holding only to statutes that combat the "secondary effects" of speech without regard to its content.[53]

Had the regulation instead been found to be "content-based," firmly established principles would have made it presumptively invalid. Six years later, in *R.A.V. v. City of St. Paul*,[54] the Court addressed a St. Paul ordinance[55] proscribing the use of symbolic speech, "which one knows or has a reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender . . . ."[56] The defendant was prosecuted for burning a cross in the yard of an African-American family.[57] The Court struck down the ordinance, noting that it allowed individuals to engage in insulting or violence-provoking speech as long as such speech was not directed to one of the enumerated disfavored topics.[58] Justice Scalia stated that "[t]he First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed."[59] Thus, in order to survive constitutional review, a statute restricting protected speech must be directed at factors extrinsic to the content of the message, rather than at the viewpoint expressed.[60]

B. THE COMMUNICATIONS DECENCY ACT OF 1996

Against this backdrop of First Amendment case law,[61] Congress passed the Communications Decency Act of 1996 (CDA).

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[52] *Id.* at 48-55.

[53] *Id.* at 54.

[54] 505 U.S. 377 (1992).

[55] ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990).

[56] *R.A.V.*, 505 U.S. at 380 (quoting ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

[57] *Id.* at 379.

[58] *Id.* at 391.

[59] *Id.* at 382 (citations omitted).

[60] *Id.* at 396.

[61] The sponsors of the CDA were fully aware of the Court's First Amendment precedents:

> The conferees intend that the term indecency . . . has the same meaning as established in *FCC v. Pacifica Foundation* and *Sable Communications of California, Inc. v. FCC.* These cases clearly establish the principle that the federal government has a compelling interest in shielding minors from indecency. Moreover, these

The CDA is codified in Title V of the Telecommunications Act of 1996.[62] The purpose of the CDA is to prevent minors from receiving sexually explicit material over the Internet[63]—a goal furthered by the use of criminal sanctions.[64] Section 223(a)(1)(B) of the CDA punishes by fine, imprisonment or both, the knowing transmission of "obscene or indecent" communications to any person under eighteen years of age.[65] Section 223(d) prohibits the knowing sending or displaying of "patently offensive" messages to persons under eighteen years of age.[66] Affirmative defenses are provided under § 223(e)(5) for

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cases firmly establish the principle that the indecency standard is fully consistent with the Constitution and specifically limited in its reach so that the term is not unconstitutionally vague.

H.R. CONF. REP. NO. 104-458, at 422 (1996), *reprinted in* 1996 U.S.C.C.A.N. 201, 201-02 (internal citations omitted). However, awareness is not synonymous with comprehension, a fact made clear by the *Reno* Court's clear refutation of the Conference Report's latter observation.

[62] *See* Pub. L. No. 104-104, 110 Stat. 56 (1996).

[63] *See* 141 CONG. REC. S8088 (daily ed. June 9, 1995) (statement of Sen. Exon).

[64] 47 U.S.C. § 223 (Supp. 1997).

[65] 47 U.S.C. § 223(a)(1)(B) (Supp. 1997). The provision reads in relevant part:

Whoever—

(1) in interstate or foreign communications—

(B) by means of a telecommunications device knowingly—

(i) makes, creates, or solicits, and

(ii) initiates the transmission of,

any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication; . . . .

shall be fined under Title 18, or imprisoned not more than two years, or both.

47 U.S.C. § 223(a)(1)(B) (Supp. 1997).

[66] Section 223(d) provides:

Whoever—

(1) in interstate or foreign communications knowingly—

(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

(B) uses any interactive computer service to display in a manner available to a person under 18 years of age,

any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or

(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity,

shall be fined under Title 18, or imprisoned not more than two years, or both.

47 U.S.C. § 223(d) (Supp. 1997).

those who make "good faith" and "effective" efforts to restrict access by minors to prohibited communications.[67]

Senator James Exon (D-Neb.) originally proposed the CDA in 1995.[68] Despite some resistance to the indecency provisions, Senator Exon and a coalition of right-wing and anti-pornography groups were able to maintain the bill in its original form.[69] In an 84 to 16 vote, the Exon amendment was attached to the Senate's telecommunications bill in June of 1995.[70] However, the House version of the legislation expressly prohibited Internet censorship and was passed by a 420 to 4 vote.[71] In the joint conference committee, the House participants abandoned their measure and adopted Senator Exon's proposal.[72]

C. THE INTERNET

A discussion of the Communications Decency Act should begin with a brief overview of the mechanics of the Internet. The Internet is a complex network of computers, linked for the

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Whether § 223(d) should be treated as one substantive section or two was the subject of debate between the Justices. The dissent viewed the section as comprised of two separate provisions. Reno v. ACLU, 117 S. Ct. 2329, 2352 (1997) (O'Connor, J., dissenting). The "specific person" provision, § 223(d)(1)(A), governs transmissions to a specific person the sender *knows* to be under age 18. *Id.* (O'Connor, J., dissenting). The "display" provision, § 223(d)(1)(B), more broadly applies to the posting of patently offensive messages or images in any manner available to minors. *Id.* (O'Connor, J., dissenting). The majority treated the section as consisting of only one "patently offensive display," provision, thereby avoiding the issue of a transmission purposefully directed at a known minor. *Id.* at 2338 n.25.

[67] Section 223(e)(5) provides that:

> It is a defense to a prosecution under subsection (a)(1)(B) or (d) of this section, or under subsection (a)(2) of this section with respect to the use of a facility for an activity under subsection (a)(1)(B) of this section that a person—
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> (A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or
>
> (B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.

47 U.S.C. § 223(e)(5) (Supp. 1997).

[68] *See* S. 314, 104th Cong. (1995)

[69] *See* Blake T. Bilstad, *Obscenity and Indecency in a Digital Age: The Legal and Political Implications of Cybersmut, Virtual Pornography, and the Communications Decency Act of 1996*, 13 SANTA CLARA COMPUTER & HIGH TECH. L.J. 321, 375 (1997).

[70] *Id.*

[71] *Id.*

[72] *Id.* at 375-76.

purpose of transmitting information.[73] This network has undergone enormous growth in recent years: the number of linked computers has grown from fewer than 300 in 1981 to over 9,400,000 by 1996.[74] Approximately 60% of these computers are estimated to be located within the United States, excluding personal computers.[75] As many as 40 million people worldwide use the Internet, and that number is expected to grow to 200 million by 1999.[76]

No single person or organization controls or administers the Internet—it exists because individuals have chosen voluntarily to use common data transfer protocols to transmit information.[77] There is no single point at which the Internet is administered, and it would be technically infeasible for any entity to control the enormous amount of information transmitted over the system.[78]

Users can access the Internet either by connecting to the network on a personal computer through a modem, or by using a computer that is directly connected to the Internet.[79] Access can be gained at schools, businesses, libraries, or storefront "computer coffee shops."[80] Individuals can also gain access to

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[73] *See* ACLU v. Reno, 929 F. Supp. 824, 830-31 (E.D. Pa. 1996). The Internet was created as an experimental project of the Advanced Research Project Agency (ARPA) in the late 1960s. ED KROL, THE WHOLE INTERNET USER'S GUIDE AND CATALOG 13 (2d ed. 1994). This system, dubbed ARPANET, linked computers owned by the military, defense contractors, and university laboratories engaged in military research. *Id.* at 13. The purpose of the network was to "rapidly transmit[] communications without direct human involvement or control, and with the automatic ability to re-route communications if one or more individual links were damaged or otherwise unavailable," perhaps due to war. *Reno*, 929 F. Supp. at 831. As ARPANET eventually grew to include universities, corporations, and individuals worldwide, the network became known as the DARPA Internet and ultimately the Internet. *Id.*

[74] *Reno*, 929 F. Supp. at 831.

[75] *Id.*

[76] *Id.*

[77] KROL, *supra* note 73, at 16.

[78] *Reno*, 929 F. Supp. at 832.

[79] STEVE LAMBERT & WALT HOWE, INTERNET BASICS 4 (1993). The district court found that:

> [I]t takes several steps to enter cyberspace. At the most fundamental level, a user must have access to a computer with the ability to reach the Internet (typically by way of a modem). A user must then direct the computer to connect with the access provider, enter a password, and enter the appropriate commands to find particular data.

Reno, 929 F. Supp. at 844.

[80] *Reno*, 929 F. Supp. at 832-33.

the Internet through noncommercial Internet service providers or commercial online services, which allow users to dial in to a local telephone number and connect their personal computers to the Internet.[81]

After connecting to the Internet, users may communicate with each other using a variety of methods.[82] One-to-one messaging (such as e-mail) allows a sender to address and transmit a message to one or more people.[83] One-to-many messaging (such as listserv) allows a person to subscribe to a mailing list and receive messages that are forwarded to subscribers.[84] Likewise, a recipient's reply to the message can be viewed by all the subscribers.[85] Distributed message databases (such as USENET newsgroups) are similar to listservs, except that a user need not subscribe to the database; he or she may access it at any time.[86] Real time communication (such as Internet Relay Chat, or IRC), rather than fora where messages are posted and later read, allows users to converse in an immediate dialogue with other users.[87] Real time remote computer utilization (such as telnet) provides users with the resources of remote computers in real time, for such purposes as browsing a distant library's card catalogue.[88]

Remote information retrieval, perhaps the most familiar means of Internet communication, allows users to search for and retrieve information located on remote computers.[89] There are three basic methods of locating and retrieving information on the Internet.[90] File transfer protocol (ftp) lists the names of computer files on remote computers and transfers those files to a local computer.[91] Another program, gopher, similarly guides a

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[81] LAMBERT & HOWE, *supra* note 79, at 4-5.

[82] *Id.* at 11.

[83] *Id.* at 11-12.

[84] *Id.* at 13-14.

[85] *Reno*, 929 F. Supp. at 834.

[86] LAMBERT & HOWE, *supra* note 79, at 14-15.

[87] *Id.* at 87. "IRC is analogous to a telephone party line, using a computer and keyboard rather than a telephone." *Reno*, 929 F. Supp. at 834. Perhaps a better analogy is to a teletype machine, used by hearing-impaired individuals to converse over telephone lines.

[88] LAMBERT & HOWE, *supra* note 79, at 15.

[89] *Reno*, 929 F. Supp. at 834.

[90] *Id.*

[91] KROL, *supra* note 73, at 65; LAMBERT & HOWE, *supra* note 79, at 12.

user's search through the available resources on a remote computer.[92] Finally, the World Wide Web "utilizes a 'hypertext' formatting language called hypertext markup language (HTML), and programs that 'browse' the Web can display HTML documents containing text, images, sound, animation and moving video."[93] HTML documents often include links to other resources, so, while viewing an HTML document that contains such a hyperlink, one can "click" a computer mouse button and immediately access the linked document.[94]

Several systems have been designed to enable users of the Web to search for particular information.[95] These search engines seek out Web sites with certain categories of information or key words.[96] After inputting the desired category or key word, the search engine presents the user with a list of sites containing the information.[97] This list is actually a series of hyperlinks to the selected sites and short descriptions of the sites' contents.[98] The user then selects those sites he or she wishes to visit.[99]

D. PORNOGRAPHY ON THE INTERNET

Sexually explicit material, including text, chat, bulletin boards, and newsgroups, exists on the Internet.[100] This material

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[92] KROL, *supra* note 73, at 233; LAMBERT & HOWE, *supra* note 79, at 16.

[93] *Reno*, 929 F. Supp. at 835. *See also* KROL, *supra* note 73, at 287-88; LAMBERT & HOWE, *supra* note 79, at 17-18, 164-65.

[94] KROL, *supra* note 73, at 288. Hyperlinks are typically sections of text that are blue or underlined, and when the user clicks a mouse button on the highlighted link the desired text instantly appears on the computer screen. *Reno*, 929 F. Supp. at 836.

[95] *Reno*, 929 F. Supp. at 837.

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.* at 844. In assessing the pervasiveness of Internet pornography, the Senate debate was influenced by a cover article in *Time* magazine. *See* 141 CONG. REC. S9017; Philip Elmer-DeWitt, *On a Screen Near You: Cyberporn*, TIME, July 3, 1995, at 38, *reprinted in* 141 CONG. REC. S9019-21. The article, in turn, referenced a study on cyberporn that appeared in the *Georgetown Law Journal*. *See* Marty Rimm, *Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces, and Territories*, 83 GEO. L.J. 1849 (1995). The author of the study, Marty Rimm, was a 30-year-old senior at Carnegie Mellon University who "had a history of involvement in media stunts and wild self-promotion." JONATHAN WALLACE & MARK MANGAN, SEX, LAWS AND CYBERSPACE 127-28 (1996). Rimm's study concluded that on Usenet newsgroups where digitized images are stored, 83.5% of the pictures were pornographic. *Id.* at 126. In the weeks after the study appeared in *Time*, Rimm's methodology was attacked from several fronts, eventually prompting both *Time* and

is created, named, and posted in the same manner as non-sexual material.[101] A search engine accidentally may retrieve sexually explicit material through an imprecise search.[102] However, "users seldom encounter [sexually explicit] content 'by accident.'"[103] A document's title or an abstract of the content usually appears before the user may view the document.[104]

There is currently no effective way to determine the age or identity of a user accessing material through e-mail, listservs, newsgroups, or chat rooms.[105] Further, even if technology were available to block the access of minors to these fora,

> there is no method by which the creators of newsgroups which contain discussions of art, politics or any other subject that could potentially elicit "indecent" contributions could limit the blocking of access by minors to such "indecent" material and still allow them access to the remaining content, even if the overwhelming majority of that content was not indecent.[106]

However, current technology does enable the operator of a World Wide Web server to limit access by minors.[107] A Web document can include a fill-in-the-blank form that requests information from a would-be viewer of the Web site.[108] The Web server then could screen visitors by requesting a credit card number or adult password.[109]

Carnegie Mellon to distance themselves from the study. *Id.* at 129-52. *See also* Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating the Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 53-57 (1996). "But the damage had already been done—Senators Grassley and Exon had waved the *Time* article around Congress; Senator Coats had quoted Rimm's phony statistics." WALLACE & MANGAN, *supra*, at 151.

[101] *Reno*, 929 F. Supp. at 844.

[102] *Id.* Imprecise searches also retrieve irrelevant material that is not sexually explicit. *Id.*

[103] *Id.*

[104] *Id.* "Almost all sexually explicit images are preceded by warnings as to the content." *Id.* The Government's witness in *Reno*, Agent Howard Schmidt, Director of the Air Force Office of Special Investigation, admitted that the "odds are slim" that a user would encounter sexually explicit material accidentally. *Id.* at 844-45.

[105] *Id.* at 845. The Government's expert, Dr. Olsen, agreed that no currently available technology could give a speaker assurance that the participants in a particular mail exploder, newsgroup, or chat room are all adults. *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.* The information would be processed by a computer program, usually a Common Gateway Interface (cgi) script. *Id.*

[109] *Id.* However, the district court noted:

> Content providers who publish on the World Wide Web via one of the large commercial online services, such as America Online or CompuServe, could not

The Government contended that the CDA creates three affirmative defenses for all content providers: credit card verification; adult verification by password or identification number; and "tagging."[110] At present, none of these proposals is feasible, for either technological or practical reasons.[111]

III. FACTS AND PROCEDURAL HISTORY

Immediately after President Clinton signed the Communications Decency Act into law on February 8, 1996, twenty plaintiffs[112] brought suit against United States Attorney General Janet Reno and the United States Justice Department challenging the constitutionality of two of its provisions.[113] The plaintiffs alleged that the provisions conflicted with the free speech clause of the First Amendment.[114] One week later, Judge Ronald L. Buckwalter of the U.S. District Court for the Eastern District of Pennsylvania entered a temporary restraining order against

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use an online age verification system that requires cgi script because the server software of the online services available to subscribers cannot process cgi scripts. There is no method currently available for Web page publishers who lack access to cgi scripts to screen recipients for age.

Id. at 845-46. *See supra* note 108. While it is quite common for "adult" Web sites to require information from their visitors, "a modest number of freely accessible Web sites containing hard core pornography still exist on the Web." Bilstad, *supra* note 69, at 339.

[110] *Reno*, 929 F. Supp. at 846. *See* Brief for Appellant at 34-38, Reno v. ACLU, 117 S. Ct. 2329 (1997) (No. 96-511). Tagging requires content providers to label all "indecent" or "patently offensive" material by imbedding a string of characters, such as "XXX," in the Web site's address or program. *Reno*, 929 F. Supp. at 847.

[111] *Reno*, 929 F. Supp. at 846-48.

[112] Reno v. ACLU, 117 S. Ct. 2329, 2339 n.27 (1997). Those plaintiffs were: American Civil Liberties Union; Human Rights Watch; Electronic Privacy Information Center; Electronic Frontier Foundation; Journalism Education Association; Computer Professionals for Social Responsibility; National Writers Union; Clarinet Communications Corp.; Institute for Global Communications; Stop Prisoner Rape; AIDS Education Global Information System; Bibliobytes; Queer Resources Directory; Critical Path AIDS Project, Inc.; Wildcat Press, Inc.; Declan McCullagh dba Justice on Campus; Brock Meeks dba Cyberwire Dispatch; John Troyer dba The Safer Sex Page; Jonathan Wallace dba The Ethical Spectacle; and Planned Parenthood Federation of America, Inc.

[113] 47 U.S.C. §§ 223(a)(1)(B), (d) (Supp. 1997). *See supra* notes 65, 66.

[114] *Reno*, 117 S. Ct. at 2339. The First Amendment reads:

> 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 to peaceably assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

enforcement of § 223(a)(1)(B)(ii) as it applies to indecent communications, based upon a finding that the term "indecent" was too vague to support a criminal prosecution.[115] A second action was subsequently initiated by an additional twenty-seven plaintiffs,[116] and the cases were consolidated for a hearing before a three-judge district court.[117]

At the parties' urging, extensive evidentiary hearings were held,[118] which, combined with a detailed stipulation between the parties, allowed the district court to make findings as to the nature and history of the Internet, and the existence and accessibility of pornography on the Internet.[119] Significantly, the court found that "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer unbidden. Users seldom encounter content 'by accident.'"[120] Further, the court noted, despite the development of ratings systems[121] and

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[115] *Reno*, 117 S. Ct. at 2339.

[116] *Id.* at 2339 n.28. Those plaintiffs were: American Library Association; America Online, Inc.; American Booksellers Association, Inc.; American Booksellers Foundation for Free Expression; American Society of Newspaper Editors; Apple Computer, Inc.; Association of American Publishers, Inc.; Association of Publishers, Editors and Writers; Citizens Internet Empowerment Coalition; Commercial Internet Exchange Association; CompuServe, Inc.; Families Against Internet Censorship; Freedom to Read Foundation, Inc.; Health Sciences Libraries Consortium; Hotwired Ventures LLC; Interactive Digital Software Association; Interactive Services Association; Magazine Publishers of America; Microsoft Corp.; The Microsoft Network, LLC; National Press Photographers Association; Netcom On-Line Communication Services, Inc; Newspaper Association of America; Opnet, Inc.; Prodigy Services Company; Society of Professional Journalists; Wired Ventures, Ltd.

[117] This panel was convened pursuant to § 561(a) of the Telecommunications Act of 1996, which provides that:

> Notwithstanding any other provision of law, any civil action challenging the constitutionality, on its face, or this title or any amendment made by this title, or any provision thereof, shall be heard by a district court of 3 judges convened pursuant to the provisions of section 2284 of title 28, United States Code.

47 U.S.C. § 561(a) (1996).

The court consisted of Chief Circuit Judge Sloviter of the Third Circuit Court of Appeals and Judges Buckwalter and Dalzell of the District Court for the Eastern District of Pennsylvania.

[118] ACLU v. Reno, 929 F. Supp. 824, 830 (E.D. Pa. 1996).

[119] *See id.* at 830-49.

[120] *Id.* at 844.

[121] The Platform for Internet Content Selection (PICS), launched by the World Wide Web Consortium, attempts to create "technical standards that support parents' ability to filter and screen material that their children see on the Web" by enabling individual content providers to rate content on the Internet. *Id.* at 838-39.

computer programs[122] to block out pornographic material, at present there is no reliable method to shield minors from pornography that is not economically prohibitive to some users and providers.[123]

With each judge filing a separate opinion, the three-judge district court unanimously found that the CDA's references to "indecent" and "patently offensive" conduct were inherently vague, and therefore found the statute facially unconstitutional.[124]

A. CHIEF JUDGE SLOVITER'S OPINION

Chief Judge Dolores K. Sloviter was skeptical of a strong governmental interest in regulating the wide realm of online material that possibly could fall within the purview of the CDA, but recognized that there is a "compelling" interest with respect to certain material.[125] Notwithstanding this concern, she found that the scope of material regulated by the CDA was so broad as to create a chilling effect.[126] Furthermore, she stated that the terms "patently offensive" and "indecent" are so vague as to be incapable of application.[127] Thus, material deemed indecent in one region of the country may not be regarded as such in another.[128] She also stated that the affirmative defenses established

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[122] Examples of software released in recent years to limit Internet access to children include: Cyber Patrol; CYBERsitter; The Internet Filter; Net Nanny; Parental Guidance; SurfWatch; Netscape Proxy Server; and WebTrack. *Id.* at 839-42. These programs do not appear to please everyone—the ACLU has threatened suit against Kern County, California unless the county removes a program on library computers that blocks access to adult-oriented sights. *ACLU Protests Library's Use of Filtering Software*, SAN DIEGO UNION-TRIB., Jan. 27, 1998, at 11.

[123] *Reno*, 929 F. Supp. at 849.

[124] *Id.* at 857 (Sloviter, C.J.); *id.* at 865 (Buckwalter, J.); *id.* at 883 (Dalzell, J.).

[125] *Id.* at 853 (Sloviter, C.J.).

[126] *Id.* at 854 (Sloviter, C.J.).

[127] *Id.* (Sloviter, C.J.).

[128] *Id.* at 852-53 (Sloviter, C.J.). Judge Sloviter gave as an example the Broadway play *Angels in America*, which won two Tony Awards and a Pulitzer prize. *Id.* at 852-53. This play dealt with homosexuality and AIDS in "graphic language" and could be considered unacceptable for children under 18-years-old in "less cosmopolitan communities." *Id.* at 853. However, Judge Sloviter commented that uninhibited teachers and parents might find it acceptable for 11th or 12th graders. *Id.* Similarly, articles on female genital mutilation, a routine practice in some countries, might be viewed as patently offensive in some communities, even if presented in context. *Id.* Judge Sloviter further commented that non-obscene material, such as photographs in *National Geographic* of Indian sculptures depicting copulation, a written description of a prison rape, or Francesco Clemente's painting *Labirinth*, might easily fall within the

by § 223(e)(5) are not "technologically or economically feasible for most providers"—rejecting the Government's position that providers can avoid liability by "tagging" their material to allow potential readers to screen out unwanted material.[129] Chief Judge Sloviter also refused to narrowly construe the CDA as only applying to commercial pornographers.[130]

B. JUDGE BUCKWALTER'S OPINION

Judge Buckwalter found the terms "indecent" in § 223(a)(1)(B) and "patently offensive" and "in context" in § 223(d)(1) so vague that their enforcement would violate the "fundamental constitutional principle" of "simple fairness,"[131] as well as the First and Fifth Amendments.[132] He found that the Government's assertion that §§ 223(a) and (d) would be applied only to "pornographic" materials was lacking in statutory support, and commented that, unlike obscenity, "indecency has not been defined to exclude works of serious literary, artistic, political or scientific value."[133]

Additionally, Judge Buckwalter stated that the Government's argument that the material must be patently offensive when considered "in context" did little to dispel the statute's vagueness. The relevant context might be "the nature of the communication as a whole, the time of day it was conveyed, the medium used, the identity of the speaker, or whether or not it is accompanied by appropriate warnings."[134] The vagueness of the statute, he commented, is aggravated by the distinctive qualities of the Internet.[135]

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prohibitory language of 47 U.S.C. § 223(d)(1). *Id.* She stated that the Government presented no evidence before the three-judge panel that "it has a compelling interest in preventing a seventeen-year-old minor from accessing such images." *Id.*

[129] *Id.* at 856 (Sloviter, C.J.).

[130] *Id.* at 854-55 (Sloviter, C.J.). Commercial pornographers are those who post sexually explicit material on the Internet for profit, and typically require a would-be viewer to input his or her credit card information before accessing such material.

[131] *Id.* at 861 (Buckwalter, J.).

[132] *Id.* at 858 (Buckwalter, J.). *See supra* note 114 for the text of the First Amendment. The Fifth Amendment reads: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

[133] *Reno*, 929 F. Supp. at 863 (Buckwalter, J.). *See supra* note 21 and accompanying text.

[134] *Reno*, 929 F. Supp. at 864 (Buckwalter, J.).

[135] *Id.* at 865 n.9 (Buckwalter, J.). Judge Buckwalter pondered:

> Are the contemporary community standards to be applied those of the vast world of cyberspace, in accordance with the Act's apparent intent to establish a uni-

C. JUDGE DALZELL'S OPINION

Judge Dalzell found that the unique nature of the Internet as a communication medium prevents Congress from regulating the content of protected speech transmitted thereby.[136] He expounded upon the dangers of regulating speech on the Internet, including the squelching of protected speech among a significant number of people.[137] He stated that, ironically, this same regulation would have little effect on the commercial pornographers about whom Congress is most concerned.[138] Judge Dalzell noted that most Websites operated by these individuals already have the safeguards enumerated in § 223(e)(5).[139] Thus, according to Judge Dalzell, the Supreme Court's First Amendment case law required a "medium-specific" approach to judicial analysis of the regulation of mass communication.[140] Because the Internet is the "most participatory form of mass speech yet developed,"[141] it is entitled to "the highest protection from governmental intrusion."[142]

From the district court's unanimous ruling that the CDA was unconstitutionally vague and infringed on the right to free

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form national standard of content regulation? The Government offered no evidence of any such national standard or nationwide consensus as to what would be considered "patently offensive."

Id. at 863 (Buckwalter, J.).

[136] *Id.* at 867 (Dalzell, J.).

[137] *Id.* at 877-78 (Dalzell, J.).

[138] *Id.* at 879 (Dalzell, J.).

[139] *Id.* (Dalzell, J.). Commercial pornographers typically require the user to input his or her credit card information before accessing pornographic material, thereby availing themselves of § 223(e)(5)(B). *See supra* note 67 for the text of this provision.

[140] *Reno*, 929 F. Supp. at 873 (Dalzell, J.) (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994); City of Los Angeles v. Preferred Comm., Inc., 476 U.S. 488, 496 (1986) (Blackmun, J., concurring); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 500-01 (1981); FCC v. Pacifica Found., 438 U.S. 726, 748 (1978)).

[141] *Reno*, 929 F. Supp. at 883 (Dalzell, J.).

[142] Judge Dalzell commented:

> Four related characteristics of Internet communication have a transcendent importance to our shared holding that the CDA is unconstitutional on its face. . . . 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.

Id. at 877 (Dalzell, J.).

speech, the Government appealed to the Supreme Court,[143] which noted probable jurisdiction.[144]

IV. SUMMARY OF OPINIONS

A. MAJORITY OPINION

Writing for a 7-2 majority,[145] Justice Stevens found the two challenged provisions of the Communications Decency Act, § 223(a) and § 223(d), were unconstitutionally vague and overbroad, and infringed upon the right to free expression.[146]

1. Searching for Precedent

Justice Stevens commenced his analysis by evaluating the precedential effects of *Ginsberg*, *Pacifica*, and *Renton*.[147] The Government's attempts to analogize its case to these precedents were unconvincing to the Court.[148]

First, Justice Stevens rejected the Government's attempt to invoke *Ginsberg v. New York*,[149] explaining that the New York statute in *Ginsberg* was significantly narrower in scope than the Communications Decency Act.[150] Under that New York statute: (1) parents could still buy their children the regulated material; (2) only commercial transactions were affected; (3) the material

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[143] The Government appealed directly to the Supreme Court under the CDA's special review provisions. Section 561(b) of the Telecommunications Act of 1996 provides that:

> Notwithstanding any other provision of law, an interlocutory or final judgment, decree, or order of the court of 3 judges in an action under subsection (a) holding this title or an amendment made by this title, or any provision thereof, unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court. Any such appeal shall be filed not more than 20 days after entry of such judgment, decree, or order.

47 U.S.C. § 561(b) (1996).

[144] Reno v. ACLU, 117 S. Ct. 554 (1996).

[145] Justices Scalia, Kennedy, Souter, Thomas, Ginsburg and Breyer joined in the majority opinion.

[146] Reno v. ACLU, 117 S. Ct. 2329, 2334 (1997). *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); FCC v. Pacifica Found., 438 U.S. 726 (1978); Ginsberg v. New York, 390 U.S. 629 (1968).

[147] *Reno*, 117 S. Ct. at 2341.

[148] *Id.*

[149] 390 U.S. 629 (1968) (upholding a New York statute prohibiting minors from purchasing material deemed obscene for them, although not necessarily obscene for adults). *See supra* notes 12-14 and accompanying text (discussing *Ginsberg*).

[150] *Reno*, 117 S. Ct. at 2341.

regulated was limited to that "utterly without redeeming social importance for minors;" and (4) the statute defined minors as people under seventeen years of age, thereby excluding from its scope a significant number of people nearest the age of majority.[151] In contrast, the CDA operates as a complete ban on transmitting "indecent" material to anybody under eighteen years of age.

Likewise, Justice Stevens found *Pacifica*[152] inapposite: the scope of communications addressed by the FCC's order in *Pacifica* was significantly narrower than that regulated by the CDA.[153] The CDA sought to control all transmissions on the Internet—the most extensive communications network ever conceived—which requires a user to take several steps to access information and where there is a minimal risk of encountering unwanted material.[154] By comparison, in *Pacifica,* the FCC merely sought to restrict certain language at a certain time of day on a medium with a finite number of frequencies.[155]

The Court also rejected the Government's attempt to invoke an analogy to *City of Renton v. Playtime Theaters, Inc.*:[156] "The purpose of the CDA is to protect children from the primary effects of 'indecent' and 'patently offensive' speech, rather than any 'secondary' effect of such speech."[157] The ordinance in *Renton,* on the other hand, was aimed at preventing crime and other byproducts of adult entertainment.[158]

Justice Stevens chose instead to highlight the similarities between the CDA and the statute addressed in *Sable Communica-*

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[151] *Id.* (quoting *Ginsberg,* 390 U.S. at 646).

[152] FCC v. Pacifica Found., 438 U.S. 726 (1978) (upholding FCC sanction of a patently offensive radio broadcast at a time when children were likely to be in the audience). *See supra* notes 25-32 and accompanying text (discussing *Pacifica*).

[153] *Reno,* 117 S. Ct. at 2342.

[154] *Id. See supra* note 104.

[155] Justice Stevens noted that "unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a 'scarce' expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds." *Reno,* 117 S. Ct. at 2344.

[156] 475 U.S. 41 (1986) (upholding zoning ordinance preventing establishment of adult movie theaters when ordinance was only aimed at secondary effects of land use). *See supra* notes 51-53 and accompanying text (discussing *Renton*).

[157] *Reno,* 117 S. Ct. at 2334.

[158] *Id.* at 2342.

tions of California, Inc. v. FCC,[159] which banned indecent "dial-a-porn."[160] The critical factor which mitigated against regulation in *Sable* was the difficulty involved in accessing the indecent communication. Justice Stevens likened the act of clicking hyperlinks in an Internet document to dialing a telephone, reasoning that children were unlikely to encounter indecent speech accidentally in either context. Therefore, he reasoned, the Government's scope of authority should not be as broad as in *Pacifica*, where children could easily encounter the indecent radio broadcast.

2. *Is the CDA Unconstitutionally Vague?*

The Court next responded to the charge that the CDA is so vague as to violate the First Amendment.[161] Section 223(a) attempts to regulate "indecent" communications,[162] while § 223(d) refers to material which, "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."[163] Because neither "indecent" nor "patently offensive" is defined in the CDA,[164] Justice Stevens predicted that the difference in language will create confusion as to what the terms mean and how

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[159] 492 U.S. 115 (1989) (finding unconstitutional an FCC ban on indecent telephone messages accessed by dialing a telephone number). *See supra* text accompanying notes 33-39 (discussing *Sable*).

[160] *Reno*, 117 S. Ct. at 2343.

[161] *Reno*, 117 S. Ct. at 2344. The Fifth Amendment vagueness issue alleged by the plaintiffs was not addressed. *Id.*

[162] 47 U.S.C. § 223(a) (Supp. 1997). *See supra* note 65 for the text of § 223(a)(1)(B).

[163] 47 U.S.C. § 223(d) (Supp. 1997). *See supra* note 66 for the text of § 223(d).

[164] The legislative history does provide some guidance for the intended meaning of "indecent":

> The conferees intend that the term indecency . . . has the same meaning as established in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), and *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989). These cases clearly establish the principle that the federal government has a compelling interest in shielding minors from indecency. Moreover, these cases firmly establish the principle that the indecency standard is fully consistent with the Constitution and specifically limited in its reach so that the term is not unconstitutionally vague. . . . The precise contours of the definition of indecency have varied slightly depending on the communications medium to which it has been applied. The essence of the phrase—patently offensive descriptions of sexual or excretory activities—has remained constant, however.

H.R. CONF. REP. NO. 104-458, at 422, *reprinted in* 1996 U.S.C.C.A.N. 201, 201-02.

they interrelate.[165] The Court traditionally has been especially concerned with vagueness in a content-based regulation of speech because of its "obvious chilling effect on free speech."[166] This concern is especially meaningful when, as with the CDA, a criminal statute creates the risk of discriminatory enforcement.[167]

The Government responded that the language of the CDA is at least as clear as the standard for obscenity set forth in *Miller v. California*.[168] In *Miller*, the Court defined the qualities of obscene material in a three part test.[169] Because the CDA only codifies the second prong of the test (with the significant omission of the "applicable state law" language), the Court ruled that it is more vague than *Miller*'s obscenity test.[170]

3. Is the CDA Unconstitutionally Overbroad?

While acknowledging Congress's interest in protecting minors from certain harmful material on the Internet,[171] the Supreme Court refused to permit enactment of a statute that would hinder severely the right and ability of adults to communicate in a constitutionally protected manner.[172] The Court saw no reason to defer to the congressional judgment that only a total ban would serve the Government's interest in protecting minors.[173] The District Court's findings regarding the inability of

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[165] *Reno*, 117 S. Ct. at 2344 & nn.35-37.

[166] *Id.* at 2344 (citing Gentile v. State Bar of Nev., 501 U.S. 1030 (1991)).

[167] *Id.* at 2345. The Court used this risk of discriminatory enforcement to distinguish the CDA from the civil regulations at issue in *Denver Area*. *See supra* text accompanying notes 40-49 (discussing *Denver Area*).

[168] *Id.* (citing Miller v. California, 413 U.S. 15 (1973)).

[169] *Miller*, 413 U.S. at 24. *See supra* note 22 and accompanying text.

[170] *Reno*, 117 S. Ct. at 2345. Justice Stevens noted: "Even though the word 'trunk,' standing alone, might refer to luggage, a swimming suit, the base of a tree, or the long nose of an animal, its meaning is clear when it is one prong of a three-part description of a species of gray animals." *Id.* at 2345 n.38.

[171] *Id.* at 2346 (citing Pacifica Found. v. FCC, 438 U.S. 726, 749 (1978); Ginsberg v. New York, 390 U.S. 629, 639 (1968)).

[172] *Id.* (citing Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 116 S. Ct. 2374 (1996)).

[173] *See* Sable Communications of Cal. v. FCC, 492 U.S. 115, 129 (1989). In fact, any claim that Congress's reasoned judgment should be given deference is questionable, as the extent of congressional inquiry into the subject of the legislation was perhaps insufficient. *Reno*, 117 S. Ct. at 2346 n.41. As stated by Senator Leahy in his opening statement before the Senate Judiciary Committee's hearing on the CDA:

> It really struck me . . . that it is the first ever hearing . . . . And yet we had a major debate on the floor, passed legislation overwhelmingly on a subject involving the

users to prevent access to their messages by minors persuaded the Court that a significant amount of protected speech would be curtailed.[174] According to Justice Stevens, the Government failed to explain why a more precisely worded statute would be less effective than the CDA in restricting minors' access to online pornography.[175] As a result, he declared that the CDA was "not narrowly tailored if that requirement has any meaning at all."[176]

4. Severability

The Government's final argument was that, should the Act be deemed vague or overbroad, the unconstitutional provisions should be severed pursuant to the CDA's severability clause, 47 U.S.C. § 608,[177] and the remaining sections construed narrowly.[178] The Court refused to do so, except with respect to § 223(a), from which the phrase "or indecent" was severed to limit the provision to obscene material only.[179] Notwithstanding this immaterial severance, the Court declared the CDA as a whole facially invalid, thereby affirming the decision of the district court.[180]

Internet, legislation that could dramatically change—some would say even wreak havoc—on the Internet. The Senate went in willy-nilly, passed legislation, and never once had a hearing, never once had a discussion other than an hour or so on the floor.

Cyberporn and Children: The Scope of the Problem, The State of the Technology, and the Need for Congressional Action, Hearing on S. 892 Before the Senate Committee on the Judiciary, 104th Cong., 7-8 (1995). *Cf. Sable*, 492 U.S. at 129-30 (no evidence in Congressional Record as to how effective the FCC's ban on dial-a-porn would be).

[174] *Reno*, 117 S. Ct. at 2347.

[175] *Id.* at 2348.

[176] *Id.*

[177] Section 608 provides: "If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby." 47 U.S.C. § 608 (1994 & Supp. 1996).

[178] *Reno*, 117 S. Ct. at 2350.

[179] This change effectively eviscerated the provision, as obscene material is already a proper subject of censorship in light of the Court's decision in *Miller v. California*, 413 U.S. 15 (1973). *See supra* notes 19-23 and accompanying text (discussing *Miller*).

[180] The Government referred to a unique aspect of the CDA's severability clause, which asks a court finding the Act unconstitutional to allow it to be applied "to other persons or circumstances" that might be constitutional. *See* Appellant's Brief at 46, Reno v. ACLU, 117 S. Ct. 2329 (1997) (No. 96-511). The Court rejected this argument because the statute that allows the Court jurisdiction on an expedited basis limits that grant to suits challenging the CDA "on its face." *See supra* note 117 for the text of 47 U.S.C. § 561 (1996).

B. JUSTICE O'CONNOR'S PARTIAL DISSENT

Justice O'Connor wrote a separate opinion concurring in the judgment in part and dissenting in part.[181] She accepted the majority's position that the CDA is unconstitutional insofar as it prevents adults from exercising their right to free speech, but she believed that a more narrowly tailored statute would be permissible under *Renton*'s[182] "zoning" model.[183] In this context, Justice O'Connor viewed the CDA as an attempt to create "adult zones" in cyberspace.[184]

Justice O'Connor accepted the Government's position that § 223(d)(1) consists of two separate provisions, rather than only the "patently offensive display" provision recognized by Justice Stevens.[185] Specifically, § 223(d)(1)(A)[186] criminalizes the knowing transmission of patently offensive material to a specific person under the age of eighteen ("specific person" provision),[187] while § 223(d)(1)(B)[188] makes it a crime to display patently offensive messages or images "in a[ny] manner available" to minors ("display" provision).[189] Neither these provisions, nor § 223(a)(1)(B) ("indecency transmission" provision), intend to prevent indecent or patently offensive material from being re-

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Additionally, the Government requested that the Court observe its previous instruction that absent "countervailing considerations," a statute should "be declared invalid to the extent it reaches too far, but otherwise left intact." *See* Appellant's Brief at 46, *Reno* (No. 96-511) (citing Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503-04 (1985)). The Court declined to do so, instead finding that one of the "countervailing considerations" discussed in *Brockett* existed in the instant case. *Reno*, 117 S. Ct. at 2350. Specifically, the Court may allow a limiting construction only if the statute is "readily susceptible" to such construction. *Id.* (citing Virginia v. American Bookseller's Ass'n, 484 U.S. 383, 397 (1988); Erznoznik v. Jacksonville, 422 U.S. 205, 216 (1975)). Thus, the Court declared that the "open-ended character of the CDA provides no guidance what ever for limiting its coverage." *Id.*

[181] *Reno*, 117 S. Ct. at 2351 (O'Connor, J., concurring in part and dissenting in part). Chief Justice Rehnquist joined in Justice O'Connor's opinion.

[182] City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). *See supra* notes 50-53 and accompanying text (discussing *Renton*)

[183] *Reno*, 117 S. Ct. at 2357 (O'Connor, J., concurring in part and dissenting in part).

[184] *Id.* at 2351 (O'Connor, J., concurring in part and dissenting in part).

[185] *Id.* at 2352 (O'Connor, J., concurring in part and dissenting in part). *See supra* note 66.

[186] *See supra* note 66.

[187] *Reno*, 117 S. Ct. at 2351-52 (O'Connor, J., concurring in part and dissenting in part).

[188] *See supra* note 66.

[189] *Reno*, 117 S. Ct. at 2351-52 (O'Connor, J., concurring in part and dissenting in part).

ceived by adults, who have a First Amendment right to view or read it.[190] Justice O'Connor therefore interpreted the "undeniable purpose of the CDA" to be the segregation of the Internet's indecent material into areas inaccessible to minors.[191]

Justice O'Connor noted that the creation of "adult zones" has been long accepted by the states in a variety of contexts.[192] As such, she was willing to support the federal government's right to zone the Internet so long as it does not unduly restrict adult access and affects only material that minors have no First Amendment right to receive.[193] She recognized that the "display" provision, as well as some applications of the "indecency transmission" and "specific person" provisions, fail to comply with that limiting principle because it prevents adults from accessing constitutionally protected materials in certain circumstances.[194] Thus, in those particular circumstances only, Justice O'Connor acknowledged that she would invalidate the provisions.[195] In closing, Justice O'Connor stated that she would uphold the "indecency transmission" and "specific person" provisions insofar as they apply to Internet communications where the party transmitting the information knows that all of the recipients are minors.[196]

V. ANALYSIS

Congress has assumed a Herculean task in attempting to impose restraints on free speech over the Internet. The nature

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[190] *Id.* at 2352 (O'Connor, J., concurring in part and dissenting in part).

[191] *Id.* (O'Connor, J., concurring in part and dissenting in part).

[192] In support of this contention, Justice O'Connor enumerated statutes from 26 states and the District of Columbia banning the presence of minors in adult environments such as pool halls, taverns, and adult movie theaters. *Id.* at 2352 n.1 (O'Connor, J., concurring in part and dissenting in part).

[193] *Id.* at 2352-53 (O'Connor, J., concurring in part and dissenting in part). While the majority declined to rule on whether minors have a First Amendment right to view material regulated by the CDA, *id.* at 2348, Justice O'Connor stated that no such right exists. *Id.* at 2356 (O'Connor, J., dissenting). She listed statutes in 42 states and the District of Columbia that deny minors access to speech deemed "harmful to minors." *Id.* at 2352 n.2 (O'Connor, J., concurring in part and dissenting in part).

[194] *Id.* at 2353 (O'Connor, J., concurring in part and dissenting in part). While Justice O'Connor believes this to be the case at the present time, she urged that the development of a widely available, user-based program for screening out adult Internet sites makes "the prospects for the eventual zoning of the Internet . . . promising." *Id.* at 2354 (O'Connor, J., concurring in part and dissenting in part).

[195] *Id.* (O'Connor, J., concurring in part and dissenting in part).

[196] *Id.* at 2356 (O'Connor, J., concurring in part and dissenting in part).

and purpose of the medium is to disseminate material globally at the click of a button. At no time in history has it been so simple to transmit information to so many people at one time. While this fact makes the Internet a tremendously helpful resource, it also creates the opportunity for abuse. The wisdom of imposing restraints on speech in cyberspace is an issue this Note does not seek to address. Rather, this Note will address the *Reno* Court's choice of precedent, selection and application of a standard of review, and evaluation of the Government's zoning argument.

A. THE IMPORTANCE OF ANALOGY

The key to the Court's analysis is the selection of an analogy—some communication medium whose characteristics are so similar to those of the Internet that it is logical that the same degree of regulation as that other medium should be employed.[197] As noted by Judge Dalzell, "The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers."[198] As a new medium, the Internet seems to defy analogy to any other previously used system of information dissemination. In *Reno*, the Government pressed an analogy to the broadcast media discussed in *Pacifica*,[199] while the plaintiffs urged an analogy to the "dial-a-porn" telephone communications in *Sable*.[200] The former would give Congress wide berth in regulating Internet transmissions, while the latter would place more restrictions on any proposed regulatory scheme.

The district court, while unanimous in finding the CDA unconstitutional, was unable to settle upon a specific analogy. Chief Judge Sloviter likened the Internet to a telephone system.[201] Implicit in this analogy is the possibility that the Internet

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[197] *See generally* Jonathan Wallace & Michael Green, *Bridging the Analogy Gap: The Internet, the Printing Press and Freedom of Speech*, 20 SEATTLE U. L. REV. 711 (1997).

[198] ACLU v. Reno, 929 F. Supp. 824, 873 (E.D. Pa. 1996) (Dalzell, J.) (quoting Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring)).

[199] FCC v. Pacifica Found., 438 U.S. 726 (1978). *See supra* notes 25-32 and accompanying text (discussing *Pacifica*).

[200] Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989). *See supra* notes 33-39 and accompanying text (discussing *Sable*).

[201] "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

"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."[202] In contrast, Judge Dalzell urged that the Internet be regarded as fundamentally different than any other means of mass communication—its unique qualities frustrating any analogy to broadcasting or print.[203] He framed the Internet as a "never-ending worldwide conversation."[204] Judge Buckwalter avoided the analogy issue altogether.

Justice Stevens was clear in the analogy he selected—the Internet is like the "dial-a-porn" telephone communications in *Sable*.[205] To Justice Stevens, the crucial factor is that the Internet is less invasive than radio or television—i.e., one must take more affirmative steps to receive information in cyberspace than through broadcast media.

The *Reno* Court's reasoning is sound. Realistically, the risk of a child accidentally accessing harmfully explicit material on the Internet is quite low.[206] A carefully worded search on a Web browser will exclude the vast majority of pornographic sites. For those whose abstracts still appear, a user must specifically select offensive sites in order for them to appear on the screen.[207]

Similarly, a person may only access pornographic messages via the telephone by dialing a specific number. As noted by the Court, this is fundamentally different from radio or television, where unwanted content may simply appear without the consent of the person listening or watching.[208] The Internet, while not similar to the telephone in all respects, requires an analogous effort on the part of a person wishing to receive information.

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information online." *Reno*, 929 F. Supp. at 851-52 (Sloviter, C.J.). *See* Wallace & Green, *supra* note 197, at 738.

[202] *Reno*, 929 F. Supp. at 872-77 (Sloviter, C.J.). *See* Wallace & Green, *supra* note 197, at 738.

[203] *Reno*, 929 F. Supp. at 881 (Dalzell, J.).

[204] *Id.* at 883 (Dalzell, J.).

[205] Reno v. ACLU, 117 S. Ct. 2329, 2346 (1997).

[206] *See supra* note 79 and accompanying text.

[207] This would not necessarily be the case if a person posting information on the Internet were to disguise its contents such that the abstract received was not indicative of any "adult" material. In this case, pornographic content could appear before children without their having any intent to receive it. The Court correctly did not address this issue, as the district court made no mention of the possibility.

[208] *Reno*, 117 S. Ct. at 2343-44.

B. WHAT LEVEL OF SCRUTINY IS APPROPRIATE?

The Supreme Court validated the district court's application of strict scrutiny for the CDA.[209] In doing so, the Court acted consistently with established First Amendment case law wherein statutes regulating protected speech traditionally have been held to strict scrutiny, warranted by the critical importance of the First Amendment.[210] This standard of review requires that a court analyze whether the questionable statute was enacted to serve a compelling interest, and whether the statute is narrowly tailored to effectuate that interest.[211] While the Court found a compelling governmental interest in preventing access by minors to harmful material,[212] the majority held that the CDA was unconstitutionally overbroad in that it interfered with the right of adults to engage in protected speech.[213]

The Court was correct in finding that Congress has a strong and legitimate interest in protecting minors from the vast array of pornographic material available on the Internet.[214] Few would disagree that allowing minors to view such material serves no important function, and, in fact, may be harmful. While the majority avoided the issue,[215] the dissent went so far as to find that minors have no constitutional right to view material that is indecent or patently offensive.[216]

However, the Government acts unconstitutionally when, either purposefully or incidentally, it prevents adults from transmitting or receiving material that is not obscene.[217] Therefore, in order to legislate pursuant to its interest, Congress may only

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[209] *Id.* at 2346.

[210] *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (finding unconstitutional an ordinance prohibiting violence-inciting speech related to specific topics); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989) (invalidating total ban on indecent "dial-a-porn" telephone communications).

[211] *See Sable*, 492 U.S. at 126 ("The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.").

[212] *Reno*, 117 S. Ct. at 2346.

[213] *Id.* at 2346-48.

[214] *Id.* at 2346.

[215] *Id.* at 2348.

[216] *Id.* at 2356 (O'Connor, J., concurring in part and dissenting in part) (citing Ginsberg v. New York, 390 U.S. 629, 633 (1968)).

[217] *Id.* at 2346.

restrict the access of minors to the Internet while preserving the rights of adults.[218]

The unique attributes of the Internet make the Government's task a difficult one.[219] Once a person places information on a Web page or bulletin board, that person has little control over, or knowledge of, who gains access to it.[220] Despite the availability of screening programs, preventing minors from accessing indecent material while safeguarding adults' right to do so is technologically infeasible at this time.[221] Without requiring the use of a credit card to access information, which for some is prohibitively expensive, a person who posts material on the Internet can never be sure that no minor will access that information.

Compounding this problem is the fact that the wording of the CDA is so imprecise. References to "indecent" or "patently offensive" material are so vague as to be incapable of real-world application.[222] It is incomprehensible how Congress could pass a bill containing such language, until one realizes that the CDA was enacted with virtually no examination on the floor of Congress or in committee sessions.[223] If Congress attempts to pass the CDA again (and it almost certainly will), specific language must be inserted in the statute explicitly describing what acts or depictions will be subjected to its restrictions. Barring such amendments, the chilling effect caused by the legislation will continue, and it may be found unconstitutional again.

Furthermore, the dispute over whether § 223(d)(1) is one provision or two is of little practical importance. Justice O'Connor conceded that the "display" provision is unconstitutional.[224] Her view of the statute was that the "specific person" provision is constitutional to the extent that it is applied to transmissions where the sender knows that all the recipients are under eighteen years old.[225] Justice O'Connor would sustain the

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[218] *Id.* at 2346-47.

[219] *See supra* note 142.

[220] *See* ACLU v. Reno, 929 F. Supp. 824, 854 (E.D. Pa. 1996).

[221] *See id.*

[222] *Reno*, 117 S. Ct. at 2344.

[223] *See supra* note 173.

[224] *Reno*, 117 S. Ct. at 2354 (O'Connor, J., concurring in part and dissenting in part).

[225] *Id.* at 2355-56 (O'Connor, J., concurring in part and dissenting in part).

"indecency transmission" and "specific person" provisions in these circumstances.[226] Were the Court not statutorily constrained to analyze the plaintiffs' suit as a facial challenge,[227] Justice O'Connor's preferred construction would be a valid one. However, the expedited review provision only allowed the Court to declare the CDA valid or invalid—a fact ignored by Justice O'Connor.[228] The majority was correct in sustaining the district court's holding that the CDA was facially unconstitutional.

C. FACIAL CHALLENGES AND THE ROAD LESS TRAVELED

A different opportunity would have been presented had the Government opted to litigate the matter at the appellate court level.[229] While 47 U.S.C. § 561 grants the Government the right to appeal directly to the Supreme Court, nothing in the statute *requires* the Government to take that route.[230] Assuming that the plaintiffs had won at the appellate level, and the Supreme Court granted certiorari,[231] the Court would have been free to limit the application of the CDA to certain circumstances. In this situation, the majority might have been more inclined to follow Chief Justice Rehnquist and Justice O'Connor in validating the CDA as it applies to transmissions purposefully and knowingly sent to specific persons under the age of eighteen.[232]

D. ZONING

The most intriguing issue raised by *Reno v. ACLU* is whether Congress legitimately may place restrictions on Internet communications under a zoning rationale. The use of zoning laws

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[226] *Id.* (O'Connor, J., concurring in part and dissenting in part).

[227] *See supra* note 117 for the text of 47 U.S.C. § 561(a).

[228] *See Reno*, 117 S. Ct. at 2356 (O'Connor, J., concurring in part and dissenting in part).

[229] The Government appealed directly to the Supreme Court from the district court pursuant to 47 U.S.C. § 561(b). *See supra* note 143 for the text of § 561(b).

[230] *Id.*

[231] Of course, the failure of the Court to grant certiorari is the most apparent risk of this approach.

[232] If Congress opts to enact a revised version of the Communications Decency Act, it would be well advised to emphasize the application of the statute to users who send indecent messages to people under the age of 18, with the knowledge that they are doing so. Justice O'Connor and Chief Justice Rehnquist would certainly uphold such a statute, and, in light of *Ginsberg v. New York*, 390 U.S. 629 (1968), the remaining Justices would probably be more willing to do so if no significant chilling effect is foreseeable. Such a statute would, however, contain within its scope only a small percentage of Internet transmissions.

for the regulation of speech is merely an attempt to suppress non-obscene expression the government would be otherwise unable to control. To prevent disingenuous circumvention of the First Amendment, courts should subject this type of legislation to the strictest scrutiny. Zoning laws should be upheld only when they are directed at all uses of land which create deleterious secondary effects, without regard to the subject matter of the speech in question. Justice O'Connor and Chief Justice Rehnquist would go to lengths to allow such regulation, while the majority is more reluctant to do so.

Under *City of Renton v. Playtime Theaters, Inc.*, a state may adopt legislation restricting indecent, non-obscene speech if, in doing so, it seeks to prevent the secondary effects of that speech.[233] In the context of the Internet, an obvious question arises—what secondary effects could possibly result? It is implicit in the dissenting opinion that Justices O'Connor and Rehnquist would view harm to children as a secondary effect if Congress framed the statute as such.[234] If this is the case, however, it is not at all clear what is the *primary* effect of pornography on the Internet. Thus, the argument set forth by Justice O'Connor is mere sophistry. A "zoning" law is no more than the type of content-based regulation explicitly denounced in *R.A.V. v. City of St. Paul.*[235]

Justice O'Connor apparently does not find this troubling. Her willingness to allow Congress to circumvent the First Amendment not only undermines the Court's position as the ultimate protector of constitutional rights, but also encourages Congress to use creative theories for restricting the rights of Americans to participate in free speech. If, at some future time, the Court upholds a statute restricting speech on the Internet under a zoning rationale, the very essence of the First Amend-

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[233] *See supra* notes 51-53 and accompanying text (discussing *Renton*). Secondary effects envisioned by the Court's precedent include crime and decreased property values. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1985).

[234] *See* Reno v. ACLU, 117 S. Ct. 2329, 2353-54 (1997) (O'Connor, J., concurring in part and dissenting in part).

[235] 505 U.S. 377 (1992) (finding facially invalid a Minnesota statute imposing special prohibitions on expression of matters concerning race, color, creed, religion or gender, while permitting abusive displays concerning other topics). *See also* U.S. Sound & Service, Inc. v. Township of Brick, 126 F.3d 555, 559 (3d Cir. 1997) ("The impact of protected speech on minors is a direct, rather than a secondary, effect, and a regulation that singles out non-obscene sexually explicit material because of its impact on minors is not content-neutral.").

ment would be endangered; virtually anything could have an impact on property values or crime rates.[236] Little could prevent Congress, under a zoning rationale, from declaring that radical political discourse engaged in on a street corner is subject to regulation for its effect on the surrounding neighborhood. A communist bookstore which might tend to decrease the value of surrounding property[237] could, under Justice O'Connor's analysis, be constitutionally regulated. The majority's reluctance to embrace "cyberzoning" is prudent—the logical implications of suppressing speech based upon a zoning paradigm threaten the fundamental tenets of the Bill of Rights.

Furthermore, utilizing the zoning paradigm for regulation of this type raises an equal protection issue.[238] Congress passed the Communications Decency Act to prevent harm to children.[239] However, sexually explicit material is not the only speech on the Internet capable of causing this type of damage. The Internet abounds with sites containing equally harmful material; Websites advocating racism, violence, and sexism exist in large numbers.[240] In passing the CDA, Congress made no at-

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[236] The zoning rationale is also novel in that it regards the value of private property as a governmental interest worthy of being balanced against an individual's First Amendment right to free expression. While the preservation of national order and the prevention of imminent harm have been used by the Court to justify restrictions on protected speech, *R.A.V.* and the *Reno* dissent regard maintaining property values as a sufficient interest. This is a disturbing trend. Balancing a private property interest against a fundamental right seems antithetical to the judgment expressed by the framers in the First Amendment.

[237] The Court in *Renton* rejected the notion that a zoning regulation must be accompanied by a study outlining the effects of the contested land use in the city. *Renton*, 475 U.S. at 50. Rather, the Court merely required the city to provide evidence that deleterious effects have occurred in other areas (in Renton's case, a Seattle study was used), and that the city reasonably believes such effects will occur. *Id.* at 51.

[238] Section 1 of the Fourteenth Amendment reads in relevant part: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws. . . ." U.S. CONST. amend. XIV, § 1.

[239] *See Reno*, 117 S. Ct. at 2334.

[240] *See, e.g.*, White Civil Rights Now (visited Oct. 23, 1997) <http://www.k-k-k.com/> (homepage of the national office of the Knights of the Ku Klux Klan); Stormfront (visited Oct. 23, 1997) <http://www.stormfront.org/> (self-proclaimed White Nationalist Resource Page); Misogyny Unlimited (visited Oct. 23, 1997) <http://www.oemail.com.au/~ksolway/misogyny.html> (a list of links "especially unpopular with women"). These sites represent a number of similar sites found over the course of one evening on the World Wide Web. They represent only a small fraction of the whole, and the number of such sites will surely proliferate as the Internet continues to expand. *See also* Kelly R. Damphousse & Brent L. Smith, *The Internet: A Terrorist Medium for the 21st Century*, *in* THE FUTURE OF TERRORISM: VIOLENCE IN THE NEW MILLENIUM 213-24 (Harvey W. Kushman ed., 1998).

tempt to protect minors from the deleterious effects of such non-obscene speech, but chose to single out pornographers for criminal punishment. This unreasoned policy clearly implicates the Equal Protection clause.

The Court addressed the issue of underinclusion in *Renton*, where the city failed to pass zoning legislation aimed at adult businesses other than movie theaters. The Court reasoned that the city's concentration on theaters was understandable because no other adult businesses existed in Renton.[241] The Court further remarked that there was nothing to indicate that Renton would not regulate against other adult businesses in the future, should the need arise.[242]

There is a critical distinction between the situation in *Renton* and that in *Reno v. ACLU*. In passing the CDA, Congress ignored material on the Internet which can harm children, except where pornography is involved.[243] Nothing indicates that Congress will ever attempt to regulate these other types of Internet postings. Thus, to apply a zoning rationale not only would be contrary to the purposes expressed in *Renton*, but also would violate the Equal Protection Clause of the Fourteenth Amendment.

To avoid such a violation, Congress must seek out all sources of harm to children, and legislate against them in a uniform manner. To do otherwise is to discriminate against purveyors of sexually explicit messages while ignoring those who transmit non-sexual, but equally harmful, messages. If the secondary effect of harm to children really is the subject of congressional concern, the only content-neutral means of eliminating this effect is to examine *all* of its sources. The Government's use of the term "content-neutral" to describe zoning legislation is therefore misleading.

The truly content-neutral approach is one in which Congress makes a bona fide effort to inquire into the sources of the harm about which it is concerned, disregarding both subject matter and medium in its analysis. Only after ferreting out these sources should Congress create a legislative scheme to deal with them. This *a posteriori* analysis is the only way to pre-

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[241] City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 52 (1985).

[242] *Id.* at 52-53.

[243] *See supra* note 240 and accompanying text.

vent Congress from cherry-picking forms of protected speech for regulation. Arbitrarily selecting instances of free expression threatens to erode the protection the framers sought to protect so forcefully.

VI. CONCLUSION

By invalidating the Communications Decency Act of 1996 in *Reno v. ACLU*, the Supreme Court has ensured the right of Americans to converse in a constitutionally protected manner on the Internet. Congress's failure to carefully craft the language of the CDA to conform to its narrow prerogative in the area of censorship was properly noted by the Court. Perhaps a more narrowly tailored law could pass strict judicial scrutiny in the future, but such a law would necessarily regulate only a small number of communications—specifically, those that are obscene or intentionally directed at an audience of minors.

The Internet will remain, at least for some time, free of artificial restrictions. As a medium, it is not free of faults; the ease with which users may access information creates the potential for real and significant harm. However, this same characteristic makes the Internet the most valuable communication tool developed since the printing press. The necessity of protecting the right of Americans to engage in uninterrupted discourse is manifest: "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."[244]

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[244] ACLU v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996) (Dalzell, J.).