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TOWARD A CONSTITUTIONAL REGULATION OF MINORS' ACCESS TO HARMFUL INTERNET SPEECH

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INTRODUCTION

In his article *On Protecting Children from Speech*, Amitai Etzioni argues forcefully in favor of the importance, and the feasibility, of protecting minors—especially younger minors—from harmful speech.[1] He laments the fact that courts, in condemning Congress's efforts to regulate minors' access to harmful Internet speech, have focused almost exclusively on protecting the First Amendment rights of *adults*—at the expense of the interests of minors. Adverting to the problem of what we might call "minor-to-adult spillover" in such legislative efforts, courts have emphasized the ways in which such legislation has burdened adults' free speech rights, and have failed to focus sufficiently on minors' more limited free speech rights and on the beneficial effects such legislation may have on protecting minors from harm. Etzioni contends that regulators have failed in their efforts to regulate minors' access to harmful speech because they have not regulated in a careful enough manner so as to avoid or reduce minor-to-adult spillover. He suggests that more careful regulation is both technically feasible and constitutionally desirable. Indeed, he contends, the technology exists to facilitate a finely-honed version of Internet speech regulation that would enable regulators to restrict older minors' (*i.e.*, teenagers') access to certain categories of speech, while restricting younger minors' (*i.e.*, children's) access to other categories of speech, without impinging upon adults' free speech rights.

I substantially concur with these contentions and in this Article undertake a technological and doctrinal inquiry into precisely how

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1. Amitai Etzioni, *On Protecting Children from Speech*, 79 CHI.-KENT L. REV. 3 (2004).

regulators might overcome the manifold constitutional obstacles that courts have repeatedly held stand in the way of regulating minors' access to harmful Internet speech. In so doing, in Part I of this Article, I first review the ways in which Congress has failed in its efforts over the past decade to craft a constitutional regulation of minors' access to harmful Internet content. Because these efforts involve content-based restrictions of speech that are disfavored under First Amendment jurisprudence, and because these efforts to restrict *minors'* access to such content have the spillover effect of also restricting *adults'* access to such content, courts have closely scrutinized these efforts. The obstacles to crafting a constitutional regulation of minors' access to harmful Internet speech appear at this stage to be daunting and manifold. I closely examine the constitutional flaws such regulations were found to embody, with an eye toward considering whether and how these constitutional infirmities are remediable. In Part II, I apply the lessons learned from Congress's failed efforts, and consider in particular whether and how the use of filtering software to restrict only *minors'* Internet access to harmful sexually-themed speech in public libraries and public schools could be constitutionally implemented. In so doing, I work through the nuances of several complex First Amendment doctrines, including those involving content-based regulations of expression and prior restraints on protected speech. I examine in particular the proposal advanced by Etzioni (and favorably received by the judiciary[2]) of subdividing the category of "minors" into *older minors* and *younger minors* (with perhaps even further subdivisions) for purposes of finely and narrowly tailoring the regulation of minors' access to harmful Internet speech.

I. CONGRESS'S EFFORTS TO REGULATE MINORS' ACCESS TO HARMFUL INTERNET CONTENT

Over the past decade, Congress has undertaken three major efforts to regulate minors' access to harmful Internet speech—the Communications Decency Act of 1996 ("CDA")[3], the Child Online Protection Act of 1998 ("COPA")[4], and the Children's Internet Pro-

2. *See infra* text accompanying notes 65–75 (discussing the Third Circuit's COPA decision on remand).

3. Pub. L. No. 104-104, 110 Stat. 133 (codified as amended at 47 U.S.C. § 223 (2000)).

4. Pub. L. No. 105-277, 112 Stat. 2681-736 (codified at 47 U.S.C. § 231 (2000)).

tection Act of 2000 ("CIPA").[5] Each of these regulations has been challenged as violative of the First Amendment, and the first two have been struck down as unconstitutional. Although the Supreme Court recently rejected a facial challenge to CIPA, it indicated that an as-applied challenge to the statute might be successful. While Congress has attempted to learn from the constitutional infirmities found in earlier-enacted legislation, it has had difficulty crafting a regulation of minors' access to harmful Internet content that will survive the scrutiny applicable to content regulations.

Many liberal theorists have condemned Congress's efforts to regulate minors' access to harmful speech,[6] while conservative theorists have bemoaned the intricate and well-settled First Amendment jurisprudence that has rendered these legislative efforts constitutionally infirm.[7] My approach differs from each of these. By attending carefully to the constitutional flaws in Congress's legislative forays in this arena, I undertake the constructive project of setting forth specifications for a constitutional regulation of minors' access to harmful Internet speech.

A. The Communications Decency Act of 1996

Congress's first attempt to regulate minors' access to harmful Internet speech was embodied in the Communications Decency Act of 1996. Reacting to (since discredited) reports that a substantial percentage of the content available on the Internet contained hard-core pornography (and other harmful sexually-themed expression)[8], Congress sought to criminalize the transmission of such pornographic materials where such transmissions were available to minors. Such regulation was complicated by a number of factors. First, as a content-based restriction of speech, this regulation would be deemed pre-

5. Pub. L. No. 106-554, 114 Stat. 2763A-335 (codified at 20 U.S.C. § 6777, 20 U.S.C. § 9134, 47 U.S.C. § 254(h) (2000)). Because it raises separate issues and has developed within a distinct line of First Amendment jurisprudence, I leave to others a discussion of Congress's efforts to restrict access to *child* pornography on the Internet. *See, e.g.*, Symposium, *The Fate of the Child Pornography Act of 1996*, 23 CARDOZO L. REV. 1993 (2002).

6. *See, e.g.*, Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223 (1999).

7. *See, e.g.*, Catherine J. Ross, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 436 n.27 (2000) (citing examples of such legal scholarship).

8. *See, e.g.*, Barry Glassner, THE CULTURE OF FEAR: WHY AMERICANS ARE AFRAID OF THE WRONG THINGS (1999) (describing unfounded and/or misleading data that fed public paranoia about influence on America's children, including "cybersmut").

sumptively unconstitutional and subject to exacting scrutiny.[9] Second, given the state of technology and the means of regulation chosen, such regulation inevitably restricted the constitutional right of adults to access non-obscene sexually-themed expression—a right that the Supreme Court has taken pains to protect in the face of various governmental censorial efforts over the past years. Third, even to the extent that it restricted minors' access to sexually-themed expression, the legislation failed to adequately protect *minors'* (less robust) right to access sexually-themed expression. In short, to get such legislation right, Congress would need to either (1) understand and protect minors' right to access sexually-themed expression and limit the legislation's reach and effect to minors, or (2) understand and protect minors' limited constitutional right to access sexually-themed expression, and understand and protect adults' broad constitutional right to access sexually-themed expression, and ensure that the legislation effected no spillover from one category to the other.

Accordingly, in crafting the CDA, Congress would have been well-advised to begin its undertaking with a focus on the Supreme Court's finely-tuned obscenity jurisprudence[10] and its derivative jurisprudence of indecency or obscenity-for-minors.[11] While "obscene" speech, properly defined, is wholly outside the protection of the First Amendment—for any and all speakers and listeners—"obscene-for-minors" speech is speech that adults have a constitutional right to access (and engage in), while minors do not. The government therefore has a legitimate[12] interest in restricting minors' access to obscene-for-minors speech, but does *not* have a legitimate interest in restricting *adults'* access to such speech. In order to restrict *adults'* access to sexually-explicit speech, such speech must be found to satisfy the legal definition of obscenity.[13]

Several principles follow from this basic structure of First Amendment jurisprudence regarding sexually-explicit speech. First, adults have a constitutional right to access obscene-for-minors speech, while minors do not. Second, the *definitions* of "obscene" and

9. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) (holding that the government cannot restrict speech on account of its content, "subject only to narrow and well-understood exceptions").

10. *See infra* text accompanying notes 16–27.

11. *See infra* text accompanying notes 28–41.

12. As described *infra*, it is unclear precisely what type of showing needs to be made by the government in regulating minors' access to sexually-themed expression.

13. *See infra* text accompanying notes 16–18.

"obscene-for-minors" speech are of critical importance, because they set off First Amendment-protected speech from unprotected speech. Third, because of the differences in their First Amendment rights, it is of critical importance to be able to distinguish between adults and minors. In crafting the CDA, which sought to restrict minors' access to harmful, sexually-themed expression on the Internet, Congress paid insufficient attention to each of these principles. In purporting to restrict minors' access to such content, Congress failed to adequately define the unprotected speech—*viz.*, indecent or obscene-for-minors speech—in a constitutionally-permissible manner, and failed to adequately protect *adults'* constitutional right to access indecent or obscene-for-minors speech.

First, because the definitions of "obscene" and "obscene-for-minors" speech set off unprotected speech from protected speech, these definitions are of critical constitutional importance. The Supreme Court struggled for decades[14] to articulate a meaningful set of standards to be embodied within such definitions. After struggling to define a meaningful test for distinguishing First Amendment-protected sexually-explicit speech from unprotected obscene speech,[15] in 1973 the Supreme Court set forth this test once and for all in the case of *Miller v. California*.[16] In order for sexually-themed speech to fall outside the protection of the First Amendment for adults, the three-pronged *Miller* test requires a determination of:

> (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.[17]

Because the Supreme Court has repeatedly made clear that *Miller* sets forth the definitive standard for regulating obscene

14. *See, e.g.*, Roth v. United States, 354 U.S. 476 (1957); Miller v. California, 413 U.S. 15, 20–23 (1973).

15. Other categories of unprotected speech include "fighting words" and "defamation." *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992) (recognizing that obscenity, defamation, and fighting words are not protected categories of speech).

16. 413 U.S. at 24.

17. *Id.* (internal citation omitted).

speech,[18] it is important for us—and for Congress—to focus carefully on each of the three prongs of this test. Importantly, if sexually-themed expression falls outside of this *Miller*-required definition of obscene speech, adults enjoy a constitutional right to access it,[19] which the government cannot constitutionally restrict or impair.

First, *Miller* makes clear that obscenity is to be judged by a *local, community standard*—in particular, by the standard of the average member of the community, applying contemporary *community standards* to assess whether the expression at issue, taken as a whole, appeals to the prurient interest. This prong of the *Miller* test grants local (geographically-defined) communities the autonomy to draw the line between sexually-themed speech that is to be protected by the First Amendment within and for their respective communities, and sexually-themed speech that is to be deemed outside of the First Amendment's protection within and with respect to their communities.[20] Thus, although it might seem that the First Amendment sets forth a *national* standard of protection for expression, in the context of regulating sexually-themed speech, the Supreme Court's obscenity jurisprudence grants individual local communities the autonomy to determine what subset of such speech (if any) is to be deemed outside the protection of the First Amendment within and with respect to their communities.

An inevitable concomitant of such communities' autonomy is the potential geographical variation in the classification of speech as obscene. Accordingly, the community of Salt Lake City may classify as obscene and as unprotected by the First Amendment expression that may be deemed protected and not obscene by the community of New York City. As the Supreme Court, recognizing the geographic variability in the definition of obscenity, explained in *Miller*:

> Our nation is simply too big and too diverse . . . to reasonably expect that . . . fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive" . . . could be articulated for all 50 states in a single formulation. . . . To require a State to structure obscenity proceedings around evidence of a *national* "community standard" would be an exercise in futility. . . . It is neither realistic nor constitutionally sound to read the First

18. *See, e.g.*, Jenkins v. Georgia, 418 U.S. 153, 157 (1974); Pope v. Illinois, 481 U.S. 497, 500–01 (1987).

19. This is assuming that the sexually-themed expression also does not fall within a constitutional definition of child pornography. *See* text accompanying note 5.

20. *But see* Ashcroft v. ACLU, 535 U.S. 564, 587 (2002) (O'Connor, J., concurring) ("Our precedents do not forbid adoption of a national standard.").

> Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.... People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.[21]

Second, *Miller* requires that, in order to regulate obscene content, the regulator (whether the federal, state, or local government) must specifically define the sexual acts, the descriptions or depictions of which will be deemed to be patently offensive under contemporary community standards.[22] The requirement that regulators set forth these acts with specificity helps to reduce the potential for unconstitutional vagueness within obscenity statutes.[23] This specific determination of patent offensiveness, like the determination of appeal to the prurient interest, is also to be made by the average member of the geographically local community.[24] Thus, both the assessment of appeal to the prurient interest, and the assessment of patent offensiveness, are subject to geographic variability.

Local communities' autonomy under *Miller* to determine which speech appeals to the prurient interest and is patently offensive is not unfettered, however. In assessing local communities' determinations of obscene speech, the third prong of *Miller* requires that *judges* retain the power to determine whether such speech nonetheless has redeeming serious social value—*i.e.*, literary, artistic, political, or scientific value—and therefore whether such speech is protected by the First Amendment regardless of its assessment by local communities.[25] Because this determination is ultimately to be made by appellate courts and not by jury members, this "savings clause" provides an objective floor to local communities' power to determine which sexually-themed expression is unprotected by the First Amendment. As the Supreme Court has explained, "the serious value requirement allows appellate courts to impose some limitations and regularity on the definition [of obscenity] by setting, *as a matter of law*, a national floor for socially redeeming value."[26]

21. 413 U.S. at 30, 32, 33.

22. *Id.* at 24–25.

23. *See* Reno v. ACLU, 521 U.S. 844, 873 (1997).

24. *See ACLU*, 535 U.S. at 576 n.7 ("[T]he 'patently offensive' prong of the test is also a question of fact to be decided by a jury applying contemporary community standards.").

25. *See, e.g.*, Jenkins v. Georgia, 418 U.S. 153 (1974) (reversing jury verdict where film in question was not patently offensive under the *Miller* standard).

26. *See ACLU*, 535 U.S. at 579 (internal citation omitted) (emphasis in original). Thus, even if a less "tolerant" community made the determination that a certain edition of *The Joy of Sex* was obscene and unprotected by the First Amendment, *Miller* requires that such determina-

In short, *Miller* embodies a principle of geographical variability of obscene expression, under which the determination of whether expression is deemed obscene and therefore unprotected or not obscene and therefore protected may vary from one local community to the next. Under *Miller,* each community enjoys the autonomy to make these determinations within the geographical boundaries of their own community. All determinations of obscenity made by communities, however, can be checked by an appellate court's determination under the *Miller* savings clause that such content is nonetheless protected because it has serious social value.

An analysis of First Amendment jurisprudence also makes clear that determinations of obscenity are not only *geographically* variable, but that such determinations also vary based on the *age* of the individuals who seek access to such expression. *Ginsberg v. New York,*[27] and related cases,[28] make clear that legislators may constitutionally restrict minors' access to speech that they cannot constitutionally restrict adults' access to, provided they are careful not to restrict adults' rights (including adults' rights qua *parents*[29]) within such legislation.

In *Ginsberg*, the Supreme Court upheld the seemingly commonsense principle[30] that minors' First Amendment rights to access sexually-explicit content are more limited than adults' rights to access such material. The Court upheld a New York statute that regulated minors' access to content that fell within the statute's definition of "obscene for minors."[31] The statute at issue, which was primarily aimed at restricting the sale of "girlie" magazines to minors, prohibited selling to individuals age sixteen and under material that was considered

tions be second-guessed by the judicial branch, which has the responsibility for applying this *Miller* savings clause to declare that the expression at issue nonetheless has serious redeeming social value and is therefore protected by the First Amendment. Accordingly, despite the fact that a local jury in Georgia, applying its state obscenity statute, determined that the Academy Award-winning film *Carnal Knowledge* appealed to the prurient interest and described sexually conduct in a patently offensive manner, the court in that case enjoyed and exercised the power to determine that the work nonetheless enjoyed serious literary value. The court was therefore able to rescue the film from the jury's classification of it as obscene and unprotected by the First Amendment. *See Jenkins*, 418 U.S. at 153.

27. 390 U.S. 629 (1968).

28. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978).

29. *See infra* text accompanying notes 37–39.

30. This principle was not commonsensical to the plaintiff in that case, who advanced "the broad proposition that the scope of the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend upon whether the citizen is an adult or a minor." *Ginsberg*, 390 U.S. at 636.

31. *Id.* at 631–33.

obscene for minors even though not obscene for adults.[32] In accordance with the Supreme Court cases prior to *Miller* that required the inclusion of a savings clause in order to uphold the regulation of obscene speech,[33] the statute at issue in *Ginsberg* included within its definition of speech that was obscene for minors a savings clause for speech that had redeeming social importance to minors, as well as a community standards component for determining whether the expression was patently offensive.[34]

In sanctioning a two-tiered, age-dependent approach to regulating obscene content, in which states were granted greater latitude to regulate minors' access than adults' access to sexually-themed expression, the Supreme Court first emphasized its long-established principle respecting "parents' claim to authority in their own household to direct the rearing of their children[, which] is basic in the structure of our society."[35] The Court observed that "parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility."[36] Apparently concluding that the prohibitions in the New York statute aided parents (and those standing *in loco parentis*) in discharging these responsibilities, the Court looked favorably upon the statute's purposes. The Court also placed emphasis on the fact that the statute's operation did not usurp parental autonomy to determine what material was suitable for their children, in that the statute's "prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children."[37] While the statute's prohibition on the dissemination of obscene-for-minors speech might therefore be thought to aid parents in the discharge of their parental duties, had the statute gone as far as to *remove* from parents the authority to determine what material was suitable for their children, it would have been constitutionally infirm.

The *Ginsberg* Court also recognized that, in addition to *parents'* interest in regulating their children's access to harmful speech, the State enjoyed an independent interest in the well-being of minors that

32. *Id.* at 645–47.

33. *See* Roth v. United States, 354 U.S. 476, 487 (1957) ("The portrayal of sex, *e.g.* in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.").

34. *Ginsberg*, 390 U.S. at 646.

35. *Id.* at 639.

36. *Id.*

37. *Id.*

provided a separate justification for regulating minors' access to harmful speech.[38] Toward this end, the Court observed that:

> While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designated to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults.[39]

Ginsberg therefore stands for the principle that minors' access to speech can be regulated under a standard different than the standard by which adults' access to speech is regulated, so long as certain safeguards are included within such regulation. Such safeguards include primarily those definitional safeguards set forth in *Miller* tailored to apply to minors, including a patently offensive and prurient interest analysis undertaken in light of contemporary community standards and a savings clause for speech that has redeeming social importance for minors. The constitutional requirement of including a savings clause in this context makes clear that any such regulation must preserve minors' access to expression that has serious literary, artistic, scientific, or political value for them.

Now, back to 1996 and the problem of regulating minors' access to harmful sexually-themed expression on the Internet. Because Congress, in drafting the Communications Decency Act, sought to restrict the dissemination of sexually-themed expression to Internet users, it was obliged to not restrict or impair *adults'* constitutional right to access sexually-themed expression that falls outside of the carefully delineated guidelines for a constitutional definition of obscenity set forth in *Miller.* Furthermore, in drafting the CDA, Congress sought to regulate minors' access to sexually-themed content that was unprotected—because it was indecent or obscene—*for minors.* With *Miller, Ginsberg*, and other relevant precedents in hand, in addressing the issue of minors' access to harmful speech on the Internet, Congress might have chosen to carefully craft a regulation of minors' access to obscene-for-minors (as well as other unprotected) content on the Internet, while at the same time carefully preserving adults' right to

38. *Ginsberg*, 390 U.S. at 640.

39. *Id.* (quoting People v. Kahan, 206 N.E.2d 333, 334–35 (N.Y. 1965) (Fuld, J., concurring)).

access content that was protected for adults, including obscene-for-minors content. However, Congress was not careful in drafting the CDA, and the Supreme Court properly took Congress to task for its carelessness.

First, Congress failed to align its statutory definitions of unprotected speech with the definitions of obscene and obscene-for-minors speech set forth in *Miller* and *Ginsberg*, rendering the CDA's definitions of unprotected speech vague and overbroad.[40] Beyond the problems of vagueness and imprecision in the definitions Congress

40. The CDA's efforts to regulate minors' access to harmful Internet content were set forth in two provisions. First, the CDA criminalized the knowing transmission of "obscene *or indecent*" messages to any recipient under eighteen years of age. 47 U.S.C. § 223(a)(1)(B)(ii) (2000) (emphasis added). Second, the CDA criminalized the knowing sending or displaying to any person under eighteen any message "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." 47 U.S.C. § 223(d) (2000). The Act provided certain affirmative defenses to these two criminal prohibitions, including for those who undertook "good faith, . . . effective . . . actions" to restrict access by minors to the prohibited communications and those who restricted such access by requiring proof of age, such as a verified credit card or an adult identification number. 47 U.S.C. § 223(e)(5) (2000). Given the substantial emphasis that the Supreme Court has placed on carefully defining speech that is obscene and obscene for minors, it is surprising that Congress chose not to follow closely the mandates set forth in *Miller* and *Ginsberg* in drafting the CDA. Although the Supreme Court, in reviewing the CDA's provisions, found that the term "obscene" in the statute could be construed to incorporate the *Miller*-inspired and constitutionally-approved definition from the criminal obscenity statute, the Court found that the Congress's failure to precisely define "indecent" in a constitutional manner rendered this provision constitutionally infirm. Reno v. ACLU, 521 U.S. 844, 883 (1997). The Supreme Court held that the provision of the CDA restricting the transmission of *obscene* speech was severable from the unconstitutional provisions restricting the transmission of *indecent* material, and was constitutional. *Id.* Because the term "indecent" enjoys no constitutionally-defined meaning, the Court concluded that Section 223(a) was impermissibly vague, in that it failed to define with precision the content to be proscribed, and failed to adhere to the strictures of *Miller*, *Ginsberg*, and related precedent for defining such proscribed content. *Id.*

The Supreme Court also held that Section 223(d) of the Act was constitutionally infirm. Although the drafters of this subsection included a *subset* of the relevant definitional language from *Miller*, they indelicately cobbled together parts of *Miller*'s three constitutionally required prongs, resulting in an unconstitutional amalgam of *Miller*'s carefully delineated definitional language. In this subsection, Congress included a portion of *Miller's* patently offensive prong, coupled with only the contemporary community standards language of the prurient interest prong, while failing to provide any savings clause whatsoever to exempt from the provision's reach content that has serious social value. In chastising Congress for failing to carefully adhere to the required definitional analysis set forth in *Miller,* the Supreme Court explained:

> [The uncertainty caused by CDA's vagueness] undermines the likelihood that it has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials. . . . Just because a definition including three limitations is not vague, it does not follow that one of those limitations, standing by itself, is not vague. Each of Miller's additional two prongs [beyond the "patently offensive" prong] critically limits the uncertain sweep of the obscentity definition.

Id. at 871, 873. While the Supreme Court in *Reno v. ACLU* recognized, following *Ginsberg*, that governments have an interest in protecting children from potentially harmful materials, the Court reiterated that governments must pursue any such content-based restrictions in a manner that avoids unconstitutional vagueness in its definitions and that employs the least restrictive means possible.

adopted to set apart sexually-themed expression that was unprotected for minors from sexually-themed expression that was protected for minors, Congress also failed to adequately protect *adults'* constitutional right to access Internet expression that was unprotected for minors but nonetheless protected for adults. Because of the formidable technological difficulty of ensuring that Internet communications that are unprotected for minors are communicated only to adults, the CDA's provisions essentially operated to restrict adults from engaging in and accessing constitutionally-protected expression for them. Thus, the CDA "inevitably curtail[s] a significant amount of adult communication."[41]

Furthermore, the CDA failed to protect parents' autonomy to determine what material their children should have access to—even if such a determination is contrary to determinations made by the government as to an expression's harmfulness for minors. In contrast to the statute upheld in *Ginsberg*—which permitted parents to override the state's determination that material was obscene-for-minors and to purchase "girlie" magazines for their children—the CDA effected a complete ban on minors' access to statutorily-proscribed materials and effectively usurped parental autonomy in this regard.[42]

In evaluating the CDA's constitutionality under the requisite strict scrutiny analysis, the Supreme Court explained that if there were means available to effectively restrict minors' access to harmful material while imposing fewer restrictions on adults' free speech rights, the CDA would fail the "least restrictive means" component applicable to content-based restrictions.[43] In assessing the CDA's compliance with this component, the Court concluded that indeed other such less restrictive means were or would soon be available. Specifically, the Court noted that "currently available *user-based* software suggests that a reasonably effective method by which *parents* can prevent their children from accessing material which *parents* may believe is inappropriate for their children will soon be widely available."[44] Because such filtering software presented a means of restricting minors' access to harmful material that would intrude less severely upon adults' right to access protected material—and upon the right of minors of "permissive" parents to access such material—

41. *Id.* at 877.
42. *Id.* at 878.
43. *Id.* at 874.
44. *Id.* at 877 (emphasis in original) (citation omitted).

the Supreme Court concluded that the CDA did not embody the least restrictive means of advancing Congress's compelling interest in protecting minors from harmful Internet expression.[45]

In short, (1) because Congress's definitions of proscribed expression were impermissibly vague and not as narrowly tailored as the definitions in *Miller* and *Ginsberg,* (2) because these proscriptions burdened adults' right to access protected (for adults) expression, (3) because these proscriptions usurped parental authority to determine what expression their children could access, and (4) because less restrictive methods—such as the use of filtering software *by parents*[46]—of restricting minors' access to harmful Internet speech existed, these provisions of the CDA were held unconstitutional.

B. The Child Online Protection Act of 1998

Congress paid closer attention to First Amendment jurisprudence in its two subsequent attempts to regulate minors' access to harmful Internet speech. Shortly after the Supreme Court struck down the relevant provisions of the CDA, Congress went back to the drawing board, this time directing its attention to the applicable Supreme Court obscenity (and obscenity-for-minors) jurisprudence. Legislators focused in particular on *Miller*'s three-prong test, as modified for minors by *Ginsberg*, and put forward a more plausibly constitutional effort at regulating minors' access to harmful Internet speech. In the Child Online Protection Act of 1998, Congress carefully imported the three prongs of the *Miller* test into its regulation, while also incorporating an age-dependent standard for determining harmful material as sanctioned by the Supreme Court in *Ginsberg*.[47]

45. *Id.*

46. The Supreme Court did not comment upon the related issue of the government's requiring the use of filtering software by minors (or adults) in this opinion, but later upheld its constitutionality in *United States v. American Library Ass'n, Inc.*, 123 S. Ct. 2297 (2003).

47. Pub. L. No. 105-277, 112 Stat. 2681-736 (codified at 47 U.S.C. § 231 (2000)). The relevant provisions of COPA are as follows:

> Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes *any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors* shall be fined not more than $50,000, imprisoned not more than 6 months, or both.

47 U.S.C. § 231(a).

> Material that is harmful to minors.—The term 'material that is harmful to minors' means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—

If one compares the constitutional definition of obscenity set forth in *Miller,* as modified for minors in *Ginsberg*, with the definition of "harmful to minors" set forth in COPA, one might predict that the statute would withstand strict scrutiny applicable to such content-based restrictions on speech. However, in reviewing the constitutionality of COPA, the courts have found substantial constitutional flaws in other aspects of the statute. At each level of review—in the district court, the Third Circuit, the Supreme Court (and the Third Circuit on remand)—different aspects of COPA were found problematic.

The district court, in reviewing COPA, emphasized the burdens that the statute imposed on speakers and publishers of sexually-themed, protected-for-adults expression and found that these burdens were significant enough to create a substantial likelihood that the statute is unconstitutional.[48] Furthermore, the district court held that the government once again had failed to establish that COPA was the least restrictive means of regulating minors' access to "harmful to minors" material, because "blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web site operators."[49]

On appeal, the Third Circuit focused on a different aspect of the Supreme Court's obscenity jurisprudence—one that goes to the heart of regulating obscene and obscene-for-minors content on the Internet—*viz.*, the autonomy of communities to determine the contours of obscene (and obscene-for-minors) speech within and with respect to their communities.[50] As discussed above, *Miller*'s first prong requires

> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. § 231(e)(6).

Like the CDA, COPA also provides an affirmative defense for defendants who in good faith restrict access by minors to material that is harmful to minors by use of credit cards, adult codes, and other "reasonable measures that are feasible under available technology." 47 U.S.C. § 231(c)(1).

48. ACLU v. Reno, 31 F. Supp. 2d 473, 495 (E.D. Pa. 1999).

49. *Id.* at 497.

50. ACLU v. Reno, 217 F.3d 162 (3d Cir. 2000).

that there be an inquiry into whether the average member of a community, applying that community's contemporary standards, would find that the work in question appeals to the prurient interest. *Miller*'s second prong (implicitly) carries over this communitarian inquiry to the assessment of whether the expression is patently offensive. These required communitarian analyses permit a Salt Lake City jury to classify certain speech (say, a book or a magazine) as obscene and unprotected within their local community, where such speech might very well be deemed protected by and within another local community, say New York City.[51]

While this constitutionally-required, geographically-based determination of obscenity might be workable to separate protected from unprotected expression in real space, where a community's geographic boundaries are meaningful, this geographic variability becomes more problematic when applied to expression on the Internet. It is feasible in real space, although somewhat burdensome, for distributors of pornographic expression contained in books, magazines, videos, mailings, etc., to take steps to restrict the dissemination of such works into communities that consider such works to be obscene, in order to avoid being prosecuted for purveying obscenity within such less "tolerant" communities. Giving communities such autonomy does not (necessarily) restrict the ability of other communities to determine for themselves the contours of obscenity within *their* communities. Put differently, there is not substantial spillover in real space with respect to the rights of local communities to determine the contours of obscene speech within their communities, given the feasibility of restricting the real space dissemination of (potentially obscene) expression to certain geographic communities. For, although a publisher of pornography *might* decide to self-censor all expression that *any* community would likely deem obscene so as to avoid the difficulty of limiting dissemination to certain (more tolerant) communities, it might also decide to undertake measures to restrict dissemination to only those communities where its content would likely not be deemed obscene.

However, given the absence of meaningful boundaries delimiting one "local" community from another within cyberspace, it becomes far more difficult for individual communities to exercise their autonomy in cyberspace with respect to determining the contours of ob-

51. These communitarian analyses are subject to the judicially determined floor described above.

scenity within their borders without substantial spillover to other communities. Because it is not feasible for an Internet publisher of sexually-themed expression (contra a real-space publisher of such expression) to restrict the dissemination of its expression only to those local communities that would likely not find such expression to be obscene, the Internet publisher has only one realistic alternative to avoid being subject to obscenity prosecution—forgo dissemination of such expression on the Internet altogether.[52] Given the inability of web publishers to restrict the dissemination of expression by geographical location, one community's determination of obscenity spills over to all other communities, thereby impinging upon these other communities' autonomy to determine the contours of obscene (and obscene-for-minors) expression for and within their communities.

Addressing this issue, the Third Circuit held that the conflict between (1) the prerogative of a community to determine the boundary between obscene-for-minors speech and non-obscene-for-minors speech, and (2) the inability to control the geographic dissemination of Internet content, was so severe as to be constitutionally intolerable.[53] In reviewing the definition of harmful-to-minors material set forth in COPA, which embodied *Miller*'s contemporary community standards analysis as modified for minors by *Ginsberg*, the Third Circuit explained:

> Because material posted on the Web is accessible by all Internet users worldwide, and because current technology does not permit a Web publisher to restrict access to its site based on the geographic locale of each particular Internet user, COPA essentially requires that every Web publisher subject to the statute abide by the most restrictive and conservative state's community standards in order to avoid criminal liability. Thus, because the standard by which COPA gauges whether material is "harmful to minors" is [and, per *Miller* and *Ginsberg*, must be] based on identifying "contemporary community standards" the inability of Web publishers to restrict access to their Web sites based on the geographic locale of the site visitor,

52. For example, it might come to pass that a Salt Lake City jury would find that a particular web site was obscene for minors under a *Miller/Ginsberg* definition of obscenity, such as set forth in COPA. *See, e.g.*, United States v. Thomas, 74 F.3d 701, 710–11 (6th Cir. 1996). In that case, the only meaningful option for the Internet publisher of such material would be to take down such expression altogether, for all communities throughout the United States (and indeed the world), even though some other communities, applying *their* contemporary community standards, would conclude that such expression was protected by the First Amendment and that members of their community had a First Amendment right to access such material.

53. *ACLU*, 217 F.3d at 166.

> in and of itself, imposes an impermissible burden on constitutionally protected First Amendment speech.[54]

The case was appealed to the Supreme Court.[55] Writing for a plurality of the Court, Justice Thomas rejected the Third Circuit's conclusion that the conflict between *Miller*'s requirement of community-determined standards of obscenity and the inability on the Internet to limit dissemination based on geography *alone* sufficed to render COPA unconstitutional on its face.[56] Thomas explained that the Supreme Court has historically held speakers and publishers disseminating their content nationwide to potentially varying community standards of obscenity, and that "requiring a speaker disseminating material to a national audience to observe varying community standards does not violate the First Amendment."[57] Thomas explained, for example, that those mailing materials to a nationwide audience,[58] as well as those operating commercial "dial-a-porn" operator services,[59] have been held subject to potentially varying local community standards under the Supreme Court's obscenity jurisprudence. Referring to these earlier obscenity cases, Justice Thomas observed:

> There is no constitutional barrier under *Miller* to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others. If [for example, a"dial-a-porn" operator's] *audience is comprised of different communities with different local standards, Sable ultimately bears the burden of complying with the prohibition on obscene messages.*[60]

The Third Circuit had held that the analysis of the statutes at issue in these earlier obscenity cases, which involved different mediums of expression, were distinguishable from COPA and its application to Internet dissemination because the defendants in these earlier cases could feasibly control the geographic distribution of their potentially obscene material, whereas Internet publishers have no such control. Justice Thomas rejected this distinction, explaining that in none of these earlier cases "was the speaker's ability to target the release of material into particular geographic areas integral to the legal analysis."[61]

54. *Id.*
55. Ashcroft v. ACLU, 535 U.S. 564 (2002).
56. *Id.* at 566.
57. *Id.* at 580.
58. *Id.*
59. *Id* at 581.
60. *Id.* (quoting Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 125–26 (1989)) (emphasis in the original).
61. *Id.* at 582.

Justices Kennedy, Souter, and Ginsburg, who concurred in the judgment, disagreed with Justice Thomas on this point. They found that the Court of Appeals' emphasis on COPA's incorporation of varying community standards was not misplaced, and were concerned about the conflict between geographical variability in the definition of obscene-for-minors speech and the inability of Internet publishers and speakers to control the geographic dissemination of their speech. Their concurrence emphasized that *Miller*'s contemporary community standards test grants individual communities the autonomy to determine what speech is protected and what speech is unprotected within their borders, and observed that "[t]he national variation in community standards constitutes a particular burden on Internet speech."[62]

Yet, because the case involved a *facial* challenge to COPA—before it had been applied to restrict any speech whatsoever—the concurring justices ultimately concluded that those challenging the statute at this stage had failed to meet their burden of identifying what, if any, speech would be unconstitutionally burdened by the statute.[63] While observing that the national variation in community standards constituted a particular burden on Internet speech, these Justices concluded that absent a comprehensive and careful analysis of the speech that is burdened, the Third Circuit's conclusion was premature.[64]

The Third Circuit was charged on remand with expanding the focus of its inquiry into the constitutionality of COPA beyond the effect of the national variation in community standards on sexually-themed Internet expression. While expanding its analysis of COPA's constitutionality, the Third Circuit nonetheless reiterated its conclusion that the statute is unconstitutional.[65] While concluding that the statute advanced a compelling government interest, the court held that the statute was not narrowly tailored to achieve this interest, that this interest was not advanced in the least restrictive means possible, and that COPA therefore failed strict scrutiny.[66] For good measure, the court also conducted an overbreadth analysis, and concluded that the statute was overbroad.[67] In reaching these conclusions, the court first held that a number of provisions of COPA were not narrowly tai-

62. *Id.* at 597 (Kennedy, J., concurring).
63. *Id.*
64. *Id.*
65. ACLU v. Ashcroft, 322 F.3d 240, 243 (3d Cir. 2003), *cert. granted*, 124 S. Ct. 399 (2003).
66. *Id.* at 265.
67. *Id.* at 266–67.

lored. Of particular interest to the present inquiry is the court's focus on COPA's use of the expression "for minors" in all three of its definitional prongs.[68] The court held that because Congress failed to *further* narrow the age range covered by the term "minors," and because material that, for example, had serious value for sixteen-year-olds might not have serious value for six-year-olds:

> Web publishers would face great uncertainty in deciding what minor could be exposed to its publication, so that a publisher could predict, and guard against, potential liability. Even if the statutory meaning of "minor" were limited to minors between the ages of thirteen and seventeen, Web publishers would still face too much uncertitude as to the nature of material that COPA proscribes.[69]

Thus, much as earlier courts were concerned with minor-to-adult spillover in regulations of speech, the Third Circuit in its latest COPA decision focused on the problem of younger-minor-to-older-minor spillover. Apparently assuming that older minors enjoyed the First Amendment right to receive a broader scope of Internet expression than younger minors, the Third Circuit held that COPA's failure to distinguish among minors of different age groups rendered the statute insufficiently narrowly tailored to achieve its ends.[70]

Another aspect of the Third Circuit decision that is relevant for present purposes is its inquiry into whether less restrictive means existed, other than COPA's federal criminal prohibition on certain Internet speech, to advance the government's compelling interest of protecting the physical and psychological well-being of minors. As had the district court, the Third Circuit on remand concluded that the voluntary use of blocking and filtering software by parents was a less restrictive and more effective means of advancing this end.[71] The Third Circuit first observed that the use of such software was likely to be more effective than COPA's provisions in blocking harmful speech because, unlike COPA, such software also blocks harmful speech on foreign web sites and noncommercial web sites.[72] Second, the court rejected the government's argument that the voluntary use of such software by parents impermissibly placed the burden of avoiding such harmful speech on the potential victims of such speech. Adverting to the Supreme Court's decision in *United States v. Playboy Entertain-*

68. *Id.* at 252.
69. *Id.* at 255.
70. *Id.* at 268.
71. *Id.* at 261–63.
72. *Id.* at 264.

ment Group,[73] in which the Supreme Court struck down a mandatory regulatory scheme for blocking sexually-explicit channels in favor of a voluntary scheme by which parents could opt to block such channels, the Third Circuit held that "a court should not presume that parents, given full information, will fail to act."[74] Although the Third Circuit recognized that filtering and blocking software imperfectly achieves its goals in that it both over-blocks and under-blocks speech deemed harmful, the court found that the *voluntary* use of such software by parents—as compared to the mandatory use by public institutions—would help to ameliorate constitutional problems of under- and over-blocking.[75]

In sum, the Third Circuit found a number of constitutional infirmities in COPA beyond its reliance on community standards to assess whether sexually-themed speech was protected or unprotected for minors, including COPA's inclusion of a non-age-variable definition of "minors" and the existence of the less speech restrictive alternative of the voluntary use of filtering software by parents to achieve the statute's compelling interests. The Third Circuit's decision, however, will once again be reviewed by the Supreme Court.[76]

C. *The Children's Internet Protection Act*

The Children's Internet Protection Act embodies Congress's latest effort to overcome the constitutional hurdles identified in earlier legislative attempts to regulate minors' access to harmful Internet speech. Instead of outright criminalizing harmful Internet expression as previously attempted in the CDA and COPA, CIPA operates by conditioning public schools' and libraries' eligibility to receive certain federal funds upon their commitment to use filtering software to block access to certain "harmful" Internet materials. Within the regulatory scheme contemplated by CIPA, each community, acting through its community-based institutions, theoretically enjoys a measure of autonomy to determine for its own community—and only its own community—the contours of obscene and obscene-for-minors (or "harmful to minors") expression. This determination is to be effectuated through the use of filtering software configured to block expression that falls within the definitions of speech that is harmful to

73. 529 U.S. 803, 825–27 (2000).
74. *ACLU*, 322 F.3d at 262.
75. *ACLU*, 322 F.3d at 264–65.
76. *See* ACLU v. Ashcroft, 124 S. Ct. 399 (2003).

minors set forth by the community-based institution itself. In this way, CIPA's basic regulatory scheme embodies the promise of overcoming the constitutional obstacles to regulating obscene and obscene-for-minors speech that confronted COPA, as well as any other federal law embodying a *Miller*-based standard of geographically-variable obscenity.

Under the CIPA scheme, each public elementary and secondary school and each public library theoretically enjoys the autonomy to determine what type of Internet speech is to be deemed obscene and obscene for minors (subject apparently to the judicially-determined floor for material with serious redeeming social value, for adults and minors, respectively). As a theoretical matter, under CIPA, each community, acting through its public schools and libraries, is permitted to specify the parameters of protected and unprotected speech, for minors and for adults, and to implement these objective parameters by configuring filtering software—to be used by members of its community only within the community's public libraries and schools—to effectuate these restrictions. Thus, as a theoretical matter, CIPA's overarching scheme quite nicely resolves the seemingly intractable problems to implementing a *Miller*-based constitutional regulation of minors' access to obscene-for-minors speech. Each community is allowed to determine the contours of protected and unprotected speech for its community, thereby protecting community autonomy in this area and substantially limiting community-to-community spillover of such determinations. Although CIPA's basic regulatory scheme embodies great promise for achieving a constitutional regulation of minors' access to harmful Internet speech, the details of this scheme have proven problematic, as discussed below.[77]

CIPA operates by making the use of software filters by a public library or a public school a condition on its receipt of two kinds of federal subsidies: grants under the Library Services and Technology Act ("LSTA") and "E-rate" discounts for Internet access and support under the Telecommunications Act.[78] In order to receive LSTA funds or E-rate discounts, CIPA requires public libraries and schools to certify that they are using a "technology protection measure" that

77. *See generally* Steven D. Hinckley, *Your Money or Your Speech: The Children's Internet Protection Act and the Congressional Assault on the First Amendment in Public Libraries*, 80 WASH. U. L.Q. 1025 (2002) (arguing that CIPA undermines the role of public libraries as providers of multiple points of view and thus violates the First Amendment rights of both libraries and their patrons).

78. *See* 20 U.S.C. § 6777 (2000); 20 U.S.C. § 9134 (2000).

prevents patrons from accessing visual depictions that are obscene, child pornography, or in the case of minors, harmful to minors.[79] While CIPA's scheme allows library officials, under certain circumstances, to disable software filters for certain patrons engaged in bona fide research or other lawful purposes, the disabling of such filters on computers used by minors is prohibited if the library or school receives E-rate discounts.[80]

1. CIPA's Amendments to the E-rate Program

a. Provisions Applicable to Computers Used by Minors

First, CIPA modifies the federal E-rate program, under which telecommunications carriers are required to provide high-speed Internet access and related services to public schools and libraries at discount rates. CIPA requires that a library "having one or more computers with Internet access may not receive services at discount rates" unless the library certifies that it is

> (i) enforcing a policy of Internet safety for minors that includes monitoring the online activities of minors and the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are (I) obscene; (II) child pornography; or (III) harmful to minors; and (ii) . . . enforcing the operation of such technology protection measure *during any use of such computers by minors*.[81]

Thus, libraries and schools, in order to receive E-rate discounts, must certify that, during any use of Internet-accessible computers by minors (*i.e.*, those sixteen and under[82]), filtering technology is being used to block access to obscene material, child pornography, and "harmful to minors" material. While the terms "obscene" and "child pornography" are given their (constitutionally acceptable) standard meaning, CIPA defines material that is "harmful to minors" as

> any picture, image, graphic image file, or other visual depiction that—(i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion; (ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual con-

79. CIPA § 1703(b)(1), 114 Stat. 2763A-336.

80. 20 U.S.C. § 6777(c); 20 U.S.C. § 9134(f)(3). The disabling provision in the context of E-rate discounts applies only "during use by an adult." 47 U.S.C. § 254(h)(5)(D) (2000).

81. 47 U.S.C. § 254(h)(5)(B) (2000).

82. 47 U.S.C. § 254(h)(7)(d) (2000).

> tact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and (iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.[83]

Although the third prong of the harmful-to-minors definition seems to provide a savings clause for material that appellate courts find has redeeming social value, CIPA would appear to prohibit federal interference in local determinations regarding what Internet content is appropriate for minors:

> A determination regarding what material is inappropriate for minors shall be made by the school board, local educational agency, library, or other authority responsible for making the determination. No agency or instrumentality of the United States Government may— (A) establish criteria for making such determination; (B) review the determination made by the certifying [entity] . . . ; or (C) consider the criteria employed by the certifying [entity] . . . in the administration of [CIPA's requirements].[84]

b. Provisions Applicable to All Computers

Additionally, as a further condition on its receipt of E-rate discounts, a library or school must certify that, during *any* use of Internet-accessible computers—*by minors or by adults*, including the libraries and staff themselves—it is "enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are (I) obscene; or (II) child pornography."[85] Thus, a library or school, in order to receive E-rate discounts, must further certify that it is using filtering technology to block access to obscene and child pornographic materials during *any* use of computers that are Internet accessible.

c. Disabling Provisions

With respect to *adults'* use of Internet-accessible computers, CIPA provides that a library official is permitted to "disable the technology protection measure concerned, *during use by an adult*, to enable access for bona fide research or other lawful purpose."[86] However, CIPA's amendments to the E-rate program do not permit

83. 47 U.S.C. § 254(h)(7)(G) (2000).
84. 47 U.S.C. § 254(l)(2) (2000).
85. 47 U.S.C. § 254(h)(5)(C).
86. 47 U.S.C. § 254(h)(5)(D) (emphasis added).

libraries or schools to disable filters to enable bona fide research or other lawful use for *minors*.

In short, CIPA requires that public libraries and schools, as a condition of receiving federal funding under the E-rate program, (1) utilize filtering software to block adults' access to obscene and child pornographic visual content, and (2) utilize filtering software to block *minors'* Internet access to the above content *as well as* to visual content that is "harmful to minors." Although the filtering of adults' Internet access may be disabled for bona fide research or other lawful purposes, such disabling is not permitted for minors.

2. CIPA's Modifications to the LSTA Program

CIPA's modifications to the LSTA program generally track its modifications to the E-rate program. CIPA amends the Library Services and Technology Act to require that the funds made available under the Act will not be available unless the library has in place and is enforcing "a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access" that protects against access through such computers of certain types of content.[87] When such computers are "in use by minors," the library must protect against access to visual depictions that are "obscene," "child pornography," or "harmful to minors."[88] At all times, the library must use filtering software to protect against access to visual depictions that are "obscene" or "child pornography" in order to receive such funds.[89] The definition of the term "harmful to minors" in CIPA's amendment to the LSTA program is similar to the definition found in the amendment to the E-rate program.[90] CIPA's amendment to LSTA, like its amendment of the E-rate program, allows for library officials to disable filtering in order to "enable access for a bona fide research or other lawful purposes."[91] These disabling provisions, unlike those provided in the amendments to the E-rate program, apparently permit the disabling of filtering during use by adults or minors for bona fide research or other lawful purposes.[92]

87. 20 U.S.C. § 9134(f)(1)(A)(i).
88. *Id.*
89. 20 U.S.C. § 9134(f)(1)(B).
90. 47 U.S.C. § 254(h)(7)(G).
91. 20 U.S.C. § 9134(f)(3).
92. *Id.*

By borrowing directly from COPA's definition of material that is harmful to minors, CIPA's definition of material that is harmful to minors appears to embody the constitutionally necessary elements set forth by the Supreme Court in *Miller*. And, by enabling local community-based institutions to decide *for their communities* what material is harmful to minors within their communities, CIPA advances *Miller*'s goal of granting local communities the autonomy to determine the scope of protected and unprotected speech within their communities, thus resolving the problem of community-to-community spillover identified by the Third Circuit in the COPA case.

Despite CIPA's marked improvements upon earlier legislative efforts to regulate minors' access to harmful Internet speech, the constitutionality of CIPA as applied to public libraries was challenged by the American Library Association and several affected libraries, in *American Library Association v. United States*.[93] The case was heard by a special three-judge panel, which found CIPA unconstitutional on its face.[94] In a decision handed down in June 2003, the Supreme Court reversed, holding that CIPA was not unconstitutional on its face. CIPA is nonetheless still quite vulnerable to as-applied challenges. Importantly, several Justices, through their questions at oral argument and their opinions, made clear that their analysis of the constitutionality of CIPA was dependent upon the statute—and in particular, its filter-disabling provisions—being implemented in a manner that protects (at least adults') free speech rights.[95]

In order to understand the constitutional issues at stake in CIPA, it is important to understand the mechanics of software filtering.[96]

93. 201 F. Supp. 2d 401 (E.D. Pa. 2002), *rev'd*, 123 S. Ct. 2297 (2003).

94. *Id.*

95. Justice Kennedy in his concurrence explains:

> If, on the request of an adult user, a librarian will unblock filtered material or disable the Internet software filter without significant delay, there is little to this case. The Government represents [during oral argument] this is indeed the case.... If some libraries do not have the capacity to unblock specific Web sites or to disable the filter or if it is shown that an adult user's election to view constitutionally protected Internet material is burdened in some other substantial way, that would be the subject for an as-applied challenge....

123 S. Ct. at 2309–10 (Kennedy, J., concurring). *See also* Justice Breyer's concurrence (recognizing that libraries' practices in implementing CIPA may subject CIPA to a successful as-applied challenge), 123 S. Ct at 2312. Indeed, even the Opinion of the Court, written by Chief Justice Rehnquist, bases its analysis of CIPA's constitutionality in large part on the ease with which (adult) patrons can secure the disabling of filtering software. *See* 123 S. Ct. at 2306–07.

96. My discussion of software filtering follows closely that provided by filtering experts Seth Finkelstein and Lee Tien in their extremely lucid article *Blacklisting Bytes,* in Filters & Freedom 2.0 (2001), *available at* http://www7.nationalacademies.org/itas/whitepaper_1.html. *See*

Almost all filtering software programs operate by comparing web site addresses that a user wishes to access against a "blacklist." The blacklist may be stored locally on the Internet user's computer (which is termed "client implementation") or may be stored remotely on a proxy server (which is called "server implementation"). Some filtering programs, such as CyberPatrol, offer both client and server-based implementations. Others are either strictly client-side programs or strictly server-side programs. Filtering software programs operate by blocking Internet users' access to certain web sites in the following manner:

> When an Internet user types in [an Internet address or Uniform Resource Locator (URL)] indicating material he or she wishes to access, the [filtering software] examines various parts of the URL against its internal blacklist to see if the URL is forbidden .... If the [URL] is found on the blacklist ..., then the program looks to see how extensively it should be banned [i.e., whether to blacklist the whole domain, a directory of the site, or only a particular file on the site].... Blacklists can have multiple categories of banned sites (e.g., one for "Sex," another for "Drugs," perhaps another for "Rock & Roll," and so on)... But blacklists are almost always secret, so there's no way to know what sites are actually in the category.... The whole list-matching process above may be repeated all over again against exception lists or "whitelists." A few products consist only of whitelists, or can work in whitelist only mode. [Some filtering software] can be set ... so that everything not prohibited is permitted (blacklist only) or only that which is explicitly allowed is permitted (whitelist only). And of course the whitelist can override the blacklist. In general, such blacklist/whitelist settings are standard in server-level programs, along with the ability to create additional organization-specific blacklists or whitelists.[97]

The default blacklists and whitelists used by filtering software programs are created by the software developers and constitute a substantial portion of the programs' value to consumers. As such, they are typically protected as trade secrets. Thus, a library implementing a filtering software program typically has no way of knowing which web sites will actually be rendered inaccessible by the filtering software program. Although the library may choose to configure the filtering software to filter out certain pre-defined categories of web sites (such as "Adult/Sexually Explicit"), the library has no way of knowing the *criteria* used by the software developers to select which

also R. Polk Wagner, *Filters and the First Amendment*, 83 MINN. L. REV. 755 (1999) (describing the essential features of software filters).

97. *Id.*

web sites fall into this category, nor which web sites will actually be found to fall within this category.

In considering the constitutionality of CIPA, the three-judge panel first found that the use of the filtering software programs mandated by CIPA "erroneously block a huge amount of speech that is protected by the First Amendment,"[98] estimating the number of web pages erroneously blocked to be "at least tens of thousands."[99] Filtering software programs, the court found, "block many thousands of Web pages that are clearly not harmful to minors, and many thousands more pages that, while possibly harmful to minors, are neither obscene nor child pornography."[100] Indeed, the government's expert himself acknowledged that popular filtering software packages over-block at rates between nearly 6 percent and 15 percent (*i.e.*, between 6 percent and 15 percent of blocked web pages contained no content that met even the software's own definitions of sexually-themed content, let alone the constitutional definitions of obscenity or child pornography).[101] Furthermore, the three-judge panel concluded that software filtering programs inevitably over-block harmless Internet content, which adults and minors have a First Amendment right to access, and under-block obscene and child pornographic content, which neither adults nor minors have a First Amendment right to access. This is in part because the categories used by such software for filtering purposes are broader than the constitutional categories of unprotected speech defined by CIPA and in part because of the imperfections in filtering software technology.[102]

The three-judge panel also found that the provisions of CIPA permitting libraries to unblock wrongfully blocked sites upon the request of an adult[103] (or in some cases a minor[104]) who is engaged in bona fide research or other lawful purposes were insufficient to render the statute constitutional.[105] In addition to the constitutional infirmities inherent in refusing to permit libraries to unblock wrongly blocked sites for minors,[106] the court found that many *adult* patrons

98. American Library Ass'n, Inc. v. United States, 201 F. Supp. 2d 401, 448 (E.D. Pa. 2002) *rev'd*, 123 S. Ct. 2297 (2003).

99. *Id.* at 449.

100. *Id.* at 475.

101. *Id.* at 448.

102. *Id.* at 476–77.

103. *Id.* at 484.

104. *Id.* at 485.

105. *Id.* at 489.

106. *Id.* at 427.

would be "reluctant or unwilling to ask librarians to unblock Web pages or sites that contain only materials that might be deemed personal or embarrassing, even if they are not sexually explicit or pornographic."[107] Because libraries were not required under CIPA's scheme to permit Internet users to make *anonymous* unblocking requests, the vast majority of patrons confronted with wrongfully blocked sites apparently declined to request the unblocking of such sites.[108] Furthermore, even where unblocking requests were submitted and acted upon, the unblocking process took too long—between twenty-four hours and one week. The court concluded that:

> [T]he content-based burden that the library's use of software filters places on patrons' access to speech suffers from the same constitutional deficiencies as a complete ban on patrons' access to speech that was erroneously blocked by filters, since patrons will often be deterred from asking the library to unblock a site and patron requests cannot be immediately reviewed.[109]

In short, the three-judge panel concluded that "[g]iven the substantial amount of constitutionally protected speech blocked by [filtering software]," CIPA was not narrowly tailored.[110] And, the ability of patrons falling within certain categories[111] to request unblocking of erroneously blocked sites did not save the statute from being held unconstitutional.

The Supreme Court reversed, holding that the restrictions CIPA imposed on speech (or more precisely, required libraries to impose on speech) were not unconstitutional.[112] The Justices finding the statute unconstitutional on its face articulated several rationales for their conclusion. Chief Justice Rehnquist, who authored a plurality opinion in which Justices O'Connor, Scalia, and Thomas joined, held that strict scrutiny was the wrong standard to apply. Rehnquist explained that, because the provision of Internet access in public libraries did not constitute a public forum, strict scrutiny was not the proper level of scrutiny for analyzing CIPA's constitutionality.[113] Because CIPA—unlike the CDA and COPA—did not involve direct government

107. *Id.*
108. *Id.*
109. *Id.* at 489.
110. *Id.* at 476
111. *Id.* at 489.
112. 123 S. Ct. 2297 (2003).
113. On this point, Rehnquist explained that "[w]e require the Government to employ the least restrictive means only when the forum is a public one and strict scrutiny applies." *Id.* at 2297 n.3.

regulation of Internet speech, but rather the regulation of Internet speech by and within a governmental forum for speech, to determine what level of scrutiny to apply, we must turn to public forum doctrine. Under the public forum doctrine, the level of scrutiny to apply to government regulation of speech depends upon the characteristics of the forum in which the speech is being regulated. If the governmental forum for speech at issue is a "traditional public forum" or a "designated public forum," then strict scrutiny applies to any regulation of speech within that forum. If the forum is a non-public forum, then reduced scrutiny applies to speech regulations within such forum.

Rehnquist first explained that Internet access in public libraries did not constitute a "traditional public forum" within the constitutional meaning of that term because "this resource—which did not exist until quite recently—has not immemorially been held in trust for the use of the public [or], time out of mind, . . . been used for purposes of assembly, communication of thoughts between citizens, and discussing public questions."[114] Of course, given Rehnquist's formulation of the test for traditional public forums, it will be impossible for any resource in a modern medium to fall within this definition.

Rehnquist next explained that Internet access in public libraries did not constitute a "designated public forum." In order to create a designated public forum, "the government must make an affirmative choice to open up its property for use as a public forum."[115] According to Rehnquist, "a public library does not acquire Internet terminals in order to create a public forum for web publishers to express themselves, [but] . . . to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality."[116] Rehnquist continued that "even if appellees had proffered more persuasive evidence that public libraries intended to create a forum for speech by connecting to the Internet, we would hesitate to import the public forum doctrine . . . wholesale into the context of the Internet."[117]

Having concluded that libraries' provision of Internet access did not constitute a public forum, Rehnquist analyzed CIPA's constitutionality under a framework of reduced scrutiny, and merely inquired

114. *Id.* at 2305 (internal quotation marks omitted).
115. *Id.*
116. *Id.*
117. *Id.* at n.3 (internal quotation marks omitted).

into whether libraries' use of filtering software as mandated by CIPA was "reasonable."[118]

Rehnquist considered but rejected the argument that the over-blocking effected by filtering software rendered the statute unconstitutional. In reaching this conclusion, he relied upon the representations of the Solicitor General at oral argument that filtering systems would be implemented by libraries such that any adult patron could have erroneously blocked sites unblocked and/or software filters disabled upon request:

> Assuming that such erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled. When a patron encounters a blocked site, he need only ask a librarian to unblock it or (at least in the case of adults) disable the filter. As the District Court found, libraries have the capacity to permanently unblock any erroneously blocked site, and the Solicitor General stated at oral argument that a "library may . . . eliminate the filtering with respect to specific sites . . . at the request of a patron." With respect to adults, CIPA also expressly authorizes library officials to "disable" a filter altogether "to enable access for bona fide research or other lawful purposes." The Solicitor General confirmed that a "librarian can, in response to a request from a patron, unblock the filtering mechanism altogether," and further explained that a patron would not "have to explain . . . why he was asking a site to be unblocked or the filtering to be disabled.[119]

Several aspects of Rehnquist's analysis of the statute are significant. First, Rehnquist's analysis (as well as the analyses of the concurring Justices) wholly disregards the interests of minors in accessing constitutionally protected Internet expression. As discussed above, under the E-rate program, only adults may request that software filters be disabled, and presumably, libraries may only disable software filters upon the request of an adult. Rehnquist's analysis evidences no concern for the fact that minors are unable under the statute to request removal of filters by libraries receiving E-rate funds. Similarly, Justice Kennedy focuses solely on the interests of adult users and contents himself with adults' ability to request unblocking of filtered material: "If, on the request of an *adult* user, a librarian will unblock filtered material or disable the Internet software filter without signifi-

118. *Id.* at 2306 ("[I]t is entirely reasonable for public libraries to . . . exclude certain categories of content, without making individualized judgments that everything they do make available has requisite and appropriate quality.")

119. *Id.* (internal quotation marks and citations omitted).

cant delay, there is little to this case."[120] Likewise, Justice Breyer rests his analysis of the statute's constitutionality on the ability of adults to request unblocking by libraries: "[T]he Act allows libraries to permit any *adult* patron access to an 'overblocked' Web site; the adult patron need only ask a librarian to unblock the specific Web site or alternatively, ask the librarian, 'Please disable the entire filter.'"[121] Because the constitutional right of minors to access protected Internet speech was not squarely addressed by the Supreme Court, subsequent challenges to the statute based on its infringement of minors' First Amendment rights may be more successful.

Second, each of the opinions rejecting the facial challenge to the statute suggests that an as-applied challenge to the statute may well succeed if the statute is not implemented by libraries in a sufficiently speech-friendly manner (as the Solicitor General represented it would be). As discussed above, Rehnquist's plurality opinion assumes that CIPA will be implemented by libraries such that adults will be able easily to secure the disabling of software filters.[122] Justice Kennedy in his concurrence explains that: "If some libraries do not have the capacity to unblock specific Web sites or to disable the filter or if it is shown that an adult user's election to view constitutionally protected Internet material is burdened in some other substantial way, that would be the subject for an as-applied challenge . . . ."[123] And Justice Breyer in his concurrence explicitly recognizes that if libraries' practices in implementing CIPA are not sufficiently speech-friendly, such deficient implementation may subject CIPA to a successful as-applied challenge.[124] Accordingly, libraries must attend carefully to the implementation of CIPA in a manner that protects adults' and minors' constitutional rights to receive protected Internet expression. The constitutional implementation of CIPA is taken up in Part II.

II. TOWARD A CONSTITUTIONAL REGULATION OF MINORS' ACCESS TO OBSCENE-FOR-MINORS INTERNET EXPRESSION

As explored in Part I, Congress appears to be gradually moving toward a constitutional scheme for regulating minors' access to harmful Internet expression. After learning from the constitutional infirmi-

120. *Id.* at 2309 (Kennedy, J., concurring) (emphasis added).
121. *Id.* at 2313 (Breyer, J., concurring) (emphasis added).
122. *Id.* at 2306–07.
123. *Id.* at 2309–10 (Kennedy, J., concurring).
124. *Id.* at 2312 (Breyer, J., concurring).

ties embodied in the CDA's indecency and patently offensive provisions, Congress's subsequent legislative effort embodied in COPA was significantly less restrictive of speech. Notwithstanding these improvements, the courts will likely continue to find COPA unconstitutional. And, although CIPA has survived a facial challenge, it is likely that an as-applied challenge will follow (and will succeed). By carefully attending to the constitutional infirmities of prior legislative attempts and to the requirements set forth in previous obscenity cases—while capitalizing upon the variety of technological features available to fine-tune restrictions on access to Internet expression—I set forth in this Part practical guidelines for developing and implementing a constitutional regulation of minors' access to harmful Internet expression.

A. Reducing Community-to-Community Spillover and Respecting Communities' Autonomy to Determine the Contours of Obscene-for-Minors Speech

In order to accord true autonomy to communities to determine the contours of obscene and obscene-for-minors expression, Congress should get out of the business of regulating minors' access to harmful Internet expression altogether—whether directly (through statutes like the CDA or COPA) or indirectly (through statutes like CIPA).[125] In order to render meaningful the commitment in First Amendment jurisprudence to community autonomy in determining the contours of obscene-for-minors speech, Congress should allow each community to determine for itself whether and how[126] to define Internet expression that is unprotected for minors. It has traditionally been the province of the state governments—in their exercise of their general police power to protect the health, safety, and welfare of their communities—and not the federal government, to regulate minors' access to sexually-themed speech.[127] By legislating in this arena either directly or indirectly, Congress fails to accord to local communities the proper respect for their autonomy in matters of obscenity and obscenity-for-minors. Community-based institutions can choose to exercise

125. *See generally* Tom W. Bell, *Free Speech, Strict Scrutiny, and Self-Help: How Technology Upgrades Constitutional Jurisprudence*, 87 MINN. L. REV. 743 (2003) (arguing that private individuals' technological self-help remedies are more powerful than Congress's efforts at regulating Internet speech and that therefore Congress should defer to such private regulation).

126. Communities' determinations of speech that is harmful to minors would still be subject to the judicially-determined floor for speech with serious social value for minors.

127. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629, 636 (1968).

this autonomy to regulate minors' access to harmful Internet content by implementing acceptable use policies and carefully-designed filtering software systems to regulate the Internet access of minors within their communities alone. As Etzioni explains,[128] by using such geographically-contained policies and technologies, local communities can regulate for and within their communities without creating the problem of community-to-community spillover that is present in regulatory schemes such as the CDA and COPA. Within a constitutional overall scheme of regulating minors' access to harmful Internet speech, each state or community should therefore enjoy the *option* of regulating minors' Internet access in public places such as schools and libraries by implementing constitutional definitions of obscene-for-minors speech. Such constitutional definitions must be carefully crafted to be consistent with the definitional guidelines set forth in *Miller* and *Ginsberg*, and may be implemented through carefully designed filtering software systems.

B. *Regulating* Only Minors *Access to Obscene-for-Minors Expression—Reducing Minors-to-Adults Spillover*

As Etzioni explains,[129] one of the primary constitutional problems with Congress's attempts to regulate minors' access to harmful Internet speech has been the spillover such regulations effect upon adults' constitutional rights. Because adults enjoy the constitutional right to access expression that is deemed obscene for minors, any regulation that, in the process of restricting *minors'* access to such expression, also impinges upon *adults'* constitutional right to access such expression will likely be found unconstitutional. As the Supreme Court explained in *Reno v. ACLU*, condemning the CDA's restrictions on adults' access to sexually-themed Internet speech, "the government may not reduce the adult population . . . to only what is fit for children."[130] Because of the difficulty and expense of determining an Internet user's age, it has also been difficult to implement regulatory schemes for the Internet restricting only minors' access to obscene-for-minors expression. As discussed above, one of the primary reasons that the CDA was found unconstitutional was that in restricting minors' access to certain sexually-themed Internet expression, it also

128. *See* Etzioni, *supra* note 1, at 52.

129. *See* Etzioni, *supra* note 1, at 29–30.

130. 521 U.S. 844, 875 (1997) (quoting Denver Area Educ. Telecomm. Consortium, Inc v. FCC, 518 U.S. 727 (1996)).

thereby restricted *adults'* access to such expression.[131] Because it is difficult and expensive to ascertain with certainty the age of the recipients of one's Internet expression, the CDA's restrictions on the communication of indecent expression to minors effectively translated into restrictions on the communication of indecent (but protected for adults) expression altogether. Similarly, COPA, in regulating minors' access to harmful-to-minors content, also imposed unconstitutional burdens on adults' constitutional right to access harmful-to-minors (but protected for adults) content.

In contrast to these types of criminal bans on Internet speech applied to the nation across the board, restrictions on Internet access imposed by community-based institutions such as public schools and libraries through the mechanism of filtering software can be designed and implemented to avoid this type of problematic minor-to-adult spillover. (And, as mentioned above, such filtering by community-based institutions also eliminates problematic community-to-community spillover.) As Etzioni explains in his article,[132] public schools and libraries within communities that choose to use filtering software to regulate minors' Internet access can implement a technological infrastructure that keys the level of filtered Internet access to the age of the individual accessing the Internet. Through a technologically-feasible system of date-sensitive user IDs, public libraries and schools can require that all individuals below a certain age have filtered access to the Internet. Public libraries and schools either already have or can readily acquire and track the birth date of each young patron and student. Within such a system, each Internet user can be assigned a user ID that embeds within it the birth date of the user. Until an Internet user reaches the designated age (say thirteen- or seventeen--years-old), the default configuration would be that his or her Internet access would be filtered to screen out expression that is harmful to minors as defined by the relevant community (and, presumably, obscene and child pornographic content as well). Upon reaching the designated age, the user's Internet access would then be unfiltered (or would filter out only speech that that is wholly unprotected by the First Amendment). By implementing such a system, public schools and libraries would be able to accurately restrict Internet users' (direct) access to harmful material based on the age of the

131. *Id.* at 874.

132. *See* Etzioni, *supra* note 1, at 47.

Internet user, thereby substantially reducing the regulatory spillover of such schemes upon adults' constitutional rights.

If we assume, pursuant to the above analysis, that community-based institutions' filtering software systems could perfectly correlate the age of the Internet user with the level of filtering to be imposed upon such access, several questions then arise. First, we may ask which age categories correlate to which levels of filtering. Second, we need to inquire into the scope of First Amendment rights enjoyed by individuals of different ages. As I have discussed, the Supreme Court's jurisprudence makes clear that there are at least *two* constitutionally distinct age categories for purposes of the First Amendment—*viz.*, adults and minors. And the Supreme Court, as I discuss below, has provided some guidance on where the line between adults and minors should be drawn. Yet, the Supreme Court's First Amendment jurisprudence does not make clear precisely how limited the First Amendment rights of minors are, nor does it make clear whether further subdivisions within the category of minors would be constitutionally permissible (or indeed required).[133]

In his article, Etzioni suggests a further subdivision within the category of minors, to break out the subcategory of teenagers (those thirteen and older) and children (those twelve and under) for purposes of regulating the access of these groups to harmful Internet content.[134] Indeed, the Third Circuit, in its recent decision on remand (once again holding that COPA is unconstitutional), appeared to approve—and even to require as constitutionally necessary—the subdivision of the category of minors along the lines that Etzioni has suggested.[135] Etzioni then suggests that while the Supreme Court's jurisprudence according substantial protections for minors' First Amendment rights might reasonably apply to *teenagers*, it does not reasonably apply to *children*.[136] In analyzing whether Etzioni's proposed (at least) *three*-tiered analysis would be constitutional, it will first be helpful to scrutinize the Supreme Court's jurisprudence setting forth a *two*-tiered obscenity analysis.

The Supreme Court's obscenity and obscenity-for-minors jurisprudence clearly demarcates one place to draw a line with respect to free speech rights—*viz.*, in between those *seventeen and older* and

133. *See, e.g.*, ACLU v. Ashcroft, 322 F.3d 240 (3d Cir. 2003).
134. *See* Etzioni, *supra* note 1, at 43.
135. *See ACLU*, 322 F.3d at 268.
136. *See* Etzioni, *supra* note 1, at 47.

those *sixteen and younger*. In finding the CDA's indecency and patent offensiveness provisions unconstitutional, one important justification was the fact that the CDA drew the line between those eighteen and older and those seventeen and younger.[137] In contrast, the regulation of minors' access to expression upheld in *Ginsberg* drew the line between those seventeen and older and those sixteen and younger. In explaining that the CDA was not narrowly tailored as compared to the statute in *Ginsberg*, the Supreme Court explained that "the New York statute [in *Ginsberg*] defined a minor as a person under the age of 17, whereas the CDA, in applying to all those under 18 years, includes an additional year of those nearest majority."[138]

Accordingly, it would seem uncontroversial to maintain that those sixteen and under enjoy First Amendment rights that are more limited than those seventeen and older. The question remains whether the subcategory of *children* (those twelve and under, or, for some purposes, those reading age through age twelve) enjoy more limited First Amendment rights than the subcategory of *teenagers* (those thirteen through sixteen). Most cases and commentators analyzing the free speech rights of minors focus on the First Amendment rights of *mature* minors,[139] and very little academic or judicial inquiry has focused on the free speech rights of less mature minors. Arguments in favor of limiting minors' First Amendment rights are certainly less persuasive when applied to minors approaching the age of majority. Thus, the Supreme Court explains, in condemning the CDA, that

> Under the CDA, a parent allowing her 17-year-old to use the family computer to obtain information on the Internet that she, in her parental judgment, deems appropriate could face a lengthy prison term. Similarly, a parent who sent his 17-year-old college freshman information on birth control via e-mail could be incarcerated even though neither he, his child, nor anyone in their home community found the material "indecent" or "patently offensive," if the college town's community thought otherwise.[140]

Nonetheless, the Supreme Court also suggests that the government may have a stronger interest in regulating *younger* minors' access to harmful Internet access than in regulating *older* minors' access to such speech. The Court explains that "[i]t is at least clear that the

137. Reno v. ACLU, 521 U.S. 844, 880 (1997).
138. *Id.* at 865–66.
139. *See, e.g.*, Ross, *supra* note 6, at 223–25.
140. *Reno*, 521 U.S at 878.

strength of the Government's interest in protecting minors is not equally strong throughout the coverage of this broad statute [*i.e.*, throughout ages 0–17]."[141] Thus, the Court would likely recognize that the government has a stronger interest in regulating younger minors' access to harmful speech than older minors' access. The Third Circuit, in its recent COPA opinion, further suggests that Congress's failure to carve out finer distinctions within the category of minors rendered COPA insufficiently narrowly tailored.[142]

Several Supreme Court cases suggest that minors in *high school* and *junior high school* enjoy robust First Amendment rights (although these rights may be limited when exercised within public schools because of concerns for school order).[143] The *Pico* case is particularly instructive for our purposes, as it applies to school libraries' decisions to remove content deemed inappropriate for *junior and senior high school students*.[144] In *Pico*, several school-aged plaintiffs challenged the local school board's decision to remove nine books from the district's high school and junior high school libraries, including Kurt Vonnegut's *Slaughter House Five* and Richard Wright's *Black Boy*, because the school disapproved of the content, ideas, and viewpoints contained within these books. Holding that such removal was unconstitutional, the Supreme Court explained that:

> [T]he First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library. Our precedents have focused not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas. . . . [Although] all First Amendment rights accorded to students must be construed in light of the special characteristics of the school environment, . . . the special characteristics of the school *library* make that environment especially appropriate for the recognition of the First Amendment rights of students . . . . [S]tudents must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding. [I]n the school library a student can literally explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum. . . . The student learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom.[145]

141. *Id.*
142. *See* ACLU v. Ashcroft, 322 F.3d 240, 265 (3d Cir. 2003).
143. *See, e.g.*, Bd. of Educ. v. Pico, 457 U.S. 853, 868 (1982).
144. *Id.* at 856–60.
145. *Id.* at 866, 868, 869 (internal quotations omitted).

The Court's expansive language in *Pico* supports the claim that *junior high school*, as well as senior high school, students enjoy meaningful First Amendment rights that would prohibit their libraries from restricting access to content that school or library officials deemed inappropriate for them, absent the proper showing of constitutionally valid reasons for removal.

The Supreme Court's decision in *Tinker* provides further support for the proposition that junior high school (and perhaps even younger) students enjoy meaningful First Amendment rights.[146] In that case, several junior and senior high school students—ages thirteen- to sixteen-years-old—challenged their suspension from school for wearing black armbands to convey their opposition to the Vietnam War. In finding their suspension to be a violation of their First Amendment rights, the Supreme Court addressed the First Amendment rights of students *generally:*

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of expression at the schoolhouse gate. . . . In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression. . . . The Nation's future depends upon leaders trained through a wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, rather than through any kind of authoritative selection.'[147]

The Court's expansive language in *Tinker* regarding students' First Amendment rights was not limited to the rights of junior and senior high school students. Rather, the Supreme Court's pronouncements apparently applied to students of all ages in public schools. Indeed, the Court heard the *Tinker* case on petition for certiorari regarding the First Amendment's protections for the right of students "from kindergarten to high school."[148] The *Tinker* and *Pico* cases therefore suggest that the Supreme Court would be unprepared to recognize reduced First Amendment rights for the category of younger minors.

Several Supreme Court decisions nonetheless suggest that the requisite characteristics that render freedom of expression meaningful to individuals—namely the full capacity for meaningful independ-

146. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
147. *Id.* at 506, 511, 512 (internal quotations omitted).
148. *Id.* at 516 (Black, J., dissenting).

ent choice and the ability to define and redefine oneself as a result of exposure to different views and types of expression—do not obtain with respect to younger minors. (And indeed Etzioni appears to be in full accord with such reasoning on the part of the Supreme Court.[149]) For example, in his concurring opinion in *Ginsberg*, Justice Stewart contended that "a State may permissibly determine that, at least in some precisely delineated areas, a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."[150] Further, the majority in *Ginsberg* approvingly cited First Amendment scholar Thomas Emerson in support of the proposition that children do not possess the requisite faculties that would render full First Amendment rights meaningful to them:

> Different factors come into play . . . where the interest at stake is the effect of erotic expression upon children. The world of children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose different rules.[151]

In a subsequent related article, Emerson expounded upon this argument and upon the reasoning articulated in *Ginsberg* for limiting the First Amendment rights of children:

> A system of freedom of expression . . . cannot and does not treat children on the same basis as adults. The world of children is not the same as the world of adults, so far as a guarantee of untrammeled freedom of the mind is concerned. The reason for this is, as Justice Stewart said in *Ginsberg*, that a child "is not possessed of that full capacity for individual choice which is the presupposition of the First Amendment guarantees." He is not permitted that measure of independence, or able to exercise that maturity of judgment, which a system of free expression rests upon. This does not mean that the First Amendment extends no protection to children; it does mean that children are governed by different rules.[152]

Along these lines, Etzioni contends that children

> are different from adults in that they have few of the attributes of mature persons that justify respecting their choices. Children have not yet formed their own preferences, have not acquired basic moral values, do not have the information needed for sound judgments, and are subject to ready manipulation by others.[153]

149. *See* Etzioni, *supra* note 1, at 45–47.

150. Ginsberg v. New York, 390 U.S. 629, 649–50 (1968) (Stewart, J., concurring).

151. *Id.* at 638 n.6 (internal quotations omitted).

152. Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

153. *See* Etzioni, *supra* note 1, at 45.

Etzioni also approvingly cites Colin Macleod and David Archard for the proposition that "children are seen as 'becoming' rather than 'being'" and "the basic idea that children must be viewed as developing beings whose moral status gradually changes now enjoys near universal acceptance."[154] Yet, the fact that an individual is in the process of *becoming* and is open to having her ideas reshaped and redefined in response to expression to which she is exposed is a justification for, not against, according meaningful access to a broad range of expression to that individual. As the Court held in *Pico*,

> students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding. [I]n the school library, a student can literally explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum. . . . The student learns that the library is a place to test or expand upon ideas presented to him, in or out of the classroom.[155]

Along these lines, other commentators have rejected the claim that children or younger minors do not possess the faculties necessary for the enjoyment of the rights of freedom of expression:

> [Emerson's and similar theories of the First Amendment] assume that the average citizen is qualified to sort out and evaluate the ideas presented to him, but do not assume that he can do so whatever his age. [Such theories] rather assume that a child cannot sort and evaluate, but will accept uncritically what he reads and hears. This theory of the First Amendment is too narrow. It overlooks the obvious: that today's children are tomorrow's adults. Because a child will accept uncritically what he hears, he is to hear nothing but what the majority wants him to hear. Having heard, and by hypothesis accepted, nothing but orthodoxy all his life, he is to be suddenly transformed into a rational adult who will choose impartially in the marketplace of ideas. Surely this is too much to expect. Surely if we let any orthodoxy monopolize the minds of our children we risk letting it control the future of our society. The First Amendment, then, if its purpose is to preserve an authentic competition among opinions must protect expression to children as well as to adults. It may be that children are so immature and unsophisticated that they can easily be led into confusion and error. But some risk of confusion and error is preferable to the risk of a deadening conformity of thought.[156]

154. *See* Etzioni, *supra* note 1, at 46 (quoting David Archard & Colin M. Macleod, *Introduction*, *in* THE MORAL AND POLITICAL STATUS OF CHILDREN (David Archard & Colin M. Macleod eds., 2002)).

155. Bd. of Educ. v. Pico, 457 U.S. 853, 868–69 (1982).

156. Comment, *Exclusion of Children from Violent Movies*, 67 COLUM. L. REV. 1149, 1158 (1967).

In working through the contours of children's free speech rights, it is helpful to revisit the philosophical underpinnings of and justifications for free speech rights in general, and to consider how these are translated in the context of minors' interests in free expression. One of the most important justifications for protecting freedom of expression is the integral role freedom of expression plays within democratic self-government.[157] Yet, this justification applies directly only to those who are capable of self-government. Because minors are not able to participate formally in our system of democratic self-government, this justification for free speech does not apply to them fully and directly. However, during their minority, individuals are and should be engaged in the process of acquiring the tools they need to engage in self-government when they do reach the age of majority. For these reasons, minors should be granted broad access to a wide variety of content to enable them to practice formulating the opinions and beliefs necessary eventually to engage in meaningful self-government. As Judge Richard Posner explains in *American Amusement Machine Ass'n v. Kendrick*:

> Now that eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views on the basis of uncensored speech *before* they turn eighteen, so that their minds are not a blank when they first exercise the franchise.... People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.[158]

As the Supreme Court similarly explained in *West Virginia State Board of Education v. Barnette*, "That [we] are educating the young for citizenship is reason for scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[159] In short, for adults, protecting freedom of expression is instrumental to achieving meaningful democratic self-government, while for minors, protecting freedom of expression is necessary in order to allow individuals to experience the freedoms they will need so as to eventually exercise meaningful rights of self-government. Accordingly, the closer an individual is to the age of majority—to the age in which she will formally participate in democratic self-government—the more extensive her free speech

157. *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

158. 244 F.3d 572, 577 (7th Cir. 2001).

159. 319 U.S. 624, 637 (1943).

mocratic self-government—the more extensive her free speech rights should be. Adolescence marks off a transitional period, in which individuals should enjoy and experience many of the freedoms that they will come to enjoy in adulthood, so that they will be better able to meaningfully enjoy those freedoms in adulthood. Furthermore, our system of freedom of expression should ensure that adolescents are able to inform themselves and contribute to discussions on social and political matters even though they cannot participate in public elections, as did the minors involved in the *Tinker* case. As the Supreme Court stated in *Keyishian v. Board of Regents*, "The Nation's future depends upon leaders trained through wide exposure to . . . robust exchange of [ideas and information]."[160]

The second important justification for protecting freedom of expression grounds such protection on the integral role such protection plays in individual self-exploration, self-expression, and self-definition. As articulated by First Amendment scholar Thomas Emerson, individual self-fulfillment depends upon the development of an individual's capacity for reasoning and emotions, and self-exploration, self-expression, and self-definition form "an integral part of the development of ideas, of mental exploration and of the affirmation of self."[161] This justification—which is generally applied to *adults'* right to free speech—presumes that adults are engaged in the active process of self-definition and re-definition, which is facilitated through their enjoyment of First Amendment freedoms. But minors, if anything, are even more deeply entrenched in the process of self-exploration, self-expression, and self-definition than are adults. Thus, on this justification for First Amendment freedoms, it is important to protect minors' right to access a wide range of content in order to facilitate their process of self-exploration, self-expression, and self-definition.

Accordingly, the traditional justifications for protecting freedom of expression—based on its role in democratic self-government and in self-expression, self-exploration, and self-definition—apply to minors as well as to adults, and apply particularly strongly to minors in the transitional period to adulthood. Although the Supreme Court has not had much of an occasion to consider or articulate the contours of First Amendment protection for different subcategories within the

160. 385 U.S. 589, 603 (1967).

161. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963).

category of minors, strong justifications exist for providing robust First Amendment rights to adolescents, whereas these justifications are weaker when applied to free speech protections for pre-adolescents and younger minors. Along these lines, the creation of a three-tiered approach, as suggested by Dr. Etzioni, would provide for an appropriate period of transition for individuals from childhood (in which the justifications for protecting freedom of expression do not apply in full force) to adulthood (in which they do).

In light of the above, the question remains whether a community-based institution could constitutionally create a trifurcated system for the filtering of Internet speech along the lines of the three-tiered approach suggested by Etzioni: one (heavily regulated) category for those twelve and under ("children"); one (less regulated) category for those ages thirteen to sixteen[162] ("teenagers"); and the third (much less regulated) category for adults. Given the possibility of precisely correlating an Internet user's age with a set of filtering software settings, a library or school, as a technical matter, could readily define and impose one set of filtering software settings for those twelve and under; another set for those thirteen to sixteen; and another set (or no set) for those seventeen and older. If such a three-tiered approach were adopted, the category of unprotected expression for older minors should correlate as precisely as possible with the definitions of unprotected material set forth in the statute in *Ginsberg* and mirrored in COPA. However, the definition of unprotected expression should substitute the expression "minors ages thirteen to sixteen" for the term "minors."[163] For younger minors, it is unclear whether the category of excluded material would need to track the *Ginsberg* language, modified to apply to "minors ages twelve and

162. Consistent with the Supreme Court's analysis in *ACLU v. Reno* and *Ginsberg*, it is reasonable to categorize seventeen year olds as adults for purposes of obscenity regulation.

163. The definition of content that was obscene or harmful to older minors accordingly would be along the following lines:

> Material that is harmful to minors ages 13 to 16.—The term 'material that is harmful to minors ages 13 to 16' means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that —
>
> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors ages 13 to 16, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors ages 13 to 16, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors ages 13 to 16.

under." It is unclear whether children of this age can even form prurient interests.[164] However, it is clear that content can possess (or fail to possess) serious literary, artistic, political, or scientific value for minors ages twelve and under. Therefore, any such definition of content prohibited for younger minors should contain such a savings clause, so that material that has serious social value for (the appropriate age category of) minors would be deemed protected and either unfiltered as an initial matter or unfiltered as a result of an unblocking request.[165]

C. *Preserving Parental Autonomy By Permitting Parents to Secure Unfiltered Internet Access for Their Children*

Regardless of whether community-based institutions choose to adopt a two- or three-tiered approach to regulating minors' access to harmful Internet speech, certain other protections need to be built in to any such regulations in order to render them constitutional. The Supreme Court has recognized that parents, in the exercise of their constitutional prerogative to educate and raise their children, enjoy the right, within limits, to determine the materials to which their children have access. The Supreme Court has sought to protect this aspect of parental autonomy specifically in the context of regulations restricting minors' access to expression that the government deems harmful to minors.[166]

Accordingly, in crafting a speech-protective constitutional regulation of minors' access to harmful Internet content, such regulation should preserve parents' right to override any (default) determinations by the public institutions of what material is harmful for children. Toward this end, filtered Internet access for students and library patrons under a certain age should merely be the default configuration, and parents should enjoy the opportunity to reverse this default and allow their children unfiltered Internet access. This parental de-

164. *See* ACLU v. Ashcroft, 322 F.3d 240, 254 (3d Cir. 2003).

165. For a discussion of free speech friendly unblocking requests, see *infra*, Part II.F.

166. As discussed above, in *Ginsberg*, the Supreme Court looked favorably upon the fact that the statutory prohibition at issue preserved parents' right in the exercise of their parental discretion to grant their children access to the statutorily-proscribed materials. In *ACLU v. Reno*, the Supreme Court condemned the CDA's criminal provisions, in part because they effected a complete prohibition on minors' access to the statutorily proscribed materials and usurped parents' autonomy to override this governmental determination of harmfulness to minors for their own children.

termination could be readily implemented as a technical matter by keying this determination to each minor's user ID.

D. Reducing Surfer-to-Surfer Spillover

Libraries' experience in providing Internet access to patrons has also demonstrated another type of spillover that institutions should attempt to minimize—namely, the harm or offense caused by viewing content on the screen of another Internet user.[167] For example, an adult (or minor of tolerant parents) may be viewing content that is protected for adults but obscene for minors on his screen, and such screen may be in plain view of minors (or of individuals who would be offended by such content). To avoid such harm or offense, libraries (and if applicable, schools) should undertake measures to reduce the viewing of computer screens by those not using them. Such measures include separating minors' Internet accessible computers from adults' computers; using technological means to restrict adults' Internet access to computers in the adult section and to restrict minors' Internet access to computers in the minors' section; and positioning computer screens and/or using privacy screens so that a computer screen can only be viewed by the individual who is using the computer.[168]

E. Reducing the Over-Blocking Inherent in Filtering Software

I have suggested that community-based institutions could employ carefully-designed filtering software systems to implement their definitions of content that is obscene for minors (or for different categories of minors). But because of the technological infirmities in filtering software, community-based institutions and developers of filtering software should undertake several substantial measures to ensure that such software restricts access only to unprotected speech and blocks the least amount of protected speech possible.

In order for libraries and schools to utilize filtering software to meaningfully implement their community's definition of content that is obscene for minors, such institutions need to be able to understand and to direct how such filtering software will operate within their institutions. At a minimum, such institutions need to be able to access and understand the set of criteria used by filtering software programs

167. *See, e.g.*, Mainstream Loudoun v. Bd. of Trs. of Loudoun County Library, 24 F. Supp. 2d 552, 565 (E.D. Va. 1998).

168. *See, e.g., id.* at 565–66.

to block access.[169] As discussed above, most filtering software programs operate in a secret fashion and refuse to disclose to their users the algorithms by which they restrict access to certain categories of Internet content.

Several commentators and courts[170] have criticized the use of filtering software by libraries and schools as an unconstitutional delegation of authority over content selection and screening to private, secretive, unaccountable companies. These criticisms are not without merit, and point up the importance of transparency in the operation of filtering software programs as an absolute minimum prerequisite for a finding that their use is constitutional. For example, in holding that a public library's mandatory filtering of all Internet access was unconstitutional, the court in *Mainstream Loudoun*[171] condemned the library's "willingness to entrust all preliminary blocking decisions—and, by default, the overwhelming majority of final decision[s]—to a private vendor .... Such abdication ... is made even worse by the undisputed fact[] that .. [the library] ... does not know by what criteria [the software vendor] makes its blocking decisions."[172]

Filtering software companies will balk at requirements that they give access to their algorithms and lists of blocked sites, but there are means at their disposal to protect their interests while not compromising the public's First Amendment rights. In order to protect filtering software companies' trade secrets in their software and databases, these companies can rely upon the use of non-disclosure and confidentiality agreements with their prospective and current clients in software licensees to protect their interests in such information while rendering critical information about the operation of their software available to their clients.

Community-based institutions using filtering software programs should be able to access and modify both the "whitelists"—*i.e.*, the list of never-blocked web sites/pages—and the "blacklists"—*i.e.*, the list of blocked web pages/sites—used by such programs. Both of these

169. *See generally* Mark S. Nadel, *The First Amendment's Limitations on the Use of Internet Filtering in Public and School Libraries: What Content Can Librarians Exclude?*, 78 TEX. L. REV. 1117 (2000) (arguing that to be constitutional, libraries must, at a minimum, understand the criteria that their chosen filtering software uses to exclude content and retain the final say over selection decisions).

170. *See, e.g.*, *Mainstream Loudoun*, 24 F. Supp. 2d at 567.

171. *Id.* at 569; *see generally* Richard J. Peltz, *Use "the Filter You Were Born With": The Unconstitutionality of Mandatory Internet Filtering for the Adult Patrons of Public Libraries*, 77 WASH. L. REV. 397 (2002).

172. *Mainstream Loudoun*, 24 F. Supp. 2d at 569.

goals can be accomplished through the use of client-side implementation of the filtering software. First, these institutions should develop and maintain a comprehensive directory of recommended and approved web sites for Internet users. These web sites should be included in the software's whitelist to ensure that such sites are never blocked by the software. Second, these community-based institutions should also be able to access and modify the blacklists maintained by the filtering software so as to ensure that erroneously blocked sites can be expeditiously unblocked.

F. Speech-Friendly Unblocking Processes

As we have seen, perhaps the greatest imposition on users' free speech rights posed by the use of filtering software by public libraries and schools is overblocking—*i.e.*, the software erroneously blocks access to expression that minors (and adults) have a constitutional right to access. Because the system herein contemplated would filter only minors' Internet access, I focus on the effect that filtering software's over-blocking has on minors' First Amendment rights. Many studies have shown that even the most sophisticated filtering software programs block a substantial amount of expression that is not only *not* harmful to minors under any conceivable definition but that is expressly suited to minors.[173] Opponents of filtering advert to these studies in contending that because all filtering software is overbroad[174] and not narrowly tailored to restrict access to all and only those sites that are obscene for minors, the use of filtering software should be deemed unconstitutional.

Libraries and schools seeking to use filtering software in a constitutional manner therefore need to undertake measures to remedy the problems of over-blocking inherent in the use of filtering software. First, as mentioned above, only minors' Internet access should be made subject to filtering, and this only as a default configuration which may be opted out of by parents for their children. Second, institutional users must have access to and control over the criteria used by such software to block sites, and to the blacklists and whitelists maintained by such software. Third, as discussed below, Internet users must be able to submit—and institutions must be able to act

173. *See, e.g.*, FILTERS & FREEDOM 2.0 (Electronic Privacy Information Center, eds., 2001).
174. *See, e.g., id.*

upon—unblocking requests in a manner that does not unconstitutionally burden users' First Amendment rights.

G. *Anonymous Requests to Unblock and Information Necessary to Facilitate Unblocking Requests*

Within a constitutional filtering software system, minors should enjoy the right and the ability to submit requests to unblock a particular web page or site.[175] If a minor is wrongfully denied access to the National Zoo's or the National Geographic's web sites, she should be able to recognize that this erroneous overblocking has occurred and submit, and have expeditiously acted upon, an unblocking request with respect to such site. In order to do so, the filtering software implemented by such community-based institutions must operate sufficiently transparently, so as to convey to the Internet user the requisite information as to which web pages that otherwise satisfied her search criteria were blocked, as well as the reason the software blocked them. The filtering software, acting upon a user's search query, should therefore return a list of the URLs of blocked sites, accompanied by the reason such site was blocked. This information is the minimum necessary for a user to be able meaningfully to submit an unblocking request with respect to a blocked web site.[176]

Users should also be able to submit and to have unblocking requests acted upon (relatively) anonymously. Accordingly, unblocking requests should be identified with a particular user ID, which should not be (easily) correlated to the user's actual identity.[177] Unblocking requests should be acted upon expeditiously by designated staff members of the library or school who are familiar with the community's articulated and clear definitions of material that is obscene for minors.[178] Users should then be expeditiously notified of the result of the unblocking request in a manner that protects their anonymity.

175. Such requests would be contrary to the CIPA E-rate scheme.

176. *See, e.g.*, LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 176–82 (1999) (criticizing filtering systems on the ground that such systems could operate in such a way as to leave users ignorant of what content is blocked and for what reason).

177. As the lower court reviewing the constitutionality of CIPA pointed out, some libraries already take steps to protect the anonymity of patrons submitting unblocking requests. *See* American Library Ass'n, Inc. v. United States, 201 F. Supp. 2d 401, 475–84 (E.D. Pa. 2002), *rev'd*, 123 S. Ct. 2297 (2003).

178. But, as I suggest *infra*, the court in American Library Association was wrong to conclude that a twenty-four-hour delay is unacceptable.

H. The Prior Restraint Doctrine, The Operation of Filtering Software, and the Processing of Unblocking Requests

Several commentators, and at least one court,[179] have concluded that the use of filtering software by public institutions effectuates an unconstitutional prior restraint on protected expression. These conclusions are not without merit. As I explain, prior restraints, including those effected via filtering software, indeed should be viewed as presumptively unconstitutional. Public institutions using filtering software may, however, be able to build certain protections and safeguards into their filtering software systems to mitigate the harms to free speech effected by them and to increase the likelihood that the implementation of such systems will be found constitutional.

Prior restraints are speech regulations that operate to restrict speech by restraining speech prior to its dissemination, such as those embodied in pre-publication licensing schemes and censorship film boards. Systems of prior restraints operate in contrast to systems of subsequent punishment, which penalize the dissemination of prohibited expression *after* its dissemination. In contrast to the methods of speech regulation embodied in the CDA and COPA, which effect subsequent punishment by criminally penalizing the communication of prohibited expression *after* its dissemination, filtering software operates to restrict the expression of such speech and to prevent it from being communicated in the first place, prior to any judicial determination that such speech is protected by the First Amendment. Because prior restraints, like those embodied in filtering software, operate to censor speech prior to its dissemination, they have historically been viewed as far more pernicious and dangerous to freedom of expression than methods of subsequent punishment. As such, prior restraints are constitutionally suspect and indeed are viewed as presumptively unconstitutional.[180] As the Supreme Court explained in *Bantam Books*, "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[181]

Despite their presumptive unconstitutionality, the Supreme Court has held that the implementation of certain safeguards can

179. *See* Mainstream Loudoun v. Bd. of Trs. of Loudoun County Library, 24 F. Supp. 2d 552 (E.D. Va. 1998).

180. *See* Near v. Minnesota, 283 U.S. 697, 713 (1931) (explaining that "the chief purpose [of the First Amendment is to] prevent previous restraints upon publication.")

181. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

render prior restraints of expression constitutional.[182] In order for prior restraints, such as those effected by filtering software systems, to be found constitutional, they must embody certain *substantive* and *procedural* safeguards. First, systems of prior restraint must not vest unbridled discretion in the decision-maker (such as by enabling the decision-maker to grant or deny permission to speak based on whether such speech would "advance the public interest" or serve "national security interests" or other such broad, manipulable standards). Vesting such substantive discretion in the decision-maker is pernicious because it enables the decision-maker to restrict expression because of disagreement with its message (such as by denying a parade permit for an anti-war rally on the pretextual grounds that such a rally was inimical to public safety, when the real reason for denial was disagreement with the message to be conveyed).[183] Although the decision-making mechanics of software filtering programs arguably embody many evils, one such evil is *not* unbridled or boundless substantive "discretion" in the "decision-maker" that would be conducive to the types of evils contemplated by the Supreme Court in its prior restraint jurisprudence. On the contrary, the algorithms implementing these content-based decision-making criteria are devoid of any discretion (in the usual sense of the term) whatsoever. Put differently, computers implementing such algorithms are not subject to the danger of making pretextual determinations disfavoring certain types of expression because of disagreement with the message being conveyed.

Nonetheless, filtering programs may be held to embody standardless decision-making if they embody too much "discretion" relative to the constitutional definitions of material that is obscene for minors. That is, if the delta is too great between (1) the constitutional definition of obscenity for minors and (2) the definitions used by the filtering software to block content, the filtering software system may be found to vest unbridled discretion in the "decision-maker" and to constitute an unconstitutional prior restraint lacking the requisite substantive safeguards.

In *Mainstream Loudoun*, the district court considered the issue of whether the library's imposition of filtering software constituted an unconstitutional prior restraint. It held that the mandatory filtering software imposed by the library failed to embody the substantial safe-

182. *See* Freedman v. Maryland, 380 U.S. 51, 60 (1965).

183. *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969).

guards necessary to render it a constitutional prior restraint for various reasons: (1) because the library had abdicated the decision-making authority regarding which Internet content to block to a private vendor; (2) because the library did not even know the criteria used by the vendor to make its blocking determinations; and (3) because the filtering software did not in any case base its blocking decisions on any legal definitions of constitutionally unprotected speech.[184] Because of the gap between the constitutionally-accepted definitions of unprotected speech and the definitions of unprotected speech implemented by the filtering software, the court found that the substantive discretion of the relevant "decision-maker" was inadequately held in check.

The substantive discretion vested in filtering software's algorithms, however, could be substantially held in check in several ways. First, such discretion could be checked by ensuring that library officials have access to, and the ability to modify, the criteria used by filtering software in its blocking definitions, and by ensuring that library officials have the power to override blocking determinations made by filtering software in response to unblocking requests, where such overrides are made consistent with a clear and constitutional definition of obscenity-for-minors adopted by the relevant community.

Systems of prior restraint, to be constitutional, must also embody (at least) two *procedural* safeguards. First, any restraint must be imposed only for a specified brief time period, and must be reviewable by a designated institutional decision-maker (and reversed if wrongfully imposed) within this specified brief time period.[185] For example, a prior restraint scheme in which U.S. officials were charged with reviewing books for obscene content and were required to make a determination within two to three days was held to satisfy this first procedural safeguard on prior restraints.[186] In contrast, in the system of filtering in place in *Mainstream Loudoun*, because patrons' requests to unblock particular web sites were not required to be acted upon within any given time period (and because there was no provision for notifying the requesting patron if and when the site was unblocked), this filtering scheme was found constitutionally infirm

184. Mainstream Loudoun v. Bd. of Trs. of Loudoun County Library, 24 F. Supp. 2d 552 (E.D. Va. 1998).

185. FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990).

186. Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957).

because it did not embody this requisite procedural safeguard for prior restraint.[187] Relevant prior restraint precedent suggests that if public library and school officials acted upon unblocking decisions they received within a maximum window of twenty-four to forty-eight hours, such prior restraints would likely be deemed constitutional as regards the "specified brief time period" prong. Although it is certainly undesirable for an Internet user to be made to wait twenty-four to forty-eight hours before being granted access to a web site that she has a constitutional right to access (and which she would be able to access instantly were it not for the filtering software), such a waiting period is probably within the bounds of constitutionality. Thus, despite the CIPA court's holding that *any* amount of time that a patron has to wait while an unblocking decision is pending would be unconstitutional,[188] prior restraint jurisprudence suggests that a brief, limited delay would be constitutional.[189]

Second, systems of prior restraint such as those implemented via filtering software must provide for expeditious *judicial* review of the relevant institutional or administrative decision. The courts have repeatedly emphasized the importance of the availability of expeditious judicial review of censorship determinations in the prior restraint context.[190] As one appellate court explained, "because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final [prior] restraint."[191] Thus, in order for a filtering software system to effectuate a constitutional prior restraint, such a system would need to provide for the expeditious review of an adverse unblocking determination made by school or library officials. That is to say, a patron or student who submitted an unblocking request and whose unblocking request was

187. Mainstream Loudoun v. Bd. of Trs. of Loudoun County Library, 24 F. Supp. 2d 552, 570 (E.D. Va. 1998).

188. American Library Ass'n, Inc. v. United States, 201 F. Supp. 2d. 401, 485–86 (E.D. Pa. 2002).

189. It might be suggested that the Supreme Court's medium-specific approach to freedom of expression should apply in this context to further limit the specified, brief time during which an unblocking decision can constitutionally be pending because Internet access (contra e.g., interlibrary loans) is reasonably expected to be near-instantaneous. However, unblocking decisions necessarily entail human review, which review still takes a certain measure of time, regardless of the fast-paced nature of the Internet medium.

190. *See* United States v. Thirty-Seven Photographs, 402 U.S. 363, 372–74 (1971); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 682 (1968); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963); Kingsley Books, Inc. v. Brown, 354 U.S. 436, 440 (1957).

191. United States v. Pryba, 502 F.2d 391, 405 (D.C. Cir. 1974).

denied by the relevant library or school official would need to be able to secure expeditious judicial review of this adverse unblocking determination in order for the prior restraint effected by the filtering software system to be deemed constitutional. In the *Mainstream Loudoun* case, because there was no provision for judicial review of any unblocking determinations, the scheme was held to constitute an unconstitutional prior restraint lacking this second procedural safeguard.[192] Relevant Supreme Court precedent dictates that the availability of a judicial determination within sixty days of the unblocking determination would suffice to meet the expeditiousness requirement.[193]

In short, in order to design a filtering software system imposed by public libraries and schools that would effect a *constitutionally permissible* prior restraint, such a filtering software system would need to embody both the requisite substantive and procedural safeguards specified by the Supreme Court's prior restraint jurisprudence.

CONCLUSION

Through its recent legislative efforts embodied in the Communications Decency Act, the Child Online Protection Act, and the Children's Internet Protection Act, Congress appears to be gradually moving toward a constitutional scheme for regulating minors' access to harmful Internet expression. Whereas the drafters of the CDA acted hastily and with disregard for established First Amendment precedent, the drafters of COPA much more carefully attended to the Supreme Court's finely-honed obscenity jurisprudence in revisiting this issue. While the relevant provisions of the CDA and COPA to

192. Mainstream Loudoun v. Bd. of Trs. of Loudoun County Library, 24 F. Supp. 2d 552, 570 (E.D. Va. 1998).

193. *See Thirty-Seven Photographs*, 402 U.S. at 372–74 (delays in judicial determination as long as three months could not be sanctioned; accordingly, a federal statute imposing prior restraint must be construed to require a judicial decision within sixty days to uphold the constitutionality of the statute); *Interstate Circuit*, 390 U.S. at 690 n.22 (holding prompt judicial review was assured by provision requiring a judicial determination within nine days of the decision of the administrative body); *Bantam Books*, 372 U.S. at 70 (noting that prior restraint on speech is "tolerated . . . only where it . . . assured an almost immediate judicial determination of the validity of the restraint"); *Kingsley Books*, 354 U.S. at 439 (requiring a trial one day after the joinder of issues and a resolution within two days after the trial); Redner v. Dean, 29 F.3d 1495, 1501–02 (11th Cir. 1994) (holding that judicial review is not promptly available where administrative remedies must be sought first, but there were inadequate time restraints for such administrative decision), *cert. denied*, 514 U.S. 1066 (1995); *cf.* East Brooks Books, Inc. v. City of Memphis, 48 F.3d 220, 225 (6th Cir. 1995) (indicating that potential delay of five months from application to judicial hearing is impermissible).

date have been found unconstitutional, the Supreme Court recently rejected a facial challenge to CIPA. It is likely, however, that CIPA will be subject to an as-applied challenge. Accordingly, it is important to understand the scope and extent of minors' and adults' First Amendment rights in order to design and implement constitutional regulations of Internet speech. In particular, libraries must implement CIPA in a manner that secures both adults' and minors' free speech rights. This Article has offered such practical guidance to libraries for implementing CIPA in the least speech-restrictive manner possible.