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RECENT DECISION

RENO V. ACLU: THE COMMUNICATIONS DECENCY ACT HITS A RED LIGHT ON THE INFORMATION SUPERHIGHWAY

John M. Beahn⁺

The First Amendment to the United States Constitution states that "Congress shall make no law . . . abridging the freedom of speech."¹ The simplistic brevity of the First Amendment inherently remains misleading. Although the language of the First Amendment appears absolute, the Supreme Court never has held the First Amendment to confer an absolute right to free speech.² Rather, the Court has excluded certain categories of speech from any constitutional protection based solely on their content.³ These types of speech, such as violence-advocating or obscene speech, remain unprotected because they have no redeeming value and lack any beneficial content.⁴

The Court also has approved restrictions on certain types of speech not based on their content, but rather on their method of delivery.⁵ Such situations arise when the courts permit restrictions on certain speech, such as indecent speech, based solely on the medium through which that speech is communicated.⁶ From the printed media, to the telephonic

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1. U.S. CONST. amend I.

2. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (discussing the various types of unprotected speech); *Abrams v. United States*, 250 U.S. 616, 618-19 (1919) (denying protection to pamphlets opposing intervention in Russia); *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

3. See e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (excluding from constitutional protection speech that incited or produced imminent lawless action); *Chaplinsky*, 315 U.S. at 571-72 (noting the various forms of unprotected speech); *Schenck*, 249 U.S. at 52 (noting that some speech does not receive constitutional protection).

4. See *Chaplinsky*, 315 U.S. at 571-72. The Court stated that "[t]here are certain . . . classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Id.*

5. See E. Walter Van Valkenburg, *The First Amendment in Cyberspace*, 75 OR. L. REV. 319, 319 (1996).

6. See *Information Providers' Coalition for Defense of the First Amendment v. FCC*, 928 F.2d 866, 876 (9th Cir. 1991). The court wrote that "in any first amendment

media, to the broadcast media, the Supreme Court has struggled to distinguish permissible from impermissible speech since "each medium of expression presents special First Amendment problems."⁷ A comprehensive analysis of today's First Amendment problems, therefore, includes both a content-based analysis and a medium-specific analysis.⁸

The current wave of technological advancement in communications presents the same First Amendment problems that the legislatures and courts have wrestled with for many years.⁹ This exploding area of communications once again has forced the legislatures and courts to revisit "the intractable obscenity problem."¹⁰

The most recent Congressional attempt to control the availability of certain types of speech in a communications medium was the adoption of the Communications Decency Act of 1996 (CDA),¹¹ a part of the Telecommunications Act of 1996.¹² The incredible explosion in the popularity of the Internet,¹³ the so-called "Information Superhighway,"¹⁴ and the

speech case, [we must] evaluate both the content of words and the context in which they are delivered." *Id.*

7. *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978).

8. See G. Sidney Buchanan, *Toward A Unified Theory Of Governmental Power To Regulate Protected Speech*, 18 CONN. L. REV. 531, 535 (1986). Buchanan asserts that the Supreme Court looks to two dominant variables in its analysis of First Amendment issues: "the content variable, . . . and the forum [mode] variable." *Id.*

9. *Cf. Reno v. ACLU*, 117 S. Ct. 2329, 2338 n.4, 2336-39 (1997) (discussing the availability of sexually explicit material on the Internet and the Communications Decency Act of 1996 (CDA)). The historic inter-relationships that have existed between pornography, counterculturalism, and new communications media should be noted. See DANIEL BURSTEIN & DAVID KLINE, *ROAD WARRIORS: DREAMS AND NIGHTMARES ALONG THE INFORMATION HIGHWAY* 106-07 (1995). Pornographic pictures prompted the development of photography and film development in the late nineteenth century. See *id.* at 107. X-rated movies drove the development and wide-spread usage of VCRs in the home. See *id.* Today's new technology apparently has followed in the footsteps of its media forefathers because, as of June 1995, three of the top 20 Internet sites were dedicated to sex. See *id.*

10. *Miller v. California*, 413 U.S. 15, 16 (1973) (quoting *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 704 (1968) (Harlan, J., concurring in part and dissenting in part)).

11. Pub. L. No. 104-104, § 502(2)(d), 110 Stat. 133, 133-36 (1996) (to be codified at 47 U.S.C. § 223 (a) to (h)).

12. Pub. L. No. 104-104, 110 Stat. 56 (1996).

13. The term "Internet" resulted from a combination of the words "interconnection" and "network," and refers to "the network formed by the cooperative interconnection of computing networks." GLEE HARRAH CADY & PAT MCGREGOR, *MASTERING THE INTERNET* 5 (2d ed. 1996).

14. This term was popularized by then-Senator Al Gore, Jr., who for years campaigned for the construction of a National Research and Education Network. See BILL GATES, *THE ROAD AHEAD* 5 (1995). This origin seemed appropriate because Al Gore, Sr., another long time Tennessee Senator, had been responsible for the legislation that led to the development of a national highway system in the 1960s. See *id.* Another term often

resultant increase in pornography available on the Internet, prompted the inclusion of the CDA in the Telecommunications Bill.¹⁵ The CDA outlawed a variety of indecent and obscene communications previously available on the Internet, and criminalized the transmission of obscene or indecent communications to any person under the age of eighteen by means of a telecommunications device.¹⁶

The adoption of the CDA greatly incensed Internet users, who staged a world wide blackout of the Internet during which thousands of Internet web sites shut down in protest.¹⁷ Immediately following President Clinton's signature of the CDA, two lawsuits were filed challenging the Act's constitutionality.¹⁸ The first suit, filed in the Eastern District of

used to describe the Internet, "cyberspace," was initially coined by William Gibson in his science-fiction novel *NEUROMANCER*. See HOWARD RHEINGOLD, *THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER* 5 (1993). Gibson wrote that cyberspace involved "[a] consensual hallucination experienced daily by billions of legitimate operators, in every nation, by children being taught mathematical concepts . . . A graphic representation of data abstracted from the banks of every computer in the human system." GIBSON, *supra* note 1, at 51. The term "cyber" is derived from the term "cybernetics," initially used to describe the science of computers. See CADY & MCGREGOR, *supra* note 14, at 835.

15. See *Reno v. ACLU*, 117 S. Ct. 2329, 2338 n.24 (1997).

16. See § 502(2)(d), 110 Stat. at 133-34.

17. See Jim Upchurch, *The dark dawn of the "Decency Act"* (published Feb. 12, 1996) <<http://www.mont.mindspring.com/~jtu3/arts/96.02.12decent.html>>. These sites went black for 48 hours. See *id.*

18. See *Shea ex. rel. American Reporter v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996), *aff'd*, 117 S. Ct. 2501 (1997); *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997). Both suits specifically challenged 47 U.S.C. § 223(d)(1), which provided:

Whoever—

(1) in interstate or foreign communications knowingly—

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

(B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or

(2) knowingly permits any telecommunication facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both.

47 U.S.C.A. § 223(d)(1) (West Supp. 1997).

The plaintiffs also challenged 47 U.S.C. § 223(a)(1)(B), which provided:

Whoever—

(1) in interstate or foreign communications—

...

(B) by means of a telecommunications device knowingly—

Pennsylvania by a coalition of plaintiffs led by the American Civil Liberties Union (ACLU), argued that the CDA unconstitutionally infringed on First Amendment free speech rights.¹⁹ The second lawsuit filed by the publisher of an on-line newspaper challenged the CDA on substantially similar grounds.²⁰

Both cases were brought under a provision of the CDA allowing for an expedited constitutional challenge to the statute before a district court three-judge panel.²¹ Both panels overturned the CDA as an unconstitutional infringement on free speech²² and focused their opinions on the plaintiffs' two main arguments: statutory vagueness and overbreadth.²³ While the panels disagreed on whether the CDA was unconstitutionally vague,²⁴ both found that the statute was unconstitutionally overbroad because it would result in an impermissible chill on the free speech rights of some Internet users.²⁵

Although both sets of plaintiffs had similar interests in wanting to dismantle the CDA, dissimilar motives drove their involvement. Dedicated Internet users, obsessed with governmental intrusion into their lives,²⁶ view the Internet as the final frontier in which government regulation and intrusion is not only unwelcome, but also repulsive to the very principles that make the Internet so appealing: its decentralized structure, its self-regulated autonomy, and its liberating anonymity.²⁷

(i) makes, creates, or solicits, and

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

...

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

Id. § 223(a)(1)(B).

19. See *ACLU*, 929 F. Supp. at 827. This suit was filed the same day that the CDA was signed into law. See *id.*

20. See *Shea*, 930 F. Supp. at 923-24. This suit was filed the same day the CDA went into effect. See *id.*

21. See Pub. L. No. 104-104, § 561(a)-(b), 110 Stat. 133, 142-43 (1996).

22. See *Shea*, 930 F. Supp. at 950; *ACLU*, 929 F. Supp. at 849.

23. See *Shea*, 930 F. Supp. at 935; cf. *ACLU*, 929 F. Supp. at 849.

24. Compare *Shea*, 930 F. Supp. at 936 (finding the definition of indecency not unconstitutionally vague), with *ACLU*, 929 F. Supp. at 858 (finding the definitions of "indecent" and "patently offensive" to be unconstitutionally vague).

25. See *Shea*, 930 F. Supp. at 950; *ACLU*, 929 F. Supp. at 854 (Sloviter, C.J., supporting opinion).

26. Cf. RHEINGOLD, *supra* note 15, at 253-57 (discussing the sharp reaction by early Internet users to Operation Sun Devil, the FBI's crackdown on computer "hackers").

27. See BURSTEIN & KLINE, *supra* note 10, at 107 (noting the lack of a controlling hierarchy on the Internet as its principal appeal); cf. GATES, *supra* note 15, at 92 (noting

The coalition led by the ACLU, more concerned with the constitutional ramifications of the CDA, viewed the statute as a veiled attempt by Congress to blur the judicially created distinctions between protected and unprotected speech.²⁸ The ACLU's arguments focused primarily on the disparate constitutional protection afforded to information on the Internet under the CDA as opposed to other media of expression.²⁹ They viewed this disparity as a dangerous first step toward ever-increasing infringement on the constitutional right to free speech.³⁰

On June 26, 1997, the Supreme Court updated the First Amendment for the twenty-first century. The Court accomplished this in *Reno v. ACLU*,³¹ which struck down the Communications Decency Act (CDA).³² The Court found the CDA overbroad in comparison to previous Court-approved laws that prohibited indecent communication.³³ In its opinion, the Court dismissed the government's reliance on previous Court-approved speech restrictions as misplaced, and found the statute insufficiently tailored to effectuate the government's interest in preventing minors' exposure to indecent material.³⁴ The concurrence found the CDA to be a mere attempt to create unconstitutional "adult zones" on the Internet.³⁵ The concurrence conceded that such "adult zones" could be constitutional, but found that the CDA failed to adhere to proper drafting procedures in creating these zones.³⁶

This Recent Decision first describes the technological structure and inherent strengths of the Internet. It then provides an in-depth analysis of the development of First Amendment theory, focusing first on content-based restrictions and then on medium-based restrictions. This Re-

that text-only exchanges on the Internet have fostered a "social, racial, gender, and species blind" net culture).

28. Cf. Barry Steinhardt, *Circulating Draft of Revisions to the Exon Amendment* (visited Oct. 29, 1996) <gopher://gopher.panix.com:70/0/vtw/exon/analyses/aclu3> (noting that the CDA attempted to impose restrictions permissible in some media on the Internet without appropriate justification).

29. See *Frequently Asked Questions (FAQ) About the 1995 Communications Decency Act* (last modified June 27, 1995) <<http://www.panix.com/vtw/exon/index.html>> (presenting alleged myths related to the CDA, and distinguishing the Internet from other FCC regulatable media).

30. See *id.* (presenting a web page section entitled "Brief Analysis" of CDA).

31. 117 S. Ct. 2329 (1997).

32. See *id.* at 2334 (holding that the CDA's statutory language abridges the First Amendment's free speech protections).

33. See *id.* at 2351.

34. See *id.*

35. See *id.* (O'Connor, J., concurring in the judgment in part and dissenting in part).

36. See *id.* (asserting that the proper drafting procedures for such "zoning" can be found in the Court's "prior cases").

cent Decision critically analyzes the two district court challenges to the CDA and provides an analysis of the Supreme Court's decision in *Reno v. ACLU*. This Recent Decision contends that the Supreme Court greatly narrowed the constitutional chances of any future attempts at restricting indecent speech and concludes that any attempt to regulate the Internet, though legally permissible, remains technically unfeasible.

I. THE INTERNET—INHERENT STRENGTHS LEAD TO ENFORCEMENT WEAKNESSES

The Department of Defense initially developed the Internet to act as a reliable, high-speed method of communication that would allow governmental agencies to access supercomputers and to communicate with one another in the event of a nuclear disaster.³⁷ The rapid increase in demand for Internet access, coupled with the development of faster, more powerful computer networks, caused the Internet to become more decentralized and less dependent on a small number of government-run supercomputers, and more reliant on individual local networks.³⁸ These local networks underscore the current decentralized nature of the Internet.

Because the Internet relies on numerous local computer networks for its operation, no one organization governs or manages it.³⁹ Instead, the Internet remains a vast, loosely organized alliance of individual, cooperating computer networks that are self-operated and self-financed.⁴⁰ Thus, the Internet utilizes a series of decreasingly smaller networks, layered on

37. See PAUL GILSTER, *THE INTERNET NAVIGATOR* 16 (2d ed. 1994). In the late 1960s, the Advanced Research Projects Agency of the U.S. Department of Defense (ARPA) designed and developed ARPANET, the forerunner of the modern day Internet. See *id.* The primary missions of this new computer network were to aid researchers with the exchange of information and to study how communications between government bodies could be maintained in the event of a nuclear attack. See *id.*

38. See RHEINGOLD, *supra* note 15, at 79-83 (describing the privatization and rate of growth of Internet use).

39. See BURSTEIN & KLINE, *supra* note 10, at 107. Several organizations, however, guide and assist in the growth of the Internet. See CADY & MCGREGOR, *supra* note 14, at 27-28, 819, 821. These organizations, such as the Internet Society and the Internet Architecture Board (IAB), handle much of the architectural work of the Internet. See *id.* at 819, 821. Another group responsible for "governing" the Internet is the Network Information Center (NIC), sponsored by the National Science Foundation. See *id.* at 11. The NIC registers the names and addresses of new computers being added to the Internet. See *id.* Despite the involvement of these groups in the management of the Internet, some commentators have maintained that the structure of the Internet renders it "ungovernable." See BURSTEIN & KLINE, *supra* note 10, at 113.

40. See CADY & MCGREGOR, *supra* note 14, at 7-11 (depicting the Internet as a "network of networks," that remains void of ownership).

top of one another, that communicate over high speed data circuits.⁴¹

When a user sends a message across the Internet, the message does not remain a single continuous unit. Rather, the Transmission Control Protocol (TCP) breaks up the message into small "packets" of information.⁴² The Internet Protocol (IP) prepares these packets for mailing, ensuring that the packets will reach the proper destination by enclosing each packet into a separate "envelope" containing the proper address.⁴³ These packets are sent independently over various Internet routes to their proper destination.⁴⁴ Upon arrival at the final destination, TCP reassembles the packets into their original form.⁴⁵

The technological structure and inherent strengths of the Internet enable users to access information easily, including pornography.⁴⁶ This same structure and strength also creates tremendous enforcement problems associated with any attempt to limit the information available on the Internet. Presently, no governing body manages the Internet⁴⁷ and, because there is no central bottleneck that information must pass through, it would be difficult for any governing body to restrict the availability of certain information.⁴⁸ Other factors that create enforcement problems include inexpensive entry to the Internet⁴⁹ and anonymous ex-

41. See GILSTER, *supra* note 38, at 16-17.

42. See CADY & MCGREGOR, *supra* note 14, at 13 ("Packets are one of the basic units of measurement on the Internet.")

43. See *id.*

44. See *id.* at 13-14. As the packets travel through the Internet, "routers" examine the addresses of each IP envelope and determine the most efficient path of transport. See *id.* A router is a special computer that forwards and directs traffic between different networks. See *id.* at 837. Routers determine the best path for the packet to take to its final destination based on its IP address. See *id.* at 13-14.

45. See *id.* at 14. The entire process of packet transfer remains possible because the Internet is a packet-switched network. See GILSTER, *supra* note 38, at 18. In a packet-switched network, information packets from the same message travel across a variety of data circuits to reach the same final destination. See *id.* A natural advantage of a packet-switched network is that it allows the routers to determine alternate routes for transmissions if a particular link fails or remains unavailable. See *id.* It should be noted that the development of packet-switched networks resulted from a desire to eliminate any central link for the exchange of information between military centers because such a link would constitute an easy target during a nuclear attack. Cf. *id.*

46. See *Reno v. ACLU*, 117 S. Ct. 2329, 2334-36 (1997) (discussing the capabilities of the Internet and the availability of pornography on-line); see also BURSTEIN & KLINE, *supra* note 10, at 106-07 (noting the wide variety of information people access on the Internet).

47. See BURSTEIN & KLINE, *supra* note 10, at 106-07.

48. Cf. *id.* (describing the Internet as "an off-road environment" without "stoplights or traffic dividers").

49. See *id.* at 116; GATES, *supra* note 15, at 97.

istence on the Internet for users as well as operators of Internet sites, which can frustrate attempts to regulate unwanted activity.⁵⁰ Thus, any attempt to enforce statutory restrictions on the Internet, such as the CDA, would encounter numerous technical roadblocks.

II. RAPID TECHNOLOGICAL ADVANCEMENT, INCESSANT LEGAL CATCH-UP

A. *The Exclusion of Obscenity from Constitutional Protection*

It is a long-established judicial fact that obscene speech can be prohibited by the government.⁵¹ Although federal courts addressed limited obscenity issues in the late nineteenth century,⁵² and the Supreme Court explicitly had approved the government's ability to restrict certain types of speech,⁵³ the Court did not address squarely the issue of governmental restriction of obscene speech until the mid-twentieth century.

The Supreme Court first considered the question of the level of constitutional protection afforded obscene speech in *Roth v. United States*.⁵⁴ In *Roth*, the Court upheld the convictions of several defendants who had published and sold sexually explicit materials in violation of federal and state obscenity statutes.⁵⁵ After a review of its First Amendment jurisprudence, the Court concluded that obscenity always had been outside the bounds of constitutional protection.⁵⁶ Although, historically, obscenity had not been excluded specifically from constitutional protection, the Court reasoned that "implicit in the history of the First Amendment is the rejection of obscenity as [being] utterly without redeeming social im-

50. See BURSTEIN & KLINE, *supra* note 10, at 107; GATES, *supra* note 15, at 162.

51. See *Commonwealth v. Sharpless*, 2 Serg. & Rawle 91, 101-03 (Pa. 1815) (convicting a defendant at common law for displaying a nude painting).

52. See *United States v. Thomas*, 27 F. 682, 682-83 (S.D. Miss. 1886) (noting the ability of Congress to prevent the sending of obscenity through the mails); *United States v. Foote*, 25 F. Cas. 1140, 1140 (S.D.N.Y. 1876) (No. 15,128) (same); *United States v. Britton*, 17 F. 731, 732 (S.D. Ohio 1883) (same); *United States v. Hanover*, 17 F. 444, 444 (S.D. Ohio 1883) (same).

53. See *Abrams v. United States*, 250 U.S. 616, 623-24 (1919) (affirming convictions for denouncing U.S. intervention in Russia under the Espionage Act).

54. 354 U.S. 476 (1957).

55. See *id.* at 494. The federal statute at issue in *Roth* provided that "[e]very obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character . . . [i]s declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier." *Id.* at 479 n.1.

56. See *id.* at 484-85.

portance.”⁵⁷ Therefore, the Court concluded that obscene speech should not be granted First Amendment protection.⁵⁸ The Court defined obscenity as that which “to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to [the] prurient interest.”⁵⁹

1. Possession vs. Distribution of Obscenity

The Court sharply departed from *Roth* in *Stanley v. Georgia*,⁶⁰ reversing the conviction of a defendant for possession of obscene movies in violation of a Georgia obscenity statute.⁶¹ Though apparently similar to *Roth*, the Court distinguished *Stanley* because the defendant in *Stanley* had been convicted of illegal possession of obscene materials within his home, and not the sale or publication of such materials.⁶² The Court declined to extend the *Roth* holding to include the prohibition of private possession of obscene materials⁶³ because such a decision would constitute governmental control of individual private thoughts and would greatly invade their privacy rights.⁶⁴

Although *Stanley* seemed to partially overrule the *Roth* Court’s exclusion of obscenity from First Amendment protection, the Court restricted the breadth of that decision in *United States v. Reidel*.⁶⁵ In *Reidel*, the defendant was indicted for mailing obscene material to willing and consenting adults.⁶⁶ The district court dismissed the indictment, reasoning that the Court’s ruling in *Stanley* had rendered the federal obscenity statute unconstitutional.⁶⁷

In reversing the district court, the *Reidel* Court clarified and distinguished *Stanley*, and upheld the constitutionality of the obscenity stat-

57. *Id.* at 484. As evidence, the Court noted that there was a plethora of international, federal, and state laws regulating the distribution of obscene materials. *See id.* at 485.

58. *See id.* at 485.

59. *Id.* at 489.

60. 394 U.S. 557 (1969).

61. *See id.* at 568.

62. *See id.* at 560-61. The Court noted that all of its previous opinions involved the distribution, selling, or mailing of obscene material. *See id.*

63. *See id.* at 559.

64. *See id.* at 565. The Court noted that “[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.” *Id.*

65. 402 U.S. 351 (1971).

66. *Cf. id.* at 353.

67. *See id.* at 353, 355 (discussing the trial court’s reliance on the constitutional protections in *Stanley*).

ute.⁶⁸ The Court distinguished *Stanley* on the grounds that the decision had focused solely on the issue of private possession of obscene materials.⁶⁹ Because the defendant in *Reidel* had not possessed the material merely for private use, but had sought to distribute it using the mails, the Court concluded that the defendant had been indicted properly for criminal activity, not for the exercise of a protected free speech right.⁷⁰

2. Obscenity Defined

After *Reidel*, the Court faced a tumultuous period in its First Amendment obscenity jurisprudence.⁷¹ During this period, the Supreme Court issued no majority opinions regarding the proper obscenity standard to apply. At the same time, the Court reversed a multitude of obscenity cases.⁷² Recognizing that its vaguely defined obscenity standard had become unworkable, the Court reexamined its analysis of obscene speech in *Miller v. California*.⁷³

The *Miller* Court propounded a three-prong test for determining whether a work was obscene.⁷⁴ The first prong of the *Miller* test adopted the *Roth* test and inquired "whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest."⁷⁵ The *Miller* Court outlined the parameters of this hypothetical community standard by overtly approving of the state community standards that the jury had used in its deliberations.⁷⁶ The Court concluded that use of local standards adequately would forewarn sellers and distributors of obscene materials of the standards by which their material would be judged and the activities for

68. See *id.* at 354-57 (refusing to read *Stanley* as overruling *Roth*, thereby validating the obscenity statute at issue).

69. See *id.* The Court noted that the *Stanley* decision "neither overruled nor disturbed the holding in *Roth*." *Id.* at 354. Further, the Court stated that "[n]othing in *Stanley* questioned the validity of *Roth* insofar as the distribution of obscene material was concerned." *Id.*

70. See *id.* at 356 (declining to overrule the *Roth* principle rejecting First Amendment protections for obscenity).

71. See *Miller v. California*, 413 U.S. 15, 22 & n.3 (1973).

72. See *id.* (criticizing "censorship" practice of the Court due to the lack of a comprehensive obscenity law majority view).

73. See *id.* at 22-23. The defendant was convicted of sending unsolicited sexually explicit material through the United States mail. See *id.* at 16.

74. See *id.* at 24 (specifying basic guidelines a trier of fact must follow).

75. *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 489 (1957)).

76. See *id.* at 31. The jury applied the community standards of California, the state in which it was sitting. See *id.* The Supreme Court found that the First Amendment did not require the formulation of a national standard to determine whether materials were obscene. See *id.* at 31-32.

which they could be prosecuted.⁷⁷

The second prong of the *Miller* test asked whether the work depicted “in a patently offensive way, sexual conduct specifically defined by the applicable state law.”⁷⁸ The final prong inquired “whether the work, taken as a whole, lack[ed] serious literary, artistic, political, or scientific value.”⁷⁹ Thus, if the work satisfied all three of these criteria, it would be judged as obscene and given no constitutional protection. The *Miller* Court maintained that this three-pronged analysis would aid the courts in determining whether a work was obscene and would isolate “hard core” pornographic materials from constitutional protection.⁸⁰

B. Treatments of Advancing Technologies by the Supreme Court Force the Legal Creation of “Indecent” Speech

Although the *Miller* Court believed that it had resolved the “intractable obscenity issue,”⁸¹ developments in communications media once again outpaced the developments in constitutional theory, presenting the Court with a variety of cases involving unique First Amendment issues.

1. Broadcast Communications

In a landmark case involving broadcast radio, *FCC v. Pacifica Foundation*,⁸² the Supreme Court approved a Federal Communications Commission (FCC) ban on a radio broadcast that contained a variety of lewd and suggestive words.⁸³ In approving the ban, the Court partially extended the *Miller* Court’s ban on obscenity to encompass “indecent” speech by differentiating, for the first time, between “obscene” and “indecent” speech.⁸⁴ The Court separately interpreted the two federal obscenity statutes at issue, 18 U.S.C. §§ 1461 and 1464.⁸⁵ The Court concluded that

77. *See id.* at 27.

78. *Id.* at 24.

79. *Id.*

80. *See id.* at 27. Such “hard core” materials, the Court noted would be “specifically defined by the regulating state law.” *Id.*

81. *See supra* notes 76-81 and accompanying text (discussing the three-part test set forth in *Miller*).

82. 438 U.S. 726 (1978).

83. *See id.* at 750-51. The broadcast was satirist George Carlin’s famous “Filthy Words” monologue, in which Carlin referred to several words that could not be publicly said on the airwaves without violating FCC policy. *See id.* at 729.

84. *See id.* at 739-41.

85. *See id.* at 739-40. The Court cited the disjunctive use of the words “obscene” and “indecent” in the governing federal obscenity statute and inferred congressional intent to treat the two words differently. *See id.* The broadcasting statute had provided that “[w]hoever utters any obscene, indecent, or profane language by means of radio commu-

§ 1461 was concerned only with obscenity, whereas § 1464 was intended to encompass more than just obscene speech when applied to the public broadcast medium.⁸⁶ The Court found no congressional intent to limit the scope of § 1464 to cover only obscene material, and thus extended § 1464 to cover indecent material.⁸⁷ The Court then vaguely defined indecent speech as speech that was contrary to "accepted standards of morality."⁸⁸

Restricting the ban on indecent speech to broadcast communications, the court made the ban dependent upon certain nuisance variables, such as the time, place, and manner of its transmission.⁸⁹ The Court reasoned that the ease of accessibility by minors and the unique pervasiveness of broadcast communications justified these restrictions.⁹⁰ The *Pacifica* decision signaled a new direction in how the Court would conduct its constitutional inquiry—by evaluating not only the content of the speech, but also the means through which it was communicated.⁹¹

Two recent cases dealing with indecent broadcasts illuminate the federal courts consistent application of the *Pacifica* Court's ruling in the context of broadcast communications. In *Action for Children's Television v. FCC*⁹² (*ACT II*), the United States Court of Appeals for the District of Columbia noted its previous adoption of the *Pacifica* Court's definition of indecency and overturned an FCC order that instituted a blanket restriction on the broadcasting of indecent programming.⁹³ The

nication shall be fined not more than \$10,000 or imprisoned not more than two years, or both." *Id.* at 731 n.3 (citing 18 U.S.C. § 1464 (1976)).

86. *See id.* at 740-41.

87. *See id.* at 741. The court recognized that "the First Amendment has a special meaning in the broadcasting context." *Id.* at 742 n.17.

88. *Id.* at 740.

89. *See id.* at 750 (noting that the ban "rested entirely on a nuisance rationale under which context is all-important").

90. *See id.* at 748-50. The Court listed several reasons why broadcast communication deserves special First Amendment considerations, including the ease of access that children have to radios and the fact that radio receivers are usually in the home, a place where an individual's privacy interest is entitled to extra deference. *See id.*

91. *See id.* at 750. The Court noted that constitutional restriction of any speech, especially indecency, remains "largely a function of context." *Id.* at 742; *see also* *Action for Children's Television v. FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995) (*ACT III*) (holding that the context of the broadcast medium must be taken into account in a First Amendment analysis).

92. 932 F.2d 1504 (D.C. Cir. 1991) (*ACT II*), *overruled in part by* *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995).

93. *See id.* at 1508. The FCC order struck down in *ACT II* was a result of a congressional mandate to ban indecent television programming on a 24-hour basis. *See* Pub. L. No. 100-459, § 608, 102 Stat. 2228 (1988). The FCC had issued a comprehensive report finding that a 24-hour ban on indecent broadcasts comported with the Constitution. *See*

court found, consistent with the *Pacifica* Court's holding permitting only limited time restrictions, that a twenty-four hour restriction on the broadcast of indecent programming was not narrowly tailored to serve the government's interest in preventing the exposure of minors to such material.⁹⁴

Correspondingly, the D.C. Circuit approved of an FCC regulation that banned the broadcast of indecent programming only between the hours of 6:00 A.M. to midnight in *Action for Children's Television v. FCC*⁹⁵ (*ACT III*). The court found that the regulation was narrowly tailored to serve the government's compelling interest⁹⁶ in restricting the access of minors to indecent programming.⁹⁷ Therefore, although the *ACT III* court recognized that indecent speech retained constitutional protection, it also noted that certain broadcast speech remained subject to restrictions based upon the time and method of communication.⁹⁸

Thus, the federal courts have been consistent in their application of *Pacifica* that indecent broadcasts may be restricted dependent on certain transmission variables such as time and place.

2. Regulation of Indecency in Telephonic Communications

Although the Supreme Court partially had protected indecent speech in *Pacifica*, it did approve of time, place, and manner restrictions on the broadcast of indecent speech because of the increased potential for exposure of indecent material to minors.⁹⁹ As technology progressed, the Supreme Court and the lower courts were forced to address problems, raised by the telephonic exposure of minors to indecency, similar to those created by broadcast communications.¹⁰⁰

In *Carlin Communications, Inc. v. FCC*,¹⁰¹ a federal circuit court of ap-

In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, Report of the Commission, 5 F.C.C.R. 5297, 5297 (1990).

94. See *ACT II*, 932 F.2d at 1509. The application of this test results from the Supreme Court's ruling in *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989). See *infra* notes 107-111 and accompanying text discussing the *Sable* decision.

95. 58 F.3d 654, 656 (D.C. Cir. 1995) (en banc), cert. denied, 116 S. Ct. 701 (1996).

96. See *id.* at 663, 667. The court found the age floor to be consistent with other federal and state statutes that separated those under 17 years of age for special protection. See *id.* at 664.

97. See *id.* at 663.

98. See *id.* at 660.

99. See *FCC v. Pacifica*, 438 U.S. 726, 750 & n.29 (1978).

100. See *Reno v. ACLU*, 117 S. Ct. 2329, 2334 (1997) (considering issues of indecent material on the Internet); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 117-18 (1989) (examining dial-a-porn service problems); *Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 555 (2d Cir. 1988) (same).

101. 837 F.2d 546 (2d Cir. 1988).

peals approved FCC regulations that established various defenses against prosecution to operators of obscene or indecent telephone dial-a-porn services.¹⁰² The court noted that the defenses would restrain a minor's ability to access dial-a-porn services, while not unduly burdening a consenting adult's constitutional right of access.¹⁰³ The three-tiered approach promulgated by the FCC and approved by the court required payment by credit card, the employment of access codes by the operators, and the use of a scrambling system by the caller.¹⁰⁴

Following *Carlin*, Congress once again tried to prevent children from gaining access to dial-a-porn services by completely banning both obscene and indecent telephone messages.¹⁰⁵ Following these congressional amendments to the 1934 Communications Act, the Supreme Court in *Sable Communications of California, Inc. v. FCC*,¹⁰⁶ invalidated portions of § 223(b) of the Act, which completely banned indecent telephone message services.¹⁰⁷ The Court reaffirmed the principle that sexually explicit messages which are indecent, but not obscene, require First Amendment protection.¹⁰⁸ The Court, however, found that a complete ban of indecent telephone messages was not narrowly tailored to serve the compelling government interest in protecting minors from pornographic telephone services.¹⁰⁹ The Court distinguished *Pacifica*, which upheld a complete ban on the broadcasting of indecent speech during certain hours of the day, based on the medium used, explaining that minors have much easier access to radio broadcasts as compared to telephone services.¹¹⁰

102. *See id.* at 555.

103. *See id.* at 557.

104. *See id.* at 555.

105. *See* 47 U.S.C. § 223(b) (Supp. V 1988) (amending the Communications Decency Act of 1934 to promulgate penalties for transmission of indecent or obscene communication).

106. 492 U.S. 115 (1989). The case arose when Sable Communications, a provider of sexually explicit prerecorded telephone messages, sued to enjoin the enforcement of amended § 223(b) of the Communications Act of 1934. *See id.* at 117-18.

107. *See id.* at 131.

108. *See id.* at 126.

109. *See id.* at 131. The Court concluded that the statute as written would discourage adults from engaging in constitutionally protected speech. *See id.*

110. *See id.* at 127-28. The Court noted the affirmative steps a listener must take in order to gain access to telephone services as further reason to treat such services differently from broadcast communication. *See id.* The Court remained consistent with its obscenity decisions by approving the statute's total ban on obscene messages. *See id.* at 124. The Court also reaffirmed that the *Miller* Court's "community standard" rationale still prevailed and that no national obscenity standard had been created by § 223(b) for obscenity. *See id.* at 125. The Court ruled that the mere fact that the message services op-

Since the *Sable* Court rejected an outright ban on indecent messages, Congress responded with legislation that did not constitute an outright ban on indecent messages, but only criminalized the transmission of indecent telephone messages to anyone under eighteen years of age.¹¹¹ The Ninth Circuit reviewed this legislation in *Information Providers' Coalition for Defense of the First Amendment v. FCC*¹¹² and approved the criminalization of the transmission of indecent messages to anyone younger than eighteen years of age.¹¹³ In approving the FCC's regulations on dial-a-porn services, the Ninth Circuit adhered to Supreme Court precedent noting that indecent speech, although protected by the First Amendment, could be restricted if the regulations were narrowly tailored to further a compelling governmental interest.¹¹⁴

C. Application of Federal Obscenity Standards to Computers and the Internet

Federal courts increasingly have addressed First Amendment obscenity and indecency jurisprudence involving computers and the Internet. Application of previous Court rationales to the Internet has been troublesome because the Internet remains unique from other communications medium.¹¹⁵ The Sixth Circuit addressed this new and evolving medium in *United States v. Thomas*.¹¹⁶ Robert and Carleen Thomas were indicted and charged with violating federal obscenity statutes for operating a sexually explicit and obscene computer bulletin board.¹¹⁷ The Sixth Circuit Court of Appeals affirmed their convictions under federal obscenity laws.¹¹⁸

erators would be subject to varying community standards did not, by itself, make the law unconstitutional. *See id.* at 125.

111. *See* The Helms Amendment, Pub. L. No. 101-166, § 521, 103 Stat. 1159, 1192 (1989) (codified as amended at 47 U.S.C. § 223(b) (Supp. I 1989)).

112. 928 F.2d 866 (9th Cir. 1991).

113. *See id.* at 879.

114. *See id.* at 874-76.

115. *Cf.* *ACLU v. Reno*, 929 F. Supp. 824, 841-44 (E.D. Pa. 1996) (describing the operation and content on the Internet), *aff'd*, 117 S. Ct. 2329 (1997).

116. 74 F.3d 701 (6th Cir.), *cert. denied*, 117 S. Ct. 74 (1996).

117. *See id.* at 705-06. The Thomases operated a computer bulletin board which allowed members to download and print various pornographic images. *See id.* at 705. They were charged with, among other counts, violating 18 U.S.C. § 1465. *See id.* at 706. Section 1465 prohibits the transportation in interstate commerce of "any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character." 18 U.S.C. § 1465 (1994).

118. *See Thomas*, 74 F.3d at 716.

The Thomases first contended that the unique nature of computer-generated images justified their exclusion from federal obscenity statutes.¹¹⁹ They also argued that even if the statutes governed, the standards for judging information on such a novel medium must be updated, asserting that the national character of the Internet should force the courts to abandon the *Miller* local “community standards” analysis previously employed to evaluate obscenity.¹²⁰

The court rejected these arguments and affirmed the Thomases’ convictions by first determining that the federal obscenity statutes governed information on the Internet despite the Internet’s distinct technical features.¹²¹ The court then solidified its previous rationale for determining whether information was obscene in nature and reasoned that the *Miller* “community standard” test was properly applied to the Internet. The court concluded that the Internet material was obscene, and that the *Miller* test did not unconstitutionally chill free speech.¹²² The court found that providers of computer-generated obscenity could tailor their material to the collective standards of the communities they serve.¹²³

In response to the invention of new communications media, the Supreme Court and federal courts have, in the past thirty years, created and applied obscenity standards to broadcast, telephonic, and Internet media. The courts also have responded by creating and applying indecency stan-

119. *See id.* at 706. The Thomases argued that the federal obscenity statutes only covered tangible objects and not intangible objects like computer files. *See id.* (relying on *United States v. Carlin Communications, Inc.*, 815 F.2d 1367, 1371 (10th Cir. 1987)).

120. *See id.* at 711.

121. *See id.* at 707. The court determined that the defendants placed too much emphasis on the manner in which the Internet transmissions occurred, rather than on the actual transmission of sexually explicit photographs from one destination to another. *See id.* The defendants also argued that because the obscene material never left their home, they had a constitutionally protected right, created by the Supreme Court in *Stanley v. Georgia*, 394 U.S. 557 (1969), to possess the material. *See Thomas*, 74 F.3d at 710. The court disagreed, reasoning that “*Stanley* ‘depended not on any First Amendment right to purchase or possess obscene materials, but [rather] on the right to privacy in the home.’” *Id.* (quoting *United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123, 126 (1973)). Further, the court stated that the *Stanley* right of privacy did not “create ‘a correlative right to receive [the obscene material], transport it, or distribute it’ in interstate commerce.” *Id.* (quoting *United States v. Orito*, 413 U.S. 139, 141-42 (1973)).

122. *See Thomas*, 74 F.3d. at 711-12. The defendants argued that the *Miller* test forced them to censor themselves and to refrain from communications so as not to violate the standards of a given community, thus “chilling” their First Amendment rights. *See id.* at 711. The court rejected their argument, citing the Supreme Court’s ruling in *Sable Communications of California, Inc. v. FCC*, 492 U.S. 121, 125-26 (1989), and ruled that varying community standards did not justify declaring the statute unconstitutional. *See Thomas*, 74 F.3d at 711-12.

123. *See Thomas*, 74 F.3d at 712.

dards to the broadcast and telephonic media. Thus, it was reasonable for Congress in the recent CDA to apply the judicially created indecency standards to the newest form of electronic communication: the Internet.

III. ANALYSIS OF THE DISTRICT COURT OPINIONS REVERSING THE CONSTITUTIONALITY OF THE COMMUNICATIONS DECENCY ACT

The Communications Decency Act of 1996 was enacted to restrict children's access to pornography on the Internet.¹²⁴ As written, the CDA attempted to regulate both obscene and indecent speech.¹²⁵ The plaintiffs in *ACLU v. Reno*,¹²⁶ however, challenged only the indecency provisions of the CDA, as they conceded that the government could impose a complete ban on obscene materials.¹²⁷ In challenging the indecency provisions, both plaintiffs in *Shea ex rel. American Reporter v. Reno* and *ACLU v. Reno* attacked the vagueness of the statutory terms "indecent" and "patently offensive," as well as the overbreadth of the statute.¹²⁸

Both plaintiffs argued that the statutory definitions of "indecent" and "patently offensive" left providers and recipients of Internet material unaware of the actual parameters of "indecent" and "patently offensive" speech.¹²⁹ The plaintiffs also argued that such vague terms could lead to arbitrary enforcement of the criminal provisions of the CDA.¹³⁰ They further contended that the indecency provisions of the CDA were overbroad and extended beyond the reach of previous statutes by criminalizing constitutionally protected speech among adults.¹³¹ Finally, the plaintiffs maintained that the indecency provisions of the law restricted material that on its face was not indecent, but rather possessed significant literary and artistic value.¹³²

In overturning the indecency provisions of the CDA, the *Shea* and *ACLU* courts focused on the overbreadth and vagueness of the statute,

124. See *Shea ex rel. American Reporter v. Reno*, 930 F. Supp. 916, 922 (S.D.N.Y. 1996), *aff'd*, 117 S. Ct. 2501 (1997).

125. See 47 U.S.C.A. § 223(a), (d) (West Supp. 1997) (criminalizing the display of "patently offensive" sexually explicit material to persons under eighteen).

126. 929 F. Supp. 824 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997).

127. See *id.* at 829; *cf. Shea*, 930 F. Supp. at 922 (challenging only the provision of the CDA that prohibited the display of "patently offensive" material).

128. See *Shea*, 930 F. Supp. at 922; *ACLU*, 929 F. Supp. at 826-27.

129. See *Shea*, 930 F. Supp. at 935; *ACLU*, 929 F. Supp. at 850.

130. See *Shea*, 930 F. Supp. at 935; *ACLU*, 929 F. Supp. at 864.

131. See *Shea*, 930 F. Supp. at 940; *ACLU*, 929 F. Supp. at 855.

132. See *Shea*, 930 F. Supp. at 940; *ACLU*, 929 F. Supp. at 853.

its technically infeasible and economically prohibitive safe harbor provisions, and the government's reliance on *FCC v. Pacifica*.¹³³

A. Vagueness

The two district courts differed in resolving the plaintiffs' vagueness challenges to the statutory terms "indecent" and "patently offensive." The *ACLU* court, troubled that the statute did not define the term "indecent," found the language unconstitutionally vague.¹³⁴ The government's argument that the legislative history of the CDA contained the appropriate definition of "indecent" failed to sway the court because the court believed that the term should have been defined with specific reference to the Internet.¹³⁵ The court found the interchangeability of the statutory words "indecent" and "patently offensive" inherently suspect because operators of Internet sites would be unaware of the exact parameters of "indecent" and "patently offensive" speech.¹³⁶ The *ACLU* court also based its vagueness ruling on the government's inability to define the relevant community standards in the CDA by which the material was to be judged under the *Miller* test.¹³⁷

The *Shea* court, however, did not find the statute unconstitutionally vague, holding that the term "indecent," as used in the statute, merely codified its use as represented in *Pacifica*.¹³⁸ The court reasoned that the *Pacifica* Court's extensive use of the FCC's definition of "indecent" in its opinion indicated that the Supreme Court would approve of the CDA's codification of this same definition.¹³⁹ The *Shea* court similarly disposed of the plaintiffs' vagueness challenge to the "patently offensive" language included in the CDA.¹⁴⁰

B. Overbreadth

Despite their disparate rulings on the vagueness claims, both sustained the plaintiffs' overbreadth challenges.¹⁴¹ Each district court first de-

133. See *supra* notes 83-92 for an analysis of the *Pacifica* holding.

134. See *ACLU*, 929 F. Supp. at 856; *id.* at 858.

135. See *id.* at 862-63.

136. See *id.* at 861. The *ACLU* court concluded that a statute that criminalizes conduct clearly should define the outlawed conduct. See *id.* at 865.

137. See *id.* at 863-64. The *ACLU* court reasoned that the very nature of cyberspace prevented any consistent application of the *Miller* rationale. See *id.*

138. See *Shea*, 930 F. Supp. at 936.

139. See *id.* at 935. The *Shea* court concluded that this approval had "foreclose[d] a vagueness challenge to the FCC's definition for indecency in the broadcast medium." *Id.*

140. See *id.* at 936.

141. See *id.* at 950; *ACLU*, 929 F. Supp. at 855-57.

scribed the statute as a content-based restriction on certain speech.¹⁴² Therefore, in evaluating whether the statute was a constitutional restriction on speech, the courts inquired, pursuant to the *Sable* Court's holding, whether the CDA served a compelling governmental interest and was narrowly tailored to effectuate that interest.¹⁴³

1. *Compelling Governmental Interest*

The government argued, in each case, that shielding minors from access to pornographic images on the Internet was a compelling governmental interest. The *ACLU* court, however, discovered numerous examples of lawful and beneficial cultural and educational materials on the Internet that would be subject to the CDA's criminal provisions.¹⁴⁴ Both panels questioned whether the government could have a compelling interest in restricting a minor's access to such benign material.¹⁴⁵ The two district courts, however, did not base their opinions on the government's failure to exhibit a compelling interest, because each panel assumed a compelling governmental interest for purposes of their opinions.¹⁴⁶

2. *Narrowly Tailored Means—Safe Harbor Provisions*

The two district courts next determined whether the means by which the government sought to accomplish its compelling interest were narrowly tailored. The government maintained that the CDA did not prohibit adults from engaging in their constitutionally protected rights, because the safe harbor provisions of the CDA sufficiently narrowed the statute's reach within constitutional limits.¹⁴⁷ The government argued

142. See *Shea*, 930 F. Supp. at 939; *ACLU*, 929 F. Supp. at 851.

143. See *Shea*, 930 F. Supp. at 940; *ACLU*, 929 F. Supp. at 851. Both district courts recognized that the level of judicial scrutiny applied depended primarily on the pervasive nature of the specific communications medium at issue. See *Shea*, 930 F. Supp. at 940; *ACLU*, 929 F. Supp. at 872-74. The strict scrutiny standard appears to be applied to broadcast, telephone, and Internet use. See *Shea*, 930 F. Supp. at 940 (explaining that there was little difference in the standard applied to broadcast from that of strict scrutiny and that strict scrutiny would be used in the context of indecent Internet transmissions); *ACLU*, 929 F. Supp. at 851-52, 872-74.

144. See *ACLU*, 929 F. Supp. at 853. The *ACLU* court cited photographs from National Geographic travel magazines, literary descriptions, paintings, and recent news stories concerning the official practice of female genital mutilation as examples of permissible information that would be banned under the CDA. See *id.* The *Shea* court declined to reach this issue, focusing instead on the failure of the government to constitutionally narrow the statute. See *Shea*, 930 F. Supp. at 940.

145. See *Shea*, 930 F. Supp. at 940; *ACLU*, 929 F. Supp. at 853.

146. See *Shea*, 930 F. Supp. at 941; *ACLU*, 929 F. Supp. at 853.

147. See *Shea*, 930 F. Supp. at 942; *ACLU*, 929 F. Supp. at 855-57. Section 223(e)(5)(A) of the CDA provided a defense to prosecution if a person "ha[d] taken, in

that it could impose limitations on indecent speech; for as long as Internet providers abided by the safe harbor provisions, they could engage in indecent speech without the threat of prosecution.¹⁴⁸ The plaintiffs countered that the CDA prevented adults from engaging in constitutionally protected indecent speech, and that the statutory "safe harbor" provisions would not protect Internet providers from prosecution.¹⁴⁹

Both district court panels concluded that the CDA was not narrowly tailored to serve the government's interest, because the law would impermissibly chill First Amendment rights by causing some providers to refrain from engaging in protected speech out of fear of prosecution under the CDA.¹⁵⁰ The two courts determined the safe harbor provisions were technically infeasible, and that the costs of their implementation would be economically prohibitive for most operators.¹⁵¹

The panels found that for content providers, such as newsgroups and "chat rooms," there remained no technology available that would allow operators of these services to screen effectively for the ages of their recipients.¹⁵² For content providers on the World Wide Web, however, both panels noted that although it was technologically feasible for those operators to discover the age of those accessing their information, such measures would be prohibitively expensive and without guarantee that they could screen out minors.¹⁵³ Therefore, both types of content providers would be forced to reduce or eliminate their operations, resulting in an impermissible "chill" on their First Amendment rights.¹⁵⁴

The government also attempted to narrow the scope of the CDA by

good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication . . . which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology." 47 U.S.C. § 223(e)(5)(A) (West Supp. 1997). Further, § 223(e)(5)(B) provides a defense to prosecution if a person "has restricted access to such communication[s] by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number." *Id.* § 223(e)(5)(B).

148. See *Shea*, 930 F. Supp. at 942-43; *ACLU*, 929 F. Supp. at 855-56.

149. See *Shea*, 930 F. Supp. at 940; *ACLU*, 929 F. Supp. at 855-56.

150. See *Shea*, 930 F. Supp. at 943; *ACLU*, 929 F. Supp. at 855-56.

151. See *Shea*, 930 F. Supp. at 943; *ACLU*, 929 F. Supp. at 854. The *ACLU* court noted that "[w]ith the possible exception of an e-mail to a known recipient, most content providers cannot determine the identity and age of every user accessing their material." *Id.*

152. See *Shea*, 930 F. Supp. at 945; *ACLU*, 929 F. Supp. at 854. Discussing the intractability of this problem, the *ACLU* court noted that content providers are often unaware of the identity of their recipients, much less of their names. See *id.*

153. See *Shea*, 930 F. Supp. at 942-43; *ACLU*, 929 F. Supp. at 854.

154. See *Shea*, 930 F. Supp. at 943; *ACLU*, 929 F. Supp. at 854. The *Shea* court stated that "to avoid the threat of CDA liability, [some Internet operators] would simply have to refrain from engaging in constitutionally protected speech." *Shea*, 930 F. Supp. at 943.

arguing that the CDA's intent was to ban only commercial purveyors of pornography.¹⁵⁵ Both panels, however, found no reference to commercial pornography within the statute.¹⁵⁶ In fact, the courts noted that Congress did not have to pass a law prohibiting obscenity on the Internet, because pornography was already subject to prohibition under the federal obscenity statutes.¹⁵⁷ The panels further found that the statute was not narrowly tailored because small operators of Internet sites would either have to pay for expensive, age-screening programs or cease their Internet operations for fear of criminal prosecution.¹⁵⁸ Thus, the safe harbor provisions did not remedy the CDA's unconstitutional overbreadth.¹⁵⁹

*C. Misplaced Reliance on the Supreme Court's Holding in
FCC v. Pacifica*

The *ACLU* court extended its ruling further than the *Shea* court by analyzing the government's misplaced reliance on the Supreme Court's ruling in *Pacifica*.¹⁶⁰ The government argued in *ACLU* that the *Pacifica* ruling granted the government broad authority to restrict indecent speech in any medium.¹⁶¹ The *ACLU* court, however, cited several recent cases that limited the scope of the *Pacifica* decision.¹⁶² The court reasoned that *Pacifica*'s ban on indecent communications applied only to the broadcast medium.¹⁶³ Because the Internet more closely resembled telephonic communications than broadcast communications,¹⁶⁴ the *ACLU* court concluded that a complete ban on indecent communications would represent an unconstitutional infringement on free speech.

155. See *Shea*, 930 F. Supp. at 949; *ACLU*, 929 F. Supp. at 854-55.

156. See *Shea*, 930 F. Supp. at 949; *ACLU*, 929 F. Supp. at 855. The *ACLU* court concluded that "[i]t is clear from the face of the CDA and from its legislative history that Congress did not intend to limit its application to commercial purveyors of pornography." *Id.*

157. See *ACLU*, 929 F. Supp. at 865.

158. See *id.* at 854-55.

159. See *id.* at 854-55.

160. See *id.* at 874-77.

161. See *id.* at 874.

162. See *id.* at 875-76. The court cited recent cases in which a complete ban on indecent communications applied only to the broadcasting medium because of broadcast's unique pervasiveness. See *id.* (citing *Turner Broad., Inc. v. FCC*, 114 S. Ct. 2445 (1994); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989)).

163. See *id.* at 876-77.

164. See *id.* at 851-52.

IV. CONGRESS GETS PULLED OVER FOR RUNNING A RED LIGHT ON
THE INFORMATION SUPERHIGHWAY: *RENO v. ACLU*

In affirming the district court's ruling in *ACLU*, overturning the CDA as an unconstitutional infringement on free speech, the Supreme Court focused its opinion on the statutory overbreadth and vagueness of the CDA.¹⁶⁵ The Court characterized the government's reliance on prior First Amendment precedent as misplaced, criticized the inherent vagueness of the CDA's statutory language, and considered the unique nature and history of the Internet in crafting its decision.¹⁶⁶

In its overbreadth analysis, the Court initially focused on the government's misconstruction of prior Court precedent, finding in each instance that the CDA was far broader than any of the constitutional statutes to which the government had analogized the CDA.¹⁶⁷ The government first relied on the Court's ruling in *Ginsberg v. New York*,¹⁶⁸ where the Court upheld a New York statute that prohibited the selling of obscene material to minors, even though the material was not considered obscene to adults.¹⁶⁹ The Court determined that the CDA was broader than the statute in *Ginsberg* in three primary respects.¹⁷⁰ First, the Court determined that the statute in *Ginsberg* did not bar parents from purchasing obscene material for their children, whereas the CDA's prohibitions would have applied despite parental consent to the activity.¹⁷¹ Second, the *Ginsberg* statute applied only to commercial exchanges; the CDA contained no such limitation.¹⁷² Third, the *Ginsberg* statute limited the definition of materials harmful to minors to materials that were "utterly without redeeming social importance for minors."¹⁷³ The CDA did not define the term "indecent."¹⁷⁴

The government also contended that the Court's ruling in *FCC v.*

165. See *Reno v. ACLU*, 117 S. Ct. 2329, 2341-50 (1997).

166. See *id.*

167. See *id.* at 2341-44.

168. 390 U.S. 629 (1968).

169. See *id.* at 631-33.

170. See *ACLU*, 117 S. Ct. at 2341.

171. See *id.*

172. See *id.*

173. See *id.* (citing *Ginsberg v. New York*, 390 U.S. 629, 646 (1968)).

174. See *id.* The Court noted that the CDA not only lacked a definition of the term indecent, but more importantly, failed to include any requirement that the "patently offensive material . . . lack serious literary, artistic, political, or scientific value." *Id.* The Court reasoned that some material could fall under "patently offensive" while retaining some legitimate value, making the CDA's broad prohibition on speech containing this undefined term an integral part of the CDA's constitutional overbreadth. See *id.* at 2344.

*Pacifica*¹⁷⁵ saved the constitutionality of the CDA.¹⁷⁶ The Court disposed of this argument by finding several differences between the CDA and the Court-approved FCC order at issue in *Pacifica*.¹⁷⁷ First, the FCC order focused on a specific afternoon broadcast that represented a dramatic departure from the traditional types of content normally broadcast on that specific medium, and the order was issued by an agency charged with regulating that particular medium.¹⁷⁸ In contrast, the CDA constituted a broad prohibition, irrespective of time, and was promulgated by Congress, who was unfamiliar with the unique qualities of the Internet.¹⁷⁹ Second, the FCC order was not punitive in nature, whereas the CDA contained extensive criminal sanctions.¹⁸⁰ Finally, the FCC order targeted a medium that had a history of extensive government regulation.¹⁸¹ The Court distinguished the Internet as a medium with no such history of government regulation.¹⁸²

Finally the government analogized the CDA to the ordinance upheld in *Renton v. Playtime Theatres, Inc.*¹⁸³ That ordinance, which banned adult movie theatres from residential neighborhoods, was not directed at the content of the movies, but instead at the secondary effects the theatres would have on the surrounding area.¹⁸⁴ The government argued that the CDA constituted a similar type of "cyberzoning" of the Internet.¹⁸⁵ The Court dismissed this argument, however, stating that the CDA applied only to the content of Internet speech, and not to the time, place, and manner of its transmission.¹⁸⁶

The Court next focused on the statutory vagueness of the CDA. The

175. 438 U.S. 726 (1978); see also *supra* notes 83-92 and accompanying text (discussing the *Pacifica* decision).

176. Cf. *ACLU*, 117 S. Ct. at 2341-42 (responding to the government's reliance on the analysis and holding in *Pacifica*).

177. See *id.* at 2342.

178. See *id.* (noting the FCC's long-standing authority to regulate radio broadcasts).

179. See *id.*

180. See *id.*

181. See *id.*

182. See *id.* The Court noted that radio broadcast received the most limited First Amendment protection because of its invasive nature, and the fact that warnings failed to adequately protect the listener from random contact with the prohibited speech. See *id.* The Court noted that the district court found the Internet lacking the same ubiquitous nature, as users must take several affirmative acts in order to access obscene or indecent material. See *id.*

183. 475 U.S. 41 (1986).

184. See *ACLU*, 117 S. Ct. at 2342 (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 (1986)).

185. See *id.*

186. See *id.*

Court initially addressed the inconsistent language in the “indecent” and “patently offensive” provisions of the statute noting that each of these two parts of the CDA used a “different linguistic form” in defining the outlawed conduct and remained undefined in the CDA.¹⁸⁷ The Court concluded that these statutory flaws would result in an unconstitutional chill on protected speech, since speakers would refrain from engaging in any communication that arguably would be unlawful under the CDA.¹⁸⁸

The Court then addressed the government’s assertion that since the CDA contained the patently offensive standard approved by the Court in *Miller*, it could not be held unconstitutionally vague.¹⁸⁹ The Court reasoned that the inclusion of the patently offensive standard, by itself, did not cure the unconstitutional vagueness of the CDA.¹⁹⁰ Due to the CDA’s ill-defined nature regarding key statutory language and the absence of the remaining prongs of the *Miller* test, the Court concluded that “the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech.”¹⁹¹ Consequently, the Court found that the CDA posed a great threat to otherwise protected speech.¹⁹²

Finally, the Court addressed the unique nature and history of the Internet. First, the Court observed that the Internet had not been subject to the same extensive government regulation that had been imposed on the broadcast industry and thus, the same extensive regulation of the Internet could not be justified.¹⁹³ Additionally, the Court noted that the Internet is not as invasive as radio broadcast communication because an Internet user must take several affirmative steps in order to access the

187. *See id.* at 2344. Specifically, the Court found that 47 U.S.C. § 223(a) outlawed “indecent” communication, while § 223(d) prohibited material that was “patently offensive.” *See id.*

188. *See id.* at 2346. The Court opined that the imprecise drafting of the statute “undermine[d] the likelihood that the CDA ha[d] been carefully tailored to the congressional goal of protecting minors from potentially harmful materials.” *Id.* at 2344.

189. *See id.* at 2345.

190. *See id.* The Court distinguished the CDA’s “patently offensive” language from the *Miller* test’s second prong, noting the absence of the critical requirement that impermissible “material be ‘specifically defined by the applicable state law.’” *Id.* (quoting *Miller v. California*, 413 U.S. 15, 24 (1973)). The Court found that this requirement reduced the vagueness of the statutory language, by restricting the application of such an open-ended term as “patently offensive.” *See id.* The Court also noted that the *Miller* definition is limited to “sexual conduct,” whereas the CDA definition included both “excretory activities” and “organs” of a sexual nature. *See id.*

191. *Id.* at 2346.

192. *See id.*

193. *See id.* at 2343.

Internet.¹⁹⁴ Therefore, the same level of regulation imposed on the Internet could not be justified. The Court also noted the district court's finding that most sexually explicit messages that travel across the Internet are preceded by a warning, further differentiating the Internet from the broadcast and telephonic media, where such warnings remain typically ineffective.¹⁹⁵ Finally, the Court determined that the Internet cannot be viewed as a scarce commodity; unlike the commercial airwaves which have a finite number of frequencies, the Internet has infinite capacity to move and store information.¹⁹⁶

The concurring opinion, written by Justice O'Connor and joined by Chief Justice Rehnquist, focused on the CDA's attempt to create "adult zones" on the Internet.¹⁹⁷ The concurring Justices all agreed that such zones remain a constitutional mode of restricting speech, however, they found the CDA's methods problematic.¹⁹⁸ The concurrence concluded that these "adult zones" were historically constitutional only if they did not unduly restrict an adult's access to the material and minors had no First Amendment right to the material.¹⁹⁹ The concurrence stated that the CDA greatly restricted the adult right to receive information, and deemed the CDA's attempt at "cyberzoning" unconstitutional.²⁰⁰

V. THE RAMIFICATIONS OF *RENO V. ACLU*

The Supreme Court's opinion in *ACLU* will be remembered not only for its immediate effect of overturning the CDA, but also for its long-term effect on statutes that attempt to regulate indecent communications. The *ACLU* Court clearly attempted to narrow Court precedent which had approved of restrictions on indecent communications.²⁰¹ Perhaps the greatest ramification of the Court's decision rests with its impact on *Pacifica*. The Court went to great lengths to limit the *Pacifica* Court's precedent-setting approval of a restriction on indecent communication.²⁰² The *ACLU* Court emphasized that the *Pacifica* Court's approval of the restriction was only a plurality decision, and then described the plurality

194. *See id.*

195. *See id.* (quoting *ACLU v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996), *aff'd* 117 S. Ct. 2329 (1997)).

196. *See id.* at 2344.

197. *See id.* at 2351-57 (O'Connor, J., concurring in the judgment in part and dissenting in part).

198. *See id.* at 2351.

199. *See id.* at 2352-53.

200. *See id.* at 2357.

201. *See id.* at 2341-43.

202. *See id.*

approval as an “emphatically narrow holding.”²⁰³ The *ACLU* Court also clarified that the Court-approved restrictions in *Pacifica* remained constitutional primarily due to their medium-specific application.²⁰⁴ Thus, any future attempts to regulate indecent speech premised upon the *Pacifica* holding will encounter a stricter constitutional analysis based upon the Supreme Court’s emphatic restriction of the holding in *Pacifica*.²⁰⁵

While the majority opinion in *ACLU* strongly rejected the government’s attempt at “cyberzoning,” the concurrence suggested that, though the CDA’s attempt was unconstitutional, future attempts at “cyberzoning” would be deemed constitutional if these attempts adhered to prior Court precedent.²⁰⁶ This view remains untenable. The concurrence’s insinuation that the Internet could be regulated through such “cyberzoning” indicates the concurrence’s lack of understanding and appreciation of the Internet’s structure and culture. Though such “cyberzoning” would be legally feasible, technically it remains impossible.²⁰⁷

Any such attempt to “cyberzone” the Internet would require several components, none of which apply to the Internet: a governing authority,²⁰⁸ a central technical bottleneck,²⁰⁹ and a corporate culture that lends itself to regulation.²¹⁰ A governing body could draft and impose regulations on the Internet. However, no such body presently exists.²¹¹ The Supreme Court in *ACLU* recognized that neither Congress nor the FCC has had the historical relationship with the Internet to justify such a role.²¹² Further, the imposition of such an authority should be questioned. The Internet’s tremendous growth and success stemmed largely from its freedom from government regulation and interference.²¹³ The prescription of such an authority today would serve only to retard the growth of the Internet and stunt its further development.

A central bottleneck would be the obvious place to enforce such “cyberzones.” This bottleneck could restrict users from access to certain in-

203. *See id.* at 2343.

204. *See id.*

205. *See id.*

206. *See id.* at 2352-53.

207. *See BURSTEIN & KLINE, supra* note 10, at 113.

208. *See id.* at 107.

209. *See CADY & MCGREGOR, supra* note 14, at 13-15.

210. *See id.* at 7-8.

211. *See BURSTEIN & KLINE, supra* note 10, at 107.

212. In fact the Internet’s military background, which shrouded the development of the Internet in secrecy, can be blamed for such a lack of governmental regulatory history. *See RHEINGOLD, supra* note 15, at 67.

213. *See id.* at 84-85.

formation and “zone” certain information to restricted areas of the Internet. Again, no such bottleneck presently exists on the Internet.²¹⁴ The decentralized structure of the Internet prohibits such a bottleneck from arising, and inhibits the enforcement of any “cyberzoning.”²¹⁵ Similarly, the creation of such a technical bottleneck should be questioned. Such a bottleneck would slow the dissemination of information on the Internet and make it more prone to attack from both technical and non-technical influences.

Finally, a corporate culture that understands the need and justification for regulation would greatly enable the creation and enforcement of “cyberzones.” However, no such culture exists, and there appears to be no movement toward such a culture.²¹⁶ The Internet’s growth resulted from a disdain of such a culture.²¹⁷ Those disenfranchised with government regulation of other communications media flocked to the Internet for its comforting independence from governmental intrusion.²¹⁸ The teaching of such a culture likewise should be examined. The creation of a culture accepting regulation would stifle the creative genius that initially developed the Internet and drove its expansion.²¹⁹

VI. CONCLUSION

The Supreme Court has repeatedly fashioned its First Amendment freedom of speech jurisprudence to accommodate the unique nature of different communications media. However, the Court also has established a series of rational and protective judicial tests for examining statutory language attempting to restrict “indecent” and “obscene” speech. In its *Reno v. ACLU* opinion the Court refused to extend this prior treatment of pre-existing communications media to the rapidly developing world of the Internet. The Court found the CDA to be statutorily overbroad due to its inherent vagueness and its inability to govern efficiently a medium that, historically and presently, remains free from governmental regulation.

214. See *ACLU v. Reno*, 929 F. Supp. 824, 830-32 (E.D. Pa. 1996) (describing the Internet as a “decentralized, global medium of communications”); *aff’d*, 117 S.Ct. 2329 (1997).

215. See *id.*

216. See BURSTEIN & KLINE, *supra* note 10, at 113.

217. See *id.*

218. See *id.* at 107.

219. Cf. *id.* at 113.

