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Notes: Reno v. Aclu: The First Congressional Attempt to Regulate Pornography on the Internet Fails First Amendment Scrutiny

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RENO v. ACLU: THE FIRST CONGRESSIONAL ATTEMPT TO REGULATE PORNOGRAPHY ON THE INTERNET FAILS FIRST AMENDMENT SCRUTINY

I. INTRODUCTION

In 1999, an estimated 200 million personal computer users will access the Internet on a regular basis.[1] In 1996, in an effort to regulate this new medium, Congress passed Title V of the Telecommunications Act, also known as the Communications Decency Act (CDA).[2] After the CDA received presidential approval, forty-seven plaintiffs[3] filed suit against the Attorney General of the United States and the Department of Justice.[4] The plaintiffs alleged that sections 223(a)[5] and 223(d)[6] of the CDA were facially unconstitu-

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1. *See* ACLU v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996).
2. *See* Reno v. ACLU, 117 S. Ct. 2329, 2337-38 (1997).
3. *See id.* at 2339 nn.27-28. The 47 plaintiffs included organizations and corporations such as the National Press Photographers Association, American Civil Liberties Union, Planned Parenthood Federation of America, America Online, Apple Computer, CompuServe, Magazine Publishers of America, and Microsoft Corporation. *See id.*
4. *See id.*
5. 47 U.S.C.A. § 223(a) (Supp. 1998). This section provides in pertinent part:
   (a)Prohibited general purposes Whoever- (1) in interstate or foreign communications (A) by means of a telecommunications device knowingly (i) makes, creates, or solicits, and (ii) initiates the transmission of, any comment request, suggestion, proposal, image or other communication which is obscene, lewd, lascivious, filthy, or indecent, with intent to annoy, abuse, threaten, or harass another person; (b) by means of a telecommunications device knowingly-(i) makes, creates, or solicits, and (ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication (2) knowingly permits any telecommunications facility under his control to be used for any 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.

   Id.
6. 47 U.S.C.A. § 223(d) (Supp. 1998). This section provided in pertinent part:
   (d) Sending or displaying offensive material to persons under 18 Whoever-(1) in interstate or foreign communications knowingly-(A)

tional.[7] The challenged provisions were aimed to protect individuals under eighteen years of age from receiving harmful communications over the Internet.[8] The plaintiffs asserted that sections 223(a), which prohibited knowingly transmitting obscene or indecent communications to minors,[9] and 223(d), which prohibited knowingly sending or displaying sexually explicit messages that were patently offensive to minors,[10] violated their First Amendment free speech and Fifth Amendment due process rights.[11]

After conducting an evidentiary hearing,[12] the United States District Court for the Eastern District of Pennsylvania issued a preliminary injunction preventing the government from enforcing both provisions.[13] The Government appealed directly to the Supreme Court.[14] The issue before the United States Supreme Court was whether sections 223(a)and 223(d) of the CDA violated both the

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> uses an interactive computer service to send a specific person or persons under 18 years of age, or (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or (2) Knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph(1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both.
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> *Id.*

7. *See* ACLU v. Reno, 929 F. Supp. 824, 826 (E.D. Pa. 1996). Twenty plaintiffs filed suit immediately after the statute was signed by President William Clinton, challenging the constitutionality of both sections 223(a) and 223(d). *See Reno,* 117 S. Ct. at 2339. The district judge entered a temporary restraining order, but only against the enforcement of section 223(a) as it applied to indecent communications. *See id.* Thereafter, twenty-seven plaintiffs filed a second suit challenging the same two provisions. *See id.* The two suits were consolidated and heard by a three-judge panel of the district court as permitted under section 561 of the Act. *See id.*
8. *See Reno,117 S. Ct. at 2331.*
9. *See supra* note 5.
10. *See supra* note 6.
11. *See ACLU,* 929 F. Supp. at 849.
12. *See id.* at 827.
13. *See id.*
14. *See id.* at 826. The Government directly appealed to the Supreme Court as permitted by the statute. *See* Reno v. ACLU, 117 S.Ct. 2329, 2340-41 (1997) (applying 47 U.S.C. § 561 (Supp. 1998)).

First[15] and Fifth[16] Amendments because of overbreadth and vagueness.[17]

The United States Supreme Court resolved the First Amendment issue in *Reno v. ACLU*.[18] Certain language in the statutory provisions abridged the right to freedom of speech protected under the First Amendment.[19] The Court deemed the provisions facially unconstitutional.[20] Finding the statutory provisions in violation of the First Amendment,[21] the Court did not resolve the question of whether the vagueness of both provisions violated the Fifth Amendment.[22] In reaching its decision, the Supreme Court announced that the Internet deserves the highest degree of protection against governmental intrusion because it is the most participatory form of mass communication ever created.[23]

In order to explain the Supreme Court's First Amendment inquiry in *Reno*, Section II of this Note details several past Supreme Court cases that establish the parameters from which the *Reno* Court worked to resolve the issue presented,[24] as well as a history of the medium examined by the *Reno* Court—the Internet.[25] In Section III, this Note summarizes the facts, opinion, and rationale of the *Reno* decision.[26] Section IV critiques the Court's opinion and con-

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15. U.S. CONST. amend. I. This Amendment to the Constitution guarantees the basic freedoms of speech, religion, press, and assembly and the right to petition the government for redress of grievances. *See id.*
16. U.S. CONST. amend. V. This Amendment to the Constitution provides:
    > No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

    Id.
17. *See* Reno v. ACLU, 117 S. Ct. 2329, 2341(1997).
18. 117 S. Ct. 2329 (1997).
19. *See id.* at 2334.
20. *See id.* at 2340.
21. *See id.* at 2334.
22. *See id.* at 2345-46.
23. *See id.* at 2343.
24. *See infra* notes 32-132 and accompanying text.
25. *See infra* notes 133-69 and accompanying text.
26. *See infra* notes 170-259 and accompanying text.

cludes that the majority reached the appropriate result.[27] It was not surprising that the language of the CDA lacked the specificity and narrowness required by the First Amendment in light of the fact that Congress enacted a version of the CDA that was never the subject of a senatorial hearing, but merely discussed for approximately one hour on the Senate floor.[28] Thereafter, Section IV of this Note explores Justice O'Connor's alternative approach taken in analyzing the CDA's provisions at issue in her concurring and dissenting opinion.[29] Section IV addresses the impact *Reno* had on Congress and the Executive, focusing particularly on the Internet Indecency Act—legislation passed in an effort to correct the constitutional infirmities of the CDA.[30] This Note concludes that this newly enacted legislation adequately revised the provisions struck down in *Reno* and appears constitutionally defensible.[31]

II. HISTORICAL DEVELOPMENT

A. First Amendment Parameters

The United States Supreme Court has reviewed numerous constitutional challenges to government regulations of speech and expression.[32] From this precedent, it is clear that courts must balance the government's interest in protecting its citizens from harmful, obscene, and indecent materials[33] with the individual's interest in communicating or receiving communications.[34] It is equally evident that the method of expression can have a decisive effect on the outcome in a given case—the same speech protected in one medium may not be protected in another.[35] The challenge facing the *Reno* Court was balancing these interests in light of case precedent and

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27. *See infra* notes 260-70 and accompanying text.
28. *See Reno*, 117 S. Ct. 2329, 2338 n.24 (1997).
29. *See infra* notes 271-306 and accompanying text.
30. *See infra* notes 307-48 and accompanying text.
31. *See infra* notes 349-53 and accompanying text.
32. *See infra* notes 35-131 and accompanying text.
33. *See infra* notes 35-131, 170-259 and accompanying text. This interest is particularly acute for minors. *See infra* notes 84-101 and accompanying text.
34. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-57 (1976) (chronicling the Court's concern with the rights of receivers and concluding that "if there is a right to advertise, there is a reciprocal right to receive advertising"); Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85, 85 (1991) (noting the Court's long history of considering both speakers and potential listeners in First Amendment analysis).
35. *See infra* notes 102-20.

applying this precedent to the Internet. Before dealing with the Court's analysis, it is instructive to consider the relevant precedent with which the Court dealt.

1. Content-Neutral Regulations of Adult Material

An initial inquiry in any First Amendment case centers on the government act that is allegedly abridging expression.[36] The government can proceed in two distinct fashions when it interferes with the marketplace of ideas.[37] First, the government might attempt to regulate the content of the expression.[38] Generally, content-based regulations of speech are viewed with greater contempt and heightened scrutiny by the courts.[39] Alternatively, the government might create a restriction that is aimed at the time, place, and manner of speech, thereby appearing neutral as to the speech's content.[40] Courts will normally permit content-neutral regulations provided

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36. *See* Henry H. Perritt, Jr., *Tort Liability, The First Amendment, and Equal Access to Electronic Networks*, 5 HARV. J.L. & TECH. 65, 114 (1992) (explaining that a state action must exist to apply the First Amendment); *see also* Gitlow v. New York, 268 U.S. 652, 666 (1925) (holding that the First Amendment is applicable to the states through the Fourteenth Amendment).

37. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995) (observing that the state may regulate by either content-neutral or content-based restrictions); Chase J. Sanders, *Bearing the First Amendment's Crosses: An Analysis of* State v. Sheldon, 53 MD. L. REV. 494, 504-05 (1994) (explaining that government regulations of speech are divided into two categories); *see also* Renton v. Playtime Theatres, Inc., 475 U.S. 41, 41 (1986) (noting that the two categories of speech regulation are content-neutral and content-based).

38. *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 785 (2d ed. 1988) (discussing the marketplace of ideas theory of free speech).

39. *See* Burson v. Freeman, 504 U.S. 191, 191 (1992) (holding that content-based restrictions must be subjected to exacting scrutiny); Ward v. Rock Against Racism, 491 U.S. 781, 800 n.6 (1989) (observing that content-based regulations must be subjected to the most exacting scrutiny) (citing Boos v. Barry, 485 U.S. 312, 321 (1988)); Riley v. National Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 798 (1988) (holding that a content-based regulation is subject to the most exacting scrutiny); Boos v. Barry, 485 U.S. 312, 321 (1988) (stating that content-based restrictions must be subject to the most exacting scrutiny).

40. *See Burson*, 504 U.S. at 196 (explaining that the Court has held that the government may regulate time, place, and manner of speech so long as the restrictions are content-neutral); *Ward*, 491 U.S. at 791 (stating that the government may impose reasonable restrictions based on time, place, and manner); *Renton*, 475 U.S. at 41 (stating that time, place, and manner regulations are acceptable); United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 132 (1981) (explaining that the Court has recognized the validity of time, place, and manner restrictions).

they are reasonable.[41] Thus, content-based regulations are far more likely to fail First Amendment scrutiny than their content-neutral counterparts.[42] However, a clear line of demarcation between the categories may prove difficult to support in certain situations.

An illuminating illustration of this difficulty is *City of Renton v. Playtime Theatres, Inc.*[43] In *Renton*, the Supreme Court was petitioned to resolve a First Amendment challenge to a city zoning ordinance prohibiting adult motion picture theaters from being located within 1,000 feet of any residential zone, church, park, or within one mile of any school.[44] Playtime Theatres purchased two theaters in downtown Renton, Washington, intending to use them as adult movie theaters.[45] The theaters were located within the area regulated by the ordinance.[46] Playtime Theatres sought injunctive relief and a declaratory judgment that the ordinance violated the First and Fourteenth Amendments.[47]

The Supreme Court determined that the ordinance was not directed at regulating the content of the films shown in the theaters, but rather the secondary effects that these types of theaters tend to promote.[48] The Court analyzed the ordinance as a content-neutral regulation because the predominant purpose underlying the ordinance was to curtail the deleterious secondary effects that adult theaters have on a neighborhood, not to restrain any particular type of communication.[49] In reaching this conclusion, the Court relied heavily on the city council's "predominant interests" in enacting the ordinance which were deduced from the council's prolonged deliberations[50] and stated intentions.[51] The Court distinguished content-

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41. *See Capitol Square Review & Advisory Bd.*, 515 U.S. at 761 (holding that state governments have the right to impose content-neutral restrictions); *Ward*, 491 U.S. 781, 803 (1989) (holding that the city's regulation is content-neutral and, therefore, valid under the First Amendment).

42. *See, e.g.*, Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 134 (1981) (explaining that content-based regulations will be overturned in more instances than content-neutral restrictions).

43. 475 U.S. 41 (1986).

44. *See id.* at 44.

45. *See id.* at 45.

46. *See id.*

47. *See id.*

48. *See id.* at 47.

49. *See id.* at 46.

50. *See id.* at 47 (noting that the lower court's finding of the city council's intent was "more than adequate to establish that the city's pursuit of its zoning interests here was unrelated to the suppression of free expression."). Specifically,

based regulations from content-neutral time, place, and manner regulations.[52] The *Renton* Court explained that content-based regulations are presumed to violate the First Amendment because they chill expression of ideas or views,[53] but content-neutral regulations are acceptable "so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication."[54] The *Renton* Court held that the ordi-

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the city council referred the matter to the planning and development committee. *See id.* at 44. The committee held public hearings, researched the experiences of nearby Seattle, Washington, received advice from the city attorney's office as to similar developments in other cities, and made recommendations leading to the enactment of the challenged ordinance. *See id.*

51. *See id.* at 48 (noting that the ordinance was designed to prevent crime, protect the city's retail trade, maintain property values, and preserve neighborhoods, commercial districts, and the quality of urban life).

52. *See id.* at 46-47. One commentator recognized the significance of this distinction as follows: "No longer will adult business location ordinances be analyzed under the strict scrutiny standard . . . which establishes a presumption of constitutional invalidity that the city must overcome. Instead, adult business location ordinances will be analyzed by the rational basis standard, which raises a presumption of validity . . . ." Ronald M. Stein, *Regulation of Adult Businesses Through Zoning After* Renton, 18 PAC. L.J. 351, 352 (1987) (footnotes and internal quotations omitted).

53. *See Renton*, 475 U.S. at 47; *see also* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 782 (1996) (Kennedy, J., concurring) (stating that "[t]he Constitution in general does not tolerate content-based restrictions of, or discrimination against, speech"); R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (observing that "content-based regulations are presumptively invalid"); Carey v. Brown, 447 U.S. 455, 462 (1980) (discussing a statute that completely banned all non-labor picketing, but exempted peaceful labor picketing at a place of employment, and concluding that the statute was a content-based regulation); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 94-95, 98-99 (1972) (stating that a Chicago ordinance exempting peaceful labor picketing from its general prohibition on picketing next to a school was a content-based regulation and opining that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content").

54. *Renton*, 475 U.S. at 47; *see* City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 791, 804-07, 812-15 (1984) (upholding a prohibition against posting signs on public property as a valid time, place, and manner restriction due to the municipality's valid aesthetic concerns in limiting unpleasant forms of expression, and observing that people can still post signs outside of the city or within the city on private property); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) ("Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions."). In *Clark*, the Court reasoned that such restrictions on speech are valid if they are justified in some way without referring to the content of the

nance served a substantial government interest—preserving the quality of urban life—and allowed reasonable alternatives for communication.[55] Therefore, the ordinance survived the First Amendment challenge.[56]

Commentators have criticized the *Renton* Court's conclusion that the ordinance at issue was content-neutral,[57] in effect, agreeing with Justice Brennan's dissenting opinion that concluded the ordinance was content-based.[58] Additionally, commentators have drawn attention to a footnote in which Justice Rehnquist, writing for the majority, notes that "it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser magni-

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regulated speech, if the restrictions are narrowly tailored to serve a significant governmental interest, and if the restrictions leave open alternative methods of communicating the speech in question. *See Clark*, 468 U.S. at 293; *see also* Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 643, 647-48, 654-55 (1981) (upholding the constitutionality of a Minnesota rule which required members of ISKCON to confine their distribution, sales, and solicitation activities to a fixed location at the state fair, reasoning that the rule was not content-based because it applied to all persons or organizations wishing to sell and distribute material and that the state had a valid interest in wanting to maintain the orderly movement of people at the fair, and noting that alternative forums of expression existed outside of the fairgrounds).

55. *See Renton*, 475 U.S. at 54. The Court noted that the ordinance left approximately 520 acres, which equaled five percent of Renton's land area, available for use as adult theater sites. *See id.* at 53. Laurence Tribe explains that decisions such as "*Renton* may signal the willingness of some members of the Court to fashion rules for speech in public places which will try to accommodate the conflicting demands of individuals and communities to have government shield each from intrusion by the other." TRIBE, *supra* note 38, at § 12-19, at 950.

56. *See Renton*, 475 U.S. at 54-55. As Justice Rehnquist, writing for the majority, explained: "In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement." *Id.* at 54.

57. *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 104 (1987) (referring to *Renton* as a "disturbing" exception to the Court's protection of free speech); Leading Cases, *Restrictive Zoning of Adult Theaters*, 100 HAR. L. REV. 190, 195 (1986) ("The *Renton* ordinance was a content-based regulation of the first order.").

58. *See Renton*, 475 U.S. at 55 (Brennan, J., dissenting) ("The Court asserts that the ordinance is aimed not at the content of the films shown at adult motion picture theaters, but rather at the secondary effects of such theaters on the surrounding community, and this is simply a time, place, and manner regulation. This analysis is misguided." (citation and footnote omitted)).

tude than the interest in untrammeled political debate.'"[59] From this footnote, it appears that at least Justice Rehnquist would support the view that low-value speech, such as sexually explicit cinematography, whether regulated in a content-based or content-neutral manner is less deserving of First Amendment protection.[60] While it is unclear whether this generalization is supported by a majority of the Court, cases demonstrate that when indecent communication rises to the level of obscenity, government regulations need not be content-neutral to survive a First Amendment challenge.[61]

2. Obscene Material is not Protected by the First Amendment

Legislative efforts aimed at restricting what is deemed obscene are not novel creations.[62] When lawmakers suppress obscene material, no violation of the First Amendment occurs because, as the Supreme Court has repeatedly held, obscenity is not a form of speech worthy of First Amendment protection.[63] While several attempts of

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59. See *id.* at 49 n.2 (quoting Young v. American Mini Theatres, Inc., 427 U.S. 50, 70 (1976)).

60. *See* Philip J. Prygoski, *The Supreme Court's "Secondary Effects" Analysis in Free Speech Cases*, 6 COOLEY L. REV. 1, 18 (1989); Stein, *supra* note 52 at 351 ("The Supreme Court's acceptance of the time, place, and manner analysis set forth by Justice Stevens in *Young* also signaled the Court's view that the type of expression at issue did not deserve the fullest protection.").

61. *See* Prygoski, *supra* note 60, at 18. Delving into the reason why Justice Rehnquist "alluded to *Young* for the proposition that the kind of speech restricted by the *Young* and *Renton* ordinances was low-value speech, at least when compared to the core first amendment speech of political debate," one commentator observed:

> The only tenable conclusion is that the value of speech is related to the amount of first amendment protection the Court is willing to give it. Justice Stevens made this argument and it was rejected by a majority of the Court in *Young*. However, this argument appears to be part of Justice Rehnquist's premise as he analyzed the ordinance in *Renton*.

Id. (footnotes omitted).

62. *See* Martin Karo & Marcia McBrian, *The Lessons of* Miller *and* Hudnut: *On Proposing a Pornography Ordinance that Passes Constitutional Muster*, 23 U. MICH. J.L. REF. 179, 183-84 (1989) (tracing the history of laws restricting obscenity).

63. *See* Randolph Stuart Sergent, *The "Hamlet" Fallacy: Computer Networks and the Geographic Roots of Obscenity Regulation*, 23 HASTINGS CONST. L.Q. 671, 681 (1996) (stating that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance," and therefore "not within the area of constitutionally protected speech or press,") (quoting Roth v. United States, 354 U.S. 476, 484 (1957)); Bruce A. Taylor, *Hard-Core Pornography: A Proposal for a Per Se Rule*, 21 U. MICH. J.L. REF. 255, 255 (1988) (citing Arcara v. Cloud Books, Inc., 478 U.S. 697, 705 (1986)); Roth v. United

defining what is obscene were crafted by earlier Courts,[64] the modern definition appears in *Miller v. California*.[65]

In *Miller*, the Court analyzed the application of California's criminal obscenity statute[66] to circumstances in which an individual sent sexually explicit material to "unwilling recipients who had in no way indicated any desire to receive such materials."[67] Miller conducted a mass mailing campaign to advertise the sale of "adult" books.[68] Included in this mass mailing were five unsolicited brochures sent through the mail to a restaurant in Newport News, California.[69] The envelope was opened by the manager of the restaurant and his mother.[70] After opening the unrequested envelope, the manager and his mother complained to the police.[71] After a

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States, 354 U.S. 476, 484-86 (1957); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)).

64. *See* Sergent, *supra* note 63, at 681 (stating that *United States v. Bennett*, 24 F. Cas. 1093 (C.C.S.D.N.Y. 1879), adopted the obscenity test used in the English case of *Regina v. Hicklin*, 3 L.R.-Q.B. 360 (1868), which determined obscenity based on the effect the material would have on the most susceptible members of the population); Karo & McBrian, *supra* note 62, at 183-84 (explaining that early American courts applied the English *Hinklin* test which was subsequently abandoned and replaced by the definition of obscenity articulated by the Supreme Court in *Roth v. United States*, 354 U.S. 476, 484 (1957)); Edward John Main, *The Neglected Prong of the* Miller *Test Obscenity: Serious Literary, Artistic, Political, or Scientific Value*, 11 S. ILL. U. L.J. 1159, 1159-60 (1987) (citing Memoirs v. Massachusetts, 383 U.S. 413 (1966); Roth v. United States, 354 U.S. 476 (1957)). *But see* Sergent, *supra* note 63, at 681-82 (explaining that other courts such as *United States v. Dennett*, 39 F.2d 564 (2d Cir. 1930), *United States v. One Book Entitled Ulysses*, 72 F.2d 705 (2d Cir. 1934), and *United States v. Levine*, 83 F.2d 156 (2d Cir. 1936), adopted a test that required the material to be judged by the dominant effect the allegedly obscene work would have on the average person in the community).

65. 413 U.S. 15, 24 (1973); *see also* Karo & McBrian, *supra* note 62, at 184 ("The Court found the *Roth* language entirely unsatisfactory in practice, however, and replaced *Roth*'s obscenity definition sixteen years later in *Miller v. California*.") (footnote omitted).

66. The appellant was convicted of the misdemeanor of knowingly distributing obscene material under California Penal Code § 311.2(a) & 311 (West 1968)(amended 1969). *See Miller*, 413 U.S. at 16.

67. *Id.* at 15.

68. *See id.* at 16. The brochures that the appellant mailed primarily consisted "of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed." *Id.* at 18.

69. *See id.* at 18.

70. *See id.*

71. *See id.*

jury trial, Miller was convicted of violating a statute that prohibited knowingly distributing obscene materials.[72] Prior to this decision, the Court had never adopted a standard "to determine what constitutes obscene, or pornographic material subject to regulation under the States' police power."[73] As a result of this case, a majority of the Court agreed on "concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment."[74]

The Court focused on three criteria, each of which must be fulfilled in order to deem a communication obscene.[75] Focusing on the "average person applying contemporary community standards,"[76] the Court first required the communication as a whole to solely appeal to sexual interest.[77] The communication must also depict or describe sexual conduct, specifically addressed by the state regulation, in a "patently offensive way."[78] The final consideration requires a court to determine if the communication "lacks serious literary, artistic, political, or scientific value."[79]

The *Miller* Court affirmed the notion that states can pass laws that prohibit circulating obscene material when the method of dispersal creates a "danger of offending the sensibilities of unwilling recipients or of exposure to juveniles."[80] The Court emphasized that

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72. *See id.* at 16 n.1.

73. *Id.* at 22.

74. *Id.* at 29. Although the Court described the criteria as "guidelines," it is clear that all three requirements must be fulfilled to render material "obscene" and thereby devoid of constitutional protection. *See, e.g.*, Reno v. ACLU, 117 S. Ct. 2329, 2332 (1997) (referring to the "three-prong obscenity test set forth in *Miller*").

75. *See Miller*, 413 U.S. at 24.

76. *Id.*

77. *See id.* (citing Kois v. Wisconsin, 408 U.S. 229, 230 (1972) (quoting Roth v. United States, 354 U.S. 476, 489 (1957))). This requirement is often described as "the prurient interest." *See id.*

78. *Id.* While the Court did not specifically define "patently offensive," it provided two categories of materials satisfying this standard: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of genitals." *Id.* at 25.

79. *Id.* at 24.

80. *Id.* at 18-19; *see* Stanley v. Georgia, 394 U.S. 557, 567 (1969) (noting that the *Roth* decision rejected the need to prove that viewing obscene matter would lead to unacceptable social conduct); Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 690 (1968) (indicating that a state may regulate the access of certain materials to juveniles because of its strong interest in the development of children); Ginsburg v. New York, 390 U.S. 629, 637-43 (1968) (stating that a state's

obscene material is not entitled to First Amendment protection.[81] Accordingly, the Miller Court developed standards for identifying obscene material, thus allowing states to prohibit the dissemination of material deemed "*Miller* obscene"[82] without violating the First Amendment.[83] What is Miller obscene to a child, however, is not necessarily *Miller* obscene to an adult.

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power to control the free flow of certain material to its children exceeds control over adults, and thus material not obscene to adults may still be found obscene to children and subject to regulation); Redrup v. New York, 386 U.S. 767, 769 (1967) (noting that the three cases consolidated in this action did not involve obtrusive publication so as to make it "impossible for an unwilling individual to avoid exposure" to the material in question); Jacobellis v. Ohio, 378 U.S. 184, 195 (1964) (recognizing that states have a legitimate interest in stopping the free flow of harmful material to children); *see also* Rabe v. Washington, 405 U.S. 313, 317 (1972) (Burger, C. J., concurring) (observing that a movie screen depicting sexual acts was visible to motorists passing by the theater and to minors watching the film from outside the fence surrounding the theater; thus, the First Amendment would likely not prevent a state from regulating such displays); United States v. Reidel, 402 U.S. 351, 360-61 (1971) (opinion of Marshall, J.) (noting that the government cannot exercise its power to protect minors and unwilling recipients of sexual material until public or commercial distribution occurs because until then it is in private possession and threatens neither children nor anyone else); Breard v. Alexandria, 341 U.S. 622, 644-45 (1951) (holding that an ordinance that prohibited the sale of periodicals door-to-door at private residences, without the prior consent of the homeowner or occupants, did not abridge the First Amendment because the community felt this sort of salesmanship was irritating to homeowners who did not desire subscriptions); Kovacs v. Cooper, 336 U.S. 77, 88-89 (1949) (validating an ordinance that protected local home and business owners from the use of sound trucks which emitted loud noises); Prince v. Massachusetts, 321 U.S. 158, 169-70 (1944) (affirming the constitutionality of a state statute forbidding distribution of religious material by a minor on the streets); *cf.* Butler v. Michigan, 352 U.S. 380, 382-84 (1957) (noting that a state cannot place a total ban on material which is not obscene to adults simply because it is obscene to minors); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) (holding that motion pictures fall within First Amendment protections and even if they possessed "a greater capacity for evil, particularly among the youth of a community," it would not follow that they should be disqualified from First Amendment protection); Public Utils. Comm'n v. Pollak, 343 U.S. 451, 464-65 (1952) (stating that activities do not warrant any type of limitation when such activities do not burden the general public's "convenience, comfort and safety").

81. *See Miller*, 413 U.S. at 23.

82. *See* Michael I. Meyerson, *Impending Legal Issues for Integrated Broadband Networks*, 3 U. FLA. J.L. & PUB. POL'Y 49, 55 n.29 (1990) ("Legal obscenity is frequently referred to as 'Miller obscene.'").

83. *See Miller*, 413 U.S. at 20.

3. A Lower Threshold of Obscenity Exists for Minors

In 1968, the Court reviewed *Ginsberg v. New York*[84] to determine the constitutionality of a New York criminal obscenity statute.[85] The statute prohibited selling material to minors defined to be obscene on the basis of its appeal to minors, whether or not it would be obscene to adults.[86] In upholding the constitutionality of the statute, the Court rejected the defendant's broad argument 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 on whether the citizen is an adult or a minor."[87]

Ginsberg and his wife operated a stationary store and luncheonette in Long Island, New York.[88] Along with providing food services to customers, Ginsberg sold numerous magazines, including some described as "girlie magazines."[89] On two separate occasions, Ginsberg sold a sixteen-year-old boy a pornographic magazine[90] and was prosecuted pursuant to a New York statute.[91]

By concluding that the statute did not invade the area of freedom of expression that the Constitution grants to minors,[92] the Court affirmed the state's authority to adjust the meaning of obscenity according to what appeals to the sexual interests of minors.[93]

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84. 390 U.S. 629 (1968).

85. *See id.* at 621 (citing N.Y. PENAL LAW § 484-h (McKinney 1909) (current version at N.Y. PENAL LAW § 235.21 (1967)).

86. *See id.* at 631.

87. *Id.* at 636. The defendant store owner insisted that denying section 484-h material to minors, insofar as that material is not obscene for persons 17 years of age or older, constituted a violation of the First Amendment. *See id.*

88. *See id.* at 631.

89. *See id.*

90. *See id.*

91. *See id.*

92. *See id.* at 637. For examples of statutes that did interfere with this right, see, e.g., West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding a statute compelling children, against their religious beliefs, to salute the American flag unconstitutional); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-36 (1925) (holding an Oregon statute that interfered with children's attendance at private and parochial schools unconstitutional); Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (holding a Nebraska statute forbidding children to study modern languages other than English unconstitutional).

93. *See Ginsberg*, 390 U.S. at 638; *see also* Mishkin v. New York, 383 U.S. 502, 509 (1966) (stating that the prurient-appeal requirement will be adjusted to "social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group"); Bookcase, Inc. v. Broderick, 218 N.E.2d 668, 671 (N.Y. 1966) (holding that the

Therefore, "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.'"[94] The Court justified this regulatory paternalism over minors on the grounds that each state "has an independent interest in the well-being of its youth,"[95] and that parents are not always capable of controlling what their own children read.[96]

The *Ginsburg* opinion signaled the Court's acceptance of the "variable obscenity approach."[97] This approach recognizes the legitimate interests states have in fashioning statutes that create a lower threshold of obscenity for younger audiences.[98] Even though states are permitted to redefine obscenity for minors, courts must continue to analyze the constitutionality of these statutes with limiting principles in mind. These limiting principles are overbreadth and vagueness.[99]

In particular, the concept of overbreadth prevents the government from denying the general public access to materials simply because they could be inappropriate for minors.[100] The Court has explained that to restrict the general population to that which is appropriate for children, would be "'to burn the house to roast the pig.'"[101] This concern creates unique considerations for the Court when it reviews cases dealing with methods of speech outside of the traditional realm of print media.

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definition of obscenity may depend solely upon to whom the material in question is directed).

94. *Ginsberg*, 390 U.S. at 638 (quoting Prince v. Massachusetts, 321 U.S. 158, 170 (1944)). In *Prince*, the Court upheld the conviction of the guardian of a nine-year-old girl for violating the Massachusetts child labor law by permitting the girl to sell religious tracts for the Jehovah's Witnesses on the streets of Boston. *See id.* at 638-39.

95. *Id.* at 640.

96. *See id.* (quoting People v. Kahan, 206 N.E.2d 333, 334 (N.Y. 1965) (Fuld, J., concurring) which struck down the first version of § 484-h of the New York Penal Law on grounds of vagueness).

97. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, TREATISE ON CONSTITUTIONAL LAW, § 16.61(b), at 1205 (2d ed. 1992).

98. *See* Kevin W. Saunders, *Electronic Indecency: Protecting Children in the Wake of the Cable and Internet Cases*, 46 DRAKE L. REV. 1, 34 (1997) ("Variable obscenity allows consideration of the audience in determining whether material is obscene and prohibiting the distribution of obscene material to that particular audience.").

99. *See* NOWAK & ROTUNDA, *supra* note 97, § 16.61(b), at 1205.

100. *See id.*

101. *Id.* § 16.61(b), at 1206 (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)).

4. Indecent Broadcasting Can Be Prohibited

In 1978, the United States Supreme Court granted certiorari in *FCC v. Pacifica Foundation.*[102] The Court reviewed the constitutionality of a declaratory order issued by the Federal Communications Commission (FCC)[103] pursuant to its congressionally authorized power to regulate indecent public broadcasting under 18 U.S.C. § 1464.[104] Section 1464 forbade the use of "any obscene, indecent, or profane language by means of radio communications."[105] The Court explained that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection"[106] and ultimately concluded that the FCC could prohibit indecent broadcasting.[107]

Pacifica involved the broadcast of comedian George Carlin's infamous monologue entitled "Filthy Words."[108] The New York radio station owned by Pacifica Foundation played the monologue one afternoon at about 2:00 p.m.[109] A man who heard the broadcast while driving with his son complained to the FCC that this type of monologue should not have been broadcast on the public airwaves.[110] The FCC issued a declaratory order stating that if any more complaints about the broadcast were filed, it would decide whether to impose sanctions against the station for airing it.[111]

The *Pacifica* Court explained that governmental acts which regulate the content of speech are not automatically violative of the First Amendment.[112] The First Amendment analysis of speech regu-

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102. 438 U.S. 726 (1978).

103. Created by the Communications Act of 1934, the FCC regulates interstate and foreign communications by wire and radio in the public interest. *See* BLACK'S LAW DICTIONARY 610 (6th ed. 1990). The regulatory power of the FCC includes radio and television broadcasting, telephone, telegraph, cable television operation, two-way radio and radio operators, and satellite communication. *See id.*

104. *See Pacifica*, 438 U.S. at 731.

105. *Id.*

106. *Id.*

107. *See id.*

108. *See id.* at 729.

109. *See id.* at 729-30.

110. *See id.* at 730.

111. *See id.* The Commission did not impose formal sanctions, but it did state that the order would be "associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress." *Id.*

112. *See id.* at 744.

lations requires a court to examine both the content and context in which the speech occurred.[113] The Court found that because the content of *Pacifica's* broadcast was vulgar, offensive, and shocking, it was not entitled to absolute First Amendment protection in all situations.[114] Of more noteworthy significance, however, was the Court's review of the context in which the monologue was communicated to others.[115]

The Court primarily based its context analysis of broadcast media on two characteristics that distinguish it from other forms of communication.[116] First, broadcast media permeate the privacy of homes, "where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[117] The second

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113. *See id.* The Court quotes this analysis as first articulated by Mr. Justice Holmes in *Schenck v. United States*, 249 U.S. 47 (1919):

> We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done . . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force . . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

Id. at 52.

114. *See Pacifica*, 438 U.S. at 747.

115. *See id.* at 747-48. The importance of context is illustrated by *Cohen v. California*, 403 U.S. 15, 25 (1971). In *Cohen*, Paul Cohen entered a Los Angeles courthouse wearing a jacket bearing the words "Fuck the Draft." *See id.* at 16. After entering the courtroom, he took the jacket off and folded it. *See id.* at 19 n.3. The evidence showed no violent reaction to the jacket by anyone in the courtroom. *See id.* at 16. Nonetheless, when he left the courtroom, Cohen was arrested, convicted of disturbing the peace, and sentenced to 30 days in prison. *See id.* The Court held that criminal sanctions could not be imposed on Cohen for his political statement in a public place because there was no evidence showing his "speech" offended unwilling viewers, especially since no one objected to it. *See id.* at 22.

116. *See Pacifica*, 438 U.S. at 748.

117. *Id.* (citing Rowan v. Post Office Dep't, 397 U.S. 728, 736 (1970)). The Court stated:

> Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.

characteristic is the accessibility of the broadcasts to children.[118] This accessibility and the previously legitimized *Ginsberg* paternalism justified upholding the FCC's order.[119] While no Court has expressly held, commentators have observed that opinions such as *Pacifica* represent an attempt to create a middle tier of constitutional protection for offensive, but non-obscene speech when the context is broadcast media.[120] Another mode of communicating indecent speech that has been the subject of regulatory restrictions is the dial-a-porn industry.

> One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.

Id. at 748-49.

118. *See id.* at 749.

119. *See id.* at 750. However, the Court noted:

> It is appropriate, in conclusion, to emphasize the narrowness of our holding. This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution. The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant.

Id. Commentators have called into question the legitimacy of the FCC's interest in preventing this type of inadvertent exposure to children. *See* TRIBE, *supra* note 38, § 1218, at 937. Laurence Tribe reasons that the likelihood that children would be exposed to the particular program was minimal because most children would be at school at the time the program aired and the station catered to a distinct adult audience. *See id.*; *see also* NOWAK & ROTUNDA, *supra* note 97, § 16.18(a), at 1033 ("The Court did not explain why it did not assume that children old enough to understand the Carlin monologue were more likely to be in school in the early afternoon."). Outside of the Court's two justifications for according broadcasting the most limited First Amendment protection of all other media, a majority of Justices "could not agree on the constitutional rationale for their holding." NOWAK & ROTUNDA, *supra* note 97, § 16.18(a), at 1034.

120. *See, e.g.*, TRIBE, *supra* note 38, § 12-18, at 938 ("Although the Court has clearly embarked on the task of erecting a hierarchy of expression within the First Amendment, it is important to note that no Court has yet squarely held that offensive or sexually explicit but non-obscene speech enjoys less than full First Amendment protection.").

5. Indecent Dial-A-Porn Can be Regulated, but not Banned

In 1989, the Supreme Court decided the most analogous case to *Reno—Sable Communications of California, Inc. v. FCC.*[121] Sable Communications began providing sexually explicit, pre-recorded telephone messages through Pacific Bell.[122] Sable sought declaratory and injunctive relief against enforcement of section 223(b) of the Communications Act[123] which banned all indecent and obscene interstate "dial-a-porn" telephone messages.[124] In affirming the district court,[125] the Supreme Court held that the statute was not narrowly tailored to only protect children from exposure to indecent messages.[126] Although acknowledging that "[s]exual expression which is indecent but not obscene is protected by the First Amendment,"[127] the Court concluded that the government may regulate the content of indecent speech to serve a compelling interest.[128]

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121. 492 U.S. 115 (1989).

122. *See id.* at 117-18. Sable Communications charged a fee to people who accessed the messages, which Pacific Bell collected and divided between itself and Sable Communications. *See id.* at 118.

123. *See id.* The Supreme Court analyzed the constitutionality of section 223(b) of the Communications Act of 1934. *See id.*; 47 U.S.C. § 223(a)(1)(A) (1982 & Supp. V 1988). The company based its challenge on the First and Fourteenth Amendments. *See Sable*, 492 U.S. at 117-18. Sable Communications wanted to enjoin the FCC and the Department of Justice from pursuing "any criminal investigation or prosecution, civil action or administrative proceeding under the statute." *Id.* at 117.

124. *See Sable*, 492 U.S. at 117.

125. The district court struck down the "indecent speech" provision of 47 U.S.C. § 223(b), holding that the statute was overbroad and unconstitutional. *See id.* at 118-19. The Supreme Court upheld the district court's ruling on the constitutionality of section 223(a)(1)(A)'s prohibition on obscene messages, stating that the Court has "repeatedly held that the protection of the First Amendment does not extend to obscene speech." *Id.* at 124; *see, e.g.*, Paris Adult Theater v. Slaton, 413 U.S. 49, 69 (1973) (holding that First Amendment protection does not extend to obscene speech).

126. *See Sable*, 492 U.S. at 126. In support of the district court's decision, the Court stated that *Sable*, "like *Butler*, presents . . . 'legislation not reasonably restricted to the evil with which it is said to deal.'" *Id.* at 127 (quoting Butler v. Michigan, 352 U.S. 380 (1957)). The *Butler* Court further held that a statute which made it an offense to make available to the general public material found to have a potentially harmful influence on minors was insufficiently tailored since it denied adults their free speech rights by allowing them to read only what was acceptable for children. *See Butler*, 352 U.S. at 383.

127. *Sable*, 492 U.S. at 126.

128. *See id.* The Court observed that to survive constitutional scrutiny, any regulation promulgated to serve such an interest must be narrowly drafted so as to

The Court observed that protecting the physical and psychological well-being of minors from certain sexual material is a compelling interest.[129] However, the Court concluded that the total ban on indecent messages was unconstitutional[130] because less restrictive means were available to serve the government's interest without denying adults access to constitutionally protected messages.[131] The Court suggested that potential alternates included "credit card, access code, and scrambling rules [as] a satisfactory solution to the problem of keeping indecent dial-a-porn messages out of the reach of minors."[132] These alternative means of shielding children from inappropriate communications were a focal point of the *Reno* decision. Prior to discussing screening methods for the Internet, however, it is necessary to define what the Internet actually encompasses and how it developed up to the Court's decision in *Reno*.

B. History of the Internet

The Internet originated in 1969 as the result of an experimental project of the Advanced Research Project Agency (ARPA), and was called ARPANET.[133] Originally, the United States Government used ARPANET to link computers conducting defense-related research.[134] The network soon evolved from its defense-related re-

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not unnecessarily interfere with the First Amendment right to exercise free speech. *See id.* Specifically, the Court stated that "the Government may serve this legitimate interest, but to withstand constitutional scrutiny, 'it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms.'" *Id.* (quoting Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637 (1980), which is based on the Court's holding in Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976) and First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978)).

129. *See id.* This least restrictive means analysis, while not dispositive in *Reno*, certainly plays a part in deciding how best to regulate the Internet.

130. *See id.* at 131. It is worthy to note the similarity between § 223(b) and the CDA provisions at issue in *Reno*. *See* ACLU v. Reno, 929 F. Supp. 824, 828-29 (1996) (explaining that CDA provisions at issue regulate indecent, obscene, and "patently offensive" communication employing a telecommunications device or an interactive computer service). Section 223(b) was introduced on the floor of Congress and no Congressman or Senator presented data with respect to how often or to what extent minors could avoid any regulations and access dial-a-porn messages. *See Sable*, 492 U.S. at 130.

131. *See id.* at 128. As the Court explained, 42 U.S.C. § 223(b), "as amended in 1988, impose[d] an outright ban on indecent as well as obscene interstate commercial telephone messages." *Id.* at 117.

132. *Id.* at 128.

133. *See ACLU*, 929 F. Supp. at 831.

134. *See id.*

search origins to serve universities, corporations, and individuals around the world.[135] Following this expansive evolution, the ARPANET became known as the "DARPA Internet" and later simply the "Internet."[136]

It is nearly impossible to determine the size of the Internet because no single entity administers it.[137] However, reports show "that the Internet has experienced extraordinary growth in recent years."[138] As of 1996, approximately 9,400,000 host computers were estimated to be linked to the Internet, with sixty percent of these host computers located in the United States.[139] This estimate does not include the personal computers used to access the Internet, which brings the number of Internet users to as many as forty million worldwide.[140] The total number of computer users who access the Internet was expected to reach 200 million by the year 1999.[141]

Several methods of communicating information are available once a person gains access to the Internet.[142] These methods are as follows: (1) one-to-one messaging, such as electronic mail (e-mail), which allows direct communications to another individual comparable to sending a first class letter; (2) one-to-many messaging, such as listservs or mail exploders, which allows individuals interested in a particular subject to join a mailing list and communicate their messages to all other members of the mailing list simultaneously, analogous to a bulk mailer; (3) distributed message databases, such as newsgroups, which are similar to listservs inasmuch as they relate to particular areas of interest, but unlike a listserv, users simply access the database when they desire to communicate with others about the subject matter; (4) real time communication, such as chat rooms, which allow two or more people to type messages to each other that almost immediately appear on the others' computer screens; and (5) remote information retrieval, such as the World Wide Web, which provides a global platform of online information that users access through search engines.[143] The World Wide Web approach to information retrieval is the most advance information

135. *See id.*
136. *See id.*
137. *See id.* at 831-32.
138. *Id.* at 831.
139. *See id.*
140. *See id.*
141. *See id.*
142. *See id.* at 834.
143. *See id.*

retrieval system and is "fast becoming the most well-known on the Internet."[144] For the most part, in each of the methods described above, users can transmit and receive text, audio, and visual images.[145] The ease of accessing sexually explicit material through any one of the information retrieval methods is a major concern, particularly in light of the explosive growth of the World Wide Web. This problem arises because once someone posts sexually explicit material on the World Wide Web, the individual posting the material is unable to prevent it from entering any specific community.[146] Thus, the Internet can be viewed as a network of networks—meaning any information contained on a network connected to the Internet has the capacity to be retrieved by any other linked network.[147]

Unlike radio broadcasts and television, sexually explicit communications over the Internet are much less likely to enter a person's home inadvertently.[148] Receiving information on the Internet requires one to take "a series of affirmative steps more deliberate and directed than merely turning a dial."[149] Furthermore, almost all sexually explicit materials "are preceded by warnings as to the content."[150] One government witness testified, at an evidentiary hearing in *Reno* that "the 'odds are slim' that a user would come across a sexually explicit site by accident."[151]

Individuals and commercial entities that communicate through the Internet have faced difficulties in setting boundaries on the accessibility of materials they make available to users. Several attempts have been made to develop methods of verifying the age of Internet users who access material through the various informational retrieval methods.[152] However, when the United States District Court for the Eastern District of Pennsylvania decided *Reno*, it believed there were no reliable means by which to screen the age of Internet users accessing information through any informational retrieval method, nor could anything be done to segregate Internet fora containing sexual material into "'adult' or 'moderated' areas of cyber-

144. *Id.* at 836.
145. *See id.* at 834.
146. *See id.* at 844.
147. *See id.*
148. *See id.*
149. *Id.* at 845.
150. *Id.* at 844.
151. *Id.* at 844-45.
152. *See id.* at 845-49.

space."[153] The expansiveness of the Internet and the fact that it was unregulated led Congress to enact the Communications Decency Act of 1996.

C. History of the CDA

The Telecommunications Act of 1996[154] was an extremely broad piece of legislation promulgated by Congress. The purpose of the Act was "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[155] The Act included seven titles, but the major provisions had nothing to do with the Internet.[156]

Six of the titles were the result of "extensive committee hearings and the subject of discussion in Reports prepared by Committees of the Senate and the House of Representatives."[157] However, Title V, the CDA, contained provisions added either after the hearings were completed or as amendments during floor debates.[158] Congress failed to thoroughly analyze the CDA and its potential effect on the Internet, and the result was a hastily drafted piece of legislation.[159] The two statutory provisions challenged in *Reno* were offered on the floor of the Senate and each provision received an informal label.[160] Section 223(a), which prohibited knowingly transmitting obscene or indecent communications to minors, was labeled the "indecent transmission" provision. Section 223(d), which prohibited knowingly sending or displaying sexually explicit messages that were patently offensive to minors, was labeled the "patently offensive display" provision.[161]

In order to curtail the reach of these two provisions, Congress enacted section 223(e)(5).[162] This provision provided two affirmative defenses for potential violators seeking to escape the reach of sections 223(a) and 223(d).[163] One defense pertained to a person who

153. *Id.* at 845.
154. Pub. L. No. 104-104, 110 Stat. 56 (1996).
155. *Id.*
156. *See id.*
157. Reno v. ACLU, 117 S. Ct. 2329, 2338 (1997).
158. *See id.*
159. *See infra* note 28 and accompanying text.
160. *See Reno*, 117 S. Ct. at 2338.
161. *See id.*
162. *See* 47 U.S.C.A. § 223(e)(5) (Supp. 1998).
163. *See Reno*, 117 S. Ct. at 2339.

had taken "'good faith, reasonable, effective, and appropriate actions' to restrict access by minors to the prohibited communications."[164] The second defense provided protection for "those who restrict access to covered material by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number or code."[165] Thus, Congress drafted what it believed to be a narrowly tailored law which provided sufficient defenses to prosecution in light of the Court's prior admonitions in *Sable*.[166] *Reno* provided the Supreme Court with the opportunity to consider the constitutionality of the CDA and its affirmative defenses, while defining its stance on Internet regulation. Prior to *Reno*, the Court dealt with legislative subject matter that included areas with extensive histories of governmental regulation.[167] However, the Internet did not have this type of regulatory history and the CDA was the first attempt to regulate this medium of communication.[168] With the ever-increasing amount of Internet use in this country and the increasing awareness of the Internet's communicative capabilities, *Reno* presented a ripe situation for the Supreme Court to express its opinion about Internet regulation.[169]

III. INSTANT CASE

President Clinton signed the CDA on February 8, 1996.[170] On the same day, twenty plaintiffs, led by the ACLU, filed an action in

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164. *Id.* (quoting 47 U.S.C.A. § 223(e)(5)(A) (1997)).
165. *Id.* (citing 47 U.S.C.A. § 223(e)(5)(B) (1997)).
166. *See id.* For a discussion of *Sable*, see *supra* notes 121-32 and accompanying text.
167. *See Reno*, 117 S. Ct. at 2343 ("Thus, some of our cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers.")(citations omitted); *see also* FCC v. League of Women Voters of Cal., 468 U.S. 364, 376 (1984) (holding that the constitutionality of broadcast regulations does not require that such regulations serve "compelling" government interests since broadcast regulation "involves unique considerations"); FCC v. Pacifica Found., 438 U.S. 726, 748-50 (1978) (holding that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection" and the reasons for treating broadcasting differently are: (1) broadcasts reach people in the privacy of their own homes without prior warning and (2) broadcasts are available to children of all ages); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969) (noting that the characteristics of new media warrant different First Amendment analysis); NBC v. United States, 319 U.S. 190, 215 (1943) (upholding the FCC's authority to regulate radio communications beyond the engineering and technical aspects).
168. *See Reno*, 117 S. Ct. at 2343.
169. *See infra* notes 170-270 and accompanying text.
170. *See Reno*, 117 S. Ct. at 2339.

the United States District Court for the Eastern District of Pennsylvania and moved for a temporary restraining order to enjoin enforcement of sections 223(a) and 223(d) of the CDA.[171] The case was assigned to Judge Ronald Buckwalter, and he proceeded to conduct an evidentiary hearing on February 15, 1996.[172] Judge Buckwalter granted a limited temporary restraining order after finding that section 223(a)(1)(B) was unconstitutionally vague.[173] As a result of this order, the CDA was not enforceable against any potential violators.[174] When twenty-seven other plaintiffs filed the same constitutional challenge to the CDA, a three-judge court convened and consolidated the two cases.[175]

The parties stipulated to many of the facts involved and placed an extensive portion of their cases before the court by sworn declarations at the consolidated hearings.[176] The plaintiffs targeted their constitutional challenge on section 223(a)(1)(B) and section 223(d)(1) of the CDA.[177] However, the plaintiffs made it clear that they did "not quarrel with the statute to the extent that it covers obscenity or child pornography, which were already proscribed before the CDA's adoption."[178]

The district court held that sections 223(a)(1)(B) and 223(d)(1) were unconstitutional on their face under First Amendment overbreadth and Fifth Amendment vagueness doctrines.[179] Therefore, the judgment of the district court enjoined the Government from enforcing the "indecent" material prohibition in section 223(a)(1)(B), but "preserve[d] the Government's right to investi-

171. *See* ACLU v. Reno, 929 F. Supp. 824, 827 (E.D. Pa. 1996).

172. *See id.* at 827.

173. *See id.*

174. *See id.*

175. *See id.* at 827-28 & n.3. The plaintiffs in the first suit requested Chief Judge Dolores Sloviter of the United States Court of Appeals for the Third Circuit to appoint a three-judge court pursuant to section 561(a) of the Communications Decency Act. *See id.* at 827. As is required by 28 U.S.C. § 2284, Judge Sloviter appointed such a court consisting of herself, Judge Buckwalter, and Judge Stewart Dalzell. *See id.* Soon after these events, the American Library Association, Inc. and an additional 26 plaintiffs filed a similar lawsuit against the Government. *See id.* at 827-28 & n.3. On February 27, 1996, Chief Judge Sloviter convened the same three-judge court and consolidated the two actions pursuant to FED. R. CIV. P. 42(a). *See id.* at 828; *see also supra* note 3 and accompanying text.

176. *See Reno*, 929 F. Supp. at 828.

177. *See id.* at 829.

178. *Id.*

179. *See id.* at 849.

gate and prosecute the obscenity or child pornography activities prohibited therein. The injunction against enforcement of sections 223(d)(1) and (2) [was] unqualified because those provisions contain[ed] no separate reference to obscenity or child pornography."[180] Although the district court's judgment was unanimous, each judge wrote a separate opinion.[181]

The Government appealed the order of the district court directly to the United States Supreme Court pursuant to section 561(b) of the CDA.[182] This provision mandated that, upon request, parties could appeal directly to the Supreme Court with a facial constitutional challenge to the CDA.[183] After reviewing the provisions of the statute and the opposing arguments presented by the parties, the Supreme Court affirmed the district court's decision on First Amendment grounds without deciding whether the provisions violated the Fifth Amendment.[184]

The Court reviewed past decisions upon which the Government relied, analyzed the overbreadth of the CDA provisions at issue, and finally considered the Government's additional arguments concerning affirmative defenses and the Act's severability clause.[185] The Court found the Government's reliance on past regulatory cases misplaced and the language of the CDA's provisions overbroad.[186] In striking down the challenged provisions, the Court relied on its time-honored tradition of protecting free speech under the First Amendment when a statute is not narrowly tailored to support a legitimate government interest.[187]

A. Supreme Court Distinguishes Reno from Prior Cases

In *Reno*, the Government argued that the CDA was constitutionally permissible under three of the Supreme Court's earlier cases.[188] These cases were *Ginsberg v. New York*,[189] *FCC v. Pacifica Foundation*,[190]

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180. *Id.*
181. *See id.* at 857-83.
182. *See Reno*, 117 S. Ct. at 2340-41.
183. *See* 47 U.S.C. § 561(b) (1997).
184. *See Reno*, 117 S. Ct. at 2341.
185. *See infra* notes 188-270 and accompanying text.
186. *See infra* notes 188-270 and accompanying text.
187. *See Reno*, 117 S. Ct. at 2348.
188. *See id.* at 2341.
189. For a discussion of the *Reno* Court's distinguishment of *Ginsberg v. New York*, *see infra* notes 193-201 and accompanying text.
190. For a discussion of the *Reno* Court's distinguishment of *FCC v. Pacifica Found.*, *see infra* notes 202-10 and accompanying text.

and *Renton v. Playtime Theaters, Inc.*[191] Instead of providing support for the Government's position, the Court observed that these cases created serious doubt about the constitutionality of the CDA's provisions.[192]

1. *Ginsberg* Distinguished from *Reno*

In *Ginsberg*, the Court upheld the constitutionality of a New York statute that prohibited selling certain types of obscene material to minors.[193] The *Reno* Court reasoned that the statute in *Ginsberg* was narrower than the CDA in four different respects.[194] First, the *Ginsberg* statute did not prevent parents who wished to purchase the magazines for their children to do so, unlike the CDA, which would be applicable even if parents consented to their children receiving the material or supervised their children in obtaining the material.[195] Second, the statute in *Ginsberg* applied only to commercial sales, unlike the CDA which contained no such limitation.[196] Third, the *Ginsberg* statute specifically defined the harmful material sought to be suppressed as "utterly without redeeming social importance for minors."[197] The CDA, on the other hand, failed to provide any definition of "indecent," which was employed in section 223(a)(1).[198] In addition, the "patently offensive" standard used in section 223(d) failed to provide that such material must lack serious literary, artistic, political, or scientific value in order to fall within the statute.[199] Lastly, the Court noted that the New York statute defined a minor as any person under the age of seventeen, but the CDA applied to persons under the age of eighteen,[200] thereby increasing its reach.[201] For these reasons, the Court rejected the Gov-

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191. For a discussion of the *Reno* Court's distinguishment of *Renton v. Playtime Theatres, Inc.*, *see also infra* notes 211-21 and accompanying text.

192. *See Reno*, 117 S. Ct. at 2341.

193. *See supra* notes 84-101 and accompanying text.

194. *See Reno*, 117 S. Ct. at 2341.

195. *See id.* ("Under the CDA, by contrast, neither the parents' consent—nor even their participation—in the communication would avoid the application of the statute.").

196. *See id.* The *Ginsberg* statute applied only to situations where merchants sold magazines containing indecent materials to minors. *See* Ginsberg v. New York, 390 U.S. 629, 647 (1968).

197. *Reno*, 117 S. Ct. at 2341 (quoting Ginsberg v. New York, 390 U.S. 629, 646 (1968)).

198. *See id.* at 2341.

199. *See id.*

200. *See id.*

201. By attempting to protect people 18 and under, the CDA in effect expands its

ernment's contention that the CDA was of a similar restrictive nature to the Ginsberg statute.

2. *Pacifica* Distinguished from *Reno*

Thereafter, the Court compared its *Pacifica* decision with the instant case because of the Government's argument that *Pacifica* applied to the analysis of the CDA.[202] In *Pacifica*, the Court upheld the constitutionality of a declaratory order administered by the FCC against a radio station that broadcast a certain comedic monologue.[203] Again, the Court drew several distinctions between the *Pacifica* order and the CDA.[204]

First, the order in *Pacifica* applied to one specific broadcast,[205] unlike the CDA's prohibitions which were "not limited to particular times and [were] not dependent on any evaluation by an agency familiar with the unique characteristics of the Internet."[206] Second, the FCC's order was not punitive in any way, unlike the CDA which imposed criminal sanctions on violators.[207] Lastly, the Pacifica order applied to radio broadcasts governed by the FCC, which historically "received the most limited First Amendment protection"[208] because warnings could not protect listeners from offensive program content.[209] In contrast, the Internet was not subject to any regulatory agency's evaluations concerning material transmitted through it.[210]

3. *Renton* Distinguished from *Reno*

Lastly, the Supreme Court distinguished the instant case from its decision in *Renton v. Playtime Theatres, Inc.*[211] The zoning ordinance upheld in *Renton* had several distinguishing features from the

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coverage to a whole other segment of society that many see as adult. *See id.* at 2346.

202. *See id.* at 2341, 2343.

203. *See supra* notes 102-11 and accompanying text.

204. *See infra* notes 205-10 and accompanying text.

205. *See Reno*, 117 S. Ct. at 2342 ("[T]he order in *Pacifica*, issued by an agency that had been regulating radio stations for decades, targeted a specific broadcast that represented a rather dramatic departure from traditional program content in order to designate when—rather than whether—it would be permissible to air such a program in that particular medium.").

206. *Id.*

207. *See id.*

208. FCC v. Pacifica Found., 438 U.S. 726, 728 (1978).

209. *See Reno*, 117 S. Ct. at 2342.

210. *See id.*

211. 475 U.S. 41 (1986); *see also infra* notes 212-15 and accompanying text.

CDA.[212] The *Renton* ordinance focused on minimizing the deleterious secondary effects that adult movie theaters have on residential neighborhoods.[213] The CDA did not focus on any secondary effects that indecent or patently offensive material might have on children, but "applie[d] broadly to the entire universe of cyberspace."[214] Therefore, the Court reasoned that "the CDA [was] a content-based blanket restriction on speech, and, as such, [could not] be 'properly analyzed as a form of time, place, and manner regulation,'"[215] which was the analysis employed by the Court in *Renton*.

B. Broadcast Media Distinguished from Internet

To further distinguish its past justifications for subjecting the broadcast media to harsh regulation, the Court noted several differences between broadcast media and the Internet.[216] These differences include the long history of governmental regulation of broadcast media,[217] the lack of available frequencies for broadcasters,[218]

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212. *See Reno*, 117 S. Ct. at 2342-43.

213. *See id.* at 2342 ("The [*Renton*] ordinance was aimed, not at the content of the films shown in the theaters, but rather at the 'secondary effects'—such as crime and deteriorating property values—that these theaters fostered . . ..")

214. *Id.*

215. *Id.* (quoting *Renton*, 475 U.S. at 46). In *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), the Court stated that "[a]s a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based. By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral." *Id.* at 643 (citations omitted).

216. *See Reno*, 117 S. Ct. at 2343.

217. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 375 (1969) (holding that the history of the fairness doctrine and of related legislation demonstrates that the FCC's action did not exceed its authority, that in adopting the new regulations, the FCC was implementing Congressional policy, and that the fairness doctrine and its specific manifestations in the personal attack and political editorial rules do not violate the First Amendment).

218. *See Turner*, 512 U.S. at 637 (holding that the appropriate standard by which to evaluate the constitutionality of the must-carry provision is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech); United States v. O'Brien, 391 U.S. 367, 377 (1968) (holding that a content-neutral regulation will be sustained "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest").

and the intrusive nature of broadcasting.[219] The Court concluded that none of these factors were present in cyberspace and deferred to several of the district court's findings concerning the near impossibility of a situation in which an Internet user would access sexually explicit material accidentally or unwillingly.[220] Accordingly, the Supreme Court agreed with the district court's conclusion that prior Supreme Court case law failed to provide a compelling basis to subject the Internet to the watered-down level of First Amendment scrutiny that broadcast media endure.[221] The Court then turned to the affirmative precedent that required it to strike down the CDA.

C. *Vagueness and the* Miller *Test*

The Court did not analyze the CDA under the Fifth Amendment because it struck down the provisions on First Amendment vagueness grounds.[222] Neither "indecent" nor "patently offensive" was defined by the statute and the Court opined that these terms would "provoke uncertainty among speakers about how the two standards relate to each other and just what they mean."[223] As a result of this vagueness, the CDA was in fact a blanket content-based regulation of speech and would have a considerable chilling effect on free speech.[224] Furthermore, the CDA threatened potential viola-

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219. *See* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 128 (1989). In *Sable*, the Court distinguished radio from telephone dial-a-porn:

> There is no "captive audience" problem here; callers will generally not be unwilling listeners. The context of dial-in services, where a caller seeks and is willing to pay for the communication, is manifestly different from a situation in which a listener does not want the received message. Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message. Unlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it.

220. *Id. See Reno*, 117 S. Ct. at 2343.

221. *See id.* at 2344.

222. *See id.*

223. *Id.* (footnote omitted).

224. *See id.*; *see also* Gentile v. State Bar of Nev., 501 U.S. 1030, 1048-51 (1991) (holding that Nevada Supreme Court Rule 177, that prohibited a lawyer from making extra-judicial statements to the press that have a substantial likelihood of materially prejudicing an adjudication proceeding, was void for vagueness because the rule failed to provide fair notice to those at whom it was directed and was so imprecise grammatically that discriminatory enforcement was a real possibility).

tors with criminal sanctions.[225] The Court reasoned that the uncertainty of what material the statute covered, coupled with the threat of prosecution may deter people from communicating with one another through words or ideas that may or may not be unlawful.[226]

The Government's response to this vagueness finding was that the statute was no more vague than the three-prong obscenity standard created by the Court in *Miller v. California*.[227] The Government reasoned that the "patently offensive" standard of the CDA was included in the second prong of the widely accepted *Miller* obscenity test; therefore, according to the Government, the resulting conclusion must be that the CDA was constitutionally defensible.[228] The Supreme Court found the Government's reasoning flawed in several respects.[229]

All three prongs of the *Miller* test work together to limit the reach of the obscenity standard.[230] Thus, it would be incorrect to evaluate one prong without considering the others. The CDA lacked any limiting language and created a greater danger of suppressing speech that would otherwise lie beyond the reach of the *Miller* standard.[231] When a statutory regulation affects constitutionally protected speech in an adverse manner, the Government must demonstrate that the regulation promotes a compelling interest and that the least restrictive means of furthering such interests are employed.[232]

The Supreme Court concluded that in order for the CDA to meet its intended purpose of denying minors access to sexually ex-

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225. *See Reno*, 117 S. Ct. at 2344-45.

226. *See id.* at 2345.

227. *See id.* (discussing Miller v. California, 413 U.S. 15, 24 (1973)). In *Miller*, the Court reaffirmed *Roth v. United States*, 354 U.S. 476 (1957), holding that obscene material is not protected by the First Amendment. *See Miller*, 413 U.S. at 36.

228. *See Reno*, 117 S. Ct. at 2345.

229. *See id.* The Court concluded that the Government was incorrect because the second prong of the *Miller* test limited its reach to certain material "'specifically defined by the applicable state law.'" *Id.* The CDA has no such requirement, which would have the effect of reducing the vagueness of "patently offensive." *Id.* Furthermore, the *Miller* test is limited to "sexual conduct," while the CDA extends to "'excretory activities' as well as 'organs' of both a sexual and excretory nature." *Id.*

230. *See id.* ("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.").

231. *See id.* at 2346.

232. *See* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

plicit material, it must suppress a plethora of speech "that adults have a constitutional right to receive and to address to one another."[233] In prior cases, the Court consistently held that speech which was indecent but not obscene was entitled to protection under the First Amendment as to the adult population.[234] Protecting children from harmful materials is a valid governmental interest which has received repeated recognition by the Court.[235] However, the interest in protecting minors never justifies "an unnecessarily broad suppression of speech addressed to adults."[236] Thus, the Court agreed with the district court that the CDA was analogous to the dial-a-porn ban in *Sable*.[237]

In *Sable*, the FCC argued that the Court "should defer to Congress' conclusion about an issue of constitutional law."[238] The Court responded that "it is [the Court's] task in the end to decide whether Congress has violated the Constitution"[239] and rejected the notion "that nothing less than a total ban would be effective in preventing enterprising youngsters from gaining access to indecent communications."[240] As a result, the *Sable* Court declared that a constitutional inquiry does not end merely because a statute serves a le-

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233. *Reno*, 117 S. Ct. at 2346.

234. *See Sable*, 492 U.S. at 126; *see also* Carey v. Population Servs. Int'l, 431 U.S. 678, 701 (1977) ("[W]here obscenity is not involved, [the Court has] consistently held that the fact that protected speech may be offensive to some does not justify its suppression.").

235. *See* FCC v. Pacifica Found., 438 U.S. 726, 749 (1978) (noting that certain businesses, such as movie theaters and book stores, may be prohibited from giving children access to indecent material); Ginsberg v. New York, 390 U.S. 629, 639 (1968) (upholding a state statute that limited the availability of sexual material to minors because such material was deemed to be harmful to the development of minors).

236. *Reno*, 117 S. Ct. at 2346. "[T]he Government may not 'reduc[e] the adult population . . . to . . . only what is fit for children.'" *Id.* (quoting Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2393 (1996) (quoting Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 128 (1989))). "[R]egardless of the strength of the government's interest' in protecting children, '[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.'" *Id.* (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74-75 (1983)).

237. *See id.*

238. *Sable*, 492 U.S. at 129.

239. *Id.*; *see also* Marbury v. Madison, 5 U.S. 137, 177 (1803) (holding that it is the responsibility of the judiciary to interpret the law).

240. *Reno*, 117 S. Ct. at 2346.

gitimate government interest.[241] The purpose of the statute must be served through the least restrictive means possible for it to survive constitutional scrutiny.[242]

The Supreme Court distinguished the CDA from the statutes in *Ginsberg* and *Pacifica* because the least restrictive means of attaining the goal of the CDA were not used.[243] The *Ginsberg* and *Pacifica* statutes were tailored to meet their purposes in the least restrictive manner possible, whereas the CDA was not limited in any similar way.[244] As written, the CDA would prohibit access to "nonpornographic material with serious educational or other value"[245] and would subject parents to a prison sentence for allowing their children to access information on the Internet that the parents deem appropriate.[246] Therefore, the CDA was a content-based restriction on speech, and the Government had the burden of showing "why a less restrictive provision would not be as effective as the CDA."[247]

The Government could not prove that there were effective means, at a reasonably affordable price, for non-commercial speak-

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241. *See id.* ("[T]he mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into its validity.") (footnote omitted).

242. "As we pointed out last Term, that inquiry embodies an 'over-arching commitment' to make sure that Congress has designed its statute to accomplish its purpose 'without imposing an unnecessarily great restriction on speech.'" *Id.* at 2346-47 (quoting Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2385 (1996) (holding that a statutory provision permitting a cable operator to prohibit patently offensive or indecent programming on leased access channels is consistent with the First Amendment, a "segregate and block" provision with respect to the leased access channels violates the First Amendment, and a provision permitting the operator to prohibit patently offensive or indecent programming on public access channels violates the First Amendment)).

243. *See id.* ("Unlike the regulations upheld in *Ginsberg* and *Pacifica*, the scope of the CDA is not limited to commercial speech or commercial entities. Its open-ended prohibitions embrace all non-profit entities and individuals posting indecent messages or displaying them on their own computers in the presence of minors.").

244. *See id.*

245. *Id.*

246. *See id.* at 2348 ("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.").

247. *Id.*

ers to screen minors from "accessing material through e-mail, mail exploders, newsgroups, or chat rooms."[248] Therefore, a great deal of adult communication on the Internet was hindered because of the all-encompassing language of the CDA.[249] The Government simply failed to meet its burden and as a result the CDA, as written, was facially overbroad under the First Amendment.[250]

The Government set forth several additional arguments in support of the constitutionality of the CDA, which were dismissed by the Court.[251] In addition to these rejected arguments, the Government suggested that the affirmative defenses provided in section 223(e)(5)[252] curtailed the statute's unconstitutional reach.[253] How-

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248. *Id.* at 2347 (citing ACLU v. Reno, 929 F. Supp. 824, 845 (E.D. Pa. 1996)).

249. *See Reno*, 117 S. Ct. at 2347. "These limitations must inevitably curtail a significant amount of adult communication on the Internet." *Id.* "The breadth of the CDA's coverage is wholly unprecedented." *Id.*

250. *See id.*

251. *See id.* at 2348-49. These arguments included: (1) that the CDA was constitutional because it leaves open ample alternative channels of communication; (2) that the plain meaning of the Act's "knowledge" and "specific person" requirement restricts its applications; and (3) the Act's prohibitions are almost always limited to material lacking social value. *See id.* at 2349.

252. 47 U.S.C. § 223(e)(5) (Supp. 1998). Section 223(e)(5) provided:

> (a) Defenses-In addition to any other defenses available by law. . . (5) It is a defense to a prosecution under subsection (a)(1)(B) or (d) of this section, or under subsection (a)(2) of this section with respect to the use of a facility for an activity under subsection (a)(1)(B) of this section that a person-(A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.

Id. Finally, the Government argued that the CDA helps to encourage the growth of the Internet because people who refuse to subscribe to the Internet due to the pornographic material available to children would no longer have to worry about such a problem. Thus, the Government reasoned that this argument "provides an independent basis for upholding the constitutionality of the CDA." *Reno*, 177 S.Ct. at 2351. However, the Court considered this argument the Government's weakest because it contradicted the district court's factual findings. *See id.* These findings indicated the recent, expansive growth of the Internet occurred regardless of the availability of sexual material on the Internet. *See id.* "The Government apparently assumes that the unregulated availability of 'indecent' and 'patently offensive' material on the Internet is driving countless citizens away from the medium because of the risk of expos-

ever, the Court concluded that the Government's suggestion of "tagging" sexually explicit transmissions per section 223(e)(5)(A) would be ineffective, and thus the defense was "illusory."[254] Furthermore, the age verification defense provided by section 223(e)(5)(B) was not economically feasible for most non-commercial information providers to use, and therefore, the defense failed to sufficiently narrow the statute's burden on speech.[255] Ultimately, the Court agreed with the district court's conclusions that "the defenses do not constitute the sort of 'narrow tailoring' that will save an otherwise patently invalid unconstitutional provision."[256]

At oral argument before the Supreme Court, the Government urged that the Court should honor section 608 of the CDA—the severability clause of the statute.[257] The Court declined to do so as to section 223(d), opting to strike it down entirely because "indecent" speech receives constitutional protection.[258] The Court agreed to sever the phrase "or indecent" from section 223(a), leaving the remainder of section 223(a) intact because it related solely to obscene speech which is not entitled to First Amendment protection.[259] However, the Court concluded that the severability provision could do nothing else to save the remainder of sections 223(a) or

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ing themselves or their children to harmful material." *Id.* "The dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention. The record demonstrates that the growth of the Internet has been and continues to be phenomenal." *Id.*

253. *See Reno*, 117 S. Ct. at 2349-50.

254. *See id.* at 2349. "Tagging" means that a person could "encode their indecent communications in a way that would indicate their contents, thus permitting recipients to block their reception with appropriate software." *Id.* At the time the case was before the district court, no such software was available. *See id.*

255. *See id.* Age verification is currently used by commercial providers of sexually explicit material, and thus they would be protected by the statute. *See id.* However, the Government failed to prove that the age verification actually precluded minors from casting themselves as adults. *See id.* "The Government thus failed to prove that the proffered defense would significantly reduce the heavy burden on adult speech produced by the prohibition on offensive displays." *Id.* at 2350.

256. *Id.*

257. *See* 47 U.S.C. § 608 (1994). Section 608 provided: "If any provision of this chapter or the application thereof to any person or circumstances is held invalid, the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby." *Id.*

258. *See id.*

259. *See id.*

223(d).[260]

IV. ANALYSIS

A. Discussion of Supreme Court's Holding and Rationale

The Supreme Court did not strike down the entire CDA.[261] Instead, the Court struck down the "indecent" and "patently offensive" sections of the CDA because they were unconstitutionally overbroad.[262] However, the "obscenity" provisions of the CDA were not challenged and remain good law.[263] In its holding, the majority observed how the Internet existed at the time the case was before the Court.[264] All of the Justices agreed that age-verifying gateway technology was not widely available, particularly for non-commercial information providers.[265] It is not the Court's duty to forecast whether technical developments might occur in the near future or in the years or decades that follow.[266] The majority's position is defensible inasmuch as it held that the CDA did not pass constitutional muster because it contained undefined terms, and more importantly, lacked narrowly tailored means to meet the governmental purpose of the statute.[267]

However, one may accurately hypothesize that if the Court found that gateway technology was available to all Internet speakers when the case was before it, the CDA may have withstood the Court's First Amendment scrutiny. This type of technology could provide the Government with the narrowly tailored means necessary for legislation to survive strict scrutiny because it would make the statutory defenses effective for all information providers. Therefore, a question arises as to whether the Court genuinely intends to provide the Internet with such broad protection in the future. For example, the Court affirmed in *Reno* that the Government has a valid interest in protecting children from harmful material.[268] Therefore, access by minors to material on the Internet that is not obscene,

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260. *See id.* The Court also refused to limit its holding to a "judicially defined set of specific applications." *Id.*

261. *See supra* notes 154-61 and accompanying text.

262. *See supra* notes 185-87 and accompanying text.

263. *See supra* note 177.

264. *See supra* notes 133-53 and accompanying text.

265. Such software was not available, but Internet filtering software for information receivers was available. *See Reno*, 117 S. Ct. at 2349.

266. *See id.*

267. *See supra* notes 222-50 and accompanying text.

268. *See supra* note 235 and accompanying text.

but still harmful to them, can be regulated if the legislation containing these restrictions is appropriately drafted by Congress.

In enacting the CDA, Congress simply did not research the myriad of issues involved with such an expansive regulation.[269] The provisions were not the result of any Congressional hearings, and thus no legislative findings existed to provide factual support for the CDA.[270] In failing to draft clear, concise constitutional legislation, the Court once again sent a message to Congress that ill-prepared legislation will not be tolerated when it unduly restricts information flowing to and from the marketplace of ideas.[271]

B. Alternative Approach

The *Reno* decision was not without a differing viewpoint. Justice Sandra Day O'Connor wrote a separate opinion, joined by Chief Justice William Rehnquist, concurring in part and dissenting in part with the majority opinion.[272] Justice O'Connor concluded that the "indecent" provision of the CDA was not unconstitutional on its face.[273] Her opinion began with the observation that section 223(d) was really two separate provisions and labeled them as the "specific person" provision and the "display" provision.[274] She reasoned that each provision deserved a separate constitutional analysis.[275] Furthermore, she observed that the statute was not written to prevent adults from accessing indecent material, but rather "the undeniable purpose of the CDA [was] to segregate indecent material on the Internet into certain areas that minors cannot access."[276] The legislation created "adult zones," and the Court has upheld analogous zoning legislation in the past, but only when they meet the requirements of the First Amendment.[277] In Justice O'Connor's opinion,

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269. *See supra* notes 28 and 158-60 and accompanying text.

270. *See supra* notes 28 and 158-60 and accompanying text.

271. *See supra* notes 238-50 and accompanying text.

272. *See* Reno v. ACLU, 117 S. Ct. 2329, 2351-57 (1997) (O'Connor, J., concurring in part, dissenting in part).

273. *See id.* at 2357 (O'Connor, J., concurring in part, dissenting in part).

274. *See id.* at 2352 (O'Connor, J., concurring in part, dissenting in part).

275. *See id.* (O'Connor, J., concurring in part, dissenting in part).

276. *Id.*

277. *See id.* at 2353-54 (O'Connor, J., concurring in part, dissenting in part). Many states have enacted legislation which in effect creates these adult zones. *See, e.g.*, MD. ANN. CODE art. 27, § 416E (1996) (prohibiting minors in establishments where certain enumerated acts are performed or portrayed); MD. ANN. CODE art. 27, § 416B (1996) (denying minors access to speech deemed harmful to minors).

V. CONCLUSION

Reno v. ACLU addressed whether sections 223(a)(1) and 223(d) of the CDA impinged on the First Amendment rights of adults.[349] More importantly, the United States Supreme Court invalidated the first governmental attempt to regulate pornography on the most expansive, technologically advanced mode of communication known to this day.[350] The Supreme Court held that both sections 223(a)(1) and 223(d) were overbroad to the extent they covered undefined "indecent" material, and as a result violated the First Amendment because they could suppress constitutionally protected speech.[351]

The Court recognized the importance of protecting minors from harmful material, but refused to "'reduc[e] the adult population . . . to . . . only what is fit for children.'"[352] This refusal reaffirms the principle that the government may regulate constitutionally protected speech, but only when such a regulation serves a legitimate government purpose and is narrowly tailored by the least restrictive means available.[353] Only time will tell whether the newly adopted Internet Indecency Act will survive constitutional scrutiny. However, it appears as though the government has taken adequate steps to assure that the Act will survive a constitutional challenge and has cured the defects present in the CDA that proved fatal to its intentions in *Reno*.

Scott A. Shail

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younger. *Compare* 47 U.S.C. § 223(a)(1)(B) (1997) (CDA), *with* 47 U.S.C. § 231(d)(7) (1999) (COPA).

349. *See supra* notes 4-23 and accompanying text.

350. *See supra* notes 170-270 and accompanying text.

351. *See supra* notes 170-270 and accompanying text.

352. Reno v. ACLU, 117 S. Ct. 2329, 2346 (1997) (quoting Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 759 (1996) (quoting Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 128 (1989))).

353. *See supra* note 187 and accompanying text.

the Court should uphold this type of zoning law "if (i) [the statute]. . . does not unduly restrict adult access to the material; and (ii) minors have no First Amendment right to read or view the banned material."[278]

Justice O'Connor proceeded to discuss the "unzoneable" nature of cyberspace.[279] In comparing prior case law with *Reno*,[280] Justice O'Connor stated that previous zoning laws existed "in the physical world, a world with two characteristics that make it possible to create 'adult zones': geography and identity."[281] These characteristics allow owners to exclude minors from their establishments without affecting the First Amendment rights of adults.[282]

Adults are unduly affected by the CDA provisions because these two principles—geography and identity—do not exist in cyberspace.[283] Justice O'Connor recognized the future possibility of constructing barriers on the Internet to screen user identification, thus making cyberspace potentially zoneable.[284] However, these advancements have not been fully developed, nor were they available to all Internet users at the time *Reno* was decided.[285] As a result, this technology did not save the "display" provision, section 223(d)(1)(B), from constitutional failure.[286] Thus, Justice O'Connor agreed with the majority that this section of the CDA caused speakers to completely refrain from using indecent speech, and as a result, unduly affected the First Amendment rights of adults.[287]

Sections 223(a)(1)(B) and 223(d)(1)(A) were the subject of Justice O'Connor's dissenting opinion because she reasoned that they were not unconstitutional in every application.[288] Justice O'Connor noted that for section 223(a)(1)(B) to apply, the information sender must have known the recipient was under eighteen

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278. *Reno*, 117 S. Ct. at 2352-53 (O'Connor, J., concurring in part, dissenting in part).

279. *See id.* at 2353-54 (O'Connor, J., concurring in part, dissenting in part).

280. *See id.* at 2353 (O'Connor, J., concurring in part, dissenting in part).

281. *Id.*

282. *See id.*

283. *See id.*

284. *See id.*

285. *See id.* at 2353-54. (O'Connor, J., concurring in part, dissenting in part). These advancements are known as "gateway" technology, and includes adult verification numbers, screening software such as Cyber Patrol and SurfWatch, and Web browsers with screening capabilities. *See id.*

286. *See id.* at 2354 (O'Connor, J., concurring in part, dissenting in part).

287. *See id.*

288. *See id.*

years old.[289] Justice O'Connor opined that section 223(d) should be construed to require this knowledge as well, even though this requirement was lacking from the language of the statute.[290] Justice O'Connor reasoned that when the provisions were read to require knowledge, they would be no different than the statute in *Ginsberg* as applied to a conversation between an adult and a minor.[291]

However, when more than one adult participates in a conversation that is subsequently joined by a minor, the *Ginsberg* [292] analogy is destroyed because the CDA requires adults to cease using indecent speech immediately.[293] Therefore, in this situation, the CDA provisions restrict the rights of adults to use indecent speech over the Internet.[294] However, when an adult's constitutional right to engage in indecent speech would not normally be affected by a statute, a facial challenge to the statute will fail.[295] As a result, the Court has the authority to strike, as unconstitutional, portions of the CDA as they pertain to communications between adults and uphold those same provisions as they pertain to communications involving minors.[296] Based on this authority, Justice O'Connor "sustain[ed] the 'indecency transmission' and 'specific person' provisions to the extent they apply to the transmission of Internet communications where the party initiating the communication knows that all of the recipients are minors."[297]

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289. *See id.*

290. *See id.*

291. *See id.* at 2355 ("Restricting what the adult may say to the minors in no way restricts the adult's ability to communicate with other adults. He is not prevented from speaking indecently to other adults in a chat room (because there are no other adults participating in the conversation) and he remains free to send indecent e-mails to other adults.") (O'Connor, J., concurring in part, dissenting in part).

292. *See supra* notes 83-101 and accompanying text.

293. *See Reno,* 117 S. Ct. at 2355 (O'Connor, J., concurring in part, dissenting in part). "If they did not, they could be prosecuted under the 'indecency transmission' and 'specific person' provisions for any indecent statements they make to the group, since they would be transmitting an indecent message to specific persons, one of whom is a minor." *Id.*

294. *See id.*

295. *See id.* ; *see also* United States v. Salerno, 481 U.S. 739, 745 (1987) (stating that a facial challenge to legislation succeeds only if the challenger shows that no circumstances exist under which the statute is valid).

296. *See Reno,* 117 S. Ct. at 2355 (O'Connor, J., concurring in part, dissenting in part) (quoting Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985)).

297. *Id.* at 2356 (O'Connor, J., concurring in part, dissenting in part).

Justice O'Connor then analyzed the CDA under the second prong of the valid zoning law inquiry, which is whether the statute interferes with minors' First Amendment rights.[298] She concluded that "the CDA does not burden a substantial amount of minors' constitutionally protected speech."[299] Justice O'Connor referred to *Ginsberg* in which the Court determined that minors may be denied access to certain material deemed obscene as to minors, and established the test for determining what materials fall into this category.[300] Justice O'Connor reasoned that the CDA could potentially ban speech that minors have a constitutional right to access because Congress failed to clarify what constitutes "patently offensive" speech under the CDA.[301] This potential interference, however, was not enough for plaintiffs to successfully prove that the CDA was overbroad.[302] Justice O'Connor observed that the plaintiffs simply failed to prove substantial overbreadth concerning minors' speech rights, and thus a facial challenge of the CDA should fail.[303] Justice O'Connor concluded, under the zoning law analysis, the "display," "indecency transmission," and "specific person" provisions were unconstitutional as applied to communications between adults.[304] However, the "indecency transmission" and "specific person" provisions were constitutionally valid as applied to communications between an adult and one or more minors, and thus those portions of the statute should be upheld as constitutional.[305]

Justice O'Connor's concurring and dissenting opinion provided an alternative overbreadth analysis of the CDA.[306] This reasoning adheres to the principle that a statute may be declared unconstitutional in part, but otherwise left intact.[307] Justice O'Connor's opinion accurately demonstrates a flexible, realistic approach to

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298. *See id.*

299. *Id.* at 2357 (O'Connor, J., concurring in part, dissenting in part).

300. *See id.* at 2356 (O'Connor, J., concurring in part, dissenting in part).

301. *See id.* An example of speech that a minor has a right to access, but would be banned by the CDA, is any speech that has some redeeming value for minors and does not appeal to their prurient interest. *See id.*

302. *See id.* "Our cases require a proof of 'real' and 'substantial' overbreadth." *Id.* (citing Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)).

303. *See id.*

304. *See id.* at 2357 (O'Connor, J., concurring in part, dissenting in part).

305. *See id.*

306. *See supra* notes 271-304 and accompanying text.

307. *See Reno*, 117 S. Ct. at 2355 (O'Connor, J., concurring in part, dissenting in part) (quoting Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985)).

determining the constitutionality of statutes, which effectively preserves the congressional intent behind such legislation.

C. Impact of *Reno v. ACLU*

In *Reno v. ACLU*, the United States Supreme Court reaffirmed the framework for conducting a constitutional analysis of overbroad legislative enactments under the First Amendment.[308] The effect of this designed constitutional inquiry is twofold: (1) overbroad legislation that the Court strictly scrutinizes will be deemed unconstitutional under the First Amendment if it chills protected free speech, unless Congress narrowly tailors the provision so that the statute infringes such rights in the least intrusive way possible, and (2) Congress is forced to carefully investigate the subject matter of a statute to ensure the means for avoiding legislative overbreadth are clearly available to all who may fall within the reach of the statutory language in order to survive constitutional scrutiny.

It would be difficult to argue that the result of the *Reno* decision surprised First Amendment scholars, especially in light of *Sable*.[309] Although the version of the CDA in *Sable* created a complete ban on indecent material, and thus is facially distinguishable from the version of the CDA at issue in *Reno*, the facts in *Reno* illustrate that the CDA created a total ban on constitutionally protected speech.[310] Congress failed to document that the technology existed for the CDA, in its current form, to pass constitutional scrutiny.[311] According to the information before the Court, there was no viable age verification process to protect information providers, and therefore the statutory affirmative defenses were not an effective means to avoid prosecution.[312] Thus, the cumulative effect of all these factors created an identical restriction on speech as did the statute that was at issue in *Sable*.[313]

The *Reno* decision directly benefits Internet users who choose to provide indecent material to others. The Supreme Court expressly stated that the Internet deserves far more protection from regulation than does broadcasting.[314] Therefore, it is highly probable that potential Internet regulation supporters will be unable to

308. *See supra* notes 170-270 and accompanying text.
309. *See supra* notes 121-32 and accompanying text.
310. *See Reno*, 117 S. Ct. at 2347-50.
311. *See supra* note 284 and accompanying text.
312. *See Reno*, 117 S. Ct. at 2349-50.
313. *See supra* notes 121-32 and accompanying text.
314. *See Reno*, 117 S. Ct. at 2343.

draw any support from prior cases upholding the regulation of broadcast media. This reduces the amount of legal authority at their disposal and greatly reduces the chances of mounting successful defenses against the constitutional challenges to Internet regulations.

On the other hand, *Reno* does provide hope for those who support regulating the Internet. Once computer software is available to the average Internet user that allows persons to verify the age of a recipient, statutes such as the CDA will enjoy greater judicial support. This software will allow an Internet user wishing to send indecent messages to be reasonably sure that another user with whom the individual is communicating is an adult. This assurance will allow people to communicate with one another without the threat of prosecution under a statute that regulates communication, thus avoiding forced silence upon people and violations of the First Amendment. Until such software is available to all Internet users, whether commercial or non-commercial, legislation seeking to regulate protected speech communicated over this medium of communication will not succeed.

Reno also affected the contemporary political arena, compelling the legislative and executive branches to carefully consider First Amendment values as they create and administer regulations of the Internet.[315] Within six months of the Court's decision in *Reno*, Vice President Al Gore announced that the Clinton administration would join members of the online industry to form "Kids Online," a national effort to make the Internet and online services "safer for children."[316] Rather than calling for increased regulation of the In-

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315. *See infra* notes 314-22 and accompanying text.

316. *Kids Online to get Administration Support*, COMM. DAILY, Dec. 2, 1997, *available in* 1997 WL 13781115. Participating members of the online industry include America Online, the American Library Association, the Walt Disney Company, and Time Warner, Inc. *See id.* Each company will design and provide its own protective program for children. *See id.* Additionally, Gore praised the "use of Internet blocking and screening," and stated that the "use of such devices by parents 'is not censorship.'" *Gore at Summit Conference Sets Kids Online Policy*, COMM. DAILY, Dec. 3, 1997, *available in* 1997 WL 13781201. Gore further commented: "It's called 'parenting,' and blocking was 'fully protected' by the First Amendment." *Id.* Furthermore, Gore praised "Web sites that have started to rate themselves and the online industry for its decision to adopt a formal policy statement showing 'zero tolerance' for child pornography and that Internet service providers will 'be working closely with law enforcement to report and pursue any suspicious activity.'" *Id.*

ternet,[317] the Clinton Administration's cooperative approach to the problems posed by indecent material on the Internet reflects a realization that only with the online industry's cooperation can there be effective restrictions without a "nationwide backlash" occurring "that could stunt the growth of [the] Internet."[318] Along with parents,[319] this coalition will move toward strengthening the Reno majority's conclusion that Internet-filtering software is a viable alternative to a complete ban of indecent speech.

D. Congressional Response

The *Reno* Court was mainly concerned with two characteristics of the CDA.[320] First, the CDA covered commercial and noncommercial information providers and applied the same level of liability to these two categories.[321] Second, the CDA failed to provide any definition of "indecent" and omitted the requirement that "patently offensive" material must lack socially redeeming value.[322] In response to these concerns, the legislative branch of the federal

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317. Vice President Gore was quick to recognize that this program "should follow dictates of court decisions and [the] Constitution." *Id.* Gore attacked groups that support increased government involvement, stating "that government has to follow court rulings and 'we must find methods to keep our children safe that do not infringe on the free speech of others.'" *Id.*

318. *Id.* The administration openly supported a "3rd way" policy that calls for industry leaders to work alongside the government in solving the present problems with children and the Internet. *See id.*

319. Some would contend that *Reno* shifts the responsibility of keeping children away from sexually-explicit material on the Internet to parents. *See* Ann Gregor, *Filtering Software Can Help Make Surfing Safer for Kids*, HOME PC, Nov. 1, 1997, *available in* 1997 WL 2968922. This responsibility has spurred a movement in the online industry to develop new and improved Internet-filtering software. *See id.* Several examples of available programs parents can use to accomplish this task are Microsystems' Cyber Patrol, Solid Oak Software's CyberSitter, Net Nanny Ltd.'s Net Nanny, Spyglass's SurfWatch, and Security Software Systems' Cyber Sentinel. *See id.* These programs all share certain similarities so that:

> As children surf, the filters compare what's streaming into the computer against lists of proscribed words, phrases and Internet addresses. If the software finds a match, the page won't appear onscreen. Some programs get parents started with extensive lists of undesirable sites; others rely more on users to create their own lists, citing the vast differences in what parents consider objectionable.

Id.

320. *See* Reno v. ACLU, 117 S. Ct. 2324, 2345, 2347 (1997).

321. *See id.* at 2347.

322. *See id.* at 2345.

government accepted the Supreme Court's challenge issued in Reno. The United States Senate Commerce Committee approved Senate Bill 1482, a bill written by Senator Dan Coats of Indiana that amends section 223 of the Communications Act of 1934, and is "designed to prevent indecent material from being conveyed over the Internet" to people under seventeen years old.[323] Senate Bill 1482 is known as the Internet Indecency Act, and it outlaws the commercial distribution of pornography over the Internet to minors.[324]

The Internet Indecency Act appears to be a reincarnation of the Communications Decency Act designed to withstand constitutional challenge."[325] Senate Bill 1482 is modeled after the New York statute that the Supreme Court upheld in *Ginsberg v. New York* with

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323. *Senate Panel OK's School Filtering, Internet Decency Bills, Funds NGI*, EDUC. TECH. NEWS, Mar. 18, 1998, *available in* 1998 WL 10242373.

324. S. 1482, 105th Cong. (1998) provides:

> Section 1. Prohibition on Commercial Distribution on the World Wide Web of Material that is Harmful to Minors. (a) Prohibition- (1) IN GENERAL - Section 223 of the Communications Act of 1934 (47 U.S.C. 223) is amended -(A) by redesignating subsections (e), (f), (g), and (h) as subsections (f),(g), (h), and (i), respectively; and (B) by inserting after subsection (d) the following new section (e): (e) (1) Whoever in interstate or foreign commerce in or through the World Wide Web is engaged in the business of the commercial distribution of material that is harmful to minors shall restrict access to such material by persons under 17 years of age. (2) Any person who violates paragraph (1) shall be fined not more than $50,000, imprisoned not more than six months, or both. . .(5)it is an affirmative defense to prosecution under this subsection that the defendant restricted access to material that is harmful to minors persons under 17 years of age by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number or in accordance with such other procedures as the Commission may prescribe. (6) This subsection may not be construed to author the Commission to regulate in any manner the content of information provided on the World Wide Web. (7) For purposes of this subsection: (A) 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 -(i) taken as a whole and with respect to minors, appeal 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 contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and (iii) lacks serious literary, artistic, political, or scientific value.

Id.

325. *See supra* note 348 and accompanying text.

the *Reno* Court's remarks in mind.[326] The statute in Ginsberg prohibited the selling to minors under seventeen years of age material considered obscene as to minors but not to adults.[327]

In *Reno,* the Supreme Court found four primary differences between the CDA and the *Ginsberg* statute,[328] all of which Senate Bill 1482 clearly addresses.[329] First, like the statute in *Ginsberg,*[330] Senate Bill 1482 does not prohibit parents from obtaining material on the Internet for their children,[331] unlike section 223(a)(2) of the CDA which criminalized such parental activity.[332] Second, the scope of Senate Bill 1482 is clearly limited to commercial transactions[333] as was the statute upheld in *Ginsberg.*[334] The CDA was directed at both commercial and non-commercial activity.[335] Third, the *Ginsberg* statute's "harmful to minors" standard included the requirement that the material "lack serious literary, artistic, political, or scientific value," thus protecting material containing any of these serious value elements.[336] Section (e)(7) of Senate Bill 1482 specifically adopts this requirement of the *Ginsberg* statute.[337] On the other hand, the CDA did not contain a definition of "indecent" or a "social value" exception to the "patently offensive" provision.[338] Lastly, the *Ginsberg* statute defined minors as people under the age of seventeen,[339] and Senate Bill 1482 adopts the same definition of minors.[340] In contrast, the scope of the CDA included eighteen-year-olds.[341]

Furthermore, Senate Bill 1482 provides the narrow-tailoring that the Court has required in the past when testing the constitutionality of legislation.[342] Section (e)(5) of the bill provides certain

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326. *See supra* notes 31-44 and accompanying text.
327. *See supra* note 85 and accompanying text.
328. *See supra* notes 193-200 and accompanying text.
329. *See infra* notes 330-41 and accompanying text.
330. *See supra* note 85 and accompanying text.
331. *See supra* note 324.
332. *See supra* note 5.
333. *See supra* note 324.
334. *See supra* note 85 and accompanying text.
335. *See supra* note 5.
336. *See supra* notes 85-87 and accompanying text.
337. *See supra* note 324.
338. *See supra* note 5.
339. *See supra* notes 85-87 and accompanying text.
340. *See supra* note 324 and accompanying text.
341. *See supra* note 5.
342. *See supra* notes 32-132 and accompanying text.

affirmative defenses[343] that the *Reno* Court acknowledged as both technically and economically feasible for commercial information providers.[344] The scope of Senate Bill 1482 is explicitly limited to commercial activity on the World Wide Web, and therefore the affirmative defenses will protect those providers who follow its terms from prosecution.[345] Senate Bill 1482 is specifically designed to meet the parameters established by the Supreme Court in past decisions[346] and appears to be constitutional under the First Amendment because of its adherence to the Court's commands in both *Reno* and *Ginsberg*. This Bill eventually became part of the Child Online Protection Act (COPA)[347] and was immediately challenged.[348]

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343. *See supra* note 324.

344. *See supra* note 255.

345. *See supra* note 342.

346. *See supra* notes 328-41 and accompanying text.

347. *See* 47 U.S.C. § 231 (1999).

348. *See* ACLU v. Reno, 31 F. Supp. 2d 473 (E.D. Pa. 1999); ACLU v. Reno, 1998 WL 813423 (E.D. Pa. Nov. 23, 1998). The ACLU represented individuals, entities, organizations, World Wide Web site operators, and content providers that post, read, and respond to Web sites with information on obstetrics, gynecology, and sexual health. *See Reno*, 31 F. Supp. 2d at 484. The plaintiffs argued that the statute was unconstitutional for the same reasons as CDA—a restriction on speech "harmful to minors" burdens speech that is protected for adults. *See id.* at 478-79. Just before the COPA was about to go into effect, the United States District Court for the Eastern District of Pennsylvania issued a temporary restraining order. *See Reno*, 1998 WL 813423 at *1. The court later granted a preliminary injunction, preventing the enforcement of the statute until a final adjudication of the merits of the plaintiffs' claims. *See Reno*, 31 F. Supp. 2d at 499. The court held that the plaintiffs established "a substantial likelihood that they will be able to show that COPA imposes a burden on free speech that is protected for adults." *Id.* at 495. Like the Interent Indecency Act, the district court and commentators recognized that COPA was clearly Congress' response to the Supreme Court striking down the CDA in *Reno v. ACLU*, 117 S. Ct. 2329 (1997). *See, e.g., Reno*, 31 F. Supp. 2d at 476-77; Pierre J. Lorieau, *Reno v. ACLU: Champion of Free Speech or Blueprint for Speech Regulation on the Internet?*, 7 J.L. POL'Y 209, 247 (1998); Richard Raysman and Peter Brown, *Regulating Internet Content, Privacy; Taxes*, N.Y.L.J. Sept. 21, 1998, at 1. For example, the COPA explicitly defines "material that is harmful to minors," using some of the Supreme Court's criticisms of *Reno*. *See* 47 U.S.C. § 231(6). While the CDA used general terms such as "indecent" and "patently offensive" to describe material harmful to minors, the COPA incorporated specific guidelines, such as a lack of serious literary, political, or scientific value for minors, for courts to consider. *Compare* 47 U.S.C. § 223(a)(1)(B) (1998) (CDA), *with* 47 U.S.C. § 231(a)(1) (1999) (COPA). Furthermore, while the CDA regulated distribution of materials to eighteen-year-olds, the COPA applies only to material distributed to individuals seventeen years old and