COMMENT

RENO v. ACLU: INSULATING THE INTERNET, THE FIRST AMENDMENT, AND THE MARKETPLACE OF IDEAS

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INTRODUCTION

When the Framers of the Constitution settled that "Congress shall make no law . . . abridging the freedom of speech,"[1] it is unlikely that they foresaw the protection applying to any form of communication other than print or oral speech. While the Framers could not have predicted the emergence of radio and television broadcasts, telephone communications, cable television, and now the Internet as forms of mass communication, it does not necessarily follow that they would have denied these unforeseen mediums First Amendment protection.[2] To the contrary, the Framers would have encouraged free speech and the open exchange of ideas in any new form of communication that might develop over time.[3]

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1. U.S. CONST. amend. I. The First Amendment provides in full: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.* The First Amendment binds not only Congress, but also all branches of both the federal and state governments via the Due Process Clause of the Fourteenth Amendment. *See* Gitlow v. New York, 268 U.S. 652, 664-66 (1925) (holding that First Amendment guarantees are fundamental element of "liberty" protected by Fourteenth Amendment).

2. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.6 (5th ed. 1995) (noting that Framers' intention for First Amendment to protect speech and press does not mean that they intended to exclude movies, digital recordings, Internet, etc.); Laurence H. Tribe, The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier, Address at the First Conference on Computers, Freedom & Privacy (Mar. 26, 1991) <http://cpsr.org/cpsr/free_speech/tribe_constitution_cyberspace.txt> (arguing that while Constitution's architecture might seem "quaintly irrelevant . . . in the world as reconstituted by the microchip," Framers were wise in their creation of our Constitution with a "framework for all seasons, a truly astonishing document whose principles are suitable for all times and all technological landscapes").

3. *See* NOWAK & ROTUNDA, *supra* note 2, § 16.6 (arguing that policies behind First Amendment support coverage of all forms of media, and that if Framers could have foreseen modern methods of communications, they would have included them under First Amendment protection because doing so would promote its policies); Tribe, *supra* note 2 (arguing that "technologies familiar to the Constitution's authors and ratifiers . . . do not exhaust the threats against which the Constitution's core values must be protected").

In recent years, the rapid emergence of the Internet has brought with it the most accessible, dynamic, and democratic form of mass communication in history.[4] In many ways the Internet embodies the democratic ideals underpinning the United States' constitutional framework.[5] It provides an outlet for a cacophony of ideas with virtually no geographic, economic, social, or political restraints, giving a voice to the People in a way the Constitution's Framers could only have dreamed possible.[6]

The Internet is still in its nascent stages, and like print, broadcasting, telephone, and cable before it, it is a developing form of mass communication that will require First Amendment protection from governmental intrusion.[7] In 1996, Congress enacted the first piece of legislation specifically designed to regulate the previously untamed

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4. *See* ACLU v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997) (Dalzell, J., filing supporting opinion) ("It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen."); Deanna Robinson, *Court Acknowledges Internet Role in New World Order*, THE OREGONIAN, June 14, 1996, at C7 (arguing that Internet is only medium that permits realization of United Nation's idealistic statement that "not only does everyone have the right to freedom of opinion and expression, but that this right includes freedom 'to seek, receive and impart information and ideas through any media and regardless of frontiers'" (quoting *Universal Declaration of Human Rights*, G.A. Res. 217A(III), U.N. Doc. A/810, at 71 (1948))); *see also infra* notes 105-08 and accompanying text (describing Internet's predicted impact as an emerging form of mass communication).

5. *See ACLU*, 929 F. Supp. at 881.

6. *See, e.g.*, Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619, 1624 (1995) (suggesting that decentralized nature of Internet removes economic barriers to entry into "marketplace of ideas" which previously prevented realization of First Amendment ideal); Fred H. Cate, *Indecency, Ignorance, and Intolerance: The First Amendment and the Regulation of Electronic Expression*, 1995 J. ONLINE L. 5, ¶ 66 (Dec. 1995) <http://www.wm.edu/law/FacAdmin/publications/jol/cate2.html> (observing that structure of Internet makes the medium an egalitarian forum of communication where "the real test of expression and ideas is their own value, not the status or affiliation of their source"); Robert Kline, *Freedom of Speech on the Electronic Village Green: Applying the First Amendment Lessons of Cable Television to the Internet*, 6 CORNELL J.L. & PUBL. POL'Y 23, 24-25 (1996) (positing that Internet, "a wide open, interactive frontier that has no central control figure" and allows speech at such minimal cost, "provides for the exchange of ideas on a massive scale on a variety of topics limited only by the human imagination"); Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1846-47 (1995) (arguing that Internet is first medium that truly allows goals and premises of First Amendment jurisprudence to be realized); Jeffrey Rosen, *The End of Obscenity*, BALTIMORE SUN, June 28, 1996, at 15A (observing that Internet, more than any other form of communication, fulfills "Oliver Wendell Holmes' romantic metaphor of a perfectly deregulated marketplace of ideas . . . [by] . . . reducing the costs of entry for both speakers and listeners and creating relative equality among" all participants).

7. *See* Berman & Weitzner, *supra* note 6, at 1636-37 (recognizing likelihood that government will attempt to regulate content on Internet, as evidenced "by taking decisive and dangerous steps against the perceived growth of sexually explicit content in the new media"); WILLIAM J. CLINTON & ALBERT GORE, JR., A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE 25 (July 1, 1997), *available at* <http://www.iitf.nist.gov/eleccomm/ecomm.htm> (arguing that "unnecessary regulation could cripple the growth and diversity of the Internet").

frontier of cyberspace:[8] the Communications Decency Act ("CDA").[9] The Act imposed criminal penalties on those who transmit or display obscene, indecent, or patently offensive material over the Internet.[10]

In *Reno v. ACLU*,[11] however, the Supreme Court followed two district court decisions by striking down the CDA as unconstitutionally overbroad.[12] The Court applied a "medium-specific" analysis, the hallmark of its First Amendment jurisprudence regarding different forms of mass communication,[13] and determined that the Internet does not embody any of the characteristics that, when present in other forms of communication, has led the Court to qualify the level of First Amendment protection applied to the medium.[14] Perhaps most significantly, though, the Court recognized in its opinion that the Internet, and the egalitarian ethos it fosters, is a medium ideally suited to accomplish what Supreme Court Justice Oliver Wendell Holmes termed the "marketplace of ideas."[15]

This Comment considers where the Internet fits in the spectrum of communication mediums for First Amendment protection, and examines how the Supreme Court's holding in *Reno v. ACLU* will impact the world's newest, most exciting form of communication. Part I of this Comment summarizes the protections granted by the First Amendment and examines how those protections are limited or expanded depending on each medium's unique characteristics. Part

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8. The term "cyberspace," first used by cyberpunk novelist William Gibson, has come to define the nonphysical "place," including the Internet, where electronic communication takes place. *See* Tribe, *supra* note 2 (describing cyberspace as "a place without physical walls or even physical dimensions where ordinary telephone conversations 'happen,' where voice-mail and e-mail messages are stored and sent back and forth, and where computer-generated graphics are transmitted and transformed, all in the form of interactions . . . among countless users, and between users and the computer itself").

9. Communications Decency Act of 1996, Pub. L. No. 104-104, § 502, 1996 U.S.C.C.A.N. (110 Stat.) 56, 133 (to be codified at 47 U.S.C. § 223).

10. *See infra* Part II.B (discussing legislative history and analysis of CDA).

11. 117 S. Ct. 2329, 2351 (1997) (holding that governmental regulation of content of speech on Internet is outside bounds of constitutional tradition, particularly when considering the "dramatic expansion of this new marketplace of ideas" and the profound interest "in encouraging freedom of expression in a democratic society").

12. *See* Reno v. ACLU, 117 S. Ct. 2329 (1997). The CDA was struck down earlier at the district court level in *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997), and in *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996), *aff'd*, 117 S. Ct. 2501 (1997).

13. *See infra* Part I.C (discussing medium-specific analysis and its application to print, broadcast, telephone, and cable communications).

14. *See Reno*, 117 S. Ct. at 2343-44 (noting that factors such as a history of extensive government regulation, scarcity of frequencies, or an invasive nature, are not present in cyberspace (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637-38 (1994); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 128 (1989); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 399-400 (1969)).

15. *See id.* at 2351 (noting that expansion of medium contradicts argument that citizens are being driven away from Internet because of risk of exposure to harmful material).

II analyzes the use of existing laws and regulations to stem the perceived tide of criminal activity on the Internet, and examines Congress' enactment of the CDA as a panacea for the Internet's ills. Part III examines the subsequent challenges to the CDA and the Supreme Court's holding in *Reno v. ACLU.* Part IV considers the ramifications of the Court's decision on the future of the Internet, and offers an alternative to the Court's use of medium-specific analysis when considering the constitutionality of laws restricting freedom of speech in the future. Finally, this Comment concludes that, as the United States and the world enter a new age of information and communication, the right to free speech would be best protected by a new First Amendment jurisprudence that grants all forms of speech the highest level of constitutional protection, regardless of the medium through which they are communicated.

I. FREEDOM OF SPEECH AND FORMS OF MASS COMMUNICATION

A. *Freedom of Speech: Rights and Limitations*

In the United States, the freedom of speech is the touchstone of individual liberty and, in turn, democracy.[16] Supreme Court Justice Oliver Wendell Holmes posited that the primary goal of the First Amendment is to guarantee a "marketplace of ideas," where truth and honest debate emerge from a multiplicity of voices.[17] The market-

16. *See, e.g.*, Leathers v. Medlock, 499 U.S. 439, 448-49 (1991) (holding that one of First Amendment's central goals is promotion of the "individual dignity and choice" that arises from "putting the decision as to what views shall be voiced largely into the hands of each of us" (citing Cohen v. California, 403 U.S. 15, 24 (1971))); Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 503-504 (1984) ("[T]he freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole."); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) ("The maintenance of the opportunity for free political discussion . . . is a fundamental principle of our constitutional system." (citing Stromberg v. California, 283 U.S. 359, 369 (1931))); *see also* NOWAK & ROTUNDA, *supra* note 2, § 16.2 ("Freedom of speech is one of the preeminent rights of Western democratic theory, the touchstone of individual liberty."). Justice Brandeis summarized the origins of the First Amendment and its importance to the United States' democratic underpinnings:

> Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government . . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

17. Justice Holmes introduced the marketplace doctrine in *Abrams v. United States*, arguing:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution.

place doctrine suggests that the First Amendment serves as a protector of democracy by promoting the public discussion of competing ideas and by increasing the People's participation in society and in their government.[18] Over time, several theories regarding the primary goal of the First Amendment have been considered,[19] but the Supreme

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Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (holding that First Amendment did not protect distribution of pamphlets during war time that criticized President Wilson's sending of troops to help counter Russian revolution).

The marketplace theory "assumes that a process of robust debate, if uninhibited by governmental interference, will lead to the discovery of truth, or at least the best perspectives or solutions for societal problems." Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 3 (noting Holmes' belief that properly functioning marketplace of ideas brings about proper evolution of society, wherever that evolution might lead); *see* United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting) ("[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought that we hate.").

18. *See* Ingber, *supra* note 17, at 2-4 (noting that marketplace doctrine, in addition to its usefulness in search for truth and knowledge, promotes popular participation in society and government, thereby advancing quality of democratic government). The earliest groundwork for the marketplace doctrine was established in John Milton's *Areopagitica* in 1644, in which Milton espoused the view that freedom of expression enhances the social good, and that unrestricted debate leads to the discovery of truth. *See* T. BARTON CARTER ET AL., THE FIRST AMENDMENT AND THE FOURTH ESTATE 35 (Foundation Press 6th ed. 1994) ("'And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?'" (quoting JOHN MILTON, AREOPAGITICA (Cambridge Univ. Press 1918))). In the years between *Areopagitica* and Holmes' dissenting opinion in *Abrams*, philosophers including John Locke and John Stuart Mill advanced Milton's theories, particularly Mill, who insisted that freedom of thought, discussion and investigation were goods in their own right, and that, in the end, the open exchange of ideas benefits society above all else. *See id.* at 35-37.

19. *See* NOWAK & ROTUNDA, *supra* note 2, § 16.2 (outlining numerous theories regarding the values that underlie the First Amendment). Many scholars believe that the uncertainty surrounding Framers' intent with regard to the goals of the First Amendment and the resulting myriad theories regarding the right to free speech was intentional. *See* Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 307 (1978) (arguing that if history reveals that Framers had no specific meaning in mind, "it also permits the conclusion that no particular meanings were deliberately foreclosed . . . . Thus, the Framers may have intended the very vagueness of the text [of the First Amendment] to delegate to future generations the task of evolving a precise meaning."). In his seminal exposition on the First Amendment, *The System of Freedom of Expression*, Professor Thomas I. Emerson argued that in lieu of a single, cohesive principle guiding the interpretation of the First Amendment, a complex system of freedom of expression has emerged. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-9 (1970). Emerson posited that in a democratic society, the system of freedom of expression is based on four premises:

> [1] freedom of expression is essential as a means of assuring individual self-fulfillment . . .
> [2] freedom of expression is an essential process for advancing knowledge and discovering truth. . . .
> [3] freedom of expression is essential to provide for participation in decision making by all members of society. . . .
> [4] freedom of expression is a method of achieving a more adaptable and hence a more stable community.

Id. Justice Holmes' marketplace doctrine, it can be argued, embodies all four of these First Amendment goals.

Court has continued to subscribe to models based on Justice Holmes' interpretation.[20] The Court has consistently encouraged an ever-expanding marketplace of ideas by extending the highest level of First Amendment protection to virtually every new form of communication as each has emerged.[21]

The Court maintains that in order to ensure a free, unfettered interchange of ideas,[22] as Justice Holmes encouraged, the judiciary must act to prevent the government from interfering with the growth of the marketplace of ideas.[23] To this end, and because our political system and cultural life rest upon the ideal that the Government shall not silence speakers because of the content of their particular message,[24] the Court insists that any law that regulates speech on the

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20. *See* Ingber, *supra* note 17, at 2 n.2 (observing that "marketplace of ideas" permeates Supreme Court's First Amendment jurisprudence (citing, *inter alia*, Board of Educ. v. Pico, 457 U.S. 853, 866 (1982); Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537, 538 (1980); FCC v. Pacifica Found., 438 U.S. 726, 745-46 (1978); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 760 (1975); Bigelow v. Virginia, 421 U.S. 809, 826 (1975); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 248 (1974); *Red Lion*, 395 U.S. at 390; Time, Inc. v. Hill, 385 U.S. 374, 382 (1966))); *see also* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 968 n.9 (1978) (noting that Supreme Court "steadfastly relies upon a marketplace of ideas theory in determining what speech is protected" (citing Columbia Broad. Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 189 n.25 (1973) (Brennan & Marshall, JJ., dissenting); Furman v. Georgia, 408 U.S. 238, 467 (1972) (Rehnquist, J., dissenting); Red Lion Broad. Co. v. FCC, 398 U.S. 367, 392 n.18 (1969); *New York Times*, 376 U.S. at 272 n.13, 279 n.19; Poe v. Ullman, 367 U.S. 497, 514-15 (1961) (Douglas, J., dissenting); Barenblatt v. United States, 360 U.S. 109, 151 n.22 (1959) (Black & Douglas, JJ., and Warren, C.J., dissenting))).

21. *See infra* Part I.C (discussing manner in which Supreme Court has applied First Amendment to government regulation of print communications, radio and television broadcast communications, telephone communications, and cable television communications).

22. *See* Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."); *New York Times*, 376 U.S. at 269 (stating that First Amendment "'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people'" (quoting Roth v. United States, 354 U.S. 476, 484 (1957))).

23. *See, e.g.*, FCC v. League of Women Voters, 468 U.S. 364, 381-82 (1984) ("'The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.'" (quoting Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940))); *Pacifica*, 438 U.S. at 745-46 ("[I]t is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." (citing Madison Sch. Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175-76 (1976))); *In re* Syracuse Peace Council v. Television Station WTVH, 2 FCC Rcd. 5043, 5056 (1987) (memorandum opinion and order) ("[A] cardinal tenet of the First Amendment is that governmental intervention in the marketplace of ideas . . . is not acceptable and should not be tolerated.").

24. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) ("[E]ach person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal."); R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("'The First Amendment generally prevents government from proscribing speech . . . because of disapproval of the ideas expressed.'" (quoting Cantwell v. Connecticut, 310 U.S. 296, 309-11 (1940))); Tribe, *supra* note 2 (arguing "that, although

basis of its content is presumptively invalid.[25]

The right to free speech, however, is not absolute.[26] In some forms, speech can be so harmful or so lacking in redeeming value that the government has an interest in restricting it. The Court acknowledges, for instance, that the First Amendment does not protect obscenity,[27] child pornography,[28] libelous speech,[29] speech that incites "imminent lawless action,"[30] or words calculated to provoke a fight.[31] In each of

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information and ideas have real effects in the social world, it's not up to government to pick and choose for us in terms of the content of that information or the value of those ideas," and that "[t]he real basis for First Amendment values . . . [is] the belief that information and ideas are too important to entrust to any government censor or overseer").

25. *See R.A.V.*, 505 U.S. at 382 (noting that First Amendment does not permit government to proscribe speech or conduct because it disapproves of its content); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980) (allowing restrictions based on "time, place, or manner," but not content); Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("Content-based regulations are presumptively invalid.").

26. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 (1985) (noting that the Court has "long recognized that not all speech is of equal First Amendment importance"); Konigsberg v. State Bar, 366 U.S. 36, 49 (1961) ("[W]e reject the view that freedom of speech and association . . . as protected by the First and Fourteenth Amendments, are 'absolutes'"). *But see id.* at 60-61, 63, 68 (Black, J., dissenting) ("I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field."). Some constitutional scholars, including Professor Thomas Emerson, espouse a modified absolutist approach that makes a distinction between the way in which the First Amendment protects expression and the way in which it protects action. *See* EMERSON, *supra* note 19, at 17 (arguing that central idea of system of freedom of expression is that "a fundamental distinction must be drawn between conduct which consists of 'expression' and conduct which consists of 'action'"). Emerson insisted that

> "[e]xpression" must be freely allowed and encouraged. "Action" can be controlled, subject to other constitutional requirements, but not by controlling expression. . . . The character of the system is such that freedom of expression can flourish, and the goals of the system can be realized, only if expression receives full protection under the First Amendment.

Id.

27. *See Roth*, 354 U.S. at 485 (holding that obscene speech is not protected by the First Amendment). The Court later held in *Miller v. California* that speech is considered obscene, and thus not protected by the First Amendment, when it (a) appeals to the prurient interest according to community standards, (b) describes sexual conduct in a patently offensive way, and (c) lacks serious literary, artistic, political, or scientific value. *See* Miller v. California, 413 U.S. 15, 24 (1973).

28. *See* New York v. Ferber, 458 U.S. 747, 773 (1982) (holding that New York statute prohibiting persons from knowingly promoting sexual performance by child under the age of 16 by distributing child pornography did not violate First Amendment, as long as statute was not vague or overbroad).

29. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (holding that libelous statements "made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not," are not protected by First Amendment).

30. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (finding statute criminalizing mere advocacy of use of force, here by Ku Klux Klan, unconstitutional as violation of free speech and assembly). The Court held that while the First Amendment does protect speech merely advocating the use of force, it does not protect speech that incites or produces "imminent lawless action and is likely to incite or produce such action." *Id.* at 447. The test enunciated in *Brandenburg* refined Justice Oliver Wendell Holmes' "clear and present danger" test. *See id.* at 450-59 (Douglas, J., concurring). In *Schenck v. United States*, 249 U.S. 47 (1919), Justice

these instances, the Court reasons that the right to free speech is outweighed by a substantial governmental interest.

B. *Judicial Doctrines Safeguarding the Right to Free Speech*

Even when the Constitution permits the government to regulate types of speech such as these, the Court recognizes the need to limit the restrictions so that protected speech is not simultaneously impinged. Because freedom of speech is so "delicate and vulnerable," and "supremely precious in our society,"[32] the Court applies the intertwining doctrines of overbreadth, void-for-vagueness, and strict scrutiny to circumscribe the government's ability to restrict speech, and to safeguard the democratic freedoms at the heart of the First Amendment.

One of the primary judicial tools used to prevent unconstitutional restrictions of free speech, the doctrine of overbreadth, requires that restrictions on speech be drafted very carefully, so as not to infringe upon a protected freedom while accomplishing a permissible end.[33] Reviewing otherwise legitimate laws passed by Congress, the Court strikes down any curtailment of speech that is so overbroad that it infringes upon protected speech and thereby chills individuals' First Amendment rights.[34] In determining whether a statute is overbroad, the Court evaluates whether the statute is so sweeping that it would deter persons from engaging in protected speech, or whether it is so

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Holmes reasoned that the speech of a man who falsely shouts "fire" in a theater, causing a panic, would not be protected by the First Amendment. *See id.* at 52 (observing that character of speech depends upon circumstances in which it was uttered, and ruling that First Amendment does not protect speech that creates a "clear and present danger").

31. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (holding that New Hampshire statute banning "words likely to cause an average addressee to fight" did not violate First Amendment).

32. NAACP v. Button, 371 U.S. 415, 433 (1963).

33. *See, e.g.*, Butler v. Michigan, 352 U.S. 380, 383 (1957) (concluding that ban on distribution of material that might be unsuitable for minors was unconstitutional because it "reduce[d] the adult population of Michigan to reading only what is fit for children .... Surely, this is to burn the house to roast the pig."); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) ("In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."); CARTER ET AL., *supra* note 18, at 67-68 (noting that when determining constitutionality of restraints on freedom of speech, Supreme Court most frequently uses balancing test that weighs government's concern about protecting particular interest—national security, innocence of children, etc.—against individual's and society's interests in free expression).

34. A statute that does not directly impinge on the protected speech of a specific person is still unconstitutional if it is so broad as to indirectly dissuade that person from engaging in otherwise protected speech. *See Button*, 371 U.S. at 432 (arguing that law in question could be invalid if it prohibited free speech, regardless of "whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar.").

far-reaching that it could be used arbitrarily by law enforcement officials against political dissenters.[35]

In securing the protections of the First Amendment, the Court also strikes down statutes regulating speech if they are void-for-vagueness.[36] The void-for-vagueness doctrine requires that all criminal laws provide fair notice to persons before making their activity criminal.[37] This doctrine is enforced with particular vigor when a First Amendment right, including the right to free speech, is regulated.[38] When the content of speech is regulated by executive or legislative action, there is a heightened fear that a law that does not draw bright lines might regulate or appear to regulate more than is necessary, and thus deter persons from engaging in protected speech.[39]

In conjunction with the protections that the overbreadth and void-for-vagueness doctrines offer in checking the regulation of free speech, the doctrine of strict scrutiny also serves to ensure that a statute does not infringe upon protected speech.[40] Because freedom of speech is considered to be in a constitutionally "preferred position,"[41] any legislation that might infringe upon it must use means that are the least restrictive of free speech, even when the legislative purpose is legitimate and when there is a substantial government interest.[42] In short, the government may not pursue its

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35. *See* Gooding v. Wilson, 444 U.S. 518, 521 (1972) (submitting that "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression"); *Button*, 371 U.S. at 433 (noting "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application"). *See generally* NOWAK & ROTUNDA, *supra* note 2, § 16.8 (summarizing overbreadth doctrine).

36. *See* NOWAK & ROTUNDA, *supra* note 2, § 16.9 (noting that vagueness doctrine and overbreadth doctrines, which are applied to statutes regulating speech for identical reasons, are often spoken of together by Supreme Court).

37. *See id.* (suggesting that if law is vague, lack of notice in the law might deter exercise of constitutional rights).

38. *See id.* (indicating need to place persons on notice as to precisely what activity is made criminal when fundamental constitutional right, such as free speech, is affected).

39. *See Button*, 371 U.S. at 433 (explaining that because freedom of speech is "delicate and vulnerable, as well as supremely precious in our society . . . [t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions").

40. *See id.* ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." (citing Cantwell v. Connecticut, 310 U.S. 296, 311 (1940))); *see also* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (observing that government may regulate content of constitutionally protected speech in order to promote compelling interest only if it uses least restrictive means to further articulated interest).

41. Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) (stating that freedom of press, freedom of speech, and freedom of religion are "in a preferred position").

42. *See Sable*, 492 U.S. at 126 (reasoning that to withstand constitutional scrutiny, government achieves legitimate interest only by "'narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms'" (quoting Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637 (1980))).

interests, even if legitimate and substantial, by means that broadly stifle free speech if the same end can be achieved by more narrow means.[43]

The Court thus recognizes that an absolute right to free speech is more of a utopian ideal than a practical reality.[44] The Court acknowledges the fact that speech may lose its preferred status and be infringed, but only in those rare instances where the government is pursuing a substantial interest that outweighs the public's interest in an unfettered marketplace of ideas.[45] Acknowledging the First Amendment's crucial role as the cornerstone of democracy, the Court employs the overlapping doctrines of overbreadth, vagueness, and strict scrutiny to make it difficult for the government to regulate a constitutional right so precious in American society.[46] These doctrines are particularly relevant when determining the constitutionality of the regulation of speech in various forms of mass communication.

C. *Government Regulation of Existing Mass Mediums*

1. *Medium-specific analysis*

The Supreme Court has long held that as new forms of media are introduced, new First Amendment standards must be applied to each if there are differences in the characteristics of each new form.[47] In an attempt to keep the First Amendment up to date with technology, the Court established different sets of rules, using a medium-by-medium approach, when determining the level of First Amendment protection that should be afforded to print,[48] broadcast radio and

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43. *See id.* ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends.").

44. *See supra* note 26 and accompanying text (explaining that right to freedom of speech is not viewed as absolute).

45. *See supra* notes 26-31 and accompanying text (describing types of speech not protected by First Amendment).

46. *See supra* notes 33-43 and accompanying text (discussing requirement that statutes regulating First Amendment behavior be narrow and unambiguous, and discussing standard of review court will give such statutes).

47. *See, e.g.*, City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1986) (Blackmun, J., concurring) ("Different communications media are treated differently for First Amendment purposes."); FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) ("We have long recognized that each medium of expression presents special First Amendment Problems."); Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) ("The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each . . . is a law unto itself . . . .").

48. *See infra* notes 54-56 and accompanying text (discussing level of constitutional protection afforded to print communications); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (granting print communications highest level of First Amendment protection and holding that because selection of newspaper content is function of editorial control, judgment, and decision, statutes that attempt to interfere with or regulate this control are inconsistent with

television,[49] telephone communications,[50] and cable television[51] as each emerged onto the communications landscape.

This "medium-specific" approach to the regulation of mass communications considers each medium separately and applies a balancing approach of competing government interests to each form in a slightly different manner.[52] The Court therefore examines the underlying technology and unique characteristics of each new form of communication before determining whether there is a governmental interest which might outweigh the First Amendment interest in unrestrained speech over that particular medium.[53]

Speech conveyed through the print medium has historically enjoyed the highest level of constitutional First Amendment protection.[54] The Court has consistently spoken forcefully on the critical role the print medium plays in advancing a robust national debate.[55] Since the First

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right to free press guaranteed in First Amendment).

49. *See infra* notes 57-75 and accompanying text (discussing level of constitutional protection afforded to broadcast communications); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 366-91 (1969) (granting qualified level of First Amendment protection to broadcast communications and finding that government's role in allocating limited broadcast frequencies and insuring that broadcasters' programming ranges are sufficient to meet public interest was constitutional).

50. *See infra* notes 76-89 and accompanying text (discussing level of constitutional protection afforded to telephone communications); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 117 (1989) (granting telephone communications highest level of constitutional protection and holding that First Amendment protects indecent, though not obscene, speech in commercial telephone messages).

51. *See infra* notes 90-104 and accompanying text (discussing level of constitutional protection afforded to cable communications); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 636-38 (1994) (affording heightened level of First Amendment protection to cable communications and noting that "application of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation" (citing Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 74 (1983))).

52. *See* Fred H. Cate, *The First Amendment and the National Information Infrastructure*, 30 WAKE FOREST L. REV. 1, 3 (1995) (noting that "the same restriction on the same words would be analyzed differently under the First Amendment, depending on whether those words were uttered on a street corner, printed in a newspaper, transmitted through a telegraph wire, broadcast on the radio, or spoken into the telephone").

53. *See Red Lion*, 395 U.S. at 386 (stating that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them").

54. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 259 (1973) (White, J., concurring) (noting that there is "virtually insurmountable barrier between government and the print media"); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-25 (2d ed. 1988) (pointing out that "[t]he First Amendment guarantee of freedom from government intrusion reigns most confidently in the realm of the print media, since newspapers and pamphlets were the most significant modes of mass communication in the world of the Framers").

55. *See* Miller v. California, 413 U.S. 15, 34 (1973) ("'The protection given speech and press was fashioned to assure unfettered exchange of ideas for the bringing about of political and social changes desired by the people.'" (quoting Roth v. United States, 354 U.S. 476, 484 (1957))); *Red Lion*, 395 U.S. at 392 n.18 (noting importance of encouraging expression of views opposing those of broadcasters (citing JOHN MILL, ON LIBERTY 32 (R. McCallum ed. 1947))); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ."); *see also* Owen Fiss, *In Search of a New*

Amendment's inception, the Court has continually forbidden governmental regulation of content, however minimal, in books, newspapers, and other forms of print media.[56] As newer forms of communication have emerged over time, however, the Court has not been as willing to extend such a high level of constitutional protection.

2. Regulation of radio and television broadcasts

Much like the Internet today, the emergence of radio and television broadcasting earlier this century brought a new technology into the world of mass media, and with it new challenges of regulating within the boundaries of the First Amendment. In the seminal case of *FCC v. Pacifica Foundation*,[57] the Court drew new boundaries by establishing how far the government may go in restricting free speech over broadcast television and radio.[58]

The Court in *Pacifica* considered whether the afternoon radio broadcast of a twelve-minute George Carlin monologue containing a litany of off-color and vulgar words violated a federal statute prohibiting the broadcasting of obscene, indecent, and profane material.[59] The Court was faced with making a distinction between obscene and indecent speech,[60] and with making a determination of whether the broadcast medium should receive the same high level of First Amendment protection as that afforded print media.[61]

In its case against Pacifica, the Federal Communications Commission ("FCC") argued that broadcast media should receive a reduced level of constitutional protection.[62] The FCC argued that "indecent"

Paradigm, 104 YALE L.J. 1613, 1617 (1995) (arguing that essence of First Amendment is protecting and supporting public debate of important social issues).

56. *See Miami Herald Publ'g*, 418 U.S. at 258 (declaring unconstitutional statute granting individual attacked by newspaper right to have response printed in that newspaper); *New York Times*, 376 U.S. at 292 (overturning holding that editorial advertisement published in New York Times reciting grievances, protesting claimed abuses, and seeking financial support on behalf of African American suffrage was libelous).

57. 438 U.S. 726 (1978).

58. *See* FCC v. Pacifica Found., 438 U.S. 726, 729 (1978) (determining primarily whether FCC has power to regulate radio broadcast that is indecent but not obscene).

59. *See id.* at 729-30; 18 U.S.C. § 1464 (1994) (forbidding use of "any obscene, indecent, or profane language by means of radio communications"). Carlin's satirical monologue, entitled "Filthy Words," prompted a man who heard the material while driving with his young son to write a letter complaining to the FCC. *See Pacifica*, 438 U.S. at 729-30.

60. *See Pacifica*, 438 U.S. at 738-42 (analyzing statute's legislative history and Court's relevant jurisprudence and outlining distinctions between obscenity and indecency).

61. *See id.* at 748 (recognizing that each medium of expression prompts different First Amendment analyses, and that broadcasting traditionally receives level of protection lower than any other medium).

62. *See id.* at 730-31 (discussing FCC memorandum opinion regarding Carlin's broadcast outlining reasons why Commission believes that broadcast communications should receive lower

material, a type of expression less offensive than obscene material but still patently offensive, should not be considered protected speech when broadcast on a television or over the radio.[63] Prior to *Pacifica*, the Court had defined the concept of indecency to be co-extensive with obscenity.[64] Thus, the standard for determining indecency prior to *Pacifica* was the same as that for determining obscenity: whether the material, taken as a whole, is patently offensive, appeals to an average person's prurient interest, and is without serious literary, artistic, political, or scientific value when considered in connection with contemporary community standards.[65]

In *Pacifica*, however, the Court diluted the First Amendment protection accorded to radio and television broadcasts by drawing a distinction between obscene speech and indecent speech.[66] The Court concluded that the FCC law in question prohibited the broadcast not only of "obscene" speech, but also of the less harmful "indecent" speech.[67] The Court held that the broadcast of indecent material during times when children are presumed to be in the audience is punishable, even if the material is not obscene in the constitutional sense.[68] Thus, the Supreme Court afforded the medium of radio and television broadcasting a lower level of First Amendment protection than any other form of mass communication previously considered.[69]

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level of First Amendment protection).

63. *See id.* at 731-32 (discussing FCC memorandum opinion and contention that Carlin's broadcast, although not obscene, was patently offensive, and therefore fell under 18 U.S.C. § 1464's prohibition of indecent speech over broadcast airwaves).

64. *See* TRIBE, *supra* note 54, § 12-18 (noting that lack of precise definition of "indecency" led the Court to construe term to mean no more than "obscene"); Note, *Filthy Words, the FCC, and the First Amendment: Regulating Broadcast Obscenity*, 61 VA. L. REV. 579, 585 (1975).

65. *See* Miller v. California, 413 U.S. 15, 24 (1973). The Court later held the ban on obscenity, and the application of the *Miller* standard to broadcasting, constitutional. *See* Illinois Citizens Comm. for Broad. v. FCC, 515 F.2d 397 (D.C. Cir. 1974) (noting that determination of obscenity and indecency of broadcast does not unconstitutionally infringe upon public's rights).

66. *See Pacifica*, 438 U.S. at 738-41 (considering and rejecting Pacifica's argument that legislature intended "obscenity" and "indecency" to mean same thing and that statute only banned material which failed *Miller* test). The Court argued that when Congress included the phrase, "obscene, indecent, or profane," in the plain wording of the statute, they intended for all three of the words to be construed independently. *See id.* at 739-40 (noting that phrase is written in the disjunctive, implying that each word has a separate meaning).

67. *See id.* at 739-41 (holding that element of "prurient appeal" is not essential component of indecent language, and that speech can still be regulated as "indecent" under 18 U.S.C. § 1464 if it is "patently offensive" and either "sexual" or "excretory").

68. The Court argued that although the monologue was only indecent, and not obscene, it could still be banned because of the "uniquely pervasive presence [of broadcast media] in the lives of all Americans" and because "broadcasting is uniquely accessible to children, even those too young to read." *Id.* at 748-49.

69. The Court acknowledged and upheld the rule that broadcast communication traditionally receives a lower level of First Amendment protection. *See id.* at 748 ("[O]f all forms

In *Pacifica*, the Court made clear that the reason for this lower standard of constitutional protection was tied directly to the nature and characteristics of the broadcast medium that set it apart from print communications.[70] The Court observed that broadcast communication differs from print communication in two distinct ways: its pervasiveness and its ease of access to children.[71] The Court reasoned that because television and radio broadcasting has a "uniquely pervasive presence in the lives of all Americans,"[72] and because broadcasting "is uniquely accessible to children, even those too young to read,"[73] the Government may regulate broadcasting in ways that would run afoul of the First Amendment if they were applied to the print medium.[74] Considering these unique characteristics and the medium's underlying technology, the Court thus held that indecent speech, in addition to obscene speech, was not protected by the First Amendment when broadcast on the television or over the radio.[75]

3. *Regulation of telephone communications*

When the Court was faced with determining the constitutionality of a statute regulating telephone communications, it was not as willing to deny First Amendment protection to "indecent" speech. In *Sable Communications of California, Inc. v. FCC*,[76] the Court invalidated an FCC ban on indecent commercial telephone messages, holding that the transmission of indecent material over the telephone may be proscribed only if the government chooses the least restrictive means

of communication, it is broadcasting that has received the most limited First Amendment protection.").

70. *See id.* at 748-49 (pointing out the broadcast media's pervasiveness and accessibility to children).

71. *See id.*

72. *See id.* at 748 (remarking that the result of pervasiveness is that "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder").

73. *See id.* at 749 (arguing that while dirty words in magazine or book would be incomprehensible to first grader, those same words would be instantly comprehended by child and incorporated into his or her vocabulary if broadcast on television or over radio).

74. *See id.* at 748 (comparing Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969), which forbids government from forcing newspaper to print replies of those whom they criticize, with Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974), which forces broadcasters to give free time to victims of their criticism).

75. *See id.* at 750-51. Playing off of Justice Sutherland's "pig in the parlor" analogy, the Court held that "when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene. . . . [A] 'nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.'" *Id.* (quoting Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926)).

76. 492 U.S. 115 (1989).

of limiting such speech.[77] Considering the unique characteristics of telephone communications, the Court held that the telephone medium required a greater degree of First Amendment protection than that given to broadcast communications.[78]

The Court in *Sable* expressly distinguished *Pacifica* as "an emphatically narrow holding" that relied upon the "'unique' attributes of broadcasting."[79] The Court noted that telephone communications are not as pervasive as radio and television broadcasts and that they are not as accessible to children.[80] The Court emphasized that unlike broadcast transmissions, telephone communications do not bombard a "captive audience" with unwanted, indecent material; the telephone medium is less accessible, "requir[ing] the listener to take affirmative steps to receive the communication."[81] The Court found that the characteristics specific to the broadcast medium which justified a limited application of First Amendment protection simply are not present in the context of telephone communications.[82]

The Court in *Sable* further pointed out that the statute banning obscene and indecent dial-a-porn[83] was overbroad and thus did not pass strict scrutiny analysis.[84] The Court urged that while Congress may constitutionally impose an outright ban on "obscene" dial-a-porn messages, it may not regulate "indecent" dial-a-porn messages without

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77. *See* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 131 (1989) (holding that ban could not survive constitutional scrutiny because "the statute's denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages"). The disputed statute, section 223(b) of the Communications Act of 1934, as amended in 1988, imposed a blanket prohibition on indecent as well as obscene commercial telephone messages. *See* 47 U.S.C. § 223(b) (1994).

78. *See Sable*, 492 U.S. at 127 (noting that unique attributes of broadcasting, and fact that ban in *Pacifica* was total while here it was only partial, justify granting lower level of protection to broadcasting than that to telephone communications).

79. *Id.*

80. *See id.* at 127-28 (arguing that private commercial telephone communications at issue in *Sable* were substantially different from public radio broadcast at issue in *Pacifica*).

81. *Id.* at 128; *see id.* at 127-28 (observing that unexpected outbursts on radio broadcasts are unlike messages received by persons using dial-a-porn, in that latter is not so invasive or surprising that unwilling listeners will be exposed to it).

82. *See Sable*, 492 U.S. at 126 (distinguishing *Pacifica* from case at hand and reiterating rule that government "may not 'reduce the adult population . . . to only what is fit for children'" (quoting Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 73 (1983))).

83. The court described dial-a-porn, the type of communication at issue in *Sable*, as "sexually oriented prerecorded telephone messages." *Id.* at 117-18.

84. *See id.* at 131 (arguing that statute was not narrowly tailored, and that ban was thus unconstitutional, even though it might serve compelling government interest of preventing minors from being exposed to indecent telephone messages). "Because the statute's denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages, we hold that the ban does not survive constitutional scrutiny." *Id.*

considering the age of those receiving the messages.[85] The Court acknowledged that although the Government has a compelling interest in protecting minors,[86] Congress failed to narrowly tailor the statute to achieve that purpose, resulting in an overbroad statute.[87] Thus, because the telephone communications medium does not share those characteristics unique to broadcast communication[88] and because the statute in question was overbroad and failed strict scrutiny analysis,[89] speech transmitted over the medium enjoys heightened constitutional protection akin to that applied to print communications.

4. Regulation of cable television

When the Court was faced with the specter of regulating yet another new form of communication, cable television, it again employed a medium-specific analysis, reiterating its intent to apply different standards of First Amendment protection to new forms of communication based on their unique characteristics.[90] With regard to cable television, the Court was faced with determining whether the new form of communication was more akin to print communications,[91] which would allow it broad First Amendment protection, or

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85. *See id.* at 126 (noting that sexual expression which is indecent, but not obscene, is protected by the First Amendment). Unlike obscenity, which receives no First Amendment protection regardless of the age of its audience, indecency is protected speech which can be subjected to content-based regulation only to promote compelling interests in the least restrictive way. *See id.* at 124-26. This is the strict-scrutiny test for content-based speech regulation.

86. *See id.* at 126 ("We have recognized that there is a compelling [government] interest in protecting the physical and psychological well-being of minors.").

87. *See id.* at 128 (asserting that Congress did not choose least restrictive means of regulation, given that use of credit cards, access codes, or scrambling rules, as formulated by FCC, would keep indecent dial-a-porn out of reach of minors).

88. *See supra* notes 79-82 and accompanying text (discussing level of First Amendment protection as function of communications technology at issue).

89. *See supra* notes 84-87 and accompanying text (discussing application of strict scrutiny test to facts of *Sable* and Court's reasoning as to why dial-a-porn statute was unconstitutional).

90. *See* City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494-95 (1986) (indirectly reaffirming, in context of cable right-of-way dispute, support for different standards for different media but not deciding specific standard for cable television, which Court saw as roughly analogous both to newspapers and wireless broadcasters); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1438 (D.C. Cir. 1985) ("'[E]ach medium of expression must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.'" (quoting Southeaster Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975))).

91. *See supra* notes 54-56 and accompanying text (discussing traditionally broad scope of First Amendment protection for print media).

more like regular television and radio broadcast communications,[92] which would result in relatively narrow First Amendment protection.[93]

Although the Supreme Court has not yet set forth a clear, unequivocal standard signifying the level of First Amendment protection afforded cable communications,[94] federal courts consistently have held that cable deserves a level of protection greater than that granted to broadcast communications.[95] When the U.S. Court of Appeals for the District of Columbia examined the unique characteristics of cable communications, particularly the absence of the problems of pervasiveness and accessibility to children, the court determined that cable communications were more akin to print communications than to broadcast communications.[96]

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92. *See supra* notes 57-75 and accompanying text (discussing *Pacifica* case and application of lower standard of constitutional review to regulation of broadcast media).

93. *See Preferred Communications, Inc.*, 476 U.S. at 496 (Blackmun, J., concurring) (stating that when considering application of First Amendment to cable communications, "the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis"); Claudine Langan, *Cyberporn: . . . A New Legal Bog* (visited Nov. 15, 1997) <http://www.public.asu.edu/~langcl/history2.html>.

94. *See infra* note 100 and accompanying text (discussing confusion over appropriate level of scrutiny expressed in Supreme Court's latest treatment of content-based regulations of cable communications).

95. Most courts considering the issue have found that speech carried via cable is entitled to a greater degree of First Amendment protection than speech which is broadcast because the reasons underlying regulation of broadcast content (physical scarcity, intrusiveness of broadcast) do not support regulation of cable programming. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637 (1994) (stating that rationales for lessened First Amendment protection in broadcast context do not apply to cable context); *Quincy Cable TV, Inc.*, 768 F.2d at 1450 ("[B]eyond the obvious parallel that both cable and broadcast television impinge on the senses via a video receiver, the two media differ in constitutionally significant ways. In light of cable's virtually unlimited channel capacity, the standard of First Amendment review reserved for occupants of the physically scarce airwaves is plainly inapplicable."); Cruz v. Ferre, 755 F.2d 1415, 1419-22 (11th Cir. 1985) (holding that *Pacifica*, which enforced lower level of scrutiny for broadcast speech, was inapplicable to "cablevision" because cable is less intrusive than broadcast, requiring affirmative steps by subscriber and providing advance notice of programming content, and because interest of preventing access by children "is significantly weaker in the context of cable television because parental manageability of cable television greatly exceeds the ability to manage the broadcast media"); Home Box Office, Inc. v. FCC, 567 F.2d 9, 45-46 (D.C. Cir. 1977) (stating that rationales developed in broadcast context cannot be "directly applied" to cable television because physical scarcity rationale is not present). Furthermore, theoretical allegations of "economic scarcity" cannot justify lower standard of First Amendment protection for cable, since economic scarcity can be said to exist in print as well but is "insufficient to justify even limited government intrusion into the First Amendment rights of the conventional press"); Community Television of Utah, Inc. v. Wilkinson, 611 F. Supp. 1099, 1115 (D. Utah 1985) ("[T]he distinctions between *Pacifica* and the present case are manifest . . . . The differences between radio and cable make *Pacifica* [and its lower level of review for broadcast regulations] easily distinguishable."), *aff'd sub nom.* Jones v. Wilkinson, 800 F.2d 989 (10th Cir. 1986), *aff'd*, 480 U.S. 926 (1987).

96. *See Quincy Cable TV, Inc.*, 768 F.2d at 1450 ("[O]nce one has cleared the conceptual hurdle of recognizing that all forms of television need not be treated as a generic unity for purposes of the First Amendment, the analogy to more traditional media [print] is compel-

In *Turner Broadcasting Systems, Inc. v. FCC*,[97] the Supreme Court similarly found that cable communications deserve a greater level of First Amendment protection than that afforded to broadcast communications.[98] The Court again cited the fundamental technological differences between cable and broadcast communications as the primary reason for applying a different level of scrutiny to content-based regulations of speech.[99] Thus, the Court acknowledged, the cable medium should be granted constitutional protection nearing or equaling that of print media.[100]

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ling."); *Home Box Office, Inc.*, 567 F.2d at 46 (noting that there is no "constitutional distinction between cable television and newspapers" with regard to the unwanted intrusions into First Amendment rights).

97. 512 U.S. 622 (1994).

98. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 636-41 (1994). The Court noted that with regard to government regulations affecting the content of speech on cable, "the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation." *Id.* at 622. Note that the Court in *Turner* did not directly address the issue of government regulation of content on cable; the Court was reviewing content-neutral "must carry" regulations, contained in sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 ("CTCPCA"), Pub. L. No. 102-385, 106 Stat. 1460, 1471-81 (codified at 47 U.S.C. §§ 534-535 (1994)). These provisions required cable operators to carry the signals of a certain number of local broadcast television stations. *See id.* at 636. The Court held that an intermediate level of scrutiny, not strict scrutiny, should apply to such content-neutral restrictions that impose only an incidental burden on speech. *See id.* at 661-62. When the Supreme Court reheard the *Turner* case two years later, intermediate scrutiny again was applied to the content-neutral must carry regulations. *See* Turner Broad. Sys., Inc. v. FCC, 117 S. Ct. 1174 (1997) (reaffirming constitutionality of must carry regulations). This Comment, including the analysis of the CDA and speech limitations placed upon other forms communication, is concerned primarily with government regulation affecting the *content* of speech.

99. *See Turner*, 512 U.S. at 639 ("In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny . . . is inapt when determining the First Amendment validity of cable regulation."). The Court's primary focus was not on the pervasiveness or availability-to-children characteristics unique to broadcasting, as the focus had been in *Pacifica* and *Sable*. The Court argued that the largest distinction between broadcast communications and cable communications was that of spectrum scarcity. *See id.* at 637-39 (finding that cable communications do not suffer from spectrum scarcity as do broadcast communications). The spectrum scarcity rationale holds that because there is a limited number of broadcast frequencies, and because broadcast frequencies are considered scarce public resources, the government has an interest in regulating the use of those resources through grants of broadcast licenses in the public interest. Furthermore, without such governmental rationing, the right of any individual to broadcast would be meaningless because competing signals would crowd them out. *See id.* at 637 ("[T]here are more would-be broadcasters than frequencies available in the electromagnetic spectrum. And if two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another's signals, so that neither could be heard at all."); *Wilkinson*, 611 F. Supp. at 1112 (recognizing that "'[t]here is a fixed natural limitation upon the number of stations that can operate without interfering with each other,'" and that chaos would result if government did not ration broadcast frequencies (quoting National Broad. Co. v. United States, 319 U.S. 190, 213 (1943))).

100. *See Turner*, 512 U.S. at 639 (observing that "settled principles of First Amendment jurisprudence," rather than more lax standard of review developed in cases involving broadcast medium, should govern cable cases); *see also* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2385 (1996) (plurality opinion) (characterizing standard of review in *Turner* as "heightened scrutiny"); *id.* at 2419-20 (Thomas, J., concurring in part and dissenting

In *Turner*, the Court continued its use of a medium-specific analysis by once again determining the appropriate level of First Amendment protection according to the unique characteristics of the communications medium.[101] From print, to broadcast, to telephone communications, to cable, the Court found little need to deviate from its strong protection of the First Amendment right to free speech.[102] Only when

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in part) (noting that Court's First Amendment distinctions between media have placed cable in a "doctrinal wasteland" in which cable industry could not be certain whether it was entitled to the high level of protection afforded print media, "or was subject to the more onerous obligations shouldered by the broadcast media . . . . Over time, . . . we have drawn closer to recognizing that cable operators should enjoy the same First Amendment rights as the nonbroadcast media.") (citations omitted).

In its most recent review of regulations affecting speech on cable communications, however, the Supreme Court signaled that it might be willing to apply a level of review lower than strict scrutiny to content-based regulations. In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, which involved a challenge to FCC orders implementing the indecent and obscene programming provisions of the CTCPCA, the Court refused to expressly apply strict scrutiny in the cable communications context. 116 S. Ct. 2374, 2385 (1996) (plurality opinion). In *Denver Area*, the Court struck down, on First Amendment grounds, sections 10(b) and (c) of the CTCPCA, which *inter alia*, permitted operators of "public" access cable TV channels to prohibit patently offensive or indecent programming. The Court upheld, however, section 10(a), permitting cable operators to prohibit such programming on "leased" access channels. *See id.* at 2387-88.

The Court stated that the "segregate and block" mechanism of section 10(b) would "fail [] to satisfy this Court's formulations of the First Amendment's 'strictest,' as well as its somewhat less 'strict,' requirements." *Id.* at 2391 (plurality opinion); *see also id.* at 2404, 2406-07 (Kennedy & Ginsburg, JJ., concurring in part, concurring in judgment in part, and dissenting in part) ("The plurality cannot bring itself to apply strict scrutiny . . . ."). The Court noted that, like broadcast television and radio, cable television has become "uniquely pervasive" in homes, is highly accessible to children, and confronts a captive audience with patently offensive material "with little or no prior warning." *Id.* at 2374, 2386-87 (plurality opinion). *But see id.* at 2404, 2406 (Kennedy & Ginsburg, JJ., concurring in part, concurring in judgment in part, and dissenting in part) (arguing that when the Court is confronted with a threat to free speech in the context of an emerging technology, it "ought to have discipline to analyze the case by reference to existing elaborations of constant First Amendment principles. . . . The creation of standards and adherence to them, even when it means affording protection to speech unpopular or distasteful, is the central achievement of our First Amendment jurisprudence."). Kennedy and Ginsburg concluded that "at a minimum, the proper standard for reviewing [content based regulations of cable communications] is strict scrutiny." *Id.* at 2416 (Kennedy & Ginsburg, JJ., concurring in part, concurring in judgment in part, and dissenting in part).

Because the court expressly declined to adopt a definitive standard for evaluating content-based regulation in the cable medium, *see id.* at 2385, because the decision was so splintered (six opinions were issued, none of which garnered a majority), and because only a plurality of the Court held that something less than strict scrutiny was warranted, it is uncertain what affect the *Denver Area* opinion will have on future reviews of content-based cable regulation.

> [N]o definitive choice among competing analogies . . . allows us to declare a rigid single standard, good for now and for all future media purposes . . . . [A]ware as we are of the changes taking place in the law, the technology, and the industrial structure, related to telecommunications . . . we believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now.

Id. at 2385 (plurality opinion) (citations omitted).

101. *See supra* notes 98-100 and accompanying text (discussing functional relationship between various communications media and Court's First Amendment jurisprudence).

102. *See supra* notes 54-100 and accompanying text (cataloging development of Court's First Amendment jurisprudence with respect to emerging technologies).

considering the regulation of radio and television broadcasts did the Court carve out an exception to this high level of protection.[103] Only with broadcast communications did the Court find that the unique characteristics of the medium, namely pervasiveness and accessibility to children, justified granting a lower level of protection which would allow the government to regulate speech deemed "indecent" by Congress and the FCC.[104]

II. FREEDOM OF SPEECH ON THE INTERNET AND THE CDA

Today, the public and government are hailing the Internet as the mode of communication for the twenty-first century.[105] Along with the grand aspirations and expectations surrounding the medium, however, a critical issue has emerged: how, if at all, the government should regulate the Internet.[106] Many credit the present success of the medium to its decentralized, egalitarian nature;[107] one of its

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103. *See supra* notes 57-75 and accompanying text (discussing *Pacifica*'s relaxed standard of First Amendment review for broadcast media).

104. *See supra* notes 70-73 and accompanying text (explaining significance of broadcast's pervasiveness and accessibility to children in *Pacific* decision). *But see Denver Area*, 116 S. Ct. at 2385-86 (plurality opinion) (upholding section 10(a) of CTCPCA, which permits cable operators to block indecent programming on leased access channels, in part because of importance of interest in protecting children from indecency and similarity of problem and solution to *Pacifica*).

105. *See* Robinson, *supra* note 4, at C7 (arguing that because Internet combines the best attributes of all forms of media and because it fulfills the goals of the First Amendment like no other medium, Internet is a "herald of the information age" and the twenty-first century). FCC Commissioner Rachelle B. Chong, describing the new Information Age, paints a picture of a world in which information is a globally traded, premium commodity, and where the Internet will allow instant, inexpensive access to that information. *See* Rachelle B. Chong, The First Amendment in an Information Age, Remarks Before the National Asian Pacific Bar Association, 1996 NAPBA National Conference, *available in* 1996 WL 669221, at *4-6 (Nov. 15, 1996) (pointing out that "Information Superhighway is already changing how we do business, where we live, how we learn, and how we receive health care"). Echoing Ms. Chong's enthusiasm regarding the Internet's economic and social potential, the Clinton Administration issued a White Paper days after the Supreme Court's decision in *Reno v. ACLU* that described the Internet as a medium of communication that "empowers citizens and democratizes societies." CLINTON & GORE, *supra* note 7, at 1. The White Paper extolled the emergence of the Internet, stating:

> Once a tool reserved for scientific and academic exchange, the Internet has emerged as an appliance of every day life, accessible from almost every point on the planet. Students across the world are discovering vast treasure troves of data via the World Wide Web. Doctors are utilizing tele-medicine to administer off-site diagnoses to patients in need. Citizens of many nations are finding additional outlets for personal and political expression. The Internet is being used to reinvent government and reshape our lives and our communities in the process.

Id. at 1.

106. *See* Chong, *supra* note 105, at *7 (questioning proper role of government in regulating content transmitted over broadcast stations, cable television, and "the new medium for the nineties—the Internet").

107. *See* 141 CONG. REC. S8330 (daily ed. June 14, 1995) (statement of Sen. Leahy) ("[The Internet] has grown as well as it has, as remarkably as it has, primarily because it has not had a whole lot of people restricting it, regulating it, and touching it and saying, do not do that or

greatest virtues is that it is owned by no one, operated by no one, and regulated by no one.[108] Yet with the passage of the Communications Decency Act ("CDA") and its signing into law by President Clinton on February 8, 1996, the first regulations specifically tailored to the Internet[109] threatened to end what once was a wild and untamed cyber-frontier.[110]

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do this or the other thing."). The Clinton Administration also observed the effect that minimal government regulation has had on the Internet, noting that "[p]rivate sector leadership accounts for the explosive growth of the Internet today, and the success of electronic commerce will depend on continued private sector leadership." CLINTON & GORE, *supra* note 7, at 30 (suggesting that government take a hands-off approach to Internet by promoting self-regulation). Recognizing the Internet as the first truly "mass medium," a Human Rights Watch report points out that "[w]hile few individuals and groups can publish books or newspapers, make a film, or produce a radio or television program, any person with a personal computer and a modem can communicate with a huge international audience." Karen Sorensen, *Silencing the Net: The Threat to Freedom of Expression On-line*, 8 Human Rights Watch 2 (May 1996) <gopher://gopher.igc.apc.org:5000/00/int/hrw/expression/7>. The report further argues that the implications of a globally unrestrained Internet for the advancement of democracy are vast. *See id.* (observing that the Internet has already shown the potential to "permit individuals with common interests to organize themselves in forums to debate public policy issues; provide instant access to a wide range of government affairs; increase citizen oversight of government affairs; decentralize political decision making; [and] empower users to become active producers of information rather than passive consumers").

108. *See, e.g.*, ACLU v. Reno, 929 F. Supp. 824, 832 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997) ("No single entity—academic, corporate, governmental, or non-profit—administers the Internet. . . . There is no centralized storage location, control point, or communications channel for the Internet, and it would not be technically feasible for a single entity to control all of the information conveyed on the Internet."); CLINTON & GORE, *supra* note 7, at 5 (noting that "[t]he genius and explosive success of the Internet can be attributed in part to its decentralized nature and to its tradition of bottom-up governance"); Flumenbaum & Karp, *The Communications Decency Act and the Internet*, N.Y.L.J., Aug. 28, 1996, at 3 (describing Internet as "a series of linked, overlapping, independently controlled computer networks" and stating that "[n]o one entity or group can control content on the Internet, and none can limit access to publicly posted material").

109. *See* President's Remarks on Signing the Telecommunications Act of 1996, 32 WEEKLY COMP. PRES. DOC. 215, 216 (Feb. 8, 1996) ("Today our world is being remade . . . by an information revolution . . . . But this revolution has been held back by outdated laws designed for a time when there was one phone company, three TV networks, no such thing as a personal computer. Today, with the stroke of a pen, our laws will catch up with the future.").

110. *See* Harvey A. Silvergate, *Cyber Speech at Risk*, NAT'L L.J., Mar. 4, 1996, at A19 (declaring that with passage of CDA, "[o]vernight, the federal government transformed the newest and freest medium of communication into the most heavily censored," in that the CDA sought to ban not only obscene speech, which receives no protection in even the print media, but also to ban speech which is merely indecent, taking no account of redeeming values of speech). *But see* Robert W. Peters, *There Is a Need to Regulate Indecency on the Internet*, 6 CORNELL J.L. & PUB. POL'Y 363 (1997) (asserting the need for regulations on speech such as CDA because while Internet has vast potential for good, "if untamed, it also has potential for great harm"); Jay Alan Sekulow & James Matthew Henderson, Sr., *Unsafe at Any [Modem] Speed: Indecent Communications Via Computer and the Communications Decency Act of 1996*, 1 J. TECH. L. & POL'Y 1 <http://journallaw.ufl.edu/~techlaw/1/sekulow.html> (1996) (arguing that national problem of indecent images and messages on the Internet necessitates government regulation such as CDA, which is "an essential tool, and a constitutional one").

A. *Use of Existing Laws to Regulate the Internet Pre-CDA*

During congressional hearings on the CDA, many legislators voiced the opinion that the Internet should remain an open frontier, and that existing laws were sufficient to combat any illegal activities committed via the Internet.[111] Even the Department of Justice, when asked to opine on the subject of new regulations, agreed that the laws already in place were adequate.[112] In fact, both prior to and since the enactment of the CDA, the government has prosecuted numerous federal crimes involving the Internet, including obscenity,[113] child pornography,[114] and stalking,[115] without the use of the CDA.

Federal courts, for instance, have had little trouble convicting violators of existing obscenity and child pornography laws who use the Internet in connection with their crimes. In *United States v. Thomas*,[116] the Sixth Circuit upheld the conviction of a husband and wife team who operated a computer bulletin board service[117] that distributed obscenity in violation of 18 U.S.C. § 1456.[118] Using this

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111. *See* 141 CONG. REC. S8341 (daily ed. June 14, 1995) (statement of Sen. Leahy) ("[O]ur criminal laws already prohibit the sale or distribution over computer networks of obscene or filthy material—18 U.S.C. §§ 1465, 1466, 2252 and 2433(a) . . . [and] the solicitation of minors over computers for sexual activity—18 U.S.C. § 2252 — and illegal luring of minors into sexual activity through computer conversations—18 U.S.C. § 2423(b).").

112. *See* 141 CONG. REC. S8342 (daily ed. June 14, 1995) (letter to Senator Patrick Leahy from Kent Markus, Acting Assistant Attorney General, U.S. Department of Justice, Office of Legislative Affairs, May 3, 1995, stating: "[W]e have applied current law to this emerging problem . . . . The Department's Criminal Division has, indeed, successfully prosecuted violations of federal child pornography and obscenity laws which were perpetrated with computer technology.").

113. *See, e.g.*, United States v. Thomas, 74 F.3d 701 (6th Cir. 1996) (upholding conviction of operators of computer bulletin board service for distributing obscenity under 18 U.S.C. § 1465); United States v. Maxwell, 42 M.J. 568 (A.F. Ct. Crim. App. 1995) (upholding conviction for on-line distribution of obscenity under 18 U.S.C. § 1465), *cited in Thomas*, 74 F.3d at 708; *see also infra* notes 116-20 and accompanying text (discussing *Thomas* case and 18 U.S.C. § 1465).

114. *See, e.g.*, United States v. Ownby, 926 F. Supp. 558 (W.D. Va. 1996) (memoranda opinion) (upholding conviction for trading child pornography over the Internet in violation of 18 U.S.C. § 2252(a)); *infra* notes 121-27 and accompanying text (discussing use of existing law in convicting distributors of child pornography over the Internet).

115. *See* United States v. Baker, 890 F. Supp. 1375 (E.D. Mich. 1995) (granting motion to quash indictment accusing defendant of violating 18 U.S.C. 875(c) by transmitting threats via Internet e-mail to injure or kidnap). While the court did not convict the defendant, it acknowledged the application of 18 U.S.C. 875(c) to the Internet. *See id.* at 1390 ("While new technology such as the Internet may complicate analysis and may sometimes require new or modified laws, it does not in this instance qualitatively change the analysis under the statute or under the First Amendment.").

116. 74 F.3d 701 (6th Cir. 1996).

117. The court described a computer bulletin board service ("BBS") as a system that is operated "by using telephones, modems, and personal computers" to offer "e-mail, chat lines, public messages, and files that members [can] access, transfer, and download to their own computers and printers." United States v. Thomas, 74 F.3d 701, 705 (6th Cir. 1996).

118. The statute reads in pertinent part:

statute and the test for obscenity set forth in *Miller v. California*,[119] the Court determined that the couple was guilty of transmitting obscenity through interstate phone lines via their members-only computer bulletin board system.[120]

Other courts similarly found existing laws sufficient to convict those guilty of distributing child pornography over the Internet. In *United States v. Ownby*,[121] the United States District Court for the Western District of Virginia upheld the conviction of a man for engaging in conduct involving the sexual exploitation of minors in violation of 18 U.S.C. § 2252.[122] After being discovered through an FBI investigation into the trading of child pornography on the computer bulletin board services of America On-Line,[123] Ownby pled guilty to receiving,[124] transporting,[125] and possessing[126] images of child pornography.[127] Again, despite the lack of statutes specifically designed to

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> Whoever knowingly transports in interstate or foreign commerce for the purpose of sale of distribution, . . . any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription, or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined under this title or imprisoned not more than five years, or both.
>
> The transportation . . . of two or more copies of any publication or two or more of any article of the character described above . . . shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

18 U.S.C. § 1465 (1994).

119. *See supra* note 27 and accompanying text (indicating that, under *Miller* test, speech is considered obscene, and thus not protected by First Amendment, when it: (a) appeals to prurient interest according to community standards, (b) describes sexual conduct in a patently offensive way, and (c) lacks serious literary, artistic, political, or scientific value).

120. *See Thomas*, 74 F.3d at 709 (concluding that defendants' conduct fell within purview of statute).

121. 926 F. Supp. 558 (W.D. Va. 1996).

122. The statute read, in pertinent part:

> Any person who (1) knowingly transports or ships in interstate or foreign commerce or mails any visual depiction, if (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct; or (2) knowingly receives, or distributes any visual depiction that has been transported or shipped in interstate or foreign commerce or mailed or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct, shall be [criminally] punished . . . .

18 U.S.C. § 2252. The statute since has been modified to explicitly cover transmissions made via computer. *See* 18 U.S.C.A. § 2252 (West Supp. 1997).

123. During an FBI search of Ownby's residence, more than 1600 images depicting children engaging in sexually explicit conduct were found on 76 floppy diskettes and on Ownby's hard drive. *See* United States v. Ownby, 926 F. Supp. 558, 561 (W.D. Va. 1996).

124. *See* 18 U.S.C. § 2252(a)(2) ("receiving by computer a visual depiction, the production of which involved the use of a minor engaging in sexually explicit conduct").

125. *See id.* § 2252(a)(1) ("transporting such an image by computer").

126. *See id.* § 2252(a)(4)(b) ("possessing three or more matters containing such depictions").

127. *See Ownby*, 926 F. Supp. at 560-61.

regulate the Internet, the court was able to use existing laws to convict persons using the Internet in a criminal manner.

B. *The Communications Decency Act of 1996*

Despite the demonstrated effectiveness of existing laws in preventing crime over computer wires,[128] and despite protests by various organizations and individuals,[129] Congress sought new regulations tailored specifically to the expanding medium of electronic communications known as the Internet.[130] Spurred by a *Time* magazine cover story investigating the level and amount of pornographic material available on the Internet,[131] Congress called for new regulations, reasoning that in light of the dangers on the horizon, existing regulations would be too cumbersome and ineffective.[132]

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128. *See supra* Part II.A (detailing use of existing laws to regulate the Internet).

129. *See* Letter from ACLU and 29 undersigned civil liberties and public interest groups, Internet service providers, and commercial producers of entertainment, information and journalism, to Rep. Henry J. Hyde (R-Ill.) (Dec. 5, 1995) <http://www.epic.org/free_speech/CDA/hyde_letter.html> (urging Hyde and other representatives "to reject all proposals to impose new government censorship on cyberspace and online communications," arguing that proposed amendments to telecommunications deregulation legislation were unconstitutional). Human Rights Watch, a non-governmental organization established to promote international human rights, petitioned Congress and the President to avoid regulation of the Internet, arguing that because the Internet is a form of mass communication without national boundaries, "on-line censorship laws, in addition to trampling on the free expression rights of a nation's own citizens, threatens to chill expression globally." Sorensen, *supra* note 107 (expressing concern that censorship of "indecent" communication on-line could impede work of Human Rights Watch and similar organizations that transmit necessarily graphic and explicit accounts of human rights abuses in an attempt to expose past abuses, educate public about current abuses, and prevent future atrocities); *see also* Brock N. Meeks, *The Obscenity of Decency* (visited Nov. 15, 1997) <http://wwww.hotwired.com/Lib/Privacy/exon.privacy> (arguing that passage of a law regulating indecent speech on Internet would "cast a bone-deep chill across all forms of online communication, reducing them to nothing more thought provoking than Hallmark greeting cards").

130. *See* 141 CONG. REC. S8087 (daily ed. June 9, 1995) (statement of Sen. Exon) ("I want to keep the information superhighway from resembling a red-light district. This legislation will help stop those who electronically cruise the digital universe to engage children in inappropriate communications.").

131. *See* Philip Elmer-DeWitt, *On a Screen Near You: Cyberporn*, TIME, July 3, 1995, at 38.

132. *See* 141 CONG. REC. S8335 (daily ed. June 14, 1995) (statement of Sen. Feingold) ("Attempts to regulate computer networks as we regulate broadcasting and telephones when it has little in common with either of them, is futile [sic]. It is a unique form of media posing differing challenges and opportunities. . . . Congress needs to understand these differences before we can determine how best to protect children and the constitutional rights of Americans."); 141 CONG. REC. S8087, S8088 (daily ed. June 9, 1995) (statement of Sen. Exon) (arguing that CDA "is proposed in the context of this information revolution that is exploding in our society. . . . Unfortunately, the current laws . . . are woefully out of date with this new challenge and this new opportunity."). Potentially the most troubling problem with applying old laws to the Internet is that of applying the *Miller* community standards test for obscenity to a method of communication that turns the entire world into the "relevant community." *See generally* Pamela A. Huelster, *Cybersex and Community Standards*, 75 B.U. L. REV. 865 (1995) (outlining problems with applying current obscenity standards to Internet, arguing that alternative standards must be created).

The *Time* article, entitled *On a Screen Near You: Cyberporn*,[133] claimed that a very large percentage of images on the Internet were pornographic and that the practice of trading these sexually explicit images was "one of the largest (if not the largest) recreational applications of users of computer networks."[134] *Time* based its article on a study of Internet indecency published in the *Georgetown Law Journal* ("Rimm Study").[135]

Despite a multitude of sharp attacks challenging the veracity of the Rimm Study,[136] Congress focused its attention on the *Time* article and the study[137] and used them as a catalyst for regulating the Internet.[138] Senators J. James Exon (D-Neb.) and Daniel R. Coats (R-Ind.) introduced an amendment to the Telecommunications Act of 1996 (the "Exon Amendment") that would amend 47 U.S.C. § 223 to criminalize the transmission of obscene and indecent material via a

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133. *See* Elmer-DeWitt, *supra* note 131, at 38.

134. *Id.* at 38, 40.

135. *See* Marty Rimm, *Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers Over 2000 Cities in Forty Countries, Provinces, and Territories*, 83 GEO. L.J. 1849 (1995).

136. *See* Claudine Langan, *Cyberporn: . . . A New Legal Bog* (visited Nov. 15, 1997) <http://www.public.asu.edu/~langcl/history2.html> (noting that Rimm Study received substantial criticism from scholars, journalists, politicians, and Internet users); *see also* Donna L. Hoffman and Thomas P. Novak, *A Detailed Analysis of the Conceptual, Logical, and Methodological Flaws in the Article: "Marketing Pornography on the Information Superhighway"* (visited Nov. 15, 1997) <http://www2000.ogsm.vanderbilt.edu/rimm.cgi> (attacking the validity of the 83.5% figure, the misleading origin of the 900,000 images, and the lack of vigorous peer review). A close examination of the Rimm Study revealed three major problems with the study: (1) Rimm did not find that 83.5% of all images on the Internet were pornographic; rather he found that 83.5% of all messages in a select number of Usenet newsgroups, which combined constituted less than 0.5% of the messages on the Internet, were pornographic; (2) Rimm failed to emphasize that 99.7% of the images he studied were found on private adult bulletin boards that were not accessible to children; and (3) Rimm, along with *Time* and *Nightline*, refused to allow anyone to do an independent review of the study before publication, per a prior arrangement among the three parties. *See id.* In an article published three weeks after the *Cyberporn* article first ran, even *Time* magazine questioned the veracity of the Rimm study, upon which it based the *Cyberporn* article. *See* Philip Elmer-DeWitt, *Fire Storm on the Computer Nets*, TIME, July 24, 1995, at 57. The quasi-retraction acknowledged that *Time* had uncovered facts regarding the ethics by which the data was gathered that brought Rimm's methodology into severe question and raised concerns regarding the true authorship of the article. *See id.* *Time* also admitted that the poor quality of its research into the Rimm study, which resulted in the failure to discover "damaging flaws" in the study, likely arose from interference caused by the exclusivity arrangement between *Time*, Rimm, and the *Georgetown Law Journal*. *See id.*

137. The *Time* article and the alarming findings of the Rimm Study were introduced in Congress in mid-1995 when Senator Charles E. Grassley (R-Iowa) alerted his fellow Senators and asked that the Rimm Study be printed in the Congressional Record. *See* 141 CONG. REC. S9017 (daily ed. June 26, 1995) (statement of Sen. Grassley); 141 CONG. REC. S9021 (daily ed. June 26, 1995) (statement of Sen. Exon).

138. Citing the study's finding that "83.5 percent of all computerized photographs available on the Internet are pornographic," Senator Grassley suggested that "Congress must act and do so in a constitutional manner to help parents who are under assault in this day and age." *See* 141 CONG. REC. S9017 (daily ed. June 26, 1995) (statement of Sen. Grassley); 141 CONG. REC. S9021 (daily ed. June 26, 1995) (statement of Sen. Exon).

telecommunications device.[139] Although the amendment quickly passed with wide congressional[140] and public support,[141] many voices raised a cautionary flag. Senators,[142] Representatives,[143] interest groups,[144] and even the President[145] argued that the Internet should

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139. The proposed amendment made it a felony punishable by a fine of up to $100,000 or up to two years in prison for anyone, who "by means of telecommunications device knowingly makes, creates, or solicits, and 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 . . . ." S. 652, 104th Cong. (1995).

140. The amendment passed by a 84-16 vote. *See* 141 CONG. REC. S8347 (daily ed. June 14, 1995).

141. Christian Coalition, *Press Release, First Item in Christian Coalition's Contract with the American Family Passes Senate* (June 15, 1995) <http://www.cc/org/publications/ca/press/contracl.html> ("We applaud Senators Coats and Exon for their decisive step forward to protect our nation's youth from the real threat of cyber-porn, and we look forward to swift action in the House.").

142. Senator Patrick Leahy (D-Vt.) expressed concern that Senator Exon's attempt to impose old forms of regulations on such a new, misunderstood medium, might be rash and ill-conceived. *See* 141 CONG. REC. S8330 (daily ed. June 14, 1995) (statement of Sen. Leahy) ("[The Internet] has grown as well as it has, as remarkably as it has, primarily because it has not had a whole lot of people restricting it, regulating it, and touching it and saying, do not do that or do this or the other thing. . . . I think there is a better way to reach the goal that the Senator from Nebraska [Senator Exon] and I share. The goal is . . . to keep the really filthy material out of the hand [sic] of children."). In an attempt to prevent making regulatory decisions based on misinformation, Senator Leahy proposed a bill insisting that a thorough study of Internet indecency and the best means of regulating it be conducted. *See* S. 714, 104th Cong. (1995) (requiring "the Attorney General to study and report to Congress on the means of controlling the flow of violent, sexually explicit, harassing, offensive, or otherwise unwanted material in the interactive telecommunications systems"); *see also* Leahy Statement on CDA Alternative (Apr. 10, 1995) <http://www.epic.org/free_speech/CDA/S714_leahy_press_release.html> ("Before legislating to impose heavy-handed regulation on the content of communications, I feel we need more information from law enforcement and telecommunications officials.").

143. Even traditionally conservative members of Congress such as Speaker of the House Newt Gingrich (R-Ga.) found that the bill was extreme and ill-conceived, stating,

> I think that the Amendment . . . will have no real meaning and have no real impact and in fact I don't think [it] will survive. It is clearly a violation of free speech and it's a violation of the right of adults to communicate with each other. I don't agree with it and I don't think it is a serious way to discuss a serious issue.

Gingrich Says CDA Is a "Clear Violation" of Free Speech Rights (June 20, 1995) <http://www.cdt.org/policy/freespeech/ging_oppose.html> (reproducing comments made by Speaker Gingrich on national television show *Progress Report*).

144. *See Electronic Privacy Information Center (EPIC) Statement on Communications Decency Act* (Mar. 24, 1995) <http://www.epic.org/free_speech/CDA/epic_statement.html> (arguing that CDA is an unconstitutional restriction on free speech, personal privacy, and intellectual freedom, and that comprehensive hearings should be held before it or any similar regulation is adopted); Mike Godwin and Shari Steele, *Constitutional Problems with the Communications Decency Amendment: A Legislative Analysis by the Electronic Frontier Foundation* (Oct. 10, 1997) <http://www.eff.org/pub/Alerts/cda_passage_eff.analysis> (arguing that the legislation "imposes content restrictions on computer communications that would chill First Amendment-protected speech and, in effect, restrict adults in the public forums of computer networks to writing and reading only such content as is suitable for children").

145. *Administration Concerns Regarding S. 652* (visited Nov. 15, 1997) <http://www.cdt.org/policy/legislation/admin_s652_comnts.html#first.amdt> ("The piecemeal approach taken in this legislation [the Exon Amendment] is inadvisable. Instead, a comprehensive review should be undertaken, including Congressional hearings.").

have been researched further before antiquated regulations were extended to such a new medium.[146]

Despite the absence of virtually any debate or hearings on the issue,[147] Congress included the Exon Amendment in the final draft of the Telecommunications Act.[148] Members of Congress failed to heed Representative Ron Wyden's (D-Or.) warning that "[t]he Internet is the shining star of the information age, and government censorship could spoil much of its promise."[149] In early 1996, Congress passed and the President signed into law the Exon Amendment, renamed the Communications Decency Act, as part of the sweeping Telecommunications Act of 1996.[150]

In its final form, the CDA made it a felony for any person using a "telecommunications device" to transmit an "obscene" or "indecent"

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146. *See supra* notes 140-45 (discussing opposition of, and support for, the Exon Amendment).

147. Ironically, the first Senate hearings on the issue of regulating indecent and obscene material on the Internet were held ten days after the passage of the Exon Amendment. *See Judiciary Committee Hearing on Cyberporn and Children: The Scope of the Problem, the State of Technology and the Need for Congressional Action*, 104th Cong. (1995). The Senate Judiciary Committee did not convene to consider the already-passed CDA, but a separate bill sponsored by Senator Charles E. Grassley (R-Iowa) which proposed to amend 18 U.S.C. § 1464 to authorize the criminal division of the Justice Department, rather than the FCC, to prosecute those who knowingly allow their network to be used to transmit indecent material to minors. *See* Protection of Children from Computer Pornography Act, S. 892, 104th Cong. (1995). Critics viewed the hearings, which lasted a total of three hours, as fruitless in their attempt to demonstrate the logic behind broad regulation of the Internet. *See* Center for Democracy and Technology, *A Briefing on Public Policy Issues Affecting Civil Liberties Online*, CDT POLICY POST 22 (July 26, 1995) <http://www.cdt.org/publications/pp220726.html> (noting that while the hearings successfully demonstrated sexually explicit material available on Internet, "the hearing illustrated that current law is sufficient to prosecute those who stalk or solicit children online, and that complex constitutional issues are raised by congressional attempts to restrict indecent material on the Internet").

148. *See* Langan, *supra* note 136 (noting that in bill's Conference Committee, the Exon Amendment was adopted at the last minute in place of an alternative amendment that was proposed by Representatives Christopher Cox (R-Cal.) and Ron Wyden (D-Or.)). The Cox-Wyden Amendment, which passed in the House of Representatives by a 420-4 margin but was discarded by the Conference Committee in favor of the Exon Amendment, prohibited FCC regulation of the Internet, protected computer services providers from criminal liability reserved for content providers, removed restrictions on the development of filtering technology, and suggested that parental and educational guidance were the best guard to protect the innocence of children. *See* Internet Freedom and Family Empowerment Act, H.R. 1978, 104th Cong. (1995).

149. 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Sen. Wyden).

150. The House and Senate passed the Act by wide margins of 414-16 and 91-5, respectively. *See* 142 CONG. REC. H1141-44 (daily ed. Feb. 1, 1996); 142 CONG. REC. S1172 (daily ed. Feb. 9, 1996). Seven days after the passage of the Act, President Clinton signed the bill into law in a high profile, historic ceremony at the Library of Congress. *See* President's Remarks on Signing the Telecommunications Act of 1996, 329 WEEKLY COMP. PRES. DOC. 215, 218 (Feb. 8, 1996). President Clinton signed the Act, however, with reservations as to the constitutionality of the restrictions on free speech contained in the CDA. *See* Silvergate, *supra* note 110, at A19 (noting concerns of President, civil libertarians, computer communications experts, and many others as to overbroad scope of CDA).

communication "knowing that the recipient of the communication is under 18 years of age."[151] The Act further criminalized communications to minors that, "in context, depict[] or describe[], in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."[152] Finally, the CDA made it a crime to "use[] an interactive computer service to send [such materials] to a specific person or persons under 18 years of age"[153] or to "display [such material] in a manner available" to any person under eighteen.[154]

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151. 47 U.S.C.A. § 223(a)(1)(B) (West Supp. 1997). The CDA states, in relevant part:
(a) 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... or...
(2) knowingly permits any telecommunication 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, United States Code, or imprisoned not more than two years, or both.

Id. § 223(a) (emphasis added); and
(d) Whoever—
(1) In interstate or foreign communications knowingly—
(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or
(B) uses any interactive computer service to display in a manner available to a person under 18 years of age,
any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms *patently offensive* as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or
(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity,
shall be fined under Title 18, United States Code, or imprisoned not more than two years, or both.

Id. § 223(d) (emphasis added).

152. *Id.* § 223(d)(1).

153. *Id.* § 223(d)(1)(A).

154. *See id.* § 223(d)(1)(B).

III. *RENO V. ACLU*

A. *The Case's Origins*

Within hours of President Clinton's signing of the Telecommunications Act of 1996 into law, civil libertarians initiated the first constitutional challenge to the Communications Decency Act. In Philadelphia, in the District Court for the Eastern District of Pennsylvania, the ACLU filed affidavits supporting their request for injunctive relief to enjoin the enforcement of the CDA.[155]

In its challenge to the Act, the ACLU argued that the CDA was unconstitutionally overbroad because its provisions unnecessarily regulated constitutionally-protected speech, and that it was unconstitutionally vague in its failure to adequately define the term "indecent."[156] Judge Ronald L. Buckwalter, to whom the case was assigned, agreed with the ACLU, granting a limited temporary restraining order enjoining the enforcement of certain provisions of the CDA pending the outcome of a decision of a three-judge panel

155. *See* ACLU v. Reno, No. Civ. A. 96-963, 1996 WL 65464, at *1 (E.D. Pa. Feb. 15, 1996). At the same time, a similar request for injunctive relief was filed in the Southern District of New York by Joe Shea, the editor-in-chief and publisher of a daily online newspaper. *See* Shea v. Reno, 1996 WL 427610, at *1 (S.D.N.Y. Feb. 8, 1996); *see also infra* note 180 and accompanying text (outlining facts in *Shea*).

The American Library Association filed a similar challenge to the CDA on behalf of nearly 30 plaintiffs. The suit was subsequently consolidated with *ACLU v. Reno* and argued together. *ACLU Background Briefing* (Oct. 31, 1996) <http://www.epic.org/free_speech/CDA/lawsuit/aclu_briefing_10_31.html>. Once the ACLU case and the ALA case were consolidated, the list of plaintiffs included: the American Civil Liberties Union, Human Rights Watch, Electronic Privacy Information Center, Electron Frontier Foundation, Journalism Education Association, Computer Professionals for Social Responsibility, National Writers Union, Clarinet Communications Corp., Institute for Global Communications, Stop Prisoner Rape, AIDS Education Global Information System, Bibliobytes, Queer Resources Directory, Critical Path AIDS Project, Inc., Wildcat Press, Inc., Declan McCullagh d/b/a Justice on Campus, Brock Meeks d/b/a Cyberwire Dispatch, John Troyer d/b/a The Safer Sex Page, Jonathan Wallace d/b/a The Ethical Spectacle, Planned Parenthood Federation of America, Inc., America Library Association, Inc., America Online, Inc., American Booksellers Association, Inc., American Booksellers Foundation for Free Expression, American Society of Newspaper Editors, Apply Computer, Inc., Association of American Publishers, Inc., Association of Publishers, Editors and Writers, Citizens Internet Empowerment Coalition, Commercial Internet Exchange Association, CompuServe Incorporated, Families Against Internet Censorship, Freedom to Read Foundation, Inc., Health Sciences Libraries Consortium, Hotwired Ventures LLC, Interactive Digital Software Association, Interactive Services Association, Magazine Publishers of America, Microsoft Corporation, The Microsoft Network, L.L.C., National Press Photographers Association, Netcom Online Communications Services, Inc., Newspaper Association of America, Opnet, Inc., Prodigy Services Company, Society of Professional Journalists, and Wired Ventures, Ltd. *See* Brief for Appellants at ii, Reno v. ACLU, 117 S. Ct. 2329 (1997) (No. 96-511), *available in* 1997 WL 32931 (Jan. 21, 1997).

156. *See* ACLU v. Reno, No. Civ. A. 96-963, 1996 WL 65464, at *1 (E.D. Pa. Feb. 15, 1996). Plaintiffs argued that "as a result of the vagueness of the crimes created by the Act, they do not even know what speech or other actions might subject them to prosecution," and that "even attempts to self-censor could prove fruitless." *Id.*

tasked with deciding whether to grant the ACLU's motion for a preliminary injunction.[157]

B. District Court's Preliminary Injunction

Unlike Congress, the three-judge panel deciding *ACLU v. Reno*[158] conducted extensive evidentiary hearings to gain the greatest possible understanding of the Internet before deciding whether to uphold or strike down the regulations applying to the unique new medium.[159] With the benefit of those hearings, the court laid out over 120 findings of fact in its opinion.[160]

The Findings of Fact section in the court's opinion, which is lengthier than any of the three judges' individual discussions of the law, describes the Internet as a "unique and wholly new medium of worldwide human communication."[161] The findings set out in specific detail the nature of cyberspace,[162] the history of the Internet,[163] methods of accessing and communicating over the Internet,[164] the emergence of the World Wide Web,[165] the range of content available on the Internet (including the amount and types of

157. *See id.* at *4 ("The defendant, her agents, and her servants are hereby ENJOINED from enforcing against plaintiffs provisions of 47 U.S.C. § 223(a)(1)(B)(ii), insofar as they extend to 'indecent,' but not 'obscene.'"). The panel was formed pursuant to a provision of the Telecommunications Act that provided that any civil action challenging the constitutionality of the CDA would be heard by such a panel. *See* 47 U.S.C.A. § 561(a) ("[A]ny civil action challenging the constitutionality, on its face, of this title or any amendment made by this title, or any provision thereof, shall be heard by a district court of 3 judges convened pursuant to the provisions of section 2284 of title 28, United States Code.").

158. 929 F. Supp. 824 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997).

159. *See, e.g.*, Daniel G. Bergstein & Michelle Weisberg Cohen, *Cybersmut Goes on Trial—Federal Courts Hold CDA Unconstitutional*, N.Y.L.J., Sept. 23, 1996, at S1 (discussing three-judge panel's "extensive evidentiary hearings" conducted to gain an understanding of the Internet and how to apply First Amendment to it); Harvey Berkman, *Medium is Message*, NAT'L L.J., Aug. 19, 1996, at A1 (characterizing Congress' three-hour hearing on problem of cyberporn as "limited" and "perfunctory" when compared with the *ACLU* court's six days of comprehensive, probing hearings); Mike Godwin, *Cyber Rights Now: Dancing in the Streets*, WIRED, Sept. 1996, at 92 (predicting that because of three-judge panel's demonstrated understanding of Internet and its role in society, comprehensive record regarding Internet contained in court's Findings of Fact will be relied upon and cited by subsequent courts in many cases involving Internet). *But see* Berkman, *supra*, at A1 (quoting Patrick A. Trueman, Director of Legal Affairs for American Family Association) ("The Philadelphia court was far more impressed with the Internet than the Constitution and devoted far more of its opinion to the workings of the Internet than to the law.").

160. *See* ACLU v. Reno, 929 F. Supp. 824, 830-49 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997).

161. *Id.* at 844. The Findings of Fact section of the court's opinion consists of approximately nineteen pages of text, while Judge Sloviter's, Buckwalter's, and Dalzell's discussion of law consists of approximately eight, seven, and eighteen pages, respectively. *See id.*

162. *See id.* at 830-42.

163. *See id.* at 831-32.

164. *See id.* at 832-36.

165. *See id.* at 836-38.

sexually explicit content),[166] and the various methods of restricting access to the Internet other than government regulation.[167]

Keeping a close eye on the Supreme Court's First Amendment jurisprudence regarding the standard of review applicable to the regulation of mass communications, the court placed great emphasis on these findings of fact. Following the medium-specific approach to mass communications,[168] the court acknowledged the necessity of "examin[ing] the underlying technology of the communication to find the proper fit between First Amendment values and competing interests."[169] Focusing on the unique characteristics of the Internet, the court attempted to determine whether the medium bore greater similarity to telephone communications or to broadcast communications.[170]

Applying the findings of fact, the court found evidence that Internet communication, while unique in its own right, is much more akin to telephone communication than it is to broadcasting.[171] The court noted that, as with a telephone, a person using the Internet must act affirmatively and deliberately to retrieve specific information online.[172] The court acknowledged that there is a large amount of sexually explicit material available on the Internet,[173] but added that it is highly unlikely that children would randomly come across "indecent" or "patently offensive" material while "surfing" the Internet.[174] The court further recognized that unlike broadcast communication, where anything and everything that flows over the airwaves "assaults" a "captive audience," the Internet requires

166. *See id.* at 842-45.

167. *See id.* at 838-42, 845-49.

168. *See supra* notes 47-51 and accompanying text (explaining Court's tendency to examine characteristics unique to each new form of communication when determining applicable level of First Amendment protection).

169. *ACLU*, 929 F. Supp. at 873.

170. *See id.* at 851. If the court found it similar to telephone communications, the Internet would deserve greater First Amendment protection, requiring the application of strict scrutiny to any government-imposed content-based restriction on speech. *See id.* (citing Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989)). If the court found the Internet more akin to broadcasting, however, it would deserve a lesser level of constitutional protection, and regulations applicable to it would be subjected to a lower level of scrutiny. *See id.*

171. *See id.* at 851-52 (noting that "the evidence and Findings of Fact based thereon show that Internet communication, while unique, is more akin to telephone communication, at issue in *Sable*, than to broadcasting, at issue in *Pacifica*").

172. *See id.* (asserting that with both mediums, the user must act affirmatively to retrieve information).

173. *See id.* at 844 ("Such material includes text, pictures, and chat, and includes bulletin boards, newsgroups, and the other forms of Internet communication, and extends from the modestly titillating to the hardest-core.").

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

affirmative action by the user and lacks the element of surprise associated with broadcasting.[175]

Because of the Internet's lack of resemblance to broadcast communications under a medium-specific analysis, the court in *ACLU* applied a strict scrutiny standard of review to the CDA.[176] The court acknowledged the government's compelling interest in protecting the physical and psychological well-being of minors by shielding them from indecent and patently offensive material,[177] but under a strict scrutiny analysis found that the CDA was unconstitutional due to its overbreadth[178] and because of its failure to adopt the least restrictive means of achieving the compelling government interest.[179]

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175. *See id.* (noting that users, while "surfing" the Web, virtually always receive some warning of content of materials before they appear, thus significantly reducing element of "assault" unique to broadcasting).

176. *See id.* at 851 (declaring that because the CDA is a "government-imposed content-based restriction on speech," it is subject to strict scrutiny, and "will only be upheld if it is justified by a compelling government interest and if it is narrowly tailored to effectuate that interest."). The Court analogized the CDA's regulation of the Internet to the FCC's regulation of telephone communications in *Sable*, stating that:

> [T]he evidence and our Findings of Fact based thereon show that Internet communication, while unique, is more akin to telephone communication, at issue in *Sable*, than to broadcasting, at issue in *Pacifica*, because, as with the telephone, an Internet user must act affirmatively and deliberately to retrieve specific information online.

Id. at 851-52.

177. *See id.* at 852-53 (noting inadequacies in government's proof of compelling state interest).

178. *See id.* at 854-55. Noting the unconstitutionality of regulations that sweep more broadly than necessary, thereby chilling the expression of protected speech, the court found that because of the nature of the Internet, compliance with the CDA would result in the banning of constitutionally-protected speech. *See id.* at 854 (finding that "it is either technologically impossible or economically prohibitive for many of the plaintiffs to comply with the CDA without seriously impeding their posting of online material which adults have a constitutional right to access"). The three-judge panel held that because the CDA forced speakers to choose between complete silence or the risk of prosecution, it implicitly instituted a complete ban on speech that affected adults as well as children, and thus was overbroad. *See id.* at 855.

179. *See id.* at 855-57. The court rejected the Government's assertion that the statutory defenses attached to the CDA prove that it was designed to achieve the compelling government interest using the least restrictive means. *See ACLU*, 929 F. Supp. at 856-57 (rejecting the CDA's good faith and verified credit card/adult identification provision defenses, reasoning that neither defense was technologically or economically feasible for majority of content providers). The court also determined that the CDA was not narrowly tailored because of the vagueness of its definition of the terms "indecent" and "patently offensive." *See id.* at 856 (finding that the two terms are inherently vague, "particularly in light of the government's inability to identify the relevant community standards by which the material should be judged"). The CDA also fails to adequately define the word "indecency," and offers no guidelines as to its parameters. *See id.* at 861. Finally, the court determined that the CDA ultimately failed strict scrutiny because it attempted to achieve ends that current laws adequately addressed. *See id.* at 856-57 (arguing that vigorous enforcement of current obscenity and child pornography laws would protect minors from exposure to patently unsuitable material on Internet). The court also noted the U.S. Justice Department's concurrence on this point, as evidenced by a letter to Senator Leahy regarding the prosecution of Internet crime. *See id.* at 857 (citing 141 CONG. REC. S8342 (daily ed. June 14, 1995) (reprinting portion of letter from Kent Marcus, Acting Assistant Attorney General, to Sen. Leahy, which communicated the view that existing laws adequately cover online obscenity, child pornography, and child solicitation).

Based on these conclusions, the district court in *ACLU v. Reno* granted a preliminary injunction against the enforcement of the Communications Decency Act of 1996.[180] The Government thereafter filed a direct appeal to the Supreme Court,[181] and the Court accepted the case in late 1996 for review.[182]

C. *Supreme Court's Decision*

In its review of the Communications Decency Act, the Supreme Court in *Reno v. ACLU* closely followed the district court's reasoning and conclusions, emphatically denouncing the CDA as a patently overbroad, unconstitutional attempt to regulate the content of speech.[183] Adopting a medium specific analysis, the Court granted the highest level of protection to the Internet and subjected the CDA to

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180. *See id.* at 857 (stating court's certainty that plaintiffs would prevail on merits of their argument that CDA was facially invalid under First and Fifth Amendments). The District Court for the Southern District of New York granted a similar preliminary injunction against the enforcement of the CDA a few months later in the case of *Shea v. Reno*, 930 F. Supp. 916 (S.D.N.Y. 1996), *aff'd*, 117 S. Ct. 2501 (1997). The case was brought by Joe Shea, the editor and publisher of a daily Internet newspaper that posted a scathing commentary of the CDA on the day it was signed into law by President Clinton. *See* Joe Shea, *We're Going to War*, 2 THE AM. REP. 219 (Feb. 8, 1996) <http://www.newshare.com/current/censor/excerpts.html>. Written by a Texas Judge, Steve Russel, the article vehemently attacked the CDA as unconstitutional on its face, frequently using the "indecent" and "patently offensive" words that the new law was designed to ban from the Internet. *See* Steve Russel, *The X-On Congress: Indecent Comment on an Indecent Subject*, 2 THE AM. REP. 219 (Feb. 8, 1996) <http://www.newshare.com/current/censor/excerpts.html> ("You motherfuckers in Congress have dropped over the edge of the earth this time.... [Y]ou have sold out the First Amendment."). Applying strict scrutiny, the court in *Shea* acknowledged that the government has a compelling interest in protecting minors from harmful material, but found that the means used by the government, namely the CDA, were not narrowly tailored to that legitimate end. *See Shea*, 930 F. Supp. at 941-50. The court, like the one in *ACLU*, refused to accept the Government's main argument that the Act's two affirmative defenses were sufficient to offset its broad reach. *See id.* at 948 (holding that good faith and verified account defenses were not viable because they were technologically or economically unavailable to most providers). The court determined that without the availability of viable defenses to criminal prosecution, the CDA was so broad as to effectively ban constitutionally protected material on the Internet. *See id.* at 948 ("In sum, there is no persuasive evidence that a substantial proportion of Internet content providers can make available material potentially within the scope of the CDA without fear of prosecution and criminal liability.").

181. *See* ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996), *petition for cert. filed*, 65 U.S.L.W. 3318 (U.S. Oct. 22, 1996) (No. 96-511), *cert. granted*, 65 U.S.L.W. 3411 (U.S. Dec. 10, 1996), *aff'd*, 117 S. Ct. 2329 (1997). The government also filed a Jurisdictional Statement in the appeal of *Shea v. Reno*, asking the Court to reserve judgment on *Shea* until *Reno v. ACLU* was resolved. *ACLU Background Briefing* (Oct. 31, 1996) <http://www.epic.org/free_speech/CDA/lawsuit/aclu_briefing_10_31.html>. The Supreme Court was the next, and final, arbiter, of the CDA's constitutionality pursuant to a section of the CDA mandating an expedited appeals process. *See* 47 U.S.C.A. § 561(b) (West Supp. 1997) ("[A]n interlocutory or final judgment, decree, or order of the court of 3 judges in an action under subsection (a) holding this title or an amendment made by this title, or any provision thereof, unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court.").

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

183. *See id.*

strict scrutiny review.[184] Under such scrutiny, the Court determined by a 7-2 margin[185] that while the Act might have sought to accomplish a legitimate governmental interest,[186] it did so in a way that placed too great a burden on protected speech and thereby threatened "to torch a large segment of the Internet community."[187]

1. *Medium-specific analysis*

After disposing of the Government's contention that the CDA was facially constitutional under a patchwork of prior decisions,[188] the

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184. *See id.* at 2344 ("[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet].").

185. Justice Sandra Day O'Connor, joined by Chief Justice William Rehnquist, concurred in the judgement and dissented in part. *See id.* at 2351-57 (O'Connor, J., dissenting). Justice O'Connor analyzed the CDA as a zoning law that sought to create "adult zones" on the Internet. *See id.* at 2351 (O'Connor, J., dissenting). Adopting the analysis used by the Court in previous cases where the constitutionality of zoning laws were in question, O'Connor determined that only one of the CDA's provisions was unconstitutional, and that two others were unconstitutional only in certain circumstances. *See id.* at 2352-53 (O'Connor, J., dissenting) (noting that under the Court's current zoning law jurisprudence, such a law is valid if "(I) it does not unduly restrict adult access to the material; and (ii) minors have no First Amendment right to read or view the banned material"). O'Connor agreed with the majority that 47 U.S.C. § 223(d)(1)(B), which criminalized the display of patently offensive messages or images "in a[ny] manner available" to minors, was unconstitutional because it failed the first prong of the test, in that it unduly restricted adult access to such material. *See id.* at 2354 (O'Connor, J., dissenting). O'Connor differed from the majority, however, in arguing that § 223(d)(1)(A), which made it a crime to knowingly send a patently offensive message or image to a specific person under the age of 18, and § 223(a)(1)(B), which made it a crime to knowingly transmit an obscene or indecent message or image to a person the sender knows is under 18 years old, similarly failed the first prong and were unconstitutional only in certain situations, namely when the sender of the information believes that he is sending the material to adults and possibly children. *See id.* at 2355 (O'Connor, J., dissenting). O'Connor argued that the two provisions withstood constitutional scrutiny, however, when they were applied to the transmission of Internet communications where the party initiating the communication knows that all of the recipients are minors. *See id.* at 2355-56 (O'Connor, J., dissenting).

186. *See id.* at 2345 (citing FCC v. Pacifica Found., 438 U.S. 726, 749 (1978)) (stating that Court has repeatedly recognized governmental interest in protecting children from harmful materials); Ginsberg v. New York, 390 U.S. 629, 639 (1968).

187. *Reno*, 117 S. Ct. at 2350.

188. *See id.* at 2341-43. The Court rejected the Government's contention that the CDA was "plainly constitutional" under three cases that upheld statutes restricting speech in an attempt to protect children: *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); and *Ginsberg v. New York*, 390 U.S. 629 (1968). *See Reno*, 117 S. Ct. at 2341. The Court distinguished the New York statute upheld in *Ginsberg* that prohibited the sale of material considered obscene as to minors under 17 years of age from the CDA in four ways: (1) while the New York statute explicitly allowed parents to purchase such magazines for their children, the CDA did not present a similar option; (2) while the New York statute applied only to commercial transactions, the CDA contained no such limitation; (3) while the New York statute required that the offensive material be "utterly without redeeming social importance for minors," the CDA failed to provide guidelines as to how the terms "indecent" or "patently offensive" should be interpreted; and (4) while the New York statute defined a minor as a person under the age of 17, the CDA applied to those under the age of 18. *See id.* The Court also refused to accept the government's reliance on *Pacifica*, a case in which the Court upheld the regulation of indecent materials broadcast over the radio. *See id.* at 2341-42. The Court here distinguished its holding in *Pacifica* in three ways, arguing: (1) that the regulation of speech in *Pacifica* dictated only when indecent content could be broadcast, while the CDA

Court turned to the traditional analysis used when the government attempts to regulate new forms of mass communication: medium-specific analysis.[189] Recognizing that the only form of communication to receive a reduced level of First Amendment protection in the past was the broadcast medium,[190] the Court set out to determine whether the Internet shared those characteristics unique to the broadcast medium which would indicate that the Internet, too, should receive anything less than the highest level of constitutional protection.[191]

In conducting its medium-specific analysis, the Court examined one of the main characteristics unique to broadcasting that warranted a lower level of First Amendment protection, its history of extensive government regulation. In *Pacifica*, the Court found that legislation prohibiting the transmission of indecent speech was applied to a medium that had been heavily regulated in the past.[192] The Court in *Reno*, however, pointed out that the "vast democratic fora of the Internet [has never] been subject to the type of government supervision and regulation that has attended the broadcast industry."[193]

The Court also considered a second characteristic unique to broadcasting that was heavily relied upon in *Pacifica*, the "invasiveness" of radio and television broadcasts.[194] Much like the district court in *ACLU v. Reno*, the Court here analogized the characteristics of the

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completely banned the transmission of such content at any time and in any manner; (2) that the Court in *Pacifica* specifically refused to decide whether violation of the regulation would justify a criminal prosecution, while the CDA would require just that; and (3) that the regulation in *Pacifica* applied to a medium which as a matter of history had received very limited First Amendment protection, while the CDA sought to regulate a new form of communication, the Internet, which did not have the same characteristics justifying the lower level of protection offered to the broadcast medium. *See id.* at 2342-43. Finally, the Court refused to find the CDA plainly constitutional based on its ruling in *Renton*, a case upholding the constitutionality of a zoning ordinance that kept adult movie theaters out of residential neighborhoods. *See id.* The Court distinguished *Renton* by pointing out that while the zoning ordinance at issue in the case was a "time, place, and manner regulation" that was aimed at the secondary effects of adult movie theaters (crime, deteriorating property values, etc.), the CDA here was a content-based blanket restriction on speech that required a higher level of First Amendment constitutional scrutiny. *See id.*

189. *See Reno*, 117 S. Ct. at 2343. *See generally supra* notes 47-51 and accompanying text (explaining Court's tendency to examine characteristics unique to each new form of communication when determining applicable level of First Amendment protection).

190. *See Reno*, 117 S. Ct. at 2343 (citing FCC v. Pacifica Found., 438 U.S. 726 (1978); Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969)).

191. *See id.* at 2343-44.

192. *See id.* at 2343 (noting that radio stations were allowed to operate only pursuant to federal license, and without legislation regulating indecency, there was risk that "members of the radio audience might infer some sort of official or societal approval of whatever was heard over the radio" (citing Pacifica Found. v. FCC, 556 F.2d 9, 36 (D.C. Cir. 1977) (Levanthal, J., dissenting), *rev'd*, 438 U.S. 726 (1978))).

193. *Reno*, 117 S. Ct. at 2329.

194. *See id.* at 2343.

Internet to those of the telephone in *Sable*.[195] Echoing the Court's reasoning in *Sable* and the lower court's reasoning in *ACLU*, the Court found that the Internet is not a medium of communication that deserves a qualified level of First Amendment protection because of an invasive nature.[196] To the contrary, the Court observed, the Internet is a medium through which users seldom encounter content accidentally, and one which, unlike communications received by radio or television, "requires a series of affirmative steps more deliberate and directed than merely turning a dial."[197]

Finally, the Court concluded that a third characteristic specific to broadcast communications which warranted reduced constitutional protection, "scarcity," also was not a characteristic that the Internet shared.[198] The Court observed that when Congress first authorized the regulation of the broadcast spectrum, it partially justified its actions by pointing to the need to protect such a scarce expressive commodity.[199] The Internet, in stark contrast, "[p]rovides relatively unlimited, low-cost capacity for communication of all kinds,"[200] thereby facilitating a wealth of communication that is "'as diverse as human thought.'"[201] Thus, because the Internet lacks the scarcity, invasiveness, or history of regulation unique to broadcasting, the Court submitted that there is no basis for qualifying the level of First Amendment protection applied to the medium.[202]

2. *Strict scrutiny review*

Once the Court determined that the level of constitutional protection afforded the Internet should not be qualified, it applied the same level of protection that the district court had applied and that the Court had applied to all forms of communication other than broadcast: strict scrutiny. Using this analysis, the Court asked whether the CDA served a compelling government interest, and

195. *See id.* at 2343-44 (stating that Court in *Sable* distinguished *Pacifica* in on the basis that telephone communications do not share unique characteristics—namely, an invasive nature that often takes listeners by surprise with indecent messages—that broadcast communications have which justify the application of qualified level of First Amendment protection).

196. *See id.*

197. *See id.* at 2336 (citing ACLU v. Reno, 929 F. Supp. 824, 845 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997)).

198. *See Reno*, 117 S. Ct. at 2344.

199. *See id.*

200. *See id.* (declaring that Internet "includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue," chat rooms through which "any person with a phone line can become a town crier," and Web pages, mail exploders, and newsgroups through which "the same individual can become a pamphleteer").

201. *Id.* (quoting *ACLU*, 929 F. Supp. at 842).

202. *See Reno*, 117 S. Ct. at 2344.

whether it was narrowly tailored to accomplishes that end using the least restrictive means.[203] The Court concluded that despite the CDA's honorable intentions,[204] its vagueness and its facial overbreadth were clear evidence that Congress' attempt to regulate the Internet had resulted in a patently invalid constitutional provision[205] that placed an unacceptably heavy burden on protected speech.[206]

a. Vagueness

Insisting that "the CDA's burden on protected speech cannot be justified if it could be avoided by a more carefully drafted statute,"[207] the Court contended that the statute was defective in exactly this way.[208] By failing to narrowly tailor the language of the statute, the Court explained, Congress passed an act that was dangerously vague and clearly unconstitutional under a strict scrutiny analysis.[209]

Specifically, the Court pointed to Congress' lack of consistency in defining the terms "indecent" and "patently offensive."[210] Each term is used in one of the two main provisions of the CDA, and neither is accompanied by even an attempt at a definition.[211] Pointing out that such inconsistency and differences in language would provoke uncertainty among speakers on the Internet, the Court proclaimed that such indefiniteness "undermines the likelihood that the CDA [was] carefully tailored to the congressional goal of protecting minors from potentially harmful materials."[212]

The Court noted that the vagueness of the statute was particularly critical for two reasons: (1) because the CDA, as a content-based regulation of speech, runs the risk of having a chilling effect on free speech; and (2) because the CDA is a statute that provides criminal sanctions which could cause speakers to remain silent rather than run the risk of communicating even arguably unlawful words, ideas, or images.[213] Considering this increased deterrent effect, coupled with

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203. *See id.* at 2344-50 (discussing whether statute was narrowly tailored, whether government's three defenses to claimed overbreadth of statute were tenable, and whether statute's two affirmative defenses were effective in preserving statute's constitutionality).

204. *See id.* at 2345 (noting that protection of children from harmful materials is legitimate governmental interest).

205. *See id.* at 2350.

206. *See id.*

207. *See id.* at 2346.

208. *See id.* at 2344-46 (examining whether statute's vagueness proves that it is not narrowly tailored to achieve its admittedly compelling government interest).

209. *See id.* at 2346.

210. *See id.* at 2344.

211. *See id.*

212. *Id.*

213. *See id.* at 2344-45.

the vague contours of the coverage of the statute, the Court determined that the CDA "unquestionably silence[d] some speakers whose messages would be entitled to constitutional protection," and as such failed to pass strict scrutiny.[214]

b. Overbreadth

While recognizing that the vagueness of the statute was significant in compromising its constitutionality, the Court in *Reno* placed even greater emphasis on the CDA's facial overbreadth.[215] While acknowledging the fact that the statute was enacted for the important purpose of protecting children from exposure to sexually explicit material, the Court reemphasized its commitment to making sure that Congress designs statutes that accomplish their purposes without imposing unnecessarily great restrictions on speech.[216] In response to this concern, the Court definitively held that Congress failed in its legislative duties by passing a law with blanket restrictions over free speech that were "wholly unprecedented."[217]

The CDA's overbreadth, the Court argued, was evident in two primary ways: in its infringement upon the First Amendment rights of adults, and in its application to such a broad spectrum of speech.[218] The Court first pointed out the way in which the statute sought to protect children at the expense of the constitutional rights of adults.[219] The Court explained that in attempting to keep indecent material out of the hands of children, the government may not reduce the material that the adult population receives to the same level as that which children receive.[220] By placing a complete ban on indecent material, however, the CDA did just this.[221]

214. *See id.* at 2346.

215. *See id.* at 2346-50.

216. *See id.* at 2346-47 (citing Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2385 (1996) (plurality opinion)).

217. *See Reno*, 117 S. Ct. at 2346-47.

218. *See id.* at 2346-48.

219. *See id.* at 2346-47.

220. *See id.* at 2346 (asserting that government may not "reduce the adult population to only what is fit for children" (quoting *Denver Area*, 116 S. Ct. at 2393) (plurality opinion)). The Court further reemphasized the fact that sexual expression which is indecent, but not obscene, receives the full protection of the First Amendment. *See Reno*, 117 S. Ct. at 2346 (citing Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989)).

221. *See Reno*, 117 S. Ct. at 2346-47 (arguing that CDA, like regulation on "dial-a-porn" invalidated in *Sable*, constitutes complete ban on indecent speech). The Court emphasized the district court's finding that technology does not exist that would allow the sender of indecent material to identify the age of the recipient of the information on the Internet. *See id.* at 2347. Without such technology—which, due to the Internet's inherent infrastructure will likely never be available—the CDA "inevitably curtail[s] a significant amount of adult communication on the Internet." *See id.*

The Court further argued that the CDA's overbreadth was visible in its application to such a broad variety of speech.[222] While the speech regulations upheld in *Ginsberg* and *Pacifica* were strictly limited to commercial speech or commercial entities, the CDA was infinitely open-ended.[223] The prohibitions, the Court observed, shackled everything from nonprofit entities offering educational material on the World Wide Web,[224] to parents offering safe sex advice to their children via E-mail,[225] to the Carnegie Library placing its card catalogue online.[226]

Considering the extent of the statute's overbreadth, the Court determined that the CDA lacked the precision that the First Amendment requires when a statute regulates the content of speech.[227] Pointing out Congress' hasty, uninformed drafting of such a sweeping piece of government regulation,[228] and noting the government's failure to explain why a less restrictive provision would not be as effective as the CDA,[229] the Court held that the statute was not

222. *See id.* at 2347-48.

223. *See id.* at 2347. *See also supra* note 188 (describing regulations upheld in *Ginsberg* and *Pacifica*).

224. *See id.* at 2347-48 (contending that persons facilitating discussions about prison rape or safe sexual practices on Web site would be committing felony under CDA).

225. *See id.* at 2348 (submitting that parent allowing her 17-year-old child to use family computer to obtain arguably indecent information on Internet, or birth control information to the same child via e-mail, could face lengthy prison term under CDA).

226. *See id.* at 2347-48 (explaining that maintenance of library card catalogues containing arguably indecent words could expose libraries to criminal liability under CDA).

227. *See id.* at 2346 (finding that in its attempt to deny minors access to potentially harmful speech, "the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another").

228. *See id.* at 2348 (focusing on absence of any detailed findings by Congress as to nature of Internet, "or even hearings addressing the special problems of the CDA").

229. *See id.* The government offered three of its own defenses, *see id.* at 2348-49, and pointed to two affirmative defenses in the CDA, *see id.* at 2349-50, in an attempt to prove that the statute's burden on adult speech was not so great as to invalidate the statute under strict scrutiny; the Court rejected all of these defenses. *See id.* at 2350 (finding that government failed to prove that proffered defenses constituted "the sort of 'narrow tailoring' that [would] save an otherwise patently invalid unconstitutional provision").

The three defenses offered by the government that the Court rejected were (1) that the CDA is constitutional because it leaves open ample "alternative channels" of communication (the Court found that such a defense relies on a "time, place, and manner" analysis, which is inapplicable here); (2) that the plain meaning of the Act's "knowledge" and "specific person" requirements significantly restrict its permissible applications (the Court argued that the nature of the Internet prevents the knowledge requirement from having any real meaning, as it is virtually impossible to ever have true knowledge of who specifically is receiving the information); and (3) that the CDA's prohibitions are "almost always" limited to material lacking redeeming social value (the Court stated that there is no textual support in the Act for the argument that material having scientific, education, or other redeeming social value will necessarily fall outside the CDA's "patently offensive" and "indecent" prohibitions). *See id.* at 2348-49.

The two statutory affirmative defenses that the Court rejected were (1) that under the "good faith, reasonable, effective, and appropriate actions" provision, "tagging" by the sender of information provides a valid defense (the Court termed the defense "illusory," observing that tagging technology is not yet available, and even if it does become available, there is no way to

narrowly tailored, that it failed strict scrutiny analysis, and that it was facially unconstitutional.[230] The Court concluded by observing that if the speech restriction in *Sable* amounted to "'burn[ing] the house to roast the pig,'"[231] the CDA, "casting a far darker shadow over free speech, threaten[ed] to torch a large segment of the Internet community."[232]

IV. INSULATING THE INTERNET AND THE FUTURE OF THE FIRST AMENDMENT

The Supreme Court's holding in *Reno v. ACLU* has been hailed by CDA critics and civil libertarians as a mighty firewall that will protect the Internet in the future from the torching effects of censorship.[233] The Court's recognition of the Internet as an emerging form of communication that warrants the highest level of First Amendment protection has led pundits to describe the decision as everything from the "legal birth certificate of the Internet"[234] to the "Bill of Rights for the 21st century."[235]

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guarantee that all senders will "tag" their material); and (2) that the verified credit card/adult identification provision saves the constitutionality of the Act (the Court reasoned that because such verification technology is not economically feasible for most non-commercial speakers, the unproven technology does not save the statute). *See id.* at 2349-50.

230. *See id.* at 2350 (agreeing with district court's conclusion that CDA "places an unacceptably heavy burden on protected speech, and that the defenses do not constitute the sort of 'narrow tailoring' that will save an otherwise patently invalid unconstitutional provision").

231. *Id.* at 2350 (quoting Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 127 (1989)).

232. *Id.* at 2350.

233. *See, e.g.*, *EPIC Statement on Supreme Court CDA Victory* (visited Nov. 15, 1997) <http://www2.epic.org./cda/epic_sup_ct_statement.html> (quoting David Sobel, co-counsel for EPIC in the suit, who remarked that the Court's decision, which "defines the First Amendment for the next century," is written on a clean slate and "establishe[s] the fundamental principles that will govern free speech issues for the electronic age"); *Press Release, Electronic Frontier Foundation Statement: Supreme Court Victory for Free Speech: CDA Ruled Unconstitutional* (June 26, 1997) <http://www.eff.org/pub/Legal/Cases/ACLU_v_Reno/19970626_eff_cda.announce> [hereinafter *EFF Press Release*] (noting that the decision marks "a major victory in the Electronic Frontier Foundation's ongoing efforts to ensure that the long-standing American principles of freedom of expression be preserved and extended to the Internet"); *Supreme Court Rules: Cyberspace Will be Free! ACLU Hails Victory in Internet Censorship Challenge* (June 26, 1997) <http://www.aclu.org/news/n062697a.html> (observing ACLU Executive Director Ira Glasser's statement that ruling is "an unprecedented breakthrough in the fight to determine the future of free speech in the next century"). Ann Beeson, ACLU attorney and member of the legal team litigating the case, argued further that the Supreme Court's ruling, when coupled with recent state court decisions coming to similar conclusions regarding Internet regulation, "create[] a body of law that will help ensure that the free speech principles embodied in our Constitution apply with the same force on the Internet as they do in the morning paper, in the town square, and in the privacy of our own homes." *Id.*

234. Edward Felsenthal & Jared Sandberg, *High Court Strikes Down Internet Smut Law*, WALL ST. J., June 27, 1997, at B1 (quoting statement made by attorney Bruce Ennis, who represented groups challenging the law).

235. John Schwartz & Joan Biskupic, *1st Amendment Applies To Internet, Justices Say*, WASH. POST, June 27, 1997, at A1 (quoting statement made by Jerry Berman of Center for Democracy

These two characterizations of the Internet reflect the profound impact that the Court's decision is likely to have on the medium, yet at the same time they appropriately acknowledge the fact that the decision is only a starting point—a birth certificate, a declaration of rights—from which future constitutional protection of the Internet and even newer forms of communication will derive. The question that arises, then, is whether *Reno v. ACLU* will sufficiently protect against future attempts at censorship that might again threaten to torch the Internet or other forms of mass communication.

A. *An Alternative to the Court's Continued Use of Medium-Specific Analysis*

While the Court's decision to grant the Internet such strong constitutional protection will undoubtedly foster a much greater freedom of speech over the medium, its continued use of medium-specific analysis to reach its decision raises doubts regarding the scope of the impact of the decision on future forms of mass communication. The Supreme Court's review of the CDA's constitutionality represented an opportunity to move First Amendment jurisprudence in one of two directions: down the well-trodden path of complex medium-specific analysis,[236] or, more unlikely, down a novel path of First Amendment jurisprudence where the Court would focus less on the medium of communication and more on the goals of the First Amendment as applied to any and all forms of communication.[237]

The Supreme Court took the more predictable course in *Reno v. ACLU*,[238] following the wealth of precedent governing content-based regulation of different forms of mass communications by applying a medium-specific analysis.[239] Considering the range of forms of mass communications, with print at one end garnering the highest level of First Amendment protection[240] and broadcast communications at the other end meriting the lowest level of First Amendment protec-

and Technology, a policy group opposing the CDA).

236. *See supra* Part I.C (discussing judicial responses to government regulation of existing forms of mass communication).

237. *Cf.* Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1062-63 (1994) (arguing that technological characteristics of various types of mass communications should not be crucial factor in determining level of First Amendment protection that a message receives).

238. 117 S. Ct. 2329 (1997).

239. *See* Reno v. ACLU, 117 S. Ct. 2329, 2343 (1997).

240. *See supra* notes 54-56 and accompanying text (discussing strong First Amendment protection afforded print medium).

tion,[241] the Court determined that Internet communication falls much closer to the print end of the spectrum.[242] Thus, the Court applied strict scrutiny to the government action regulating Internet content.[243]

By choosing to follow its First Amendment jurisprudence and apply medium-specific analysis to the Internet in *Reno v. ACLU*, the Court bypassed an opportunity to dispose of the complicated, awkward analysis. Had it chosen a new course, the Court could have adopted a novel First Amendment analysis which focuses not on the specific medium of communication over which the content is transmitted, but on whether the content transmitted has the potential to contribute to the marketplace of ideas on any communications medium.[244]

Under such a "marketplace" analysis, all forms of speech—other than those already denied First Amendment protection such as obscenity and child pornography[245]—would receive the highest level of First Amendment protection regardless of the medium over which the communication is transmitted.[246] It seems only logical that the constitutionality of a person's expression should depend not on whether it is conveyed by print, television broadcast, or the Internet,

241. *See supra* notes 57-75 and accompanying text (providing background on lesser free speech protection given broadcast television and radio).

242. *See supra* notes 188-202 and accompanying text (analyzing Supreme Court's application of medium-specific analysis in *Reno*).

243. *See supra* notes 203-32 and accompanying text (discussing Supreme Court's strict scrutiny review of the CDA in *Reno*).

244. Harvard Law School Professor Laurence H. Tribe suggests that a medium-specific analysis, which focuses so narrowly on the technological characteristics of each medium and the risks of harm that those new mediums carry with them, results in an obfuscation of goals and values behind the First Amendment. *See* Tribe, *supra* note 2 (arguing that a review of cases where Court applies medium-specific analysis reveals a "curious judicial blindness, as if the Constitution had to be reinvented with the birth of each new technology"). Tribe points out that medium-specific analysis results in a recitation of the risks each new form of communication carries with it without analyzing how imposing those risks "comports with the Constitution's fundamental values of freedom, privacy, and equality." *Id.* (arguing that such an analysis has resulted, in particular, in the unwise regulating of radio and television broadcasts without adequate sensitivity to First Amendment values).

245. *See supra* notes 26-32 and accompanying text (discussing obscenity and child pornography).

246. Professor Tribe, in a speech on the Constitution's application in the growing world of technology and communications, argued that the Constitution's norms "must be invariant under merely technological transformations." Tribe, *supra* note 2. In his speech, Tribe went so far as to propose an amendment to the Constitution that would ensure that the Constitution, particularly the First, Fourth, and Fifth Amendments, would be read "through a technologically transparent lens." *Id.* Tribe proposed that the Constitution's Twenty-seventh Amendment read:

> This Constitution's protections for the freedoms of speech, press, petition, and assembly, and its protections against unreasonable searches and seizures and the deprivation of life, liberty, or property without due process of law, shall be construed as fully applicable without regard to the technological method or medium through which information content is generated, stored, altered, transmitted, or controlled.

Id.

but on whether the expression is constitutional by its nature, and is acceptable on any form of communication.[247]

While the holding in *Reno v. ACLU* would have been the same whether the Court used a medium-specific analysis or a medium-neutral "marketplace" analysis, the adoption of the latter Holmsian approach would have resulted in a new First Amendment jurisprudence under which virtually any speech, in any context or on any medium, would be allowed, as long as a substantial government interest does not outweigh the interest in allowing a free marketplace of ideas to flourish, and as long as that government interest is achieved using the least restrictive means. Thus all forms of speech, other than those previously deemed unconstitutional under strict scrutiny analysis, would be recognized as essential to the sustenance of the marketplace of ideas, and in turn the democratic foundation of our country.

B. *The Future of Communications Regulation and the Internet*

When Oliver Wendell Holmes spoke of the First Amendment's primary goal of promoting a marketplace of ideas, he never said that the means used to enter the marketplace should determine what one is allowed to say once within. Holmes stressed that the value of free speech is in letting any speech,[248] through any medium, compete against all others; the distillation of such competition would be truth and a healthy discourse which would sustain the democratic ideal.[249]

It is ironic, then, that Congress sought to place stronger restrictions on speech over the Internet than on any other form of communication,[250] especially considering the fact that Congress itself recog-

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247. *See* 142 CONG. REC. S695 (daily ed. Feb. 1, 1996) (statement of Sen. Leahy) (questioning the constitutionality of regulating speech on Internet where similar speech has been protected by courts on consistent basis when communicated through other mediums); Note, *supra* note 237, at 1063 (pointing out that political editorial is still political editorial whether printed in newspaper, broadcast on television, downloaded to computer, or faxed over phone line, and arguing that "[t]he Court should ground its analysis in essential First Amendment interests and draw upon salient technological characteristics only as the factual background against which the real First Amendment concerns must be applied"); *cf.* Mike Godwin, *The Difference Between Obscenity and Indecency* (visited Nov. 15, 1997) <http://www.eff.org/pub/Publications/Mike_Godwin/obscenity_and_indecency_godwin.excerpt> (noting that if banning on-line indecency was constitutional, the expression of many things that could be said through writing or public speaking would be criminal if expressed on the Internet).

248. Holmes did acknowledge, however, that speech which created a clear and present danger was not protected by the First Amendment. *See supra* note 30 and accompanying text (discussing Holmes' opinion in Schenck v. United States, 24 U.S. 47, 52 (1919)).

249. *See supra* notes 16-21 and accompanying text (explaining marketplace of ideas theory of First Amendment).

250. *See* Silvergate, *supra* note 110, at A19 (declaring that with passage of CDA, "[o]vernight, the federal government transformed the newest and freest medium of communication into the

nized that the Internet does more to facilitate Holmes' marketplace of ideas than any other form of communication in history.[251] The chief criticism of Holmes' theory over the years has been that it is too utopian and impractical due to the economic barriers associated with having one's voice heard in the marketplace.[252] The Internet, however, breaks down these barriers, offering an egalitarian form of communication where the cost is little or nothing and an opinion is instantaneously distributed worldwide.[253] In many ways, the Internet embodies the essence of democracy: equal participation.[254]

Congress' uninformed, myopic view of the Internet led to the passage of an ill-conceived and indefensible law. Before Congress passed the Communications Decency Act, it collected no evidence that the existing laws had failed to prevent crime on the Internet.[255] Even more, by refusing to hold hearings to adequately inform themselves of the nature of the Internet, Congress passed a law that attempted to achieve an admittedly compelling government interest, protecting children, by means that were patently absurd.[256]

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most heavily censored"). Scholars have also questioned Congress' logic in placing the harshest restrictions on a medium of communication that is much less responsible than other mediums for the distribution of pornography. *See* Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 885 (1996) (asking why, if most indecent, pornographic material gets traded over the counter rather than across the Net or over phones, has "the greatest portion of Congress's attention . . . been focused on porn on the wires rather than porn on the streets").

251. *See* 47 U.S.C.A. § 230(a)(3) (West Supp. 1997) (proclaiming that Internet "offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity").

252. *See, e.g.*, ACLU v. Reno, 929 F. Supp. 824, 880 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997) (noting that critics have long attacked Holmes' marketplace theory of First Amendment jurisprudence as being inconsistent with economic and practical reality); TRIBE, *supra* note 54, § 12-1 (questioning whether Holmes' analogy of market is an apt one and whether a free trade in ideas is likely to generate truth, "especially when the wealthy have more access to the most potent media of communication than the poor"); Ingber, *supra* note 17, at 16-17, 38-39 (arguing that theory of marketplace of ideas has been flawed in the past because mass media, the only vehicle for disseminating views widely, was accessible only to select portion of society due to monopolistic practices, economies of scale, unequal distribution of resources, and limitations of mass communication technology).

253. *See supra* notes 4-6, 105-08 and accompanying text (discussing democratic virtues of Internet).

254. *See supra* notes 4-6, 107 and accompanying text (emphasizing decentralized and egalitarian nature of Internet).

255. *See supra* notes 128-32 and accompanying text (discussing Congress' decision to design laws specific to the Internet based largely on a *Time* magazine cover story).

256. Congress' attempt to regulate content over the Internet at its source, when the amount of content grows exponentially every day, is not only unrealistic, but is counterintuitive to the technology and framework of the Internet. *See* Cate, *supra* note 6, ¶ 97 (noting technological impossibility of monitoring or controlling voluminous content of Internet transmissions); Meeks, *supra* note 129 (arguing that because every day brings an explosion of new content on web sites, newly formed newsgroups and new postings, bulletin board topics, mailing lists, etc., such a "logarithmic proliferation of message traffic makes comprehensive screening for lewd or obscene messages practically impossible"). Further, a law that institutes a nationwide ban on all Internet indecency, aside from being so broad as to impinge on constitutionally protected speech, would

Had Congress taken the time to study the Internet before blindly censoring it, it would have realized that the objective of the constitutionally-unsound law it was drafting could be much more effectively, and much less intrusively, achieved with filtering software specifically designed to monitor the global wanderings of Net-surfing children.[257] In the wake of the Court's decision, Internet advocates,[258] legislators,[259] and the White House[260] have recognized that in lieu

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have no effect on over thirty percent of the "indecent" material on the Internet that originates from outside the United States. *See* Shea v. Reno, 930 F. Supp. 916, 941 (S.D.N.Y. 1996), *aff'd*, 117 S. Ct. 2501 (1997) ("Because the CDA only regulates content providers within the United States, while perhaps as much as thirty percent of the sexually explicit material on the Internet originates abroad, . . . the CDA will not reach a significant percentage of the sexually explicit material currently available."). If a teenager wants to download a photograph deemed indecent by Congress, he or she can just as easily obtain that photograph from Malaysia as from Montana.

257. Congress, because of its lack of knowledge or diligence, overlooked a variety of means of protecting America's children without compromising the First Amendment. Specifically, Congress overlooked the only way known using today's technology to effectively block certain types of material from reaching the eyes and ears of children: filtering software. Filtering software allows a parent to choose exactly what appears or does not appear on the computer screen, regardless of from where in the world the materials originate. *See ACLU*, 929 F. Supp. at 839-42 (detailing types of user-based software that allow parents to prevent children from accessing materials that parent find undesirable); *see also* Chong, *supra* note 105, at *14-15 (urging parents to be proactive in preventing harm to their children by signing up only with computer online services that have parental control and by using filtering software that helps block access to all Internet sites except those that parents choose to make available to their children). *But see* Eugène Volokh, *Speech and Spillover*, SLATE (July 18, 1996) http://www.slate.com/Featurel/96-07-18/Featurel.asp> (arguing that filtering software is not an alternative to banning on-line indecency because the software, while less restrictive, is also less effective than the CDA would be in shielding minors from indecent material). *See generally* Mike Godwin & Hal Abelson, *Criticism of Volokh Article* (July 30, 1996) <http://www.eff.org/pub/Publications/Mike_Godwin/HTML/960730_godwin_abelson_filter_letter.html> ("Thanks to these inexpensive and highly adaptable tools [filtering software and other technical solutions], two important social interests—the protection of children and the preservation of First Amendment rights—need no longer be viewed as opponents in a zero sum game."). One critic of the CDA takes the debate a step further, arguing that the job of protecting children from indecent material lies with neither software developers nor Congress, but with parents. *See* Silvergate, *supra* note 110, at A19 (insisting that if courts do not leave responsibility of protecting children to parents, "the government will exercise the power to act as parent to all of us, and a giant hole will have been carved in the First Amendment").

258. *See EFF Press Release*, *supra* note 233 (arguing that low low-cost technical solutions such as filtering software, when coupled with existing obscenity laws, "offer a less intrusive and more efficient answer to questions about protecting children in the online world"). The EFF press release, quoting vice president and general manager of SurfWatch Software, further notes that the courts, as well, have been convinced that "parental control software like SurfWatch is a much more effective and less restrictive solution than excessive government regulation." *Id.* Some Internet advocates, however, have warned that reliance on filtering software and the creation of a self-regulating ratings system could pose considerable threats to open and robust speech on the Internet. *See ACLU White Paper: Fahrenheit 451.2: Is Cyberspace Burning?* (visited Nov. 15, 1997) <http://www.aclu.org/issues/cyber/burning.html> (arguing that if filtering software must be included in all browsing software by legislative mandate, a system will likely develop whereby filtering software blocks all speech that is left unrated—which, because of great time and cost involved in rating Internet content, could be a significant amount of material—and where those who mis-rate material will be subject to criminal prosecution).

259. Two bills currently being considered in the House of Representatives seek to require Internet service providers to provide filtering software to all of their subscribers. *See* Family-Friendly Internet Access Act of 1997, H.R. 1180, 105th Cong. (amending Communications Act

of legal regulation of the Internet, such filtering software and industry self-regulation are the best options when considering how to protect children while safeguarding the First Amendment.

Despite the wisdom behind such a hands-off approach, however, many legislators at the federal and state levels have continued their efforts to regulate the content of speech on the Internet.[261] While their intentions for the most part have been good, their actions run the risk of destroying the greatest vehicle ever available to enter and maintain the marketplace of ideas guaranteed by the First Amendment.[262] With the specter of future regulation turning the right of free speech into the right of controlled, tempered speech, the Supreme Court must decide how easily it will allow free speech, the touchstone of democracy and the cornerstone of our country, to be muted.[263]

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of 1934 to require Internet access providers to offer all customers "screening software that is designed to permit the customer to limit access to material that is unsuitable for children"); Internet Freedom and Child Protection Act of 1997, H.R. 774, 105th Cong. (requiring Internet service providers to provide screening software to all subscribers).

260. In response to the Court's decision, President Clinton discussed the need to develop a solution for the Internet "that protects children in ways that are consistent with America's free speech values." Statement on the Supreme Court Decision on the Communications Decency Act, 33 WEEKLY COMP. PRES. DOC. 975 (June 26, 1997) (observing that while the Internet is "an incredibly powerful medium for freedom of speech and freedom of expression that should be protected, . . . there is material on the Internet that is clearly inappropriate for children. . . . [W]e must give parents and teachers the tools they need to make the Internet safe for children."). The White House's proposed solution recognizes the dangers of government regulation and instead suggests that industry self-regulation (including competing rating systems) and filtering software provide the best options. *See* CLINTON & GORE, *supra* note 7, at 25 (stating Administration's support for "industry self-regulation, adoption of competing rating systems, and development of easy-to-use technical solutions (e.g., filtering technologies and age verification systems) to assist in screening information online").

261. *See, e.g.*, Child Pornography Prevention Act of 1996, S. 1237, 104th Cong. § 3(5) (expanding definition of child pornography to include computer creation of pictures made to appear that a minor was used); S. 1762, 104th Cong. § 1088 (1996) (making distribution on Internet of information relating to explosive materials for a criminal purpose a crime punishable by up to 20 years imprisonment); Bergstein & Cohen, *supra* note 159, at S1 (observing that CDA is unlikely to be last effort to legislate Internet's content); *see also* ACLU, The Threat of State Censorship Bills (visited Nov. 15, 1997) <http://www.aclu.org/issues/cyber/censor/stbills.html> (describing online censorship legislation passed in at least 11 states in past two years).

262. *See* CLINTON & GORE, *supra* note 7, at 25 (recognizing that "unnecessary regulation could cripple the growth and diversity of the Internet"); *supra* notes 4-6 and accompanying text (praising Internet as embodiment of First Amendment ideals). Scholars have also noted the potentially disastrous effects that U.S. regulation of the Internet could have on global communications. *See* John T. Delacourt, *The International Impact of Internet Regulation*, 38 HARV. INT'L L.J. 207, 208 (1997) (examining regulation of Internet in United States, Germany, and China, and observing that political pressure prompting the creation of "draconian national regulation" could render the Internet's potential unfulfilled).

263. A *Washington Post* editorial held out hope that Congress' ill-fated attempt to regulate the Internet with the CDA might have taught at least one lesson, observing that it is "unlikely that the Net, in its complexity, will remain totally free of regulation of any kind. After this debacle, though, perhaps future rounds will take at least some account of constitutional realities." Editorial, *Yes, the Net Is Speech*, WASH. POST., June 27, 1997, at A24.

CONCLUSION

The greatest protection the Court can give to the future of the First Amendment is the application of strict scrutiny to *any* government regulation that impinges on the freedom of speech, regardless of the medium of communication over which the speech is transmitted. Such protection would be guaranteed by a new "marketplace" approach to the regulation of mass communications, whereby the focus would shift from a concentration on the medium over which the content is transmitted, to whether the content transmitted has the potential to contribute to the marketplace of ideas on *any* communications medium.

Under this marketplace analysis, there would always be the chance that some expression of speech might run counter to the greater interests of the country, but those instances should be few and far between. The proper balance would still lie in applying a standard by which only the most compelling government interests, when applied using the least restrictive means possible, will override the interest in protecting free speech.

As Judge Dalzell pointed out in *ACLU v. Reno*, the absence of governmental regulation of the Internet has unquestionably created a type of chaos, where indecent, "discordant voices" go largely unchecked.[264] What Congress failed to realize was that the strength of the Internet is this chaos, and that very similarly, "the strength of our liberty depends on the chaos and cacophony of the unfettered speech the First Amendment protects."[265] While some of the "discordant voices" might be regarded as indecent to some, they still deserve the protection of the First Amendment. Whether the Court in the future continues its use of medium-specific analysis, or whether it veers down a new, clearer road of First Amendment jurisprudence, it must recognize that the Internet is the most democratic, participatory form of mass speech ever developed, and as such, any speech flowing over it deserves a level of constitutional protection equal to that lofty American ideal.

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264. *See* ACLU v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996) ("True it is that many find some of the speech on the Internet to be offensive, and amid the din of cyberspace many hear discordant voices that they regard as indecent. The absence of governmental regulation of Internet content has unquestionably produced a kind of chaos . . . ."), *aff'd*, 117 S. Ct. 2329 (1997).

265. *Id.*