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From Little Acorns Great Oaks Grow: The Constitutionality of Protecting Minors from Harmful Internet Material in Public Libraries Comment.

Kimberly S. Keller

FROM LITTLE ACORNS GREAT OAKS GROW: THE CONSTITUTIONALITY OF PROTECTING MINORS FROM HARMFUL INTERNET MATERIAL IN PUBLIC LIBRARIES

KIMBERLY S. KELLER

> Children are like the tiny figures at the center of the nesting dolls for which Russian folk artists are famous. The children are cradled in the family . . . . But around the family are the larger settings of neighborhood, school, church, workplace, community, culture, economy, society, nation, and world . . . . Each of us, therefore, has the opportunity and responsibility to protect and nurture children. We owe it to them to do what we can to better their lives every day—as parents and through the myriad choices we make as employers, workers, consumers, volunteers, and citizens . . . . We must stop making excuses for why we can't give our children what they need at home and beyond to become healthy, well-educated, empathetic, and productive adults.[1]

I. INTRODUCTION

Consider the following situation. Cloaked in the anonymity of the Internet, James Barrows, using the log-on identity of "Captain Jake," frequents the "Girls Pre-Teen Chat Room."[2] However, unbeknownst to the young "chatters" discussing such innocent topics as favorite television shows and teen idols, Captain Jake intends to strike up conversations with young girls in order to satisfy devious intentions.[3] One day, Captain Jake sends a private message to one of the youthful chatters, "Tori."[4] After

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1. HILLARY RODHAM CLINTON, IT TAKES A VILLAGE AND OTHER LESSONS CHILDREN TEACH US 317 (1996).

2. *See* People v. Barrows, 677 N.Y.S.2d 672, 674 (N.Y. Sup. Ct. 1998) (examining Barrows' conviction for first-degree attempt to disseminate indecent material to minors via a computer). This hypothetical situation is derived from the *Barrows* case.

3. *See id.* Operating a computer from his Connecticut home, Barrows entered the chat room with the intention of contacting underaged girls. *See id.*

4. *See id.* at 675. The initial conversation went as follows:

> Captain Jake: Hi from CT, MWM 39, you?
> Tori83: Xcool, I'm much younger, but I don't care.
> . . . .
> Captain Jake: What do you like to do, or are you a virgin?
> . . . .
> Tori83: Do you like younger girls?

some seemingly innocent conversation, Captain Jake asks Tori to follow him from the safe harbor of the monitored, pre-teen chat room to his personal X-rated chat room.[5] Tori, who receives free, unrestricted Internet access in her local public library,[6] agrees to follow him.[7] During a series of meetings, Captain Jake converses with Tori about older men having sex with pre-teen girls and teaches her how to download pornographic images from the Internet.[8] Eventually, Captain Jake convinces Tori to meet him in person in a local park.[9] To this meeting, Captain Jake carries with him a knife; in his trunk, he has brought along rope, pornographic magazines, and a variety of sexual paraphernalia.[10]

. . . .

Tori83: I'm going to be 14 in November.

Captain Jake: There are a number of cops online that want to arrest people who like younger girls. I have to go. I would love to get an e-mail from you and we can make plans. Okay?

Id. at 675.

5. *See id.* at 676.

6. In the actual case, Tori83 did not gain access through a public library, but rather through a private server. *See id.* at 674.

7. *See id.* at 676.

8. *See id.* at 676-77. The second meeting occurred when Captain Jake contacted Tori83 in the pre-teen chat room, and after luring Tori83 into an X-rated chat room, Captain Jake continued the conversation for "several pages, includ[ing] very graphic descriptions of various sex acts." *Id.* at 676. After a number of meetings in the X-rated chat room, Captain Jake convinced Tori83 to call him at home. *See id.* During this conversation, Captain Jake discussed his prior sexual acts with his thirteen year old stepsister, and after admitting to her that he could go to jail for the act, Captain Jake told Tori83 that he wanted to have sex with her. *See id.* In another telephone conversation, Captain Jake masturbated and "gave Tori explicit instructions to do the same." *Id.*

9. *See id.* at 677-78.

10. Unfortunately for Captain Jake, Tori83 was actually a Brooklyn police investigator posing as a pre-teen girl. *See id.* at 674. Deputy Inspector Robert Hayes, the Commanding Officer of the Kings County District Attorney's Office in Brooklyn, New York, initiated the "sting" operation. *See id.* Hoping to employ the Internet as a law enforcement tool, Inspector Hayes began investigating "the use of the Internet by pedophiles as a means to gain access to child pornography and to vulnerable children themselves for the purpose of engaging them in pornographic communication and actual sexual activities." *Id.* Logging onto the Internet as "Tori83," Inspector Hayes visited the chat rooms he believed to be frequented by pedophiles, such as America Online's Pre-Teen Room. *See id.*

The sting operation came to a head when Inspector Hayes stationed a youthful officer at the suggested "meeting place." *See id.* at 678. Once spotted in the park, Captain Jake was arrested, upon which he explained, "I never touched her. I didn't do anything. I never touched her." *Id.* On his person, police found a knife, and in the trunk of his car, police found numerous pornographic magazines, nylon rope, paper towels, Q-tips, and a sexual lubricant called "Wet." *See id.*

Disturbing cases like Tori's represent some of the most egregious dangers presented by the Internet's unique capabilities.[11] However, despite these dangers, the Internet remains an unprecedented source of beneficial communication opportunities that can outweigh the hazards posed by its exploitation. But, throwing the public library into the mix only heightens the Internet's conflicting and dual nature; in fact, despite the shared goal of providing a wealth of knowledge at little or no cost, the local public library and the Internet work together about as well as oil and water.

Throughout the years, librarians have struggled with monitoring minors' access to the accumulating number of controversial texts in the library.[12] Yet, even with this experience, librarians never could have imagined the headaches brought on by the Internet's endless rows of cyber-shelves.[13] The Internet's unique infrastructure affords librarians

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11. *Cf.* Chris Carroll, *5 School Districts Will Get Grants for Computer 'Filters': Money Will Be Used to Buy Software to Limit Students' Access to Pornography or Violence on the Internet*, ST. LOUIS POST-DISPATCH, Nov. 23, 1998, at 8 (reporting that while the Internet can be a valuable learning tool, schools must be wary of "messages that could be harmful to children . . . [as well as the] danger that pedophiles might be trying to contact children"), *available in* 1998 WL 3363507; Tammy Webber, *Child Porn Burgeoning on Internet: Experts Say Biggest Danger Is Children Acting out Images*, PEORIA J. STAR, Nov. 20, 1998, at B3 (quoting two professors who contend that the Internet poses a great danger to children), *available in* 1998 WL 5785449.

12. *See* Brian E. Albrecht, *Libraries Have a PG Rating: Task of Guiding Kids on Reading Choices Is Left to Parents*, PLAIN DEALER (Cleveland), Jan. 26, 1997, at 1A (discussing action taken by a local library, such as dividing sections of objectionable textual material and setting age limits for library cards, to prevent complaints from the community), *available in* 1997 WL 6576191; Charles Harmon & Ann K. Symons, *But We're Family Friendly Already: How to Respond to the Challenge*, AM. LIBR., Aug. 1, 1996, at 60 (suggesting preventative steps libraries take to protect children, such as creating video lists according to content and age-worthiness of material), *available in* 1996 WL 9701337; Jerry Hicks, *Our Librarians Shouldn't Do Parenting by the Book*, L.A. TIMES, June 17, 1997, at B1 (reporting that local librarians decide if a minor is allowed to check out certain controversial books on a case-by-case basis), *available in* 1997 WL 2221038; James Kopniske, *Baby-Sitting Not Part of Librarians Job*, PLAIN DEALER (Cleveland), Apr. 21, 1997, at 3E (asserting that most libraries are partitioned according to the ages of readers), *available in* 1997 WL 6590450.

13. *See* Eric L. Wee, *Library Chief Seeks Full Web Access: Proposal Calls for Filters on Computers for Children*, WASH. POST, July 5, 1997, at V1 (noting that the good will of libraries attempting to offer Internet access to patrons has led to a "Pandora's box" of problems), *available in* 1997 WL 11972344. Approximately twenty-eight percent of our nation's public libraries offered Internet access to patrons in 1996. *See id.* According to a National Commission on Libraries and Information Science survey, over fifty percent of libraries would have Internet access available by the end of 1997. *See id.* Testifying before the Senate Committee on the Judiciary on the Child Pornography Prevention Act, Judith F. Krug, Director of Intellectual Freedom of the ALA, also spoke about the increasing ability of public libraries to offer Internet access to their patrons. *See Child Pornography*

virtually no opportunity for the pre-shelf review available with books and videos.[14] Nonetheless, that idiosyncrasy has not outweighed the Internet's seductive lure, and public libraries are rightfully tempted by this new medium of communication "as diverse as human thought."[15] Unfortunately, the Internet comes in a "take it, or leave it" package—along with the potential for unlimited educational, cultural, and political debate comes the gateway for child pornography, obscenity, and indecency.[16] The latter becomes especially precarious when minors receive unrestricted access to the Internet.[17]

Prevention Act: Hearings on S. 1237 Before the Senate Comm. on the Judiciary, 104th Cong. (1996) (statement of Judith F. Krug, Director, Office for Intellectual Freedom, American Library Association). Krug stated that offering full access to the Internet follows along the historical goal of libraries to provide information to the public. *See id.*

14. *Cf.* Sherry Jacobson, *Plano Library Board to Weigh Access to Internet by Children*, DALLAS MORNING NEWS, Oct. 23, 1998, at 1K (relaying the Plano library policy, which provides that "the library does not have any control over the information that can be accessed by users of the Internet"), *available in* 1998 WL 13111976.

15. Reno v. ACLU, 117 S. Ct. 2329, 2344 (1997).

16. *See* Eric Handelman, Comment, *Obscenity and the Internet: Does the Current Obscenity Standard Provide Individuals with the Proper Constitutional Safeguards?*, 59 ALB. L. REV. 709, 709-10 (1995) (describing various unprecedented forms of communication available with the Internet); *see also* Laura J. McKay, *The Communications Decency Act: Protecting Children from On-Line Indecency*, 20 SETON HALL LEGIS. J. 463, 467 (1996) (emphasizing that the Internet, offering many different services, is referred to as the "world's largest computer network"); *cf. Reno*, 117 S. Ct. at 2334 (stating that the Internet is a "unique and wholly new medium of worldwide human communication" due to the continuous growth of its size and quantity of both sources and material).

17. The anonymity and unpredictability of the Internet makes children the most vulnerable users. Parents contend that sexual predators can search out young users in the guise of another youth. *Cf.* People v. Barrows, 664 N.Y.S.2d 410, 410-11 (N.Y. Sup. Ct. 1997) (describing the defendant's acts of "cyber child molesting" with the aid of the unrestricted Internet). Finding pornography on the Internet is not always the result of an intentional search. *See* Janet M. LaRue, *The Communications Decency Act of 1996: Sensible, Not Censorship*, 11 ST. JOHN'S J. LEGAL COMMENT. 721, 726 (1996) (addressing many common misconceptions about obscenity and indecency on the Internet). On the contrary, after entering certain chat rooms, the user's e-mail address is sometimes added to a list which automatically receives sexually explicit images. *See id.; see also* Ellen Goodman, *Libraries Have Curious Case with the 'Net*, HOUS. CHRON., July 27, 1997 at 6 (reporting that the key word "Bambi" results in numerous XXX-rated images and that the key word "breast" links to sites ranging from gourmet recipes to pornographic photos), *available in* 1997 WL 6570134; Don Walker, *Parents Get Task of Policing Internet: Court Ruling, Lauded for Freedom's Sake, Leaves Kids Access to Pornography*, MILWAUKEE J. SENTINEL, June 29, 1997, at 1 (stating that the search from the key word "toy" turns up two million sites, with the second retrieved web site entitled "AAA Nice-N-Naughty Toy Store"), *available in* 1997 WL 4806676. In addition to exposing children to sexually explicit material, the Internet has also become a new recruiting mechanism for hate groups. *See* Michael A. Fletcher, *Hate Screens on the Web Raise Alarm: ADL Developing Way to Filter out Sites*, WASH. POST, Oct. 22, 1997, at A16 (describing various hate web sites recently

Appreciating the Internet's double-edged sword, Congress enacted the Communications Decency Act (CDA) in 1996.[18] Through the CDA, Congress attempted to protect minors from the underbelly of the Internet by focusing on the sender's end of Internet transmissions, prohibiting any citizen from displaying or transmitting indecent images on the Internet.[19] However, the Supreme Court of the United States, in *Reno v. ACLU*,[20] disagreed with the "sender's end" method of regulation enacted by Congress.[21] Although it recognized the harm posed to minors by indecency on the Internet, the Court struck down the CDA, concluding that preventing all "indecent" speech from ever being placed onto the Internet reduced the entire content of the Internet to a level "fit for a child."[22] According to the *Reno* Court, Congress' attempt to balance the speech rights of adults and the protection of minors went too far and infringed upon the First Amendment guarantees contained in the United States Constitution.[23]

On the heels of its last failure, Congress has again enacted a blanket sender's end Internet regulation, the CDA II, which penalizes the know-

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bombarding Internet users and citing reports by Anti-Defamation League regarding the Internet's use to spread the messages of racist groups), *available in* 1997 WL 14708564. Among the current 250 hate sites, the Ku Klux Klan web site provides an acrimonious game of "Hang Man," whereby the user who guesses incorrectly at the word watches the hanging of an African-American figure named Leroy. *See id.*

Moreover, although there is scarce case law concerning Internet regulation of indecent or harmful material, courts have consistently enforced obscenity statutes, even if the violation occurred through Internet use. *See* United States v. Thomas, 74 F.3d 701, 716 (6th Cir. 1996) (affirming the appellant's conviction for violations of an obscenity statute). In *Thomas*, the defendant was operating a bulletin-board business on the Internet entitled "AABBS, The Nastiest Place On Earth," which provided obscene and sexually explicit images via the Internet to any user with a password. *See id.* at 705. The charges were not brought under the CDA, but rather under 18 U.S.C. § 1465, which prohibits the knowing transportation of obscene, lewd, lascivious, or filthy material. *See id.* at 705-06 (stating that the defendants were charged with "knowingly using and causing to be used . . . [a computer and telephone transmission] for the purpose of transporting obscene, computer-generated materials . . . in interstate commerce").

18. *See* 47 U.S.C. § 223 (Supp. II 1996) (criminalizing the knowing transmission of obscene or indecent material to minors over the Internet); *see also* Reno v. ACLU, 117 S. Ct. 2329, 2350-51 (1997) (discussing Congress' enactment of the CDA).

19. *See* 47 U.S.C. § 223 (listing the transmission of indecent material via the Internet as a crime).

20. 117 S. Ct. 2329 (1997).

21. *See Reno*, 117 S. Ct. at 2346, 2348 (stating that although "[i]t is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials . . . we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all").

22. *Id.* at 2347.

23. *See id.* at 2350 (holding that the CDA was not narrowly tailored, and therefore, was unconstitutional).

ing communication of "harmful" materials to minors.[24] Dubbed the "spawn of CDA,"[25] the CDA II looks strikingly similar to the statute invalidated by the Supreme Court in *Reno*.[26] Because of these similarities, the lasting effect and constitutionality of the CDA II are questionable.

Regrettably, the public library sits in the center of this confusion. Flanked by civil libertarians stressing First Amendment rights and concerned citizens demanding the protection of children,[27] the public library grapples with two unacceptable choices: (1) providing complete Internet access to patrons of all ages; or (2) not providing Internet access at all. While the visceral reaction of the American Library Association is to maintain Internet connection, thorns and all,[28] public libraries continuing to offer unrestricted access to all patrons give "every child a free pass into

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24. *See* Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (to be codified at 47 U.S.C. § 231) (regulating the transmission of Internet communications). The Act provides that:

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

Id.

25. *New Internet Censorship Bills Slither Through Senate*, (visited Jan. 7, 1999) <http://www.aclu.org/news/n0312986.html>.

26. *Compare* Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (to be codified at 47 U.S.C. § 231) (prohibiting the communication of "harmful" Internet material for *commercial purposes*), *with* 47 U.S.C. § 223 (Supp. II 1996) (criminalizing the transmission of "indecent" or "patently offensive" material over the Internet). Although the text of the CDA II reads differently, few changes were made as to the scope of its coverage. *See Meddling with the Internet: The New "CDA2" Censorship Act*, ONLINE NEWSLETTER, Nov. 1, 1998 (quoting Ann Beeson, staff attorney for the ACLU, as stating, "It's déjà vu all over again" concerning the enactment of the CDAII), *available in* 1998 WL 2088398.

27. *Compare* Ann Beeson & Chris Hansen, *Fahrenheit 451.2: Is Cyberspace Burning? How Rating and Blocking Proposals May Torch Free Speech on the Internet* (visited Nov. 14, 1997) <http://www.aclu.org./issues/cyber/burning.html> (arguing that the use of filtering software infringes upon First Amendment guarantees), *with* Pamela Mendels, *Family Sues Library for Not Restricting Children's Internet Access* (visited June 16, 1998) <http://www.nytimes.com/library/tech/98/06/cyber/articles/14library.html> (discussing a lawsuit filed by a California mother against her local public library because her son accessed "harmful material" via the library's Internet-accessible computer).

28. *See* Robyn E. Blumner, *Librarian As Book Burner*, ST. PETERSBURG TIMES, May 25, 1997, at 1D (commenting on the fight against censorship in public libraries), *available in* 1997 WL 6199604. In January 1996, the ALA began developing policy provisions concerning electronic information services. *See id.* In this policy, the ALA manifests its viewpoint that public libraries should offer full Internet access to patrons of all ages because "[l]ibraries and librarians should not deny or limit access to information available via electronic resources because of its allegedly controversial content or because of the librarian's personal beliefs or fear of confrontation." *Id.*

the equivalent of every adult bookstore and every adult video store in the country."[29] Notably, one California mother has even sued her local public library for providing unrestricted Internet access to minors after her son came home with a disk containing sexually graphic images.[30]

Some public libraries have turned to one possible solution—filtering software.[31] Filtering software allows libraries to provide complete In-

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29. Dwight Silverman & Jamie Karl, *Heated Exchange: High Court Tackles Indecency on the Internet*, HOUS. CHRON., Mar. 20, 1997, at A1 (quoting Seth Waxman, Assistant Solicitor General, who discussed the ramifications of providing minors with unrestricted Internet access), *available in* 1997 WL 6546370. It is uncontroverted that sexually explicit images and text are easily accessible to Internet users of any age. *See Reno*, 117 S. Ct. at 2336 (outlining the inherent difficulties in attempting to limit or screen obscene materials from children who access the Internet). The electronic bulletin-board system (BBS) permits users to post pictures or graphics onto the Internet, which can then be viewed by other Internet users. *See* Eric Handelman, *Obscenity and the Internet: Does the Current Obscenity Standard Provide Individuals with the Proper Constitutional Safeguards?*, 59 ALB. L. REV. 709, 709 (1995). Taking advantage of this new technology, users scan the photo into digital form; the image is then transmitted from sender to receiver in photo-realistic quality. *See id.* at 710 (explaining the steps required for an Internet user to access a photographic image). Following transmission, the graphic can be printed or downloaded to disk. *See id.* This system provides easy access for users, regardless of age, to sexually explicit and otherwise indecent material. *See id.* at 715 (stating that because of the Internet's virtual nature, anyone may access Internet information). As a result of this technology, any child with an Internet-accessible computer can acquire sexually explicit images with a few clicks of the mouse.

30. *See* Pamela Mendels, *Family Sues Library for Not Restricting Children's Internet Access* (visited June 16, 1998) <http://www.nytimes.com/library/tech/98/06/cyber/articles/14library.html> (describing a suit filed on May 28, 1998 that involved access provided to minors at a local public library). Because the library did not limit the Internet access of her twelve-year-old son and other minors, "Kathleen R." brought suit against the library on behalf of her son, "Brandon P." *See id.* The suit asks for injunctive relief and that no public funds be allocated to the library until minors' Internet access is restricted. *See id.* (indicating that the relief sought includes a request that city officials be barred from spending public money on the public library's computers until minors' Internet access is limited). After downloading the sexually graphic images onto a disk in the library, Brandon P. printed the images at a relative's house and showed the images to friends. *See id.* The images ranged from partially nude to completely nude women engaging in sexual encounters. *See id.* Arguing that the library is providing information "harmful to minors," Kathleen R.'s petition alleges two theories: waste of public funds and nuisance. *See id.*

31. *See* Brian E. Albrecht, *Library Tightens Internet Policy*, PLAIN DEALER (Cleveland), May 15, 1997, at 4B (announcing that public libraries in Ohio will install filtering software on all computers), *available in* 1997 WL 6594257; Robyn E. Blumner, *Librarian As Book Burner*, ST. PETERSBURG TIMES, May 25, 1997, at 1D (stating that Clearwater and Orlando public libraries employ browsers to prevent exposing minors to indecent material while the San Antonio library system currently offers unfettered Internet access to patrons), *available in* 1997 WL 6199604; Carlos Byars, *Libraries to Restrict Internet Access: Terminals for Kids to Filter Adult Sites*, HOUS. CHRON., July 4, 1997, at A37 (mentioning that the Harris County public library system blocks access to adult web sites while the Houston public library system allows free and full Internet access to users), *available in*

ternet access to adults, yet at the same time deny minors access to harmful material.[32] Despite the seemingly great advantages of this technology, the use of filtering software has prompted an eruption of controversy.[33] For instance, in Virginia, patrons have sued their local public library because the filtering software prevented adults from accessing material deemed harmful to minors.[34] In *Mainstream Loudoun v. Board of Trust-*

1997 WL 6566504; Paul Freeman, *The Business of Blocking Objectionable Web Sites*, PUGET SOUND BUS. J., July 18, 1997, at 6A (asserting that California and Oklahoma public library systems have contracted with browser services to restrict Internet access of patrons), *available in* 1997 WL 11543481; Ellen Goodman, *Libraries Have Curious Case with the 'Net*, HOUS. CHRON., July 27, 1997 (commenting on the Boston solution, which divides computer terminals into adult and children's sections and then places filters on the children's computers), *available in* 1997 WL 6570134; Amy Beth Graves, *Libraries Aim to Simplify Net: Columbus Firm Provides Easy Software Guide*, PLAIN DEALER (Cleveland), June 1, 1997, at 6B (discussing the Library Channel, which provides Internet monitoring services specifically aimed at needs of public libraries, and that public library systems of Ohio, California, and Massachusetts are currently considering use of the channel), *available in* 1997 WL 6597867; Sylvia Moreno, *Library Censors Internet*, DALLAS MORNING NEWS, Mar. 9, 1997, at 46A (asserting that despite pressures by the ACLU, Austin public library officials believe filtering equipment is the answer to the current Internet problem), *available in* 1997 WL 2652692. *But see* Heidy Hartley, *Checking out Hustler at the Library*, CHI. TRIB., May 18, 1997, at 22 (declaring that Chicago public library systems will not restrict access to the Internet), available in 1997 WL 3549936; Karen Kucher, *Children Will Need Written Permission to Check out Internet at County Libraries*, SAN DIEGO UNION-TRIB., June 4, 1997, at B2 (remarking that the San Diego public library system will not use filtering services on Internet terminals, but rather will require parental permission for minors to access the Internet), *available in* 1997 WL 3137182; Dan Parks, *Library May Limit Its Internet Access: Officials Describe Issue of Sexually Explicit Material As a Complex Dilemma*, MILWAUKEE J. SENTINEL, Aug. 7, 1997, at 1 (voicing the Milwaukee public library system's debate between filtering software and parental consent forms for Internet access), *available in* 1997 WL 12726731.

32. *See* Thomas E. Weber, *The Naked Truth: There Are Ways to Keep Your Kids Away from On-line Porn but None Are Foolproof*, WALL ST. J., June 16, 1997, at R12 (discussing ways to block minors' access to sexually explicit material); *see also* Karen J. Bannan, *Cybersitter 97 Makes the World (Wide Web) a Safer Place for Children*, COMPUTER SHOPPER, Nov. 1, 1997, at 560 (reviewing different methods of Internet monitors); Monica Campbell, *SurfWatch Expands Filtering*, MACWEEK, July 7, 1997, at 26 (providing alternative techniques used by filtering programs to block harmful material), *available in* 1997 WL 11793385.

33. *See* Robyn E. Blumner, *Librarian As Book Burner*, ST. PETERSBURG TIMES, May 25, 1997, at 1D (relating tension between public libraries offering free Internet access and expressive freedom of patrons), *available in* 1997 WL 6199604; *Some Libraries Filter Internet Content: Practice Fuels Debate Regarding Censorship, First Amendment*, DALLAS MORNING NEWS, Mar. 1, 1997, at 34A (discussing the problems faced by libraries that offer free Internet access to the public), *available in* 1997 WL 2650501.

34. *See* Mainstream Loudoun v. Board of Trustees, 24 F. Supp. 2d 552, 556 (E.D. Va. 1998) (permanently enjoining a Virginia public library from enforcing its Internet filtering policy because the policy violated adult patrons' First Amendment right to receive information). The library established a "Policy on Internet Sexual Harassment" including a

ees,[35] a federal district court granted a permanent injunction enjoining the public library from enforcing its Internet filtering policy because of First Amendment violations.[36] Moreover, the ACLU has obtained a temporary injunction preventing New Mexico public libraries from using filtering software;[37] the ACLU has also threatened further suits in Texas and Florida if filters are not removed from public library computers.[38] In essence, these civil libertarians contend that filtering software constitutes an overbroad speech restriction because they occasionally permit access to harmful sites and occasionally deny access to non-harmful sites.[39]

In 1998, Congress, under Senator John McCain's leadership, considered two bills targeting the current flurry of debate surrounding the use of filtering software on Internet-accessible library computers.[40] The leg-

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provision that "all library computers would be equipped with site-blocking software to block all sites displaying (a) child pornography and obscene material; and (b) material deemed harmful to juveniles." *Id.* Arguing that this policy infringed on their right to receive material deemed harmful to minors, adult patrons brought suit. *See id.* In addition, the patrons argued that the policy, if enforced, constituted a prior restraint on speech, violating the First Amendment. *See id.* In granting the permanent injunction, the court focused upon the policy's effect on adult patrons, emphasizing that if the policy concerned only minors' right to receive the harmful material, the policy would likely withstand a constitutional challenge. *See id.* at 567-68.

35. 24 F. Supp. 2d 552 (E.D. Va. 1998).

36. *See Mainstream Loudoun*, 24 F. Supp. 2d at 570 (holding that a library filtering policy that prevented adult patrons from receiving material deemed harmful to minors violated the First Amendment). Unlike the legislation to be proposed by this Comment, the filtering policy in *Mainstream Loudoun* prevented both minors and adults from receiving harmful Internet material, and as such, the policy fell prey to all of the challenges brought against blanket Internet regulation such as the CDA. *See id.* at 567.

37. *See New Mexico: 'Net Censor Law on Hold,'* NAT'L L.J., July 6, 1998, at A8 (discussing U.S. District Court Judge LeRoy Hansen's grant of a preliminary injunction order barring New Mexico's Internet censorship law from taking effect).

38. *See Internet to Filter out Porn*, FLA. TIMES-UNION (Jacksonville), Dec. 2, 1997, at A1 (stating that the ACLU filed a public-records request seeking documents concerning the Jacksonville public library's decision to install filtering equipment on all Internet-accessible computers), *available in* 1997 WL 14334896; Sharon Jayson, *Libraries Debate Internet Policing*, AUSTIN-AM. STATESMAN, Oct. 2, 1997, at B7 (reporting that the national ACLU is "keeping a close eye" on the Austin Public Library, which has used a filtering program for seven months), *available in* 1997 WL 2841180. Opposing the use of filtering programs, the ACLU argues that no existing filter can constitutionally restrict minors' Internet access. *See ACLU Cautions Against Internet Censorship* (visited Dec. 7, 1997) <http://www.aclu.org/news/n120297b.html> (opining that the restriction of one type of communication necessarily limits other types of communication).

39. *See* Ann Beeson & Chris Hansen, *Fahrenheit 451.2: Is Cyberspace Burning? How Rating and Blocking Proposals May Torch Free Speech on the Internet* (visited Nov. 14, 1997) <http://www.aclu.org./issues/cyber/burning.html> (providing the ACLU's opinion that the use of filtering software by state actors violates the First Amendment right to freedom of speech because filters are overbroad and permit censorship).

40. *See* S. 1619, 105th Cong. (1997); S. 1482, 105th Cong. (1997).

islation, called "The Internet School Filtering Act," not only attempted to address the problems faced by public libraries, but also sought to balance the speech rights of adults with the goal of protecting minors.[41] However, despite its admirable goals, this legislation was overshadowed by the CDA II and did not become law during the 105th legislative session.[42] Yet, even if the proposed Internet School Filtering Act had become law, it would not have provided a full solution to the ensuing problem because it failed to ensure that the use of filtering software did not run afoul of the First Amendment.[43]

This Comment uses Senator John McCain's bill as a foundation for proposing a refined statutory method of "cyber-zoning"[44] minors' Internet access in public libraries that will pass constitutional muster. The proposed statute seeks to accomplish its goals through the use of filtering software. Part II begins by examining the inner workings of the Internet and how filtering software is able to efficiently "kiddie-proof" the In-

41. *See* S. 1619 (requiring public libraries to install filtering software on Internet-accessible computers available to minors in order to continue receiving governmental funding); S. 1482 (regulating the Internet access provided by public libraries to their patrons). In addition to the federal bills, several other states have proposed bills regulating how libraries should provide Internet access. *See, e.g.*, H.R. 2455, 43d Leg., 2d Reg. Sess. (Ariz. 1998); S. 115, 110th Leg., 2d Reg. Sess. (Ind. 1998); S. 670, 77th Leg., Reg. Sess. (Kan. 1998); S. 670, 77th Leg., Reg. Sess. (Mo. 1998); H.R. 3129, 46th Leg., 2d Sess. (Okla. 1998); S. 691, 181st Leg., Reg. Sess. (Pa. 1998); S. 177, 73d Leg., Reg. Sess. (S.D. 1998); H.R. 3353, 100th Leg. (Tenn. 1998).

42. *See* Search of WESTLAW, US-BILLTRK Database (Jan. 6, 1999).

43. *See* Ann Beeson & Chris Hansen, *Fahrenheit 451.2: Is Cyberspace Burning? How Rating and Blocking Proposals May Torch Free Speech on the Internet* (visited Nov. 14, 1997) <http://www.aclu.org./issues/cyber/burning.html> (claiming that any use of filtering equipment by state agencies will violate the First Amendment).

44. "Cyber-zoning" is an extension of Justice O'Connor's suggestion from her concurring opinion in *Reno v. ACLU* to create adult zones. *See* Reno v. ACLU, 117 S. Ct. 2329, 2351 (1997) (O'Connor, J., concurring in part, dissenting in part) (providing alternatives to sweeping legislation that regulates the Internet). Justice O'Connor discussed the historical ways that society has reconciled the First Amendment right of adults to receive indecent material with protection of children from the same material. *See id.* at 2352 (O'Connor, J., concurring in part, dissenting in part). By creating "adult zones," the government has been able to constitutionally restrict children's access to "harmful material." *See id.* (O'Connor, J., concurring in part, dissenting in part). Instead of banning indecent speech, "adult zones" allow the government to provide adults with protected indecent speech and simultaneously prevent children from being exposed to such speech. *See id.* at 2352-53 (O'Connor, J., concurring in part, dissenting in part). The problem faced by public libraries can be solved by the wisdom of Justice O'Connor. For public libraries to constitutionally restrain minors from accessing indecent material on the Internet, restrictive policies must stay within the guideposts set up by Justice O'Connor: (1) preventing children from obtaining speech that they are not allowed to receive, while (2) providing that same, protected speech to adults. *See id.* at 2353 (O'Connor, J., concurring in part, dissenting in part) (commenting on "zoning").

ternet. Part III reviews the meandering path of First Amendment case law, specifically focusing upon a minor's right to receive information. Part IV then evaluates previous attempts at Internet regulation and critically analyzes the recent holding of *Reno v. ACLU*, which struck down Congress' attempt to regulate the sender's end of Internet transmissions. Finally, Part V proposes a solution to the current Internet quagmire that troubles public libraries. The solution proposed would also survive the Supreme Court's strict scrutiny analysis and strike a constitutional balance between the speech rights of adults and the protection of minors.

II. INTERNET FILTERING SOFTWARE: RESTRICTING MINORS' ACCESS WHILE MAINTAINING THE INTERNET'S OVERALL CONTENT

A. *Infrastructure of the Internet*

The Internet originated as a governmental defense program and has far exceeded its initial purpose, growing into a vast communication resource.[45] Because the Internet derives its information through the merging of prior networks, no one person, business, or entity can control either its access or content.[46] However, once an individual gains access to the Internet, usage can be divided into two broad categories: (1) interactive real-time communication with other users, and (2) location and retrieval of material from the World Wide Web.[47]

Within the first category, users can enter "chat rooms" and communicate with other "chatters" in real-time dialogue.[48] Without divulging their ages or identities, these "chatters" carry on conversations despite

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45. *See* ACLU v. Reno, 929 F. Supp. 824, 833 (E.D. Pa. 1996) (discussing the Internet's metamorphoses), *aff'd*, 117 S. Ct. 2329 (1997).

46. *See Reno*, 117 S. Ct. at 2336.

47. *See ACLU*, 929 F. Supp. at 834 (supplying findings of fact as to the nature of the Internet that the Supreme Court emphasized in its final ruling of *Reno*).

48. *See id.* Technologically, a person can communicate in several ways with other Internet users. E-mail, mail-exploders, newsgroups, and chat rooms are some of the most popular methods employed to gain interactive communication with others via the Internet. *See id.* The ability to send or receive E-mail permits a user to communicate with individualized messages from one Internet user to another. *See id.* Regardless of age, any Internet user can send or receive E-mail messages and join mailing lists that spontaneously send out information on certain subjects. *See id.* Furthermore, those directing the mailing lists have no directory identifying the receiver's age. *See id.* at 845-46 (providing problems with identifying or verifying the ages of Internet users).

In addition to E-mail and mailing lists, the Internet also encompasses newsgroups, which are discussion groups allowing daily entries of articles, comments, and messages to be entered and read by newsgroup users. *See id.* at 834. A user who transmits an article to the newsgroup often has no way of knowing who will retrieve it, and a user seeking out a newsgroup on a particular subject has no way of knowing what quality of information will be accessed. *See id.* at 845.

the fact that they are located thousands of miles apart.[49] Specifically, once one "chatter" types in a message to be conveyed and presses the "Enter" key, the message is displayed upon the screens of the other "chatters" in a particular chat room.[50] The messages sent are spontaneous, and "chatters" in the room cannot predict or control the next response transmitted.[51]

In addition to providing this interactive communication, the Internet also serves as a virtually limitless source of information.[52] Via the click of a mouse, a middle school student in San Antonio, Texas, can visit the Guggenheim Museum in New York City and retrieve educational information. On the other hand, without warning, a user who is "surfing" the Internet can jump inadvertently from a web site on the history of motion

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Perhaps the most popular form of interactive communication on the Internet is the use of chat rooms. Whether provided by the commercial on-line service providers or the World Wide Web itself, chat rooms allow a user to enter a "room" full of other Internet users and converse. *See id.* at 835-36. The only identifier of each "chatter" is the user name displayed next to the message sent. *See id.* at 835. In most cases, the user name has little to do with the actual identity or age of the "chatter," but rather involves some trendy, unique word play. *See id.* at 834-35. Consequently, "chatters" have no idea of the age of other "chatters" unless one of them chooses to reveal his or her age through a message. *See id.* at 835. As a result, the content of chat rooms is not moderated, and adults feel free to discuss material inappropriate for younger users to view. *See id.*

49. *See id.* at 835.

50. *See id.*

51. *See* Shea v. Reno, 930 F. Supp. 916, 928 (S.D.N.Y. 1996) (emphasizing quick responses to messages sent while in a chat room and the inability to predict the response), *aff'd*, 117 S. Ct. 2501 (1997). For a more detailed analysis of chat rooms and the manner in which they transmit information, see PAUL WHITEHEAD & RUTH MARAN, INTERNET AND WORLD WIDE WEB SIMPLIFIED 106-18 (2d ed. 1997), which also dissects the inner workings of the Internet using lay person's terminology.

52. *See Shea*, 930 F. Supp. at 927-28 (discussing the two typical uses of the Internet). The most popular method of retrieving information through the Internet is by "surfing the World Wide Web." *Id.* at 929. Files and material retrieved by this method are provided not by a central content supplier, but by individual computers linked to the Internet. *See id.* Users explore different Internet areas while "web browsers" display documents and images that are formatted in hypertext markup language (HTML). *See id.* (defining a "web browser" as client software, such as Netscape Navigator, Mosaic, or Internet Explorer). A user can contact a specific web page by one of two ways: (1) by entering the web site's address, known as the Uniform Resource Locator (URL), or (2) by selecting "links," highlighted areas within web sites that automatically transport users from the current web page to another connected to the "link." *See id.* Again, regardless of his or her age, a user can access any web page, and content providers can determine neither the identity nor age of the user accessing their material. *See id.* (stating that the Internet presents extremely low entry barriers to those who wish to convey Internet content or gain access to it).

pictures to another containing sexually explicit images.[53] With approximately 1.5 million new web pages added daily to the Internet,[54] including a number containing sexually explicit material, the Internet's content is ever-changing.[55]

B. *Filtering Software*

Although the Internet has provided individuals with unlimited, innovative freedom, such freedom has made it vulnerable to all types of speech, including not only political, educational, and interactive debate, but also obscenity, pornography, and indecency.[56] To resolve this dichotomy, the computer industry created filtering software, which permits a user to regulate the reception of Internet transmissions.[57] Generally, filtering

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53. *See* Dawn C. Chmielewski, *Parents Can Take Steps to Monitor Kids Online*, HOUS. CHRON., Aug. 14, 1997, at 4 (reporting that, when the web site concerning "frequently-asked questions about the film industry" was accessed, links to obscene web sites were contained within), *available in* 1997 WL 13056450.

54. *See* Rick Broadhead, *Speeding the Search*, COMPUTER DEALER NEWS, Nov. 9, 1998, at 41 (reporting that everyday, an estimated 1.5 million web pages are added to the Internet), *available in* 1998 WL 13889123; Martyn Williams, *Study Estimates Web Grows by 1.5m Pages Daily*, NEWSBYTES, Aug. 31, 1998 (discussing a survey that indicated that an average of 1.5 million web pages are added each day to the World Wide Web), *available in* 1998 WL 11726036.

55. *See* Eric Blom, *Can We Protect Kids from Internet's Dark Side? The Unprecedented Access to Information Is an Educational Boon, but Smut and Hate Talk Also Abound*, PORTLAND PRESS HERALD, Oct. 26, 1997, at 1C (reporting that the Internet is a $100 million business with thirty-nine new sex sites entering the World Wide Web daily), *available in* 1997 WL 12534791; *see also* Roberta Furger, *Internet Filters: The Smut Stops Here—Or Does It? Screening Five Top Web Filters,* PC WORLD, Oct. 1, 1997, at 78 (contending that with the number of new sexually explicit sites added daily, it is a battle to keep filtering software updated), *available in* 1997 WL 10079455; Edward Martin, *Fallen off the Deep End: Internet Addicts Neglect Work, Family to Go Surfing*, BUS. J. (Charlotte), June 15, 1998, at 27 (noting that the "daily addition of Web addresses for pornography or other nonbusiness uses makes constant upgrading [of filtering software] necessary"), *available in* 1998 WL 13449565.

56. *See* PAUL GILSTER, THE INTERNET NAVIGATOR 21-36 (1994) (analyzing the Internet's continuously changing content); TRACEY LAQUEY & JEANNE C. RYER, THE INTERNET COMPANION: A BEGINNER'S GUIDE TO GLOBAL NETWORKING 11-20 (1993) (describing the limitless options provided by the Internet due to its daily expanding content); *see also* Blake T. Bilstad, *Obscenity and Indecency in a Digital Age: The Legal and Political Implications of Cybersmut, Virtual Pornography, and the Communications Decency Act of 1996*, 13 SANTA CLARA COMPUTER & HIGH TECH. L.J. 321, 327-30 (1997) (asserting that the Internet's unique qualities create regulatory problems).

57. *See* Thomas E. Weber, *The Naked Truth: There Are Ways to Keep Your Kids Away from On-line Porn but None Are Foolproof*, WALL ST. J., June 16, 1997, at R12 (discussing ways to block minors' access to sexually explicit material); *see also* Karen J. Bannan, *Cybersitter 97 Makes the World (Wide Web) a Safer Place for Children*, COMPUTER SHOPPER, Nov. 1, 1997, at 560 (reviewing different methods of Internet monitors); Monica

software is used to block minors from receiving information that is of an obscene or indecent nature.[58]

Campbell, *SurfWatch Expands Filtering*, MACWEEK, July 7, 1997, at 26 (providing alternative techniques used by filtering programs to block harmful material), *available in* 1997 WL 11793385.

58. *See* Reno v. ACLU, 117 S. Ct. 2329, 2336 (1997) (discussing the availability of filtering programs that restrict access of minors, and due partially to this alternative, invalidating legislative regulation of the Internet); *see also* Taylor Lincoln, *Protecting Young from Cyber Smut: Software Babysitters Can Help, but None Has Perfect References*, BALTIMORE SUN, July 16, 1997, at 1A (providing detailed reviews of Internet monitoring and filtering material available to protect children from indecency on the Internet), *available in* 1997 WL 5520404. Currently three approaches shield minors from obscene or indecent material on the Internet. *See id.* First, specialized Internet service providers are created that specifically provide Internet access to minors, allowing users to retrieve information only from friendly web sites. *See id.* These providers, such as Kidznet, a service provider from Clark Internet Services of Columbia, offer much of the same services as general providers like America Online, but keep users from accessing objectionable sites. *See id.*

Second, minors may be shielded from indecent material by computer filtering programs that, once installed onto the terminal, block access to certain adult web sites. *See* Karen J. Bannan, *Cybersitter 97 Makes the World (Wide Web) a Safer Place for Children*, COMPUTER SHOPPER, Nov. 1, 1997, at 560 (illustrating the process by which Internet filtering programs select and remove material inappropriate for children); Monica Campbell, *SurfWatch Expands Filtering*, MACWEEK July 7, 1997, at 26 (stating that filtering programs remove web sites that fall into four categories: "sexually explicit material, gambling, drugs and alcohol"), *available in* 1997 WL 11793385; *vImpact Releases the Library Channel Version 2.0*, INFO. TODAY, Oct. 1, 1997, at 59 (reporting creation of a filtering program made specifically for public libraries), *available in* 1997 WL 9331255; Michael Krantz, *Censor's Sensibility: Are Web Filters Valuable Watchdogs or Just New Online Thought Police*, TIME, Aug. 11, 1997, at 48 (providing the pros and cons of the use of Internet filters). Many forms of this software, including Cybersitter, SurfWatch, NetNanny, and NetSnitch, are currently available for relatively inexpensive fees. *See* Tom Henderson, *Internet Monitors*, NETWORK MAG., Nov. 1, 1997, at 4 (discussing in detail individual filtering systems and the process of removing sexually explicit web sites), *available in* 1997 WL 12468061. These filters will not only prevent minors from accessing certain sites, but can also alert adults to which areas of the Internet the child has visited. *See id.*

Third, a prototype Internet V-chip, which follows along the lines of television V-chip technology, unites filtering software with an Internet rating system, allowing the most efficient form of supervision to minor surfers. *See* Taylor Lincoln, *Protecting Young from Cyber Smut: Software Babysitters Can Help, but None Has Perfect References*, BALTIMORE SUN, July 16, 1997, at 1A (describing an Internet V-chip currently in the works), *available in* 1997 WL 5520404. Although the Internet V-chip is not yet available for purchase, manufacturers of televisions began installing the V-chip inside new televisions beginning in 1998. *See id.* Allowing parents to prevent their children from watching certain TV shows, the V-chip will block access to shows based on the TV ratings system, and the results of this product can provide insight to the creators of the Internet V-chip. *See* Benjamin M. Dean, *The Age-Based Ratings System: An Unfortunate Response to the V-Chip Legislation*, 4 VA. J. SOC. POL'Y & L. 743, 756-58 (1997) (pointing out First Amendment controversies arising upon implementation of the V-chip as a means of regulating television and the Internet); Howard M. Wasserman, Comment, *Second-Best Solution: The First Amendment, Broadcast Indecency, and the V-Chip*, 91 NW. U. L. REV. 1190, 1207-27 (1997) (pro-

For example, although the spontaneity provided by active real-time chat rooms is attractive to adult "chatters," it can expose minors[59] to things ranging from inappropriate conversation topics to predatory child molesters.[60] In fact, pedophiles, like "Captain Jake" discussed earlier, can use the Internet as a vehicle for sexual perversion by visiting popular youth chat rooms and luring young users into X-rated Internet areas.[61] Filtering software, however, can prevent minors from falling victim to

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viding an in-depth discussion of the V-chip, future advances, and constitutional implications of its use).

Some manufacturers are currently working on a device that would work similarly on computer monitors; however, a universal ratings system, similar to the ones currently used by television and motion picture associations, would be required for the V-chip to work on the Internet. *See* Taylor Lincoln, *Protecting Young from Cyber Smut: Software Babysitters Can Help, but None Has Perfect References*, BALTIMORE SUN, July 16, 1997, at 1A (describing future V-chip technology), *available in* 1997 WL 5520404. Currently, third parties are rating or labeling web sites according to general standards, and participation in self-regulation would allow web site owners more control over the classification of their web sites. *See id.*

59. In this Comment, any mention of the term "minors" indicates those individuals under the age of seventeen. As will be discussed in *supra* Part V.A.1., the one year age difference between those individuals under the age of eighteen and those individuals under the age of seventeen seems to play a pivotal role in the constitutionality of statutes regulating the speech of minors. *Compare* Ginsberg v. New York, 390 U.S. 629, 636 (1968) (holding constitutional a statute regulating minors as defined as those individuals under age seventeen), *with* Reno v. ACLU, 117 S. Ct. 2329, 2341, 2346 (1997) (striking down a statute regulating speech according to its effects on minors, with minors being defined as those individuals under the age of eighteen).

60. *See* Robert W. Peters, *There Is a Need to Regulate Indecency on the Internet*, 6 CORNELL J.L. & PUB. POL'Y 363, 364 n.13 (1997) (describing, among the many problems associated with unrestricted Internet access, the increased frequency with which pedophiles prey upon children on the Internet (citing *FBI Investigating On-Line Sexual Solicitations of Teenagers*, N.Y. TIMES, June 11, 1995, at 25, and Kim Murphy, *Youngsters Falling Prey to Seducers in Computer Web*, L.A. TIMES, June 11, 1995, at A1)); Chris Carroll, *5 School Districts Will Get Grants for Computer 'Filters': Money Will Be Used to Buy Software to Limit Students' Access to Pornography or Violence on the Internet*, ST. LOUIS POST-DISPATCH, Nov. 23, 1998, at 8 (reporting that although the Internet is a valuable learning tool, it can expose children to harmful messages and pedophiles), *available in* 1998 WL 3363507. Doubtlessly, children are both vulnerable and sometimes in danger from Internet abuses. *See* Sally Greenberg, *Threats, Harassment, and Hate On-line: Recent Developments*, 6 B.U. PUB. INT. L.J. 673, 686-88 (1997) (discussing the increasing presence of hate web sites on the Internet, especially those catering to youthful users).

61. *See* People v. Barrows, 677 N.Y.S.2d 672, 688 (N.Y. Sup. Ct. 1998) (upholding the conviction of a defendant who used the Internet to meet pre-teen girls in a chat room and then attempted to lure them to meet him in person). If filtering software had been installed on the computer used by Tori83, she would have been unable to enter the adult chat room. *Cf.* Dawn C. Chmielewski, *Parents Can Take Steps to Monitor Kids Online*, HOUS. CHRON., Aug. 14, 1997, at 4 (highlighting many safeguards available to protect children from certain Internet areas through the use of filtration programs), *available in* 1997 WL 13056450.

those who prey on minors. First, filtering software has been designed in a way such that minors are only permitted to "surf" a particular "mini web" created by a software company.[62] Second, additional filtering software has been developed that allows minors to surf the World Wide Web, but denies them access to the areas created and frequented by individuals who wish to exploit them.[63]

However, filtering software can be used in ways beyond overcoming the potential dangers with interactive services; it also can be used to sift through the cornucopia of information, both educational and harmful, encompassed by the World Wide Web.[64] For instance, typing in the key word "teenage girls," an adolescent female wishing to access information on sexism or athletics can be inadvertently confronted with far more than she originally intended.[65] Although the first web site may locate an age-appropriate response that provides information on fighting sexism and improving a woman's economic status, subsequent web sites may include sexually explicit images and web pages entitled "Naughty Teen-Age Girls—Barely Legal Teens in Hot, Naked and XXX Pictures."[66] Filtering software can monitor such Internet responses by customizing the parameters for a specific user and blocking those categories considered inappropriate.[67]

Originally, software companies premised Internet filters upon the recognition of "key words," forbidding access to web sites containing certain specific terms.[68] This method, however, proved impractical and inade-

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62. *See* Alex Markels, *Surf Central Keeps Watch over Net: Web Blockers Rely on Work of Reviewers,* HOUS. CHRON., May 4, 1997, at 5 (describing the network of friendly web sites linked together by the filter, Cyber Patrol), creating a "mini-web," *available in* 1997 WL 6554956.

63. *See id.*

64. *See* ACLU v. Reno, 929 F. Supp. 824, 840 (E.D. Pa. 1996) (discussing how Cyber Patrol uses twelve categories of harmful material to filter information available on the Internet), *aff'd*, 117 S. Ct. 2329 (1997).

65. *See* Eric Blom, *Can We Protect Kids from Internet's Dark Side? The Unprecedented Access to Information Is an Educational Boon, but Smut and Hate Talk Also Abound*, PORTLAND PRESS HERALD, Oct. 26, 1997, at 1C (describing what results when the innocent phrase "teenage girls" is typed into the search engine), *available in* 1997 WL 12534791.

66. *See id.*

67. *See ACLU*, 929 F. Supp. at 840 (discussing the twelve categories used by Cyber Patrol).

68. *See* Michael Krantz, *Censor's Sensibility: Are Web Filters Valuable Watchdogs or Just New Online Thought Police*, TIME, Aug. 11, 1997, at 48 (describing the processes by which Internet filters block access to sites). Because filters must work within the parameters of the Internet, some programs still use key words to locate sites containing sexually explicit material. *See* Dawn C. Chmielewski, *Parents Can Take Steps to Monitor Kids Online*, HOUS. CHRON., Aug. 14, 1997 at 4 (listing various types of Internet filters), *available in*

quate.[69] Consequently, the industry yielded a more efficient method of Internet monitoring by employing Platform Internet Content Selection (PICS), a universal rating system for web pages.[70]

Introduced in 1995, Cyber Patrol[71] is one of the many PICS-compatible filtering programs available that, upon installation, prevents access to suspect web sites.[72] Instead of blocking web sites based upon specific key words, Cyber Patrol's manufacturer employs web-site reviewers to sort through the Internet, web page by web page, flagging web sites as

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1997 WL 13056450. To ensure that indecent web sites are not accessed by minors, the filter blocks key words normally associated with sexually explicit sites. *See id.* The filtering program SurfWatch blocks over 2,100 sexually oriented web sites by blocking key words normally included in the addresses of sexually explicit web sites. *See* Chip Rowe, *Lust-Free Libraries,* PLAYBOY, May 1, 1996, at 39 (stating that SurfWatch is Silicone Valley's response to noise made by Congress about censoring "filth and indecency"), *available in* 1996 WL 9258180. Some of the sexually explicit terms blocked by SurfWatch include "sex," "porn," "intercourse," "smut," "erotic," "XXX," and "nude." *See id.*

69. *See* Ari Staiman, *Shielding Internet Users from Undesirable Content: The Advantages of a PICS Based Rating System*, 20 FORDHAM INT'L L.J. 866, 880-84 (1997) (analyzing technological deficiencies of current filtration systems); John Henrichs, *Library to Filter Children's Access to Internet*, HOUS. CHRON., June 22, 1997, at A29 (describing problems associated with filters removing protected speech as well as unprotected speech), *available in* 1997 WL 6566053. The oft-cited "breast" example illustrates the problems with filters: by blocking the key word "breast," the filter not only denies access to sexually explicit sites, but also denies the minor access to sites concerning breast cancer and chicken breast recipes. *See id.* (illustrating how filters can inadvertently block access to protected speech); *see also* Chip Rowe, *Lust-Free Libraries*, PLAYBOY, May 1, 1996, at 39 (describing the arbitrariness of key-word filters), *available in* 1996 WL 9258180. Critics of filters argue that filters are both overbroad, in blocking protected sites, and underinclusive, in not blocking all sites containing sexually explicit material. *See id.* For example, SurfWatch blocks the word "boobs," but not "breasts," "tits," or "mammary glands," all three of which can lead to sex sites. *See id.* SurfWatch also blocks the word "nude," but not the word "naked." *See id.*

70. *See* ACLU v. Reno, 929 F. Supp. 824, 838-39 (E.D. Pa. 1996) (describing the PICS monitoring system), *aff'd*, 117 S. Ct. 2329 (1997).

71. Cyber Patrol, created by Microsystems Software, Inc., provides two methods of restricting Internet access. *See* Thomas E. Weber, *The Naked Truth: There Are Ways to Keep Your Kids Away from On-line Porn but None Are Foolproof*, WALL ST. J., June 16, 1997, at R12 (exploring the many filtering systems on the market that provide adults with options for limiting minors' Internet access). Minors can surf a mini-web that is kept up privately by Cyber Patrol and contains several "friendly" web sites, or minors can be given free access to the World Wide Web, with the exception of about 15,000 "no-no" sites. *See id.* The company continually updates the "no-no" site list to include any new web sites with material concerning twelve major categories. *See* Sharon Jayson, *Library to Loosen Internet Limits*, AUSTIN AM.-STATESMAN, Mar. 6, 1997, at B1 (categorizing web sites with the help of Microsystems' Cyber Patrol), *available in* 1997 WL 2815300.

72. *See* Alex Markels, *Surf Central Keeps Watch over Net: Web Blockers Rely on Work of Reviewers,* HOUS. CHRON., May 4, 1997, at 5 (describing the filtering process used by Microsystems' Cyber Patrol), *available in* 1997 WL 6554956.

"CyberNOT" if they contain indecent or obscene material.[73] These CyberNOT sites are then divided into twelve categories that can be selectively blocked.[74] These categories include such topics as partial nudity,[75] nudity,[76] and sexual acts.[77] To keep up with the new web sites added

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73. *See id.* Hiring parents, teachers, and other professionals, Microsystems attempts to gain a "community standard" viewpoint to review the web sites. *See id.* To live up to the company motto, "To Surf and Protect," each Internet reviewer examines approximately 75 web sites per hour. *See id.* Using search engines, workers collect lists of sites containing suspect words. *See id.* An Internet reviewer later examines these hundreds of thousands of sites, and each web site is either ignored or added to three comprehensive databases to provide detailed decision-making options for users: (1) the Sports/Entertainment list contains about 10,000 web sites, and is provided to suit the needs of employers who provide Internet access to employees; (2) the CyberYES list, which consists of approximately 43,000 sites "friendly" enough for children viewers; and (3) the CyberNOT list contains sites deemed obscene and indecent, which can be selectively blocked. *See id.*

74. *See ACLU*, 929 F. Supp. at 840. While Cyber Patrol uses twelve categories to divide the questionable web sites, other filters, such as SafeSurf, use different categorical systems.

75. *See id.* (defining "partial nudity" as "[f]ull or partial exposure of the human anatomy except when exposing genitalia").

76. *See id.* (defining "nudity" as "[a]ny exposure of human genitalia").

77. *See id.* (defining "sexual acts" as "[p]ictures or text exposing anyone or anything involved in explicit sexual acts and lewd and lascivious behavior, including masturbation, copulation, pedophilia, intimacy and involving nude or partially nude people in heterosexual, bisexual, lesbian or homosexual encounters. Also includes phone sex ads, dating services, adult personals, CD-ROM, and videos").
Other categories include:

(1) "Violence/Profanity," defined as "[e]xtreme cruelty, physical or emotional acts against any animal or person which are primarily intended to hurt or inflict pain. Obscene words, phrases, and profanity defined as text that uses George Carlin's seven censored words more often than once every fifty messages or pages;"
(2) "Gross Depictions (graphic or text)," defined as "[p]ictures or descriptive text of anyone or anything which are crudely vulgar, deficient in civility or behavior, or showing scatological impropriety . . . [and i]ncludes such depictions as maiming, bloody figures, indecent depiction of bodily functions;"
(3) "Racism/Ethnic Impropriety," defined as "prejudice or discrimination against any race or ethnic culture . . . , [including] [e]thnic or racist jokes and slurs[, and] [a]ny text that elevates one race over another;"
(4) "Satanic/Cult," defined as "[w]orship of the devil; affinity for evil, wickedness[, including] [s]ects or groups that potentially coerce individuals to grow, and keep, membership;"
(5) "Drugs/Drug Culture," defined as "[t]opics dealing with the use of illegal drugs for entertainment" including "substances used for other than their primary purpose to alter the individual's state of mind" but excluding "current illegal drugs used for medicinal purposes;"
(6) "Militant/Extremist," defined as "[e]xtremely aggressive and combative behaviors, radicalism, advocacy of extreme political measures," including "extreme political groups that advocate violence as a means to achieving their goal;"

daily, Cyber Patrol provides subscribers with an automatic update of new CyberNOT sites every seven days.[78]

Unfortunately, technology has not yet perfected filtering software.[79] Due to the infrastructures of both the Internet and current filtering programs, a monitoring system that simultaneously blocks every harmful site while maintaining every protected site has not been developed.[80] Cur-

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(7) "Gambling," "[o]f or relating to lotteries, casinos, betting, number games, on-line sports or financial betting including non-monetary dares;"
(8) "Questionable/Illegal," defined as "[m]aterial or activities of a dubious nature which may be illegal in any or all jurisdictions, such as illegal business schemes, chain letters, software piracy, and copyright infringement," and;
(9) "Alcohol, Beer & Wine," defined as "[m]aterial pertaining to the sale or consumption of alcoholic beverages[, including] sites and information relating to tobacco products."

Id.

78. *See id.* Through this process, Cyber Patrol offers its subscribers two options: (1) a user can either access a "mini-web," which is a miniature form of the World Wide Web containing only "friendly sites;" or (2) a user can explore the actual World Wide Web subject to the blocked categories. *See* Alex Markels, *Surf Central Keeps Watch over Net: Web Blockers Rely on Work of Reviewers*, HOUS. CHRON., May 4, 1997, at 5 (describing the "mini-web" created by Cyber Patrol's predetermined blocking service), *available in* 1997 WL 6554956. Including only web sites that are fit for children, the "mini-web" is made up of web sites that have been reviewed by Microsystems employees and labeled "Cyber-YES." *See id.* By adding each friendly web site that becomes available on the Internet, the "mini-web" site grows as the Internet grows. *See id.* A library seeking to provide more access than the "mini-web" can permit minors to "surf" the World Wide Web, and in that event, libraries can select the various categories of "Cyber NOT" sites that are indecent according to the local community standards of their patrons. *See id.* (analyzing the options supplied by the filtering program Cyber Patrol).

79. *See* Roberta Furger, *Internet Filters: The Smut Stops Here—Or Does It? Screening Five Top Web Filters*, PC WORLD, Oct. 1, 1997, at 78 (discussing the problems facing filtering software), *available in* 1997 WL 10079455; Edward Martin, *Fallen off the Deep End: Internet Addicts Neglect Work, Family to Go Surfing*, BUS. J. (Charlotte), June 15, 1998, at 27 (noting that filtering software must be updated daily to keep up with the number of new websites added daily), *available in* 1998 WL 13449565; Ann Beeson & Chris Hansen, *Fahrenheit 451.2: Is Cyberspace Burning? How Rating and Blocking Proposals May Torch Free Speech on the Internet* (visited Nov. 14, 1997) <http://www.aclu.org/issues/cyber/burning.html> (indicating that filtering software is not perfect).

80. *See* Ann Beeson & Chris Hansen, *Fahrenheit 451.2: Is Cyberspace Burning? How Rating and Blocking Proposals May Torch Free Speech on the Internet* (visited Nov. 14, 1997) <http://www.aclu.org/issues/cyber/burning.html> (stating that the Internet's structure has delayed the creation of a monitoring system that is technologically perfect). Playing on words with the title of the novel, *Fahrenheit 451*, this ACLU newsletter attempts to show a cyclical repeat in library censorship. *See id.* In the novel, Bradbury creates fireman-like characters who, with the help of technology, burn books that contain controversial or disturbing ideas. *See generally* RAY BRADBURY, FAHRENHEIT 451 (1953) (painting a general picture of worldwide suppression of the written word). Comparing the use of filtering programs on public library computers to the "firemen" in Bradbury's novel, the newsletter discusses the ACLU's concerns about the use of filtering software on Internet-accessible

rently, filters are designed to block as few sites as necessary when removing access to sites deemed inappropriate on the Internet.[81] Nevertheless, harmful material can possibly seep through, and non-harmful material could be blocked from viewing. Regardless of the imperfection of available filtering software, the need for a monitoring system to protect minors from harmful Internet material is no less dire.

III. The First Amendment: An Overview of Pertinent Considerations Relating to Protecting Minors on the Internet

Because the Internet is a network of speech, any law regulating the Internet through the use of filtering software will affect a user's ability to access information. Regulations affecting access to information on the Internet implicates the First Amendment.[82] As such, lawmakers hoping to protect minors from harmful Internet material by using filters must follow the meandering path created by the many cases interpreting the First Amendment.[83]

A. *Categorizing the Speech Restriction: Content-Based or Content-Neutral*

Although the First Amendment generally protects speech,[84] the Supreme Court of the United States has stripped certain types of speech,

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computers. *See* Ann Beeson & Chris Hansen, *Fahrenheit 451.2: Is Cyberspace Burning? How Rating and Blocking Proposals May Torch Free Speech on the Internet* (visited Nov. 14, 1997) <http://www.aclu.org./issues/cyber/burning.html> (arguing that the use of filters is synonymous with censorship). The newsletter also specifically targets public libraries that use filtering software and condemns any restriction as unconstitutional. *See id.* (opposing libraries' use of filtering software because of First Amendment concerns).

81. *See* Alex Markels, *Surf Central Keeps Watch over Net: Web Blockers Rely on Work of Reviewers*, Hous. Chron., May 4, 1997, at 5 (recounting the history of Cyber Patrol's development), *available in* 1997 WL 6554956. The Microsystems reviewing procedure began two years ago, and after an examination of approximately five million web sites, only 18,000 have been blocked by the CyberNOT list. *See id.*

82. *See* U.S. Const. amend. I (stating that "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").

83. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637-39 (1994) (using "a less rigorous standard of First Amendment scrutiny" to examine regulations of cable television); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 131 (1989) (requiring a regulation that restricts indecent telephone communications to seek a compelling governmental interest and to be the least restrictive means of achieving that interest); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 370 (1969) (qualifying the level of First Amendment protections granted to the broadcast medium).

84. *See* U.S. Const. amend. I (prohibiting infringement on speech).

such as obscenity, of First Amendment protection.[85] Consequently, statutes regulating such speech have little trouble passing constitutional muster.[86] On the other hand, some speech restrictions, such as those aimed at protecting minors from harmful material, can restrict protected as well as unprotected speech.[87] Under the Supreme Court's First Amendment jurisprudence, these restrictions must be examined as being either content-based or content-neutral.[88] Concluding whether the restriction is content-based or content-neutral not only determines the level of judicial scrutiny to be applied, but also oftentimes foreshadows the restriction's ability to pass constitutional muster.[89]

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85. *See, e.g.*, Miller v. California, 413 U.S. 15, 23 (1973) (deeming speech fitting within the definition of "obscenity" to be outside the First Amendment's realm of protection); Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (holding that any speech that advocates illegal action is not protected by the First Amendment); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (stating that fighting words are not within the protection of the First Amendment).

86. *See Miller*, 413 U.S. at 23-26 (discussing a permissible statutory scope that would keep obscene speech unprotected by the First Amendment); *see also Sable Communications*, 492 U.S. at 124 (stating that Congress can impose an outright ban on obscene speech in the broadcast medium).

87. *See, e.g.*, Reno v. ACLU, 117 S. Ct. 2329, 2345 (1997) (addressing a statute that regulates indecent speech for the purpose of protecting minors); *Turner Broad. Sys.*, 512 U.S. at 662 (examining a cable television regulation designed to protect minors); Ginsberg v. New York, 310 U.S. 629, 643 (1968) (evaluating a restriction on "harmful" speech enacted to protect minors).

88. *Compare Sable Communications*, 492 U.S. at 126 (1989) (holding that content-based speech restrictions are presumed unconstitutional and subject to strict scrutiny), *with* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986) (applying less judicial scrutiny to a speech restriction based on the secondary effects of the speech rather than upon the content of the speech). As a result of the two-tract analysis, the labeling of the statute often predetermines the constitutional outcome. *See Reno*, 117 S. Ct. at 2346 (striking down the CDA, which the Court concluded was a content-based regulation); *Ginsberg*, 390 U.S. at 637 (upholding a provision that forbade sales of "harmful" material to minors under content-neutral analysis).

89. *See Renton*, 475 U.S. at 47 (holding that speech regulations not based on the content of speech, but rather on secondary effects of speech, will be treated differently than content-based speech regulations). The origin of the two-tract system, which draws the line between content-based restrictions and content-neutral restrictions, began in *Young v. American Mini Theatres, Inc.* *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 70 (1976) (determining that speech restrictions not based upon content should not be analyzed by a strict scrutiny standard because content-neutral speech regulations do not pose the same threat of speech suppression as content-based speech restrictions). In *Young*, the Court discussed our nation's history of being protective of First Amendment rights, but also recognized a limit to that instinctive fear of speech suppression. *See id.* "Few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice." *Id.*

To determine which tract of analysis applies, the Supreme Court has focused upon the legislative motivation for the speech restriction.[90] If the speech regulation is based upon the content of the speech or is motivated by the direct effects of the speech, the regulation is deemed content-based.[91] These restrictions that carve out one type of speech to be treated differently than others are suspect because "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[92] Accordingly, restrictions on the content of speech are presumed to be unconstitutional and are subject to the often fatal strict scrutiny test.[93]

The strict scrutiny test requires the restriction to satisfy two prongs.[94] First, the restriction must be aimed at a compelling governmental interest, and second, the restriction must be narrowly tailored in its pursuit of

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90. *See Turner Broad. Sys.*, 512 U.S. at 642 (declaring that the main factor in deciding if a restriction is content-based is "whether the government has adopted [the] regulation of speech because of [agreement or] disagreement with the message it conveys").

91. *See id.* (providing the general rule that content-based speech restrictions carve out a certain type of speech to be treated differently). Protecting children has not been the only governmental interest deemed a primary effect of speech. *See, e.g.*, Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992) (holding that a listener's reaction to speech is the primary effect of speech); Boos v. Barry, 485 U.S. 312, 321 (1988) (emphasizing that the listeners' reaction to speech is not a secondary effect); Erzoznik v. City of Jacksonville, 422 U.S. 205, 211-12 (1975) (finding an interest in protecting unwilling viewers from seeing offensive material as speech's primary effect); *see also* Simon & Schuster, Inc. v. New York Crime Victims Bd., 502 U.S. 105, 118 (1991) (tagging the regulation as content-based because it was motivated by the speech's primary effects); *Renton*, 475 U.S. at 49-50 (basing the interpretation of the speech regulation on the reasons for enforcing the regulation, not on the ordinance's text).

92. Texas v. Johnson, 491 U.S. 397, 414 (1989).

93. To pass constitutional muster, regulations affecting a fundamental right, such as the First Amendment right to freedom of speech, must be necessary to achieve a compelling governmental interest. *See Reno*, 117 S. Ct. at 2339. For the restriction to pass this strict scrutiny test, it must be "narrowly tailored," or necessary to achieve the governmental objective. *See id.* at 2350. The Court developed the "narrowly tailored" standard to help legislators understand the meaning of "necessary" in the strict scrutiny test; a statute that is "narrowly tailored" is one which is enacted without any less burdensome or less restrictive alternatives. *See* Nyquist v. Mauclet, 432 U.S. 1, 15 (1977) (Powell, J., dissenting) (pioneering the requirement of "narrowly tailoring" regulatory statutes on speech); *see also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (emphasizing that content-neutral restrictions on time, place, and manner of speech can be constitutional if they meet the requirements of narrow tailoring and alternative channels of communication). *But see Reno*, 117 S. Ct. at 2348 (including interesting dicta within its opinion that states that "the CDA is not narrowly tailored *if that requirement has any meaning at all*" (emphasis added)).

94. *See Reno*, 117 S. Ct. at 2350 (discussing the two steps taken to examine a statute under strict scrutiny analysis).

that compelling interest.[95] If both prongs are satisfied, the restriction is considered constitutionally enforceable; however, if the restriction fails to meet either prong, it will be struck down.[96]

Conversely, if the speech restriction is not based upon the content of the speech, but rather is motivated by the secondary effects of the speech, it is deemed content-neutral.[97] Rather than being presumed unconstitutional, content-neutral regulations are analyzed under the much more deferential time, place, and manner test.[98] Under this test, the regulation is constitutionally enforceable if it is narrowly tailored to achieve a substantial governmental interest, and it leaves open ample alternative channels for communication.[99]

In addition to being categorized as content-based or content-neutral, speech regulations are vulnerable to attacks based upon overbreadth and

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95. *See id.*

96. *Cf.* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (holding that a content-based statutory provision was constitutional after the provision passed the strict scrutiny test).

97. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (labeling a statute as content-neutral because it was enacted to stymie secondary effects of speech). The *Renton* Court found that the city's interests in preventing crime and protecting retail and property values were secondary effects of the speech prohibited by statute. *See id.* at 47-49. The regulation challenged in *Renton* appeared facially to be content-based; however, upon discovering that the interest sought was only indirectly related to the speech, the Court analyzed the regulation under "intermediate" scrutiny, requiring that the regulation be narrowly tailored to achieve a substantial interest and that it leave open ample alternative channels for communication. *See id.* at 47 (discussing scrutiny of "content-neutral" restrictions). In subsequent cases, the Supreme Court has stated that "prevention of crime, maintenance of property values, and protection of residential neighborhoods" are secondary effects of speech. *Boos,* 485 U.S. at 320; *see also* Young v. American Mini Theatres, Inc., 427 U.S. 50, 71-72 (1976) (describing the secondary effects of ordinances).

98. *See Renton*, 475 U.S. at 50 (holding that a content-neutral speech restriction need not surpass the strict scrutiny test, but rather must be "designed to serve a substantial governmental interest and allow for reasonable alternative avenues of communication"). Ironically, our nation has become so enamored with suspicions of governmental thought control that it is more difficult to maintain a speech regulation aimed at protecting our most valuable asset, our youth, than to maintain a restriction set up to protect the property values of our houses. *Compare Reno*, 117 S. Ct. at 2341 (striking down a speech restriction aimed at protecting minors from "indecent" Internet material), *with Renton*, 475 U.S. at 48 (upholding a speech restriction aimed at, among other things, preserving the property values of neighborhood houses and businesses).

99. *See Renton*, 475 U.S. at 48 (holding that regulations based on time, place, and manner of speech rather than on content of speech are "designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views"). The *Renton* Court went on to emphasize that, had the city wanted to stomp out the viewpoint expressed by the theatres, it would have closed down all of the theatres rather than simply redistricting them. *See id.*

vagueness.[100] Both the overbreadth and vagueness safeguards are premised upon the insistence that speech restrictions must not place a "chilling effect" on the speech of American citizens.[101] Often, in an attempt to regulate a specific type of speech, the legislative body will craft a restriction that affects more speech than necessary to achieve the respective compelling governmental interest.[102] Such a restriction is considered overbroad, and thus, invalid.[103] In addition to overbreadth problems, speech restrictions may fail to define precisely what types of speech are governed, violating the void-for-vagueness doctrine.[104] Moreover, a restriction with ambiguities regarding either the type of speech regulated or the circumstances triggering the regulation generally succumbs to a vagueness challenge.[105] Thus, a regulation affecting Internet communications will be categorized as content-based or content-neutral, and then analyzed accordingly. In addition this regulation will also be required to overcome the hurdles posed by overbreadth and vagueness claims.

B. *The First Amendment Right to Receive Information and Ideas*

Although the First Amendment freedom of speech clause expressly protects the right to speak, it also protects the right to receive speech.[106]

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100. *See Reno*, 117 S. Ct. at 2344-45 (discussing the three challenges brought against the CDA—violations of the First Amendment based upon the availability of less restrictive alternatives, overbreadth, and vagueness); *see also* Randall J. Cude, Note, *Beauty and the Well-Drawn Ordinance: Avoiding Vagueness and Overbreadth Challenges to Municipal Aesthetic Regulations*, 6 J.L. & POL'Y 853, 864-66 (1998) (explaining that "the Supreme Court has developed extensive First Amendment jurisprudence in this area"). The *Reno* Court found that the CDA was overbroad because it restricted protected as well as unprotected speech without justifying the restriction with a compelling interest achieved in a narrowly tailored manner. *See Reno*, 117 S. Ct. at 2347-48. In addition, the Court also pointed to problems in the provision's language, creating ambiguity and vagueness. *See id.* at 2345-46.

101. *See id.* at 2346 (discussing the effects that overbroad speech restrictions have on the constitutional right to freedom of speech).

102. *See* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 131 (1989) (advising that speech restrictions that suppress large amounts of speech, which adults are entitled to either speak or receive, are overbroad).

103. *See id.* (indicating that speech restrictions are invalid if they limit adult speech to only that speech which is suitable for minors).

104. *See Reno*, 117 S. Ct. at 2344 (examining the ambiguities resulting from unclear language in a speech restriction and determining that "[g]iven the absence of a definition . . ., this difference in language will provoke uncertainty among readers about how the . . . standards relate to each other and just what they mean").

105. *See Sable Communications*, 492 U.S. at 126 (noting that speech regulations must be narrowly designed to avoid unnecessary interference with the First Amendment).

106. *See* Board of Educ. v. Pico, 457 U.S. 853, 867 (1982) (exemplifying the necessity for recognizing the right to receive by highlighting numerous cases in which the Supreme Court affirmed the right to receive); Glen Kubota, Comment, *Public School Usage of In-*

As such, individuals and groups challenging speech regulations include those whom the regulation prevents from speaking and those whom the regulation prevents from gaining information.[107] Under this notion, any speech regulation affecting a minor's ability to access the Internet in a public library directly implicates the First Amendment right to receive speech.

1. Public Libraries and the Right to Receive Information

Board of Education v. Pico[108] is arguably the one decision by the Supreme Court that directly affects content-based speech restrictions enforced in public libraries.[109] In *Pico*, students challenged the constitutionality of a school board's decision to remove books from the public school library.[110] Claiming that the book removal violated their right to receive speech, the students focused upon the school board's motivation for removing the books, arguing that the school board was attempting to

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ternet Filtering Software: Book Banning Reincarnated, 17 LOY. L.A. ENT. L.J. 687, 706-07 (1997) (discussing the importance of the right to receive corollary of the right to free speech); Donald T. Stepka, Note, *Obscenity On-Line: A Transactional Approach to Computer Transfers of Potentially Obscene Material*, 82 CORNELL L. REV. 905, 910 (1997) (asserting that freedom of speech includes the right to receive information).

107. *See generally* Kleindienst v. Mandel, 408 U.S. 753 (1972) (involving freedom of speech rights of students and alien students); Red Lion Broad. Co. v. FCC, 395 U.S. 369 (1969) (discussing freedom of speech in media and broadcasting); Stanley v. Georgia, 394 U.S. 557 (1969) (evaluating the notion of freedom of speech in regards to pornographic material).

108. 457 U.S. 853 (1982).

109. *See Pico*, 457 U.S. at 870 (addressing book removal by a public school library).

110. *See id.* at 868 (discussing how a First Amendment challenge arose from the removal of library books). It is important to note that although *Pico* deals directly with the First Amendment challenge to a public *school* library procedure, the rationale used by the *Pico* Court is equally binding upon the constitutionality of any public library procedure. *See id.* (recognizing that a public school library is similar to a public library). The Court explained that "[a] school library, no less than any other public library, is 'a place dedicated to quiet, to knowledge, and to beauty.'" *Id.* (quoting Brown v. Louisiana, 383 U.S. 131, 142 (1966)). In its analysis, the Court emphasized that the removed books were not part of the required school curriculum; rather, they were optional reading for the students, such as the type of reading sought out at public libraries. *See id.* at 861-62. Discussing the unique role of a school library, the Court stressed that the "use of . . . libraries is completely voluntary on the part of the student" and that the "selection of books from these libraries is entirely a matter of free choice . . . afford[ing] them an opportunity at self-education and individual enrichment that is wholly optional." *Id.* at 869. *But see id.* at 915 (Rehnquist, J., dissenting) (distinguishing between a public school library and other public and private libraries). In his dissenting opinion, Justice Rehnquist emphasized that "[u]nlike university or public libraries, elementary and secondary school libraries are not designed for freewheeling inquiry; they are tailored, as the public school curriculum is tailored, to the teaching of basic skills and ideas." *Id.* (Rehnquist, J., dissenting).

prescribe orthodoxy through speech restrictions.[111] Rather than removing the books because of obscene or indecent content, the school board stated that it removed the books because they were "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy."[112]

In evaluating the *Pico* case, the Supreme Court was extremely fractured, yielding seven different opinions.[113] Justice Brennan wrote for the plurality, emphasizing the broad discretionary authority historically granted to local school boards.[114] However, Justice Brennan also observed that students, as well as other citizens, are beneficiaries of the protected right to receive.[115] Justice Brennan focused on this conflict between free speech and inculcation and attempted to reconcile these two established legal theories by placing great weight on the school

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111. *See id.* at 871 (contrasting the potential motivations behind the removal of books).

112. *Id.* at 857 (quoting Board of Educ. v. Pico, 474 F. Supp. 387, 390 (E.D.N.Y. 1979)).

113. *See id.* at 855 (holding by a plurality of the Court). Justice Brennan wrote the plurality opinion and was joined by Justices Marshall, Stevens, White, and Blackmun. *See id.* However, of the plurality, Justice Blackmun and Justice White wrote their own opinions. *See id.* at 875 (Blackmun, J., concurring); *id.* at 883 (White, J., concurring). Justice Blackmun, concurring in the judgment, did not agree with the plurality's interpretation of the students' right to receive information in public school libraries. *See id.* at 879 n.2 (Blackmun, J., concurring) (declaring that "my view presents the obverse of the plurality's analysis: while the plurality focuses on the failure to provide information, I find crucial the State's decision to single out an idea for disapproval and then deny access to it"). Justice White agreed with the holding of the Court and its analysis, but because the appeal was from a grant of summary judgment, he chose not to analyze the issue any further than necessary. *See id.* at 883-84 (White, J., concurring). Justice White, citing supportive case law, stated that "[w]e should not decide constitutional questions until it is necessary to do so, or at least until there is better reason to address them than are evident here." *Id.* at 884 (White, J., concurring). Chief Justice Burger wrote the dissenting opinion and was joined by Justices Powell, Rehnquist, and O'Connor; however, each of the other dissenters also wrote their own separate dissenting opinions. *See id.* at 885-921.

114. *See id.* at 866 (describing the Court's decision in *Tinker* that school officials possess authority to control conduct in schools). The Court emphasized that the removal of books from the school library directly affected the First Amendment rights of students. *See id.* The First Amendment guarantees not only the freedom of self-expression, but also the ability to gain "public access to discussion, debate, and the dissemination of information and ideas." *Id.* (citing First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978)).

115. *See id.* at 868 (stating that students have a right to receive speech). Brennan quoted *Tinker v. Des Moines School District* as stating that "in our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate . . . . [S]chool officials cannot suppress 'expressions of feeling with which they do not wish to contend.'" *Id.* (quoting Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 511 (1969)).

board's motivation for removing the books.[116] Justice Blackmun, a dogged defender of public libraries and concurring in the Court's opinion, also asserted that the decision should hinge ultimately upon reconciling First Amendment protections with the broad discretion afforded to local school boards to protect minors.[117]

After examining the evidence concerning the school board's motivation for the book removal, Justice Brennan concluded that a material issue of fact existed as to whether the board "exceeded constitutional limitations in exercising [its] discretion to remove the books."[118] Accordingly, he affirmed the appellate court's reversal of summary judgment in favor of the school board.[119] Justice Brennan also went on to create guidelines for state officials enforcing policies that concerned library book removals.[120] Specifically, Justice Brennan determined that in all cases involving content-based regulations in libraries, state officials "may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'"[121]

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116. *See id.* at 870-72. Recognizing that the Board does have some discretion in managing the school library materials, Brennan noted that school board authority is limited. *See id.* at 870. According to Brennan, content-based restrictions on school libraries may not be political in nature or narrowly partisan in manner. *See id.* Illustrating this point, Brennan described two situations in which library regulations violated the First Amendment: (1) a Democratic school board removing all books slanted toward Republicanism because of allegiance to its party affiliation, and (2) an all-white school board removing all books written by African-American authors or proposing equality of the races because of racial animus. *See id.* at 870-71. Accordingly, Brennan emphasized that the motivation to remove the books from the library will determine whether that removal violated the students' First Amendment right to receive. *See id.* If the removal was substantially based upon the Board's intent to prevent the students from receiving ideas and information that the Board did not agree with, the Board's action violates the students' First Amendment rights. *See id.* On the other hand, if the Board chose to remove the books from the library because the books were vulgar, indecent, or obscene, the Board's action would not violate students' First Amendment rights; therefore, removal of books caused by a lack of educational suitability is seemingly permissible. *See id.*

117. *See id.* at 880 (Blackmun, J., concurring). Placing a burden on the acting school board, Justice Blackmun stressed that the Board must intend to remove the books for reasons other than to suppress disagreed upon partisan and political ideas. *See id.*

118. *Id.* at 872.

119. *See id.* (concluding that summary judgment was inappropriate because there was a "genuine issue of material fact whether [the Board] exceeded constitutional limitations in exercising their discretion to remove the books from the school libraries").

120. *See id.* at 873-75 (illuminating methods that state officials should follow when enforcing policy matters).

121. *Id.* at 872 (citing West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)). Limiting the extent of its holding, the Court stressed that this decision should only

Consequently, when examining a speech restriction affecting the right to receive information, the Court's primary inquiry is the regulating body's motivation for the restriction.[122] For instance, Congress, in regulating minors' Internet access in public libraries, can properly be motivated by a paternalistic desire to protect minors from harmful material. However, if prescribing orthodoxy seeps into that motivation, the Court likely will scrutinize the regulation according to the guidelines set up by Brennan in *Pico*. As such, *Pico* provides the foundation for the right to receive analysis that will surely be applied to the use of filtering software by public libraries.

2. Minors and the Right to Receive Information

Many factors come into play with the right to receive speech, including age.[123] Accordingly, recognition of these factors can determine whether the challenger enjoys a right to receive the speech in question.[124] For instance, although the federal and state governments are afforded little discretion in regulating the speech of adults, they "may permissibly determine that . . . a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."[125] However, even though federal and state governments can constitutionally apply more stringent restrictions on the material available to minors, children still have a fundamental right to freedom of speech, albeit not as absolute.[126]

In *Bellotti v. Baird*,[127] the Supreme Court established three elements for courts to consider when determining whether the government should be afforded additional discretion when restricting children from an area that is otherwise constitutionally protected for adults.[128] First, a court

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be precedential for the examination of discretion to remove library books. *See id.* Never addressed in the opinion, however, is the discretion in book acquisition regulations.

122. *See id.*

123. *See* Ginsberg v. New York, 390 U.S. 629, 638-38 (1968) (discussing the discretion provided to the government when regulating the actions of minors alone and when regulating certain types of speech, such as sexually explicit material).

124. *See Ginsberg*, 390 U.S. at 638 (upholding a speech restriction because it affected only minors' right to receive speech, despite the fact that the same restrictions, if applied to adults, would be declared unconstitutional).

125. *Id.* at 649-50 (Stewart, J., concurring).

126. *See* Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 511 (1969) (holding that adults and children alike have First Amendment protections).

127. 443 U.S. 662 (1979).

128. *See* Bellotti v. Baird, 443 U.S. 662, 634 (1979) (establishing criteria for affording governments more discretion in the regulation of minors). Realizing that children cannot be treated the same as adults, the *Bellotti* Court developed a test to determine when governments should be given leeway in regulating children's activities. *See id.* (distinguishing

must evaluate the peculiar vulnerability of children in the particular area sought to be regulated.[129] Secondly, a court must consider a child's inability to make critical decisions in an informed, mature manner.[130] Finally, a court must provide deference to the importance of the parental role in child rearing.[131] According to the Court in *Bellotti*, if these factors apply, a court must view the speech regulation under a lower standard of scrutiny.[132] In other words, if minors are involved, the Supreme Court relaxes the examination, allowing governmental bodies to adjust their laws to social realities and changing times.[133]

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adults' constitutional rights from those of children). Fashioning the new relaxed standard on the three-tiered Equal Protection Clause analysis, the *Bellotti* Court emphasized that some groups of people, due to their unusual vulnerability, are treated differently by society. *See id.* at 635 (offering as an example the court system's treatment of children different from its treatment of adults); *see also* David A. Dittfurth, *A Theory of Equal Protection*, 14 ST. MARY'S L.J. 829, 831-37 (1983) (providing an in-depth analysis of the Equal Protection Clause and the classifications created by laws).

129. *See Bellotti*, 443 U.S. at 634.

130. *See id.*

131. *See id.*

132. *See* Prince v. Massachusetts, 321 U.S. 158, 168 (1944) (suggesting that the standard of review for regulations of minors is lower than the standard of review for the regulation of adults); Schleifer v. City of Charlottesville, 963 F. Supp. 534, 541 (W.D. Va. 1997) (applying intermediate scrutiny to a regulation affecting only minors). *But see* Nunez v. City of San Diego, 114 F.3d 935, 945 (9th Cir. 1997) (applying *Bellotti*, not as a lower standard of scrutiny, but as a determination of the existence of a governmental compelling interest); Qutb v. Strauss, 11 F.3d 488, 492 n.6 (5th Cir. 1993) (advising that the *Bellotti* criteria do not reduce the level of scrutiny; rather, they determine whether a governmental interest is compelling).

133. *See* Ginsberg v. New York, 390 U.S. 629, 638 (1968) (examining the government's need to conform regulations to social realities). The *Ginsberg* Court viewed the different standards as an adjustment to speech definitions instead of as taking rights away from minors and discussed its history of recognizing that "where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . . . '" *Id.* (quoting *Prince*, 321 U.S. at 170); *cf.* City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989) (upholding a curfew ordinance).

Recognizing the vulnerability of minors, the *Stanglin* Court upheld a statute which permitted the licensing of dance halls catering to minors between the ages of 14 to 18. *See id.* at 19 (concluding that persons 14-18 years of age have no First Amendment Right to associate with persons outside of such age group). Challenged under Equal Protection and First Amendment grounds, the ordinance was upheld by the Court. *See id.* at 28 (declaring that the ordinance violates no protected right of association). Encouraging cities to create an environment where minors can safely communicate with each other, the Court held that this ordinance did not violate the rights of individuals under or over the ages specified. *See id.* (explaining that a rational relationship exists between age restrictions and the city's interest in the welfare of its teenagers). Statutes of this nature closely resemble the mini-web promulgated by filtering systems, such as Cyber Patrol. *Compare Stanglin*, 490 U.S. at 20-21 (upholding an ordinance allowing for a *safe* place for minors to gather and hang out), *with* ACLU v. Reno, 929 F. Supp. 824, 839-40 (E.D. Pa. 1996) (describing the features

The Supreme Court has afforded Congress and state governments such discretion in cases concerning speech regulations aimed at material that is "harmful to minors."[134] For example, in *Ginsberg v. New York*,[135] a stationery store owner was charged with violating the New York Penal Code for selling a 16-year-old boy two "girlie" magazines.[136] The law in question prohibited any person from selling material considered "harmful to minors" to individuals under the age of seventeen.[137] The store owner

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provided by filtering programs that permit children to *safely* explore the World Wide Web), *aff'd*, 117 S. Ct. 2329 (1997).

134. *See, e.g.*, Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1986) (stating that the government should be afforded the discretion to shield "minors from the influence of literature that is not obscene by adult standards"); *Ginsberg*, 390 U.S. at 633. In *Ginsberg*, the Court found that the "girlie magazine" in question would not be considered obscene by the adult standard, but the magazine did meet the definition of "obscene to minors" set out in the statute. *See id.* at 638. The Court relied on the governmental interest of protecting children to approve the stricter standard of obscenity for children. *See id.* at 639-43 (detailing the government's interest in protecting children).

135. 390 U.S. 629 (1968).

136. *See Ginsberg*, 390 U.S. at 631.

137. *See id.* at 645-47 (stating that the pertinent sections of the New York Penal Law are constitutional). That law provided that:

> 2. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor:
>
> (a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors or,
>
> (b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of subdivision two hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sado-masochistic abuse and which, taken as a whole, is harmful to minors.
>
> 3. It shall be unlawful for any person knowingly to exhibit for a monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.

Id. The law also defined in detail the terms "minor," "nudity," "sexual conduct," "sexual excitement," and "sado-masochistic abuse." *Id.* In addition, the provision defined "harmful to minors" as follows:

> Harmful to minors' means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:
>
> (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and
>
> (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors, and

challenged the law on the ground that it infringed on the First Amendment right of minors to receive the prohibited material.[138] After examining the differences between the State's right to regulate adults' speech and the State's greater discretionary right to regulate minors' speech, the Court held that the statute did not violate a minor's right to receive speech.[139] The *Ginsberg* Court contended that if the statute was aimed at adults, it would be questionable; however, because the statute was aimed only at minors, it was constitutionally sound.[140]

In *Ginsberg*, the Court reasoned that the statute's underlying consideration of current social realities and sexual interests of minors was a permissible adaptation of the current obscenity standard applicable to adults.[141] Thus, according to the Court, "That the State has power to make that adjustment seems clear, for we have recognized that . . . 'the power of the State to control the conduct of children reaches beyond the scope of its authority over adults . . . .'"[142] Furthermore, along with the State's interest in protecting youth from harmful material,[143] parents also were entitled to laws conducive to their right to rear their own children.[144]

(iii) is utterly without redeeming social importance for minors.

Id.

138. *See id.* at 636.

139. *See id.* at 637. It is important to note that the *Ginsberg* Court applied only a rational basis test to the provision. *See id.* at 641 (holding that it must "not [be] irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors").

140. *See id.* at 638 (relying upon Mishkin v. State of New York, 383 U.S. 502, 509 (1966), and Prince v. Massachusetts, 321 U.S. 158, 170 (1944)).

141. *See id.* at 638 (relying on the *Mishkin* holding to find that the New York statute merely adjusts the obscenity definition that is applicable to minors). In 1973, the Court established the adult standard for obscenity. *See* Miller v. California, 413 U.S. 15, 24 (1973) (defining obscenity). The *Miller* Court approved the following three-part test:

(a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;
(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

See id. (citation omitted). The *Ginsberg* holding effectively permits the adaptation of the *Miller* test to a child-like standard. *See Ginsberg*, 390 U.S. at 638.

142. *Id.* (quoting *Prince*, 321 U.S. at 170).

143. *See id.* at 636 (emphasizing that a state may regulate the sale of materials to minors to ensure their growth into well-developed citizens).

144. *See id.* at 638 (holding that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder" (quoting *Prince*, 321 U.S. at 166)).

Because speech, by its nature, sometimes eludes the monolithic categories necessary for uniform judicial review, historical speech cases have failed to establish bright-line rules regarding constitutionality, instead creating complex requirements for federal and state governments to follow.[145] Although few absolutes regarding the prevention of a speech restriction's invalidity exist, one premise is clear—labeling a speech restriction as content-based almost always precedes its downfall.[146] However, in addition to this judicial vacillation, the complex, fluid, and decentralized nature of the Internet exacerbates any First Amendment analysis. In this regard, the Internet may not necessarily be subject to traditional First Amendment assumptions when regulations are crafted to protect minors who are on-line.

IV. JUDICIAL SCRUTINY OF INTERNET REGULATION: THE COMMUNICATIONS DECENCY ACT AND *RENO V. ACLU*

A. *Regulating the Sender's End*

As the Internet has grown in popularity, offensive images and text on-line have become widely available.[147] Congress, which had been fervently encouraging American households to partake in the Internet phenomenon, dutifully jumped into action by promulgating the Communications Decency Act,[148] a law intended to prevent indecent Internet images from harming minors.[149] However, Congress crafted the CDA without the benefit of judicial guidance concerning the Internet me-

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145. *See* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 740-42 (1996) (providing a detailed analysis of the history of First Amendment cases).

146. *See* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (holding that content-based speech restrictions are presumed unconstitutional and subject to the often fatal strict scrutiny test).

147. *See* Reno v. ACLU, 117 S. Ct. 2329, 2336 (1997) (discussing the availability of sexually explicit material on the Internet extending from "the modestly titillating to the hardest-core").

148. 47 U.S.C. § 223 (Supp. II 1996).

149. *See* Reno v. ACLU, 117 S. Ct. 2329, 2338-39 (1997) (describing the origin of the CDA and its amendments). The CDA provided, in part, that:

> (a) Prohibited general purposes:
> Whoever—
> (1) in interstate or foreign communications—
> . . . .
> (B) by means of a telecommunications device knowingly—
> (i) makes, creates, or solicits, and
> (ii) initiates the transmission of,
> any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18

dium; as a result, its pioneering efforts to regulate information on the Internet proved unsuccessful.[150]

The CDA consisted of two sections: (1) the "indecent transmission" provision, prohibiting the knowing Internet transmission of obscene or indecent material to a recipient under eighteen years of age, regardless of whether the communication was initiated by the minor;[151] and (2) the "patently offensive display" provision, prohibiting any interactive communication that displays information or image in a patently offensive manner to a receiver under age eighteen regardless of whether the adult or minor initiated the transmission.[152] A violator of either provision faced criminal sanctions ranging from monetary fines to a two-year prison term.[153]

In drafting the CDA, Congress recognized that an Internet transmission consists of a sender and a receiver.[154] As such, Congress attempted

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years of age, regardless of whether the maker of such communication placed the call or initiated the communication;

. . . .

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

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

. . . .

(d) Sending or displaying offensive material to persons under 18

Whoever—

(1) in interstate or foreign communications knowingly—

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

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

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

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

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

47 U.S.C. § 223.

150. *See Reno*, 117 S. Ct. at 2334 (concluding that because the CDA violates adults' protected speech rights, it is unconstitutional).

151. *See* 47 U.S.C. § 223(a)(1)(B); *see also Reno*, 117 S. Ct. at 2338 (informally describing section 223(a) as the "indecent transmission" provision).

152. *See* 47 U.S.C. § 223(d)(1); *see also Reno*, 117 S. Ct. at 2338 (informally describing section 223(d) as the "patently offensive display" provision).

153. *See* 47 U.S.C. § 223(a)(2), (d)(2).

154. *See generally* 47 U.S.C. § 223 (regulating the "sending" of information via the Internet rather than the "receiving" of Internet material).

to protect children from indecency by regulating only the sender's end of the transmission.[155] Accordingly, under the CDA's provisions, only a person who sent or displayed offensive material was subject to criminal liability.[156] Essentially, Congress reasoned that by preventing the sender from ever transmitting indecent or offensive material, minors would never come in contact with the questionable material.[157] Free speech advocates, however, had tracked the CDA from its inception, and before the President's signature could dry, twenty civil liberties organizations filed suit against Attorney General Janet Reno alleging First and Fifth Amendment violations.[158]

B. *Striking Down the CDA:* Reno v. ACLU

The Supreme Court eventually addressed the constitutionality of the CDA in *Reno v. ACLU*,[159] concluding that the restriction violated the First Amendment.[160] In doing so, the Court declined to analogize the Internet to broadcast communication, which receives only a qualified level of First Amendment protection. The Court also failed to recognize the pervasiveness of Internet speech. Nonetheless, the members of the Court addressed other permissible means of Internet regulation, including the creation of "adult zones."[161]

1. The *Reno* Opinion

In *Reno*, the Court first addressed what type of speech medium was affected by the CDA. In that regard, though, the Court declined to liken the Internet to a previously analyzed medium of speech, broadcast communications, which was not provided full protection under the First Amendment.[162] Instead, the Court recognized that the Internet presented a unique communications medium, granting it the fullest pro-

155. *See id.*

156. *See id.*

157. *See* 142 CONG. REC. S687-01 (daily ed. Feb. 1, 1996) (statement of Sen. Exon) (stating that the CDA, in order to prevent minors from accessing indecent Internet material, is "directed at the creators and senders of obscene and indecent information").

158. *See* Reno v. ACLU, 117 S. Ct. 2329, 2339 (1997) (stating that twenty plaintiffs filed suit immediately following the President's signature of the CDA).

159. 117 S. Ct. 2329 (1997).

160. *See Reno*, 117 S. Ct. at 2344 (refusing to qualify the level of scrutiny applied to Internet regulations).

161. *See id.* at 2352-53 (O'Connor, J., concurring in part, dissenting in part) (suggesting that Congress create adult zones on the Internet rather than enacting blanket Internet regulations).

162. *See id.* (refusing to qualify First Amendment protection of Internet communications).

tection of the First Amendment.[163] In fact, the Court noted the lower courts' conclusions that, unlike broadcast information, "the risk of encountering indecent material by accident [on the Internet] is remote because a series of affirmative steps is required to access specific material."[164] Therefore, the Court actually circumvented a number of similarities between broadcast communication and the Internet by focusing instead on the "voluntary" nature of accessing Internet information.[165]

After curbing Congress' discretion in regulating the Internet as a communications medium, the Court eliminated any chance of the CDA's survival by branding the restriction as content-based.[166] Essentially, the Court found unpersuasive the government's argument that the CDA was a *content-neutral* method of cyber-zoning.[167] The *Reno* Court emphasized that a speech restriction created to "protect children from the primary effects of 'indecent' and 'patently offensive' speech, rather than any 'secondary' effect of such speech," is a content-based restriction.[168] As a result of this determination, the Court subjected the CDA to the often fatal strict scrutiny test, which requires a restriction to be narrowly tailored in its achievement of a compelling governmental interest.[169] In evaluating whether the CDA served a compelling governmental interest, the Court reiterated that the governmental interest of protecting children from harmful material has consistently been recognized as compelling.[170]

However, the Court also found that although "there is a compelling interest in protecting the physical well-being of minors which extended to shielding them from indecent messages," the method of protecting mi-

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163. *See id.* at 2343 (discussing the unique medium of speech arising out of the Internet's birth and determining the Internet was entitled to full First Amendment protection).

164. *Id.* at 2342.

165. *See id.* at 2344 (stating that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]"). The Court set up three criteria distinguishing broadcast speech from other types: (1) an extensive history of government regulation; (2) the scarcity of available frequencies; and (3) the invasive nature of the speech. *See id.*

166. *See id.* at 2351.

167. *See id.* at 2342 (emphasizing that the CDA, a content-based restriction, would be examined with exacting scrutiny instead of the more deferential standard granted to content-neutral restrictions).

168. *Id.* at 2342.

169. *See id.* at 2343 (discussing the two-tract system of examination applied to speech regulations).

170. *See id.* at 2343 (explaining the government's argument that protecting children from indecency is compelling).

nors must be narrowly tailored.[171] Thus, in determining that the CDA did not meet the narrowly tailored requirement, the Court emphasized the CDA's heavy burden on adult speech rights.[172] According to the Court, instead of only preventing minors from accessing indecent information, the CDA regulated the sender's end, preventing anyone from ever placing the material onto the Internet, and, as a result, preventing any Internet user, regardless of age, from receiving this speech.[173] Consequently, adults were prohibited from receiving speech that they had a "constitutional right to receive and to address to one another."[174]

In *Reno*, the Court also emphasized that a "burden on adult speech is unacceptable if less restrictive alternatives" could protect the compelling governmental interest in question.[175] On that note, the Court recognized that filtering software, which, unlike the CDA, focuses on the receiver's end of Internet communication and could be a less restrictive alternative.[176] The Court indicated that filtering software would be able to achieve the governmental interest of protecting minors by preventing them from accessing questionable Internet material, and filtering software achieves this interest without affecting the overall content of the Internet and adults' right to receive information.[177]

In addition to applying strict scrutiny analysis to the CDA, the Court commented upon the statute's overbreadth and vagueness.[178] To address the CDA's breadth, the Court examined the combined effect of the two provisions governing "indecent transmissions" and "patently offensive displays."[179] Focusing upon the "indecent transmission" provision, the Court recognized that although obscenity is not protected by the First

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171. *Id.* at 2343 (quoting Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989)).

172. *See id.* at 2345.

173. *See id.*

174. *Id.* at 2346.

175. *Id.*

176. *See id.* at 2348 (finding that the CDA was not narrowly tailored, partially due to the availability of alternatives that provide a method of "tagging" indecent material); *see also id.* at 2353-54 (O'Connor, J., concurring in part, dissenting in part) (discussing the availability of screening and filtering equipment for Internet use). In comparing the CDA and filtering programs, Justice O'Connor stated that a filter "requires Internet users to enter information about themselves—perhaps an adult identification number or a credit card number—before they can access certain areas of cyberspace, much like a bouncer checks a person's driver's license before admitting him to a nightclub." *Id.* at 2354 (O'Connor, J., concurring in part, dissenting in part).

177. *See id.* at 2348.

178. *See id.* at 2344 (discussing terminology differences in the CDA's provisions).

179. *See id.* Unlike most regulations, which clearly define the parameters of the law, the different standards in the "indecent transmission" provision and the "patently offensive display" provision of the CDA raise ambiguities. *See id.* (determining that the differences

Amendment, indecent speech is protected in certain contexts.[180] The Court then noted that the CDA, by banning all indecent Internet transmissions, regardless of whether they concern adults or minors, prohibits indecency in its protected forms.[181] As such, the Court concluded that the "indecent transmission" provision of the CDA was overbroad.[182]

After concluding that the CDA was overbroad, the *Reno* Court attacked the CDA's text, highlighting its vagueness problems.[183] The Court observed that the "indecent transmission" provision failed to define the term "indecent transmission," thus "leaving ambiguities within the statute."[184] In addition, the terms of the "patently offensive display" provi-

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in terminology raise questions of meaning as well as questions as to how the two standards relate to one another).

180. *See id.* at 2343 (describing the difference between obscenity and indecency and the Internet's merging of the two).

181. *Compare* Miller v. California, 413 U.S. 15, 24 (1973) (holding that obscene speech is not protected by the First Amendment), *with* Action for Children's Television v. FCC (III), 58 F.3d 654, 656-57 (D.C. Cir. 1995) (en banc) (upholding the statutory prohibition of indecency defined as "language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs").

182. In addition, the Court observed that the CDA's "patently offensive display" provision incorporated only one of the three prongs of the obscenity definition. *See Reno*, 117 S. Ct. at 2345 (recalling the *Miller* three-prong obscenity test and the CDA provision's resemblance to only one prong). In *Miller v. California*, the Court held that a statute banning obscene speech must incorporate a three-prong definition in order to avoid being struck down as overbroad. *See Miller*, 413 U.S. at 24 (establishing a three-prong definition of "obscenity"). Thus, because the "patently offensive display" provisions of the CDA failed to include all three prongs of the obscenity definition, the Court found that it, like the "indecent transmission" provision was overbroad. *See Reno*, 117 S. Ct. at 2345 (evaluating the provisions banning indecent and obscene speech).

Although the government has discretion to regulate obscene speech, it does not have absolute power to regulate indecent speech. *See id.* The CDA, which applied to adults and children, caused the Internet to be governed by a standard appropriate for children. *See id.* Agreeing with the government that protecting children from indecent material is a compelling interest, the Court emphasized distinctions between invasive speech and affirmative action speech. *See id.* According to the Court, "the dial-it medium requires the listener to take affirmative steps to receive the communication . . . [and p]lacing a telephone call' . . . 'is not the same as turning on the radio and being taken by surprise by an indecent message.'" *Id.* at 2343-44 (citation omitted). The *Reno* Court stated that whether or not the indecent speech was invasive altered the level of discretion afforded the government during regulation. *See id.* at 2344 (determining when the government can regulate indecent speech). Because of the Court's heavy handed analysis, the CDA had virtually no chance of withstanding the constitutional challenge.

183. *See* 47 U.S.C. § 223(a) (Supp. II 1996) (banning the knowing telecommunications transmission of *obscene or indecent* material); *id.* § 223(d) (banning the knowing display of *patently offensive* material as measured by contemporary community standards).

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

sion differed from the terms in the "indecent transmission" provision.[185] According to the Court, this linguistic ambiguity resulted in the CDA being vague, thus projecting an impermissible "chilling effect" on free speech rights.[186] Ultimately, the Court struck down the CDA in *Reno*, leaving the Internet free of regulation.[187] Yet, the Court stressed that a more carefully drafted regulation could constitutionally restrict Internet speech.[188]

2. Implications of *Reno* and Unresolved Issues

Faced with the first substantial legislative attempt to regulate the Internet, the Court in *Reno* took a "first, do no harm" approach, treating the Internet as a new speech medium.[189] In this regard, the Court followed the historical pattern of holding speech restrictions suspect[190] by

185. *See id.* at 2344. Because the CDA's "patently offensive display" provision not only lacked the "applicable state law" qualifier, but also extended the *Miller* prong from "sexual conduct" to "excretory activities" and "organs," the CDA covered much more area than the *Miller* test. *See id.* The *Miller* Court specifically included the "applicable state law" qualifier to permit appellate courts to limit speech regulations. *See id.*

186. *See id.* (detailing the CDA's metamorphoses to an overbroad statute banning free speech because of its vagueness). In the Court's opinion, combining the ambiguous terminology of the statute with its criminal sanctions, the CDA posed a great risk of encouraging citizens who are unable to decide if their speech is illegal to not speak at all for fear of criminal punishment. *See id.*

187. *See id.* at 2341 (striking down the CDA because its provisions were not narrowly tailored, and as a result, violated the First Amendment). After labeling the CDA a content-based restriction, the *Reno* Court steered the CDA through the strict scrutiny framework. *See id.* at 2342. Although the CDA easily satisfied the compelling interest prong of the strict scrutiny test, it failed to satisfy the narrowly tailored prong. *See id.* at 2346, 2348. Moreover, the Court determined that not only did a less restrictive alternative exist, but the CDA also suffered from overbreadth and vagueness problems.

188. *See id.* at 2346 (stating that the CDA's hindrance upon protected speech "cannot be justified if it could be avoided by a more carefully drafted statute").

189. *See* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 778 (1996) (Souter, J., concurring) (emphasizing that when the court knows too little to guarantee the lasting effects of its holding, the judicial obligation is to do no harm). In reviewing speech restrictions on a new medium, such as cable television or the Internet, the Court typically wishes to err on the side of protecting too much speech rather than infringing on the right to free speech. *See id.*

190. Interpreting the phrase "Congress shall make no law abridging the freedom of speech" as strictly as possible, earlier courts established that the First Amendment affords the government no power to limit speech because of its ideas or subject matter. *See* Cohen v. California, 403 U.S. 15, 24 (1971) (emphasizing that, according to the First Amendment, dislike for speech is not enough to regulate such speech); Street v. New York, 394 U.S. 576, 580 (1969) (noting that the First Amendment requires speech restrictions to be based upon more than disagreement with the message); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (relating that the First Amendment affords no power to the government to suppress ideas); NAACP v. Button, 371 U.S. 415, 445 (1963) (advising that the First

reviewing the CDA as if the government was attempting to indirectly control the thoughts of its citizens.[191] However, in doing so, the *Reno* Court failed to emphasize the CDA's goal of protecting minors from harmful speech. Moreover, the Court neglected to examine fully the medium classification of the Internet and the alternative solution of establishing "adult-zones" on the Internet.

a. Medium Classification

The *Reno* Court's decision to distinguish the Internet from the broadcast medium greatly influenced its ultimate analysis of the CDA. Had the Court likened the Internet to the broadcast medium, more discretion would have been afforded to the government in regulating the Internet.[192] In making the distinction, the Court compared the Internet to two forms of broadcast speech, radio and telephone; absent from the analysis, however, is the Internet's striking resemblance to a third form of broadcast speech, cable television.[193]

(1) Internet's Likeness to Cable Television

In deciding whether the Internet should receive only limited First Amendment protection, the Court focused upon whether the Internet

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Amendment demands more than mere disagreement with ideas to regulate speech); Wood v. Georgia, 370 U.S. 375, 388-89 (1962) (holding that the First Amendment does not allow the government to regulate speech representing the minority's viewpoint); Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (enforcing First Amendment provisions denying the government the right to restrict speech); De Jonge v. Oregon, 299 U.S. 353, 365 (1937) (describing the First Amendment as a limit to the government's powers of speech regulation).

191. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 63 (1976) (describing suspicions aroused when the government regulates speech based upon content). According to the Court in *Young*,

> A remark attributed to Voltaire characterizes our zealous adherence to the principle that the government may not tell the citizen what he may or may not say. Referring to a suggestion that the violent overthrow of tyranny might be legitimate, he said: 'I disapprove of what you say, but I will defend to the death your right to say it.' The essence of that comment has been repeated time after time in our decisions invalidating attempts by the government to impose selective controls upon the dissemination of ideas.

Id. (quoting S. TALLENTRYE, THE FRIENDS OF VOLTAIRE 199 (1907)).

192. *See Reno*, 117 S. Ct. at 2343-44; *see also* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 128 (1989) (noting the pervasiveness of indecent telephone conversations justifying more stringent governmental regulation); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 399-400 (1969) (examining the long record of regulation of radio broadcasting by the FCC).

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

was invasive in a manner similar to broadcast speech.[194] However, despite obvious similarities to broadcast speech, the Court sidestepped the Internet's invasive nature by fixating on the need for affirmative acts to retrieve harmful web pages.[195]

Downplaying the Internet's invasive nature, the *Reno* Court instead focused upon the finding that users must generally take affirmative steps to locate harmful material on the Internet.[196] Comparatively, though, cable television also requires affirmative steps to locate harmful programming—changing the television channel is the same as inputting key words into the computer. Notably, the finding of such an "affirmative action" did not keep the Court from likening cable to broadcast speech, and consequently, qualifying the level of scrutiny used to examine cable regulations.[197]

In addition, the Court ignored the pervasiveness of the Internet, another characteristic of cable television that results in qualified First Amendment protection.[198] To grant the Internet the fullest protection,

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194. *See id.* at 2343 (stating that the "Internet is not as 'invasive as radio or television'"). In a recent case involving cable television regulation, the Court denounced the use of the element of "spectrum scarcity" in determining whether or not the medium is "invasive." *See Denver Area Educ.*, 518 U.S. at 748 (distinguishing a previous case that held that cable television is not like broadcast speech from the current case in which the court held that cable television is like broadcast speech by deciding that the "spectrum scarcity" characteristic should no longer be used to determine whether the medium is invasive).

195. *See Reno*, 117 S. Ct. at 2343 (noting the lower court's finding that Internet "[u]sers seldom encounter content 'by accident'" (citing ACLU v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997)). However, absent in the *Reno* Court's analysis is any notation of the striking resemblance between the popularity of radio and television twenty years ago and the popularity of computers today. *Compare id.*, at 2334 (discussing the rapidly increasing availability of Internet-accessible computers), *with* FCC v. Pacifica Found., 438 U.S. 726, 731 (1978) (noting the invasive nature of radio and television due to its popularity with the American family).

196. *See Reno*, 117 S. Ct. at 2343 (determining that accidental exposures to sexually explicit Internet material rarely happens).

197. *See Denver Area Educ.*, 518 U.S. at 743 (subjecting cable television regulations to the lower level of scrutiny applied to broadcast medium regulations).

198. The pervasiveness of a speech medium is another factor used to determine the amount of discretion afforded the Government in regulating the medium. *See* J. M. Balkin, *Media Filters, the V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1137 (1996) (analyzing the component of "pervasiveness" in determining the standard of scrutiny to be applied). Five possible definitions of "pervasiveness" are: (1) powerfulness, (2) ubiquitous in nature, (3) constitutive of our nation's culture, (4) applies to captive audiences, and (5) difficulty in parental control. *See id.* at 1136-37. The Internet is pervasive because it is difficult for parents to control; if it were not, filtering programs would not be mass marketed as they are today. The *Reno* Court also recognized the Internet's pervasiveness as applicable to parents, discussing the various options available to parents, to control their children's use, like filtering equipment. *See Reno*, 117 S. Ct. at 2336 (describing filters as "reasonably effective").

the Court needed to downplay the easy access to harmful material, and as such, the *Reno* Court pointed to the lower court's finding that a virtual obstacle course must be completed for a user to gain access to sex sites; yet, on the same page of the opinion, the Court recognized that the Internet's capabilities can take advantage of children and that filtering programs are available to help parents prevent children from gaining access to sexually explicit material.[199]

If the Court is faced with a minors-only Internet regulation, several factors should affect the pervasiveness consideration. The widespread availability of Internet-accessible computers in schools, libraries, and homes mirrors the widespread availability of cable television that the Court found noteworthy when deciding to qualify the level of protection afforded cable television.[200] In this respect, as minors are bombarded with opportunity after opportunity to access the Internet, the pervasiveness of the medium grows, effectively swallowing up any capacity to consent to the dangers posed. Furthermore, just as the Court found that the existence of cable "lockboxes" did not dilute cable television's invasive nature,[201] the Court should have found that the existence of Internet filters does not dilute the Internet's invasive nature.

(2) The "First, Do No Harm" Approach

In concluding that the Internet should be granted full protection under the First Amendment, the Court followed its historical pattern of caution, demonstrating that it preferred to err on the side of over-protection

199. *Compare Reno*, 117 S. Ct. at 2336 (emphasizing that filters are available to help parents when it comes to minors using the Internet), *with* ACLU v. Reno, 929 F. Supp. 824, 854 (E.D. Pa. 1996) (stating that the series of affirmative steps that are required to retrieve sexually explicit material makes the Internet not pervasive), *aff'd*, 117 S. Ct. 2329 (1997). The lower court found that sex sites are hard to find and that "[a] child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended." *ACLU*, 929 F. Supp. at 845. Unfortunately, the lower court overlooked newspapers reporting the many problems experienced by public libraries, and failed to recognize that sometimes, due to computer education in schools, children know more about computers than their parents. *See* Justin Romack, *On the Net Websites That Help with Schoolwork*, FORT WORTH STAR-TELEGRAM, July 29, 1997, at 36 (describing the increasing role that computers are playing in the lives of school children and the resulting computer literacy), *available in* 1997 WL 11895934.

200. *Compare Reno*, 117 S. Ct. at 2334 (describing Internet usage as "expected to mushroom to 200 million [users] by 1999" and noting that access can be gained through colleges and universities, public libraries, and at home), *with Denver Area Educ.*, 518 U.S. at 738 (stating that 60% of American families have access to cable television (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 633 (1994))).

201. *See Denver Area Educ.*, 518 U.S. at 833 (Thomas, J., concurring) (discussing the availability of cable lockboxes while noting that lockboxes alone do not overcome the invasive nature of the broadcast medium).

rather than deny full First Amendment protection to this new method of communication.[202] However, the Court failed to consider the Internet's medium classification in light of the fact that technology has had the opportunity to catch up with the World Wide Web. In fact, the Court recently went through this same type of evolution when it confronted cable television regulations.[203] Although the Court initially took the "first, do no harm" approach when it examined cable regulations, the Court later reconsidered cable television's medium classification, and reduced the level of First Amendment protection it originally granted.[204]

In the first cable television case, *Turner Broadcasting Systems, Inc. v. FCC*,[205] the Court refused to qualify the level of First Amendment protection afforded to the cable television medium, due, in large part, to the novelty of the cable television medium;[206] however, in a later case, *Denver Area Education Telecommunications Consortium, Inc. v. FCC*,[207] the

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202. *See Reno*, 117 S. Ct. at 2344 (distinguishing the Internet from the broadcast medium, and, as a result, applying a strict rather than qualified level of scrutiny to the CDA). By refusing to liken the Internet to the broadcast medium, the Court was able to highly scrutinize any speech restriction affecting the Internet, thus, ensuring the free flow of ideas on the Internet. *See id.* at 2344, 2351.

> The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.

Id. at 2351. However, in comparing the broadcast medium to the Internet, the *Reno* Court failed to address the similarity of children's access to the forms of communication. One of the reasons that broadcast speech is highly regulated is because children have easy access to radios; similarly, children today have easy access to the Internet. *Compare Reno*, 117 S. Ct. at 2334 (emphasizing the importance of the Internet because of its extensive availability at many different sources such as colleges, universities, local libraries, and computer coffee shops), *with* F.C.C. v. Pacifica, 438 U.S. 726, 749-50 (1978) (recognizing the ease of access to radio and the resulting danger of exposure to unregulated indecent monologues).

203. In classifying cable television as a medium, the court initially provided cable with the fullest protections of the First Amendment. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 632 (1996) (examining the constitutionality of "must carry" regulations on cable television). However, in a later case involving the regulation of cable operators, the Court reconsidered its classification of the cable medium, holding that cable was more like broadcast speech, and as such, should not be provided the First Amendment's fullest protection. *See Denver Area Educ.*, 518 U.S. at 747-48 (qualifying the level of scrutiny when examining cable television regulations by analogizing the instant case to *Pacifica Foundation*).

204. *Compare Turner Broad. Sys.*, 512 U.S. at 632 (distinguishing cable television from broadcast speech), *with Denver Area Educ.*, 518 U.S. at 747-48 (determining that cable television should actually be treated like broadcast speech due to changes in technology).

205. 512 U.S. 622 (1996).

206. *See Turner Broad. Sys.*, 512 U.S. at 640.

207. 518 U.S. 727 (1996).

Court held that changes in technology and the focus of the regulation required the Court to reconsider cable's medium classification.[208] This shift of focus was largely attributable to the purpose of the *Denver Area Education* regulation, which was to protect children from "patently offensive sex-related material" on cable television.[209] Essentially, in comparing speech mediums in light of the potential for accessing harmful material, cable television closely resembled the broadcast medium.[210]

Like the *Turner Broadcasting Systems* Court, the *Reno* Court cautiously afforded the fullest protection at its first encounter with a new medium; however, in doing so, it failed to address the striking comparisons between Internet communication and cable television. Hence, one could argue that the Court should follow the pattern set up by its treatment of cable television and, at its next opportunity, qualify the level of First Amendment protection granted to the Internet.

b. Future Viability of Adult Zones and Filtering Software

Despite the shortcomings of the *Reno* opinion discussed above, including the "first, do no harm" approach and the failure to recognize the Internet's similarities to cable television, the Court has anticipated the validity of future Internet regulation.[211] Although the majority opinion only briefly mentioned possible restrictions on Internet speech, Justice O'Connor, undoubtedly persuaded by the success of Internet technology, proposed a remedy to the problem at hand in her concurring opinion.[212]

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208. *See Denver Area Educ.*, 518 U.S. at 749. In *Denver Area Education*, the Court examined the constitutionality of three cable television regulations, two of which permitted cable operators to prohibit broadcasting of programs that the operator believed to describe patently offensive material. *See id.* at 732-33 (explaining that two of the provisions at issue "essentially permit a cable system operator to prohibit the broadcasting of 'programming' that the 'operator reasonably believes describes or depicts sexual or excretory activities in a patently offensive manner'" (citation omitted)). The Court, in deciding that cable television is a medium analogous to broadcast speech, emphasized that 60% of all homes have cable television and that cable television is uniquely accessible to children. *See id.* at 738 (referring to *Turner Broad. Sys.*, 512 U.S. at 631). Along with recognizing that "[c]able television broadcasting, including access channel broadcasting, is as 'accessible to children' as over-the-air broadcasting, if not more so," the Court also emphasized that a non-banning provision does not "stop 'adults who feel the need' from finding similar programming elsewhere . . . . " *Id.* at 744-45.

209. *See id.* at 743.

210. *See id.* at 744 (concluding that "the problem Congress addressed here is remarkably similar to the problem addressed by the FCC in *Pacifica*").

211. *See Reno*, 117 S. Ct. at 2346 (asserting that a "more carefully drafted statute" may be able to avoid the overbreadth and vagueness problems of the CDA).

212. *See id.* at 2352 (O'Connor, J., concurring in part, dissenting in part) (discussing adult zoning as a possible future means to allow adults access to the Internet's entire contents while denying minors access to harmful material).

In particular, Justice O'Connor provided logical insight to the future of Internet regulation in *Reno* by suggesting that the government create "adult zones."[213]

Child advocacy groups have always demanded that minors be shielded from harmful material; however, in response to those demands, the Court, while acknowledging that some forms of protected speech can harm children, has refused to enforce outright bans on harmful material.[214] In the Court's view, the possibility of minors coming in contact with X-rated movies and "girlie magazines" has never been enough to justify a complete proscription because such a ban would improperly limit adults' access to that material.[215] Nonetheless, in *Reno*, Justice O'Connor noted that the Court has consistently approved the "zoning solution," which limits minors' access while protecting adults' right to receive the same information.[216] Justice O'Connor emphasized the requirements of such "zoning" restrictions by stating that:

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213. *See id.* at 2352-53 (O'Connor, J., concurring in part, dissenting in part).

214. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46-48 (1986) (upholding a zoning ordinance because it only regulated the geographical location of an adult theater and did not ban adult theaters altogether); New York v. Ferber, 458 U.S. 747, 772 (1982) (upholding a statute because it forbade speech not protected by the First Amendment and did not ban speech protected by the First Amendment); Young v. American Mini Theatres, Inc., 427 U.S. 50, 63 (1976) (stating that a flat ban on adult theaters is impermissible); Butler v. Michigan, 352 U.S. 380, 383 (1957) (invalidating a statute which prohibited all sales of offensive material in Michigan).

215. *Cf.* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74-75 (1983) (condemning as unconstitutional a statutory ban on unsolicited mailings of contraceptive advertisements). The Court declared in *Bolger* that regardless of the strength of the government's interest "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." *Id.* at 74.

216. *See Reno*, 117 S. Ct. at 2351-52 (O'Connor, J., concurring in part, dissenting in part) (recounting the development of zoning). Almost all states have created legislation denying minors access to materials that are deemed "harmful to minors." *See, e.g.*, ALA. CODE § 13A-12-200.5 (1994); ALASKA STAT. § 11.66.300 (Michie 1996); ARIZ. REV. STAT. ANN. § 13-3556 (West 1989); ARK. CODE ANN. §§ 5-27-223-24 (Michie 1997); CAL. PENAL CODE § 313.1 (Deering 1985); COLO. REV. STAT. § 18-7-502(2) (1997); CONN. GEN. STAT. ANN. § 53a-196 (West 1994); DEL. CODE ANN. tit. 11, § 1365(i)(2) (1995); D.C. CODE ANN. § 22-2001(b)(1)(B) (1996); FLA. STAT. ANN. § 847.013(2) (West 1994 & Supp. 1998); GA. CODE ANN. § 16-12-103(b) (1996); HAW. REV. STAT. § 712-1215(1)(b) (1994); IDAHO CODE § 18-1515(2) (1997); 720 ILL. COMP. STAT. ANN. 5/11-211 (West 1993); IND. CODE ANN. § 35-49-3-3 (Michie 1994 & Supp. 1998); IOWA CODE ANN. § 728.2 (West 1993); KAN. STAT. ANN. § 21-4301c(a)(2) (1995); LA. REV. STAT. ANN. § 14:91.11(B) (West 1986 & Supp. 1998); MD. CODE ANN., CRIMES & PUNISHMENTS 416B-C (1996); MASS. ANN. LAWS ch. 272, § 28 (Law Co-op 1992); MICH. COMP. LAWS § 750.141 (1991); MINN. STAT. ANN. § 617.294 (West 1987); MISS. CODE ANN. § 97-5-11 (1994); MO. ANN. STAT. § 573.507 (West 1995); MONT. CODE ANN. § 45-8-206 (1997); NEB. REV. STAT. § 28-809 (1995); NEV. REV. STAT. § 201.265(3) (1995); N.H. REV. STAT. ANN. § 571-B:2(II) (1986); N.M. STAT. ANN. § 30-37-3 (Michie 1998); N.Y. PENAL LAW § 235.21(2) (McKinney 1989 & Supp.

> [A] 'zoning' law is valid only if adults are still able to obtain the regulated speech . . . . [If not,] the law does more than simply keep children away from speech they have no right to obtain—it interferes with the rights of adults to obtain constitutionally protected speech and effectively "reduce[s] the adult population . . . to reading only what is fit for children."[217]

Working within the constitutional parameters discussed by Justice O'Connor, filtering policies may avoid the CDA's fatal flaws. Unlike the CDA, which prevented information from being injected into the Internet, filters merely restrict the access of specific Internet users by regulating the receiver's end, rather than the sender's end, of Internet transmissions. Furthermore, filters only block certain users from accessing undesirable material and place no burden on the Internet's overall content.[218] As a result, filtering software may very well play a pivotal role in the future of Internet regulation.

C. *Round Two: Congress Enacts the CDA II*

Regardless of the potential viability of zoning and filtering software as proposed in *Reno*, Congress enacted new legislation in 1998 that regulates the Internet in much the same way as the CDA.[219] Appropriately, this new law has been labeled the CDA II.[220] However, unlike its prede-

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1998); N.C. GEN. STAT. § 14-190.15(a) (1993); N.D. CENT. CODE § 12.1-27.1-03 (1997); OHIO REV. CODE ANN. § 2907.31(A)(1) (West 1997); OKLA. STAT. ANN. tit. 21, § 1040.76(2) (West Supp. 1998); 18 PA. CONS. STAT. ANN. § 5903(a)(1) (West Supp. 1998); R.I. GEN. LAWS § 11-31-10(a) (1994); S.C. CODE ANN. § 16-15-385(A) (Law. Co-op. 1997); S.D. CODIFIED LAWS § 22-24-30 (Michie 1988); TENN. CODE ANN. § 39-17-911(a)-(b) (1997); TEX. PENAL CODE ANN. § 43.24(b) (Vernon 1994); UTAH CODE ANN. § 76-10-1206(1) (1997); VT. STAT. ANN. tit. 13, § 2802(b) (1974); VA. CODE ANN. § 18.2-391 (Michie 1996); WASH. REV. ANN. CODE § 9.68.060 (West 1988); WIS. STAT. ANN. § 948.11(2) (West 1996).

217. *Reno*, 117 S. Ct. at 2353 (O'Connor, J., concurring in part, dissenting in part) (quoting *Butler*, 352 U.S. at 383).

218. *See* Michael Krantz, *Censor's Sensibility: Are Web Filters Valuable Watchdogs or Just New Online Thought Police*, TIME, Aug. 11, 1997, at 48 (describing how filters work); *see also* Dawn C. Chmielewski, *Parents Can Take Steps to Monitor Kids Online*, HOUS. CHRON., Aug. 14, 1997, at 4 (discussing how filters can be used to block sexually explicit web sites), *available in* 1997 WL 13056450.

219. *See* Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (to be codified at 47 U.S.C. § 231).

220. *See Meddling with the Internet: The New "CDA2" Censorship Act*, ONLINE NEWS., Nov. 1, 1998 (reporting that House Bill 3783, also called the CDA II, was signed into law and will take effect in 30 days), *available in* 1998 WL 2088398. Critics of the bill claim that "[i]t's déjà vu all over again" because "[j]ust like the CDA, this bill will once again criminalize socially undervaluable adult speech and reduce the Internet to what is considered suitable for a six-year-old." Id. In addition, critics claim that the bill is uncon-

cessor, which affected all Internet transmissions, the CDA II focuses solely on Internet communications made "for commercial purposes."[221] Despite this distinction, the ACLU, along with other civil liberties organizations, filed suit recently to challenge the statute's constitutionality, obtaining a temporary restraining order against enforcement of the CDA II.[222] Although lawmakers claim that the CDA II is narrowly tailored because it applies only to minors and web sites used for commercial purposes, civil rights groups argue that the CDA II "bans a wide range of protected expression that is provided for free on the Web by organizations and entities who also happen to be communicating on the Web 'for commercial purposes.'"[223]

More than likely, the *Reno* opinion will provide the backdrop upon which the CDA II's constitutionality will be examined. Because the Supreme Court explicitly disapproved of any type of sender's end regulation in *Reno*,[224] the likelihood that the CDA II will pass constitutional muster is small. The only hope for the CDA II is that the Court will revisit the medium classification of the Internet and conclude that the Internet should not be granted full First Amendment protection. Such a determination would favor the survival of the CDA II because it would avoid becoming another fatality of the Court's strict scrutiny analysis. However, if the Court declines to revisit the Internet's classification, the CDA II, like its predecessor, will be deemed an unconstitutional speech

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stitutional because it requires "any adult wishing to receive constitutionally protected material . . . [to] register with a website before receiving information." *Id.*

221. *See* Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (to be codified at 47 U.S.C. § 231).

222. *See* ACLU v. Reno, No. 98-5591, 1998 WL 813423, at *3 (E.D. Pa. Nov. 23, 1998) (mem.) (granting a temporary restraining order against enforcement of the CDA II). In granting the order, the district court emphasized the high likelihood that the CDA II will violate the First Amendment rights of adults. *See ACLU*, 1998 WL 813423 at *2. Among the factors considered, the chance of self-censorship weighed most heavily in the court's analysis:

> [The plaintiffs'] fears of prosecution under [the CDA II] will result in the self-censorship of their online materials in an effort to avoid prosecution. This chilling effect will result in the censoring of constitutionally protected speech, which constitutes an irreparable harm to the plaintiffs . . . . For plaintiffs who choose to not self-censor their speech, they face criminal prosecution and penalties for communicating speech that they have shown is likely to be protected under the First Amendment.

Id. at *3. As a result of this order, the CDA II is nullified in Pennsylvania, and according to the implications of *Reno v. ACLU*, the CDA II will likely be formally struck down shortly thereafter.

223. *See id.* (examining the pros and cons of the new law passed to regulate the content of the Internet).

224. *See* Reno v. ACLU, 117 S. Ct. 2329, 2351 (1997) (striking down a sender's end regulation of Internet communication).

regulation because it reduces all commercial Internet content to that appropriate for a child.

V. Filtering: By Embracing Advances in Technology, Public Libraries Can Protect the Rights of Adults and the Innocence of Minors Simultaneously

As a result of the short life expectancy of the CDA II, the problem of minors' Internet access remains. With the Internet untamed, minors are forced to weed through the debris to gain the fruits yielded by the World Wide Web. The danger of minors accessing "harmful" material is heightened in the public library, where Internet access is free and often unsupervised. However, in regulating the Internet access of public libraries, Congress can benefit from its previous misfortune by avoiding the fatal flaws of the CDA and, more than likely, the CDA II. The *Reno* Court was swayed to invalidate the CDA because of the "speakers end" method of regulation, which reduced the content of the Internet to that acceptable for a child,[225] and the overbreadth and vagueness of the provision's language.[226] Although the CDA was unable to overcome these hurdles, a combination of Supreme Court precedent and Internet technology can not only surpass these hurdles but also can reconcile adults' First Amendment rights with the vulnerability of exposing minors to harmful Internet material.

A. *A Proposal for Public Library Filtering of Minors' Internet Access*

Unlike parents, who enjoy almost absolute discretion in regulating their children's speech, the public library, acting as the state's agent, is subject to all limitations imposed on state actors.[227] Due to the limited discretion afforded public libraries, along with the unique role they play in providing information to patrons, any public library restriction affecting its patrons' ability to receive speech must be carefully considered.[228]

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225. *See id.* at 2346 (striking down the CDA because it affected the Internet's entire content).

226. *See id.* at 2344 (pointing out the CDA's failure to define its key terminology).

227. *See* Board of Educ. v. Pico, 457 U.S. 853, 875 (1982) (requiring that actions in a public school library not violate the First Amendment); Kreimer v. Bureau of Police, 958 F.2d 1242, 1263-64 (1992) (requiring that restrictions in a public library not violate the First Amendment); *see also* Mark Rahdert, *Preserving the Archives of Freedom: Justice Blackmun and First Amendment Protections for Libraries*, 97 Dick. L. Rev. 437, 462-64 (1993) (discussing the various restrictions placed on public libraries).

228. *See* Arlene Bielefield & Lawrence Cheeseman, Library Patrons and the Law 39-105 (1995) (discussing legal issues faced by public libraries, especially when choosing the content of library materials); *see also* Joseph E. Bryson & Elizabeth W. Detty, Censorship of Public School Library and Instructional Material 71-91

Before it was led astray by the proposal of the CDA II, Congress had started down the right path of public library Internet regulation. Senator John McCain's proposed "Internet School Filtering Act" was aimed directly at Internet access provided by public schools and public libraries, and it targeted the receiver's end of Internet communication rather than the sender's end.[229] Essentially, the bill required that all public libraries with one or more Internet-accessible computers install filtering software on at least one of the computers.[230] By providing one "filtered" computer for minors' use, the library could ensure that minors were protected from "harmful" material on the Internet. The Internet School Filtering

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(1982) (exploring possible solutions to First Amendment freedom of speech issues for public school libraries); WILLIAM Z. NASRI, LEGAL ISSUES FOR LIBRARY AND INFORMATION MANAGERS 6-8 (1987) (providing solutions to some legal problems faced by libraries).

229. *See* S. 1619, 105th Cong. (1998) (requiring public libraries to restrict minors' Internet access through the use of filtering software). Senator McCain's bill proposed, in part, the following:

> I. No Universal Service for Schools or Libraries That Fail to Implement a Filtering or Blocking System for Computers with Internet Access.
>
> A. In general—Section 254 of the Communications Act of 1934 (47 U.S.C. 254) is amended by adding at the end thereof the following:
>
> 1. IMPLEMENTATION OF A FILTERING OR BLOCKING SYSTEM—IN GENERAL—No service may be provided under subsection (h)(1)(B) to any elementary or secondary school, or any library, unless it provides the certification required by paragraph (2) or (3), respectively.
>
> . . . .
>
> 3. CERTIFICATION FOR LIBRARIES—Before receiving universal service assistance under subsection (h)(1)(B), a library that has a computer with Internet access shall certify to the Commission that, on one or more of its computers with Internet access, it employs a system to filter or block matter deemed to be inappropriate for minors. If a library that makes a certification under this paragraph changes the system it employs or ceases to employ any such system, it shall notify the Commission within 10 days after implementing the change or ceasing to employ the system.
>
> 4. LOCAL DETERMINATION OF CONTENT—For purposes of paragraphs (2) and (3), the determination of what matter is inappropriate for minors shall be made by the school, school board, library or other authority responsible for making the required certification. No agency or instrumentality of the United States Government may-
>
> a) establish criteria for making that determination
>
> b) review the determination made by the certifying school, school board, library, or other authority; or
>
> c) consider the criteria employed by the certifying school, school board, library, or other authority in the administration of subsection (h)(1)(B).

Id.

230. *See id.* (placing a prerequisite to funding on public libraries concerning minors' Internet access).

Act, however, has yet to become law, as it was overshadowed by the CDA II.[231]

Although Senator McCain's proposed legislation begins on the right track by stressing receiver's end regulation, it requires modification to survive a constitutional challenge. Yet, to fortify the Internet School Filtering Act, Congress need look no further than Supreme Court precedent. By using the guideposts set up by the Court in *Reno v. ACLU* and *Ginsberg v. New York*, Congress can protect adult speech rights while also protecting minors from harmful Internet material.[232] Accordingly, three components must be added to the proposed statute: (1) precise definitions; (2) a single computer library provision; and (3) a safety valve provision.

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231. *See* Search of WESTLAW, US-BILLTRK Database (Jan. 6, 1999).

232. *See* Reno v. ACLU, 117 S. Ct. 2329, 2344 (1997) (striking down the CDA, which sought to regulate harmful material on the Internet); Ginsberg v. New York, 390 U.S. 629, 639 (1968) (holding that a state has constitutional power to protect its children by restricting sales to children more than it restricts sales to adults). In addition to the guidance provided by Supreme Court precedent, one court has examined the constitutionality of a public library's use of filtering software. *See* Mainstream Loudoun v. Board of Trustees, 24 F. Supp. 2d 552, 569 (E.D. Va. 1998) (permanently enjoining a public library from enforcing an Internet Filtering Policy). In *Mainstream Loudoun*, the public library established a policy aimed at preventing minors from accessing harmful material on the Internet. *See id.* at 556. The library installed a commercial filter, X-Stop, on *all* Internet-accessible computers. *See id.* As a result of the limited access provided, several adult patrons brought suit. *See id.*

The court began its analysis by first considering whether a public library constitutes a public forum. *See id.* at 561. This determination affects the analysis because regulations affecting non-public fora are reviewed under an intermediate rather than strict level of scrutiny. *See id.* (stating that regulations affecting a non-public fora "need only be 'reasonable and viewpoint neutral' to be upheld" (quoting Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 694 (1992) (Kennedy, J., concurring)). In making its determination, the court looked to the holding of the Third Circuit in *Kreimer v. Bureau of Police*, which used three factors to determine whether a public library constituted a public forum: (1) governmental intent; (2) extent of use; and (3) nature of the forum. *See id.* at 562 (citing Kreimer v. Bureau of Police, 958 F.2d 1242, 1264 (3d Cir. 1992)). The *Mainstream Loudoun* Court found that the local government intended to "designate Loudoun County libraries as a public fora for the limited purposes of the expressive activities they provide," thus satisfying the first factor. *See id.* at 563. In addition, the court found that because the government designated that library for the use of "the people" and the nature of the library is compatible with "the receipt and communication of information," the last two factors were also satisfied. *See id.* As such, the court designated the public library as a limited public forum, subjecting the library's policy to a strict scrutiny analysis. *See id.*

1. Definitions

Initially, Congress should remedy any vagueness problems by providing a conclusive list of definitions to the proposed statute.[233] Because the constitutionality of speech restrictions often centers around the specific type of speech affected,[234] Congress should opt for "pre-approved" lan-

233. *Cf. Reno*, 117 S. Ct. at 2344-45 (discussing the vagueness and consequent unconstitutionality of the CDA).

234. *See id.* at 2350-51 (invalidating the CDA, which banned obscene and indecent speech partly due to a lack of definitions for the term "indecent"); Playboy Entertainment Group, Inc. v. United States, 117 S. Ct. 1309, 1309 (1997) (affirming, without an opinion, the lower court holding that although indecent speech can be restricted to protect children, the restriction must be narrowly tailored); Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 733 (1996) (striking down one portion of a statute banning indecent programming on public access cable stations but not another portion of a statute that regulated indecent programming on leased cable stations); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 131 (1989) (holding that the proscription of *obscene* dial-a-porn messages can be banned, but *indecent* dial-a-porn messages cannot be banned); Vance v. Universal Amusement Co., 445 U.S. 308, 317 (1980) (condemning a Texas law allowing state judges to forbid future exhibition of all movies, indecent and obscene, not by showing that the movies were indecent or obscene, but by showing that the theater had shown obscene movies in past); *see also* Crawford v. Lungren, 96 F.3d 380, 389 (9th Cir. 1996) (upholding a California statute prohibiting "harmful matter" to be sold by unsupervised street vending machines), *cert. denied*, 117 S. Ct. 1249 (1997); Action for Children's Television v. FCC, 58 F.3d 654, 657 (D.C. Cir. 1995) (en banc) (upholding an FCC regulation of indecent speech in the broadcast medium); Dial Info. Servs. Corp. v. Thornburgh, 938 F.2d 1535, 1540 (2d. Cir. 1991) (declaring a statute forbidding any indecent communication to minors by telephone constitutional, and stating that the definition of "indecency" as "the description or depiction of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the telephone medium" was neither vague nor ambiguous); Fabulous Ass'n, Inc. v. Pennsylvania Pub. Util. Comm'n, 896 F.2d 780, 789 (3d Cir. 1990) (invalidating a statute restricting telephone communications and stating that although protecting children is compelling, the statute must be the least restrictive alternative); 511 Detroit St., Inc. v. Kelley, 807 F.2d 1293, 1299 (6th Cir. 1986) (stating that the possibility of a speech restriction chilling protected speech is not enough to invalidate the restriction); Fehlhaber v. North Carolina, 675 F.2d 1365, 1371 (4th Cir. 1982) (holding that a statute authorizing the court to enter an injunction against an adult store that is found to sell material only obscene in principal or substantial part as constitutional); Altmann v. Television Signal Corp., 849 F. Supp. 1335, 1346 (N.D. Cal. 1994) (determining that portions of the Cable Television Consumer Protection and Competition Act of 1992 allowing cable providers to regulate stations for indecency was unconstitutional); Central Ave. Enter., Inc. v. City of Las Cruces, 845 F. Supp. 1499, 1505 (D.N.M. 1994) (invalidating a local ordinance because it affected both unprotected and protected speech by requiring special permits for any store which sold material "distinguished or characterized by [an] emphasis on matters depicting, describing, or relating to specified sexual activities or specified anatomical areas"); Baker v. Glover, 776 F. Supp. 1511, 1518 (M.D. Ala. 1991) (asserting that a bumper sticker reading "How's My Driving? Call 1-800-EAT SHIT!" did not violate an obscenity statute, but neglecting to determine whether or not the bumper sticker violated an indecency statute); Phe, Inc. v. Department of Justice, 743 F. Supp. 15, 28 (D.D.C. 1990) (granting a preliminary injunction forbidding

guage in crafting its regulation. Thus, instead of using the term "inappropriate" to corral the speech affected by this regulation, Congress should follow the path already worn by previous speech restrictions, particularly that exemplified in *Ginsberg*.[235]

Thus, Congress can help ensure the constitutionality of any public library Internet regulation by couching the forbidden material in terms of "harmful to minors" rather than "inappropriate."[236] Because in *Ginsberg* the Court approved a precise definition of "harmful to minors," Congress should incorporate this same definition into its legislation as follows:

> "Harmful to minors" means that quality of any work, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:
> (a) according to the average person, applying local community standards, would find that the work, taken as a whole, appeals to the prurient interest of minors; and
> (b) the work is patently offensive according to local community standards with respect to what is suitable material for minors; and
> (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.[237]

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the government to carry out orders preventing a local adult store from distributing all sexually oriented materials, whether obscene or not); Roe v. Meese, 689 F. Supp. 344, 345 (S.D.N.Y. 1988) (denying summary judgment to challengers of the "Telephone Decency Act," which proscribed all indecent and obscene interstate telephone communications); American Booksellers Ass'n v. McAuliffe, 533 F. Supp. 50, 52 (N.D. Ga. 1981) (declaring that a statute prohibiting the sale to minors of any material depicting "illicit sex or sexual immorality" as unconstitutional, even though the statute was established to protect minors). *But see* Nat'l Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2180 (1998) (holding the "decency clause" in an art funding statute constitutional).

235. *See* Ginsberg v. New York, 390 U.S. 629, 633 (1968) (discussing definitions used in a constitutional speech restriction which prevented the sale of material "harmful to minors"). Although the *Ginsberg* holding is over thirty years old, it provides the only direct guidance on how the Court examines minors' right to receive harmful material; consequently, any challenges to filtering policies will be bound by the controlling authority specifically related to minors' right to receive harmful materials. *See* N.W. Enter., Inc. v. City of Houston, No. Civ.A.H-97-0196, 1998 WL 315917, at *10 (S.D. Tex. Feb. 18, 1998). Accordingly, lower courts should not conclude that more recent cases have, by implication, overruled an earlier precedent. In other words, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Agostini v. Felton, 117 S. Ct. 1997, 2017 (1997) (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989)).

236. *See Ginsberg*, 390 U.S. at 633 (upholding a statute using the term "harmful to minors" in order to outlaw certain speech).

237. *See id.* at 646 (defining terms, including "harmful to minors").

Additionally, any Internet regulatory statute should also define the term "minor." Based on previous case law, a minor should be defined as any person under the age of seventeen.[238] In *Reno*, when analyzing previous statutes aimed at protecting minors from harmful material, the Court noted a pivotal difference between statutes based upon those under the age of eighteen and statutes based upon those under the age of seventeen.[239] For example, in *Ginsberg*, the Court upheld a statute aimed at minors under seventeen.[240] When the *Reno* Court considered the applicability of its *Ginsberg* holding to its analysis of the CDA, the *Reno* Court specifically pointed to the age of the affected group as one method of distinguishing the two cases.[241] As the Court observed, the CDA applied to minors under the age of eighteen, whereas the *Ginsberg* statute targeted only minors under the age of seventeen.[242] Interestingly, the *Ginsberg* statute was upheld, and the CDA was struck down.[243]

In addition, any proposed statute should provide definitions for all relevant terms within the statutory language. This extra effort will fortify the statute against First Amendment challenges based upon vagueness.[244] Specific terms that must be defined include the following:

(1) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.
(2) "Sexual Conduct" means acts of masturbation, homosexual or heterosexual sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such a person be female, breast.
(3) "Sexual Excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

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238. *Cf. id.* at 646 (approving of a law that prohibited the distribution of harmful material to individuals under the age of seventeen).

239. *See Reno*, 117 S. Ct. at 2341 (distinguishing the CDA from a previously upheld statute in four ways, one of which focused on a one year difference between an individual under age eighteen and an individual under age seventeen).

240. *See Ginsberg*, 390 U.S. at 646 (upholding a statute prohibiting the dissemination of harmful material to individuals under the age of seventeen).

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

242. *See id.*

243. *Compare id.* at 2348 (striking down the CDA), *with Ginsberg*, 390 U.S. at 639 (upholding a statute restricting the dissemination of "harmful" material to minors).

244. *Cf. Ginsberg*, 390 U.S. at 646-47 (discussing the greater likelihood of constitutionality with a well-defined speech restriction).

(4) "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed.[245]

The definitions of these terms are also derived from the Supreme Court's opinion in *Ginsberg*.[246]

2. Single Computer Provision

The text of the Internet School Filtering Act provided that public libraries, regardless of the number of Internet-accessible computers, must install filtering software on at least one computer.[247] This structural requirement, however, subjects the proposed bill to the same attacks launched against the CDA, because although this provision may be cloaked in the guise of filtering software, it could unconstitutionally chill the free speech rights of adults.[248] In other words, by requiring a public library with only one Internet-accessible computer to install filtering software on its sole computer, any adult who attempts to access the Internet in that library will be unable to retrieve information blocked by the filtering software. Thus, indirectly, the same burden is placed on adult speech rights that led the *Reno* Court to invalidate the CDA.

Because the single-computer public library effectively will reduce the Internet's entire content to a level "fit for a child," any proposed legislation must incorporate a solution for single-computer libraries that balances the adults' right to receive full Internet access with providing only limited access to minors. If that goal is not attainable, the Supreme Court has shown that it would rather leave the Internet unfettered than resort to "kiddie-proofing."[249] One possible solution consists of adding sepa-

245. *See id.* at 645-46 (quoting the definitions provided by the New York Penal Law). It is important to note here that these definitions resemble closely the definitions used by filtering software, like Cyber Patrol, to categorize web sites. *See* ACLU v. Reno, 929 F. Supp. 824, 830-849 (E.D. Pa. 1996) (providing definitional categories of filtering software companies), *aff'd*, 117 S. Ct. 2329 (1997).

246. *See Ginsberg*, 390 U.S. at 645-46 (approving the definitions used in New York's statute regarding material "harmful to minors").

247. *See* S. 1619, 105th Cong. (1998) (requiring all public libraries, even if they possess only one Internet-accessible computer, to install filtering software on at least one computer).

248. *See Reno*, 117 S. Ct. at 2343 (emphasizing that adults cannot be permitted access to Internet information fit only for children).

249. *See id.* at 2346 (emphasizing that "[a]s we have explained, the Government may not 'reduce[e] the adult population . . . to . . . only what is fit for children'" (quoting Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 116 U.S. 2374, 2393 (1996))).

rate provisions, such as the following, for multiple-computer libraries and single-computer libraries:

> (A) Multiple Internet-Accessible Computers
>
> Public libraries with multiple Internet-accessible computers must install on at least one, but not all of the computers containing Internet access, filtering software which prevents minors from accessing material "harmful to minors." In addition, these libraries must adopt an Internet usage policy whereby minors are required to use the Internet-accessible computer with installed filtering software, and adults are provided the opportunity to use unfiltered Internet access.
>
> (B) Single Internet-Accessible Computer
>
> Public libraries containing only one Internet-accessible computer must install a password system or adopt an Internet usage policy which prevents minors from accessing Internet material that is "harmful to minors" while also permitting adults to receive full Internet access. These public libraries shall not install filtering software on the only Internet-accessible computer that prevents adults from obtaining full Internet access.

By including these above provisions, any proposed legislation will encompass all public libraries regardless of the number of computers they have and will prevent the single-computer library that installs filtering software from infringing upon an adult's right to unrestricted Internet access.

3. Safety Valve Provision

Finally, the proposed Internet School Filtering Act lacks any provision accounting for problems arising from inefficient filtering software. It is undisputed that filters are imperfect; however, Congress can overcome any deficiencies posed by current technology by adding the following "safety valve" provision to the proposed statute:[250]

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250. *See* Ann Beeson & Chris Hansen, *Fahrenheit 451.2: Is Cyberspace Burning? How Rating and Blocking Proposals May Torch Free Speech on the Internet* (visited Nov. 14, 1997) <http://www.aclu.org./issues/cyber/burning.html> (observing that filters remove sites other than sex sites). Directly addressing the issue argued, the safety valve policy would remedy any sites that were inadvertently blocked by the filtering program. One of the great benefits of the Internet is that it offers individuals anonymity and access to information they would not receive otherwise. For example, a gay teenager who is not yet ready to talk to others about his or her sexual orientation can access information anonymously about gay and lesbian rights or enter chat rooms with other gay and lesbian teens. In some cases, this window of opportunity provides the only avenue for teens to discuss their feelings in an open and comfortable manner.

> In the event that the filtering software denies access to Internet information not fitting within the provided definition of "harmful to minors," the librarian or appropriate official, upon request, shall provide the minor with Internet access to the information in question.

By adding this provision, Congress will demonstrate an awareness of the weaknesses of current technology while also permitting the incorporation of that technology into a constitutional protective measure for minors. This provision also quells any concerns about the chilling effect on minors' right to free speech.[251] Moreover, enforcing this proposed statute would fall directly in line with the *Pico* holding, where the Court explained that "[t]his would be a very different case if . . . [the library] had employed established, regular, and facially unbiased procedures for the review of controversial materials."[252]

B. *Passing Constitutional Muster: Strict Scrutiny Analysis*

If free speech advocates track the legislation proposed herein as fervently as they have with the CDA and CDA II, the government can expect an immediate challenge on First Amendment grounds upon the enactment of the proposed legislation.[253] First Amendment challenges to the proposed statute will present the Court with many issues left unresolved in *Reno*, such as the Internet's medium classification and how the strict scrutiny analysis will be altered if only minors are subjected to the regulation. However, with the additions discussed, the proposed statute should not yield to the Court's examination.

As to the constitutionality of the legislation proposed, if the Court follows the path worn by cable regulation cases, it should revisit the Internet's medium classification, and consequently, the Internet should be

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251. *Cf. id.* (reporting that the use of filters removes information that is generally otherwise unavailable to users).

252. Board of Educ. v. Pico, 457 U.S. 853, 874 (1982).

253. In addition to First Amendment claims, critics may also challenge an Internet regulation based upon Commerce Clause grounds. *Compare* American Library Ass'n v. Pataki, 969 F. Supp. 160, 169-83 (S.D.N.Y. 1997) (striking down a New York statute criminalizing dissemination of obscene material to minors for violation of Commerce Clause because (1) the statute affected citizens in states other than New York; (2) the statute's benefits did not outweigh the heavy burden placed on interstate commerce; (3) the uniqueness of the Internet medium requires national standards rather than inconsistent state standards), *with* People v. Lipsitz, 663 N.Y.S.2d 468, 475 (N.Y. Sup. Ct. 1997) (upholding a statute as "media neutral," and stating that "[t]here is no compelling reason to find that local legal officials must take a 'hands off' approach just because a crook or a con artist is technologically sophisticated enough to sell on the Internet"). The *Lipsitz* court did not find the Internet as a sanctuary for criminals and emphasized that criminals will not be immunized merely by using the Internet instead of some other method of conveyance. *See Lipsitz*, 663 N.Y.S.2d at 475 (upholding the conviction).

afforded less First Amendment protection than it currently receives.[254] However, if the Court refuses to revisit the Internet's medium classification, the Internet will continue to receive the First Amendment's fullest protection.[255] As such, the proposed regulation will first need to be categorized as either content-neutral or content-based.

Although arguments can be made in the alternative,[256] the proposed statute likely will be considered a content-based speech restriction be-

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254. *Cf.* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 748 (1996) (revisiting the medium classification of cable television and affording the Government more discretion in regulating cable television than previously afforded).

255. *See* Reno v. ACLU, 117 S. Ct. 2329, 2348 (1997) (affording the Internet, as a medium, the fullest protection of the First Amendment).

256. Even though a regulation looks like a content-based restriction, the Court will apply a lower standard of scrutiny if the restriction is justified by a secondary effect. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-49 (1986) (holding constitutional a zoning ordinance that prohibited adult movie theatres from locating within 1,000 feet of a residential zone, single or multiple family dwelling, church, park, or school). Because the *Renton* ordinance, which zoned adult theaters to locations 1000 feet or more from any residential area, church or school, sought to "generally protect and preserve the quality of the city's neighborhoods," it was deemed to serve a secondary effect of the speech. *Id.* at 48. There is little doubt that protecting the quality of a city's neighborhoods includes the protection of children from the adult theaters. However, by labeling their ordinance as a protector of the neighborhood and property values, the City of Renton was able to qualify the level of scrutiny. *See id.* at 48-49. In comparison, enacting an ordinance for the purpose of "prevent[ing] the psychological damage it felt was associated with viewing adult movies" would trigger a strict scrutiny review. *See* Boos v. Barry, 485 U.S. 312, 321 (1988) (providing examples of primary and secondary effects of speech).

Thus, to pass judicial scrutiny more easily, filtering software must be labeled as a means to prevent the deterioration of society's standards of decency rather than to protect the specific interests of children. Though tenuous, the societal decency connection can be drawn from the effects on society caused by children repeatedly gaining access to "harmful" material. After all, these children will grow up to make or change the laws we live by today. *See* Interview with David Dittfurth, Professor of Law at St. Mary's University School of Law, in San Antonio, Texas (Nov. 14, 1997) (discussing the trite differences between motivations for installing filtering programs on public library computers). The effects of this type of harm to children have not been summarily dismissed in other aspects of the law, as proven by the repeated recognition of the compelling governmental interest in protecting children from "harmful" material. *See* FCC v. Pacifica Found., 438 U.S. 726, 749 (1978) (upholding a regulation to ensure that children are not subject to are indecent monologue broadcasted over the radio by finding a compelling governmental interest in protecting children). In addition, courts have consistently upheld laws forbidding minors to enter adult bookstores and theaters because those locations pose a danger to youth. *See Reno*, 117 S. Ct. at 2351-52 (O'Connor, J., concurring in part, dissenting in part) (discussing the constitutionality of the creation of "adult zones" to prevent minors from entering adult bookstores). If, as in *Renton*, the Court recognizes the general protection of neighborhoods as a secondary effect, it is illogical to assume that courts will not recognize the general protection of society as a secondary effect. *See Renton*, 475 U.S. at 48 (finding an ordinance content-neutral because the city enacted the restriction to protect the neighborhood).

cause filtering software labels and restricts access to web sites according to their content.[257] If such a determination is made, the proposed statute will face the scathing, and potentially fatal, strict scrutiny analysis, requiring a narrowly tailored means to achieve a compelling governmental interest.[258]

1. Compelling Interest

Assuming that the proposed legislation is content based, the compelling interest prong of the strict scrutiny test must be examined. The Supreme Court has consistently accepted the governmental interest in protecting children from harmful material as compelling in cases such as *New York v. Ferber, FCC v. Sable Communications*, and *Reno v. ACLU*.[259] The Court has based this determination on the theory that "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens."[260] Because the proposed statute seeks to protect children, the government will

257. *Cf. Reno*, 117 S. Ct. at 2342 (interpreting the CDA as a content-based speech restriction because its purpose was "to protect children from the primary effects of 'indecent' and 'patently offensive' speech, rather than any 'secondary' effect of such speech").

258. *See* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (holding that the government may regulate the content of speech if the restriction is the least restrictive means of achieving a compelling interest).

259. *See Reno*, 117 S. Ct. at 2346 (stating that "[i]t is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials"); *Sable Communications*, 492 U.S. at 126 (emphasizing the Government's compelling interest in protecting children); New York v. Ferber, 458 U.S. 747, 757 (1982) (discussing a governmental interest in safeguarding its youth); *see also Denver Area Educ.*, 518 U.S. at 743 (reasserting a compelling interest in protecting children from sexually explicit material); *Pacifica Found.*, 438 U.S. at 749 (affirming a compelling governmental interest in protecting children); Young v. American Mini Theatres, Inc., 427 U.S. 50, 62-63 (1976) (discussing the important interest that a state has in protecting children); Miller v. California, 413 U.S. 15, 18-19 (1973) (stating that when a method of distributing questionable material carries a significant danger of minors being exposed to it, the dissemination can be regulated); Stanley v. Georgia, 394 U.S. 557, 567 (1969) (expressing the importance of the governmental goal of protecting children); Ginsberg v. New York, 390 U.S. 629, 637-42 (1968) (describing the discretion provided to states when the goal is protection of children); Redrup v. New York, 386 U.S. 767, 769 (1967) (relaying the importance of allowing states to protect children); Jacobellis v. Ohio, 378 U.S. 184, 195 (1964) (explaining the important interest the government has in protecting children).

260. *Ferber*, 458 U.S. at 757; *see also* Prince v. Massachusetts, 321 U.S. 158, 165 (1944) (stating that "[i]t is in the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens"); *cf.* Mainstream Loudoun v. Board of Trustees, 24 F. Supp. 2d 552, 565 (E.D. Va. 1998) (subjecting a library filtering policy to a strict scrutiny analysis). The *Mainstream Loudoun* court, which examined a library filtering policy established to prevent Internet sexual harassment, found that "avoidance of creation of a sexually hostile environment" was a compelling governmental interest. *Id.*

more than likely successfully satisfy the compelling interest prong of the strict scrutiny test; however, the government must also satisfy the narrowly tailored prong of the test to ensure the statute's constitutionality.[261]

2. Narrowly Tailored

Based upon a variety of cases, to be narrowly tailored, the proposed statute must generally meet three requirements: (1) it must be the least restrictive alternative to achieving minors' protection from "harmful" Internet material;[262] (2) it must not be overbroad, or in other words, deny access to protected speech that minors have a right to receive;[263] and (3) it must not be vague or contain ambiguities in the terminology.[264] Unfortunately, the CDA stumbled into the "narrowly tailored" trap by failing to meet all three requirements.[265] Yet, even though the imperfection of filtering software is uncontested,[266] by incorporating the provisions dis-

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261. *See Sable Communications*, 492 U.S. at 126 (discussing the two prongs of the strict scrutiny test, both of which must be satisfied).

262. *See id.* (stating that content-based speech restrictions must be narrowly tailored, and thus, must be the least restrictive alternative). Being the least restrictive alternative presumes that the regulation is narrowly tailored to achieve the governmental interest. *See id.* In a recent case, a federal district court applying the strict scrutiny test focused upon whether there was actually a need for the library filtering policy in question to serve the governmental interest of safeguarding against Internet sexual harassment. *See Mainstream Loudoun*, 24 F. Supp. 2d at 565-66. Finding only three incidents of minors accessing harmful material on the library's Internet-accessible computers, the court emphasized that the filtering policy was not necessary to further the compelling governmental interest:

> As a matter of law, we find this evidence insufficient to sustain defendant's burden of showing that the Policy is reasonably necessary. No reasonable trier of fact could conclude that three isolated incidents nationally, one very minor isolated incident in Virginia, no evidence whatsoever of problems in Loudoun County, and not a single employee complaint from anywhere in the country establish that the Policy is necessary to prevent sexual harassment.

Id. at 566.

263. *Cf. Reno*, 117 S. Ct. at 2348 (striking down a speech restriction for, among other reasons, overbreadth).

264. *Cf. id.* at 2344 (striking down the CDA partially due to vagueness).

265. *See id.* at 2346, 2348, 2350 (holding that the CDA failed to meet the narrowly tailored requirement because it was vague, overbroad, and burdened adult free speech rights).

266. *See* John Henrichs, *Library to Filter Children's Access to Internet*, HOUS. CHRON., June 22, 1997, at A29 (describing how filtering systems are inefficient in that they filter out protected speech that happens to be linked to unprotected speech), *available in* 1997 WL 6566053; Michael Krantz, *Censors Sensibility: Are Web Filters Valuable Watchdogs or Just New Online Thought Police*, TIME, Aug. 11, 1997, at 48 (condemning filters as censorship tools because they remove protected speech); Carol McDonald, *Internet Access Debated: Librarians Gather Forum of Ideas*, SUNDAY TELEGRAM (Worcester, Ma.), Sept. 21, 1997, at A1 (interviewing Nadine Strossen, ACLU President since 1991, who states that Internet filtering in public libraries is unconstitutional because speech that is neither indecent nor

cussed earlier, the proposed statute can meet all three requirements of the narrowly tailored prong and pass constitutional muster.

First, the proposed statute provides the least restrictive alternative to protecting minors from harmful Internet material because it focuses on the receiver's end, rather than the sender's end, of Internet communications.[267] By doing so, the restriction does not affect the Internet's overall content; instead, it only restricts those who can receive information from the Internet as opposed to restricting what can be placed on the Internet.[268] This unique benefit offered by filtering software permits adults to continue to exercise their right to receive harmful material, while at the same time, prohibiting minors from receiving the same information.[269] Thus, by virtue of technology, the Internet's content can remain

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obscene is also removed), *available in* 1997 WL 3721182; Thomas E. Weber, *The Naked Truth: There Are Ways to Keep Your Kids Away from On-line Porn but None Are Foolproof*, WALL ST. J., June 16, 1997, at R12 (expressing problems with current filtering systems which, although successful at removing obscene and indecent material, sometimes also remove protected material); Ann Beeson & Chris Hansen, *Fahrenheit 451.2: Is Cyberspace Burning? How Rating and Blocking Proposals May Torch Free Speech on the Internet* (visited Nov. 14, 1997) <http://www.aclu.org./issues/cyber/burning.html> (discussing the overbreadth of browsers and the resulting unconstitutionality).

267. *See Reno*, 117 S. Ct. at 2337 (striking down the CDA because, by forbidding all users from placing information onto the Internet, it made the Internet's entire content fit for a child). The *Reno* Court belabored the tremendous burden placed on adult speech rights by the CDA, due in large part to the CDA's focus on senders of Internet transmissions and eventual infringement on adult free speech rights. *See id.* at 2331 (discussing the CDA's prohibition of sending Internet communications). An Internet restriction that prohibits speakers from transmitting certain speech to minors leaves the speaker with only one option—not speaking. This problem arises because speakers using the Internet as a forum have no method of conclusively determining the age or identity of their listeners. As a result, to ensure that he or she does not violate the provision, the Internet speaker must remain silent when the speech includes "harmful" material. In theory, no "harmful" material would ever be placed onto the Internet for fear of minors coming in contact with it, and adults who have the right to receive such material would be unable to exercise their First Amendment right to receive. Consequently, the government chills the sender's speech to attain its goal of protecting children from "harmful" material.

268. *See id.* at 2352 (O'Connor, J., concurring in part, dissenting in part) (discussing the practicality of creating "adult zones" on the Internet). Although the Internet's infrastructure prevents anything but blanket regulation on the sender's end, receiver's end regulations permit the government to "cyber-zone" the Internet, and like other zoning provisions, "cyber-zoning" does not affect the overall content of the Internet as a communications medium. *See id.* (O'Connor, J., concurring and dissenting in part). As such, even though speakers are unable to determine the ages of listeners, they can continue to place information onto the Internet that constitutes harmful speech.

269. Although harmful information will continue to be disseminated onto the Internet, the government need not fear minors' exposure to such material; the filtering software will prohibit minors' access to such material. *See* Tom Henderson, *Internet Monitors*, NETWORK MAG., Nov. 1, 1997, at 4 (discussing in detail individual filtering sys-

unaffected, leaving adult patrons with full, complete Internet access and underage patrons with limited Internet access.[270]

Second, even though the speech restriction at issue is aimed at a compelling interest and does so in the least restrictive manner, it may still be constitutionally infirm if it denies access to large amounts of protected speech.[271] Because no bright line rule exists that establishes when harmful speech is protected,[272] the proposed statute can sidestep an overbreadth challenge by incorporating provisions concerning "local community standards." In fact, filters permit local librarians to decide the amount of Internet access to be afforded to minors based upon the

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tems and the process of removing sexually explicit web sites), *available in* 1997 WL 12468061.

270. However, it is important to note that improper implementation of filtering software could negate the benefits offered by this receiver's end regulation. As previously mentioned, if every library computer were equipped with filtering software denying access to harmful material, adult patrons would be unable to exercise their right to receive information deemed harmful to minors. *See* Mainstream Loudoun v. Board of Trustees, 24 F. Supp. 2d 552, 565-66 (E.D. Va. 1998) (examining constitutionality of library filtering policy). While the *Mainstream Loudoun* filtering policy slightly resembles the proposed legislation, the *Mainstream Loudoun* policy is missing one key safeguard: the assurance that adult patrons will receive unrestricted Internet access. *See id.* at 566. Because the policy prevented minors and adults from accessing material deemed harmful to minors, the Virginia district court found that the filtering policy failed to satisfy the narrowly tailored prong of the strict scrutiny test:

> [F]iltering software could be installed on only some Internet terminals and minors could be limited to using those terminals. Alternatively, the library could install filtering software that could be turned off when an adult is using the terminal . . . . In examining the specific Policy before us, we find it overinclusive because, on its face, it limits the access of all patrons, adult and juvenile, to material deemed fit for juveniles.

Id. at 567.

As such, the proposed legislation is distinguished from the policy at issue in *Mainstream Loudoun* because it contains express provisions requiring the library to provide unrestricted access to adult patrons. By doing so, the proposed legislation ensures that the filtering policy is not overinclusive, and thus, the least restrictive alternative to protecting minors from harmful Internet material.

271. *See Reno*, 117 S. Ct. 2347-48 (striking down the CDA mainly because it was overbroad and banning large amounts of speech that adults have a constitutional right to receive). The critical inquiry in determining whether the use of filtering software constitutes overbreadth is whether the software denies access to protected speech. *See id.* at 2346 (striking down the CDA because it denied adults access to speech they had a right to receive under First Amendment guarantees).

272. *Compare* FCC v. Pacifica Found., 438 U.S. 726, 730 (1978) (allowing the FCC to regulate "indecent" monologue for fear of children's exposure to indecency), *and* Ginsberg v. New York, 390 U.S. 629, 636 (1968) (allowing New York to ban the sale of "indecent" material to minors), *with* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 733 (1996) (invalidating a regulation of indecency on public access cable channels), *and* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 128 (1989) (finding a statute banning indecent speech unconstitutional).

local standards and values of their patronage, rather than pigeon-holing the access into a set of uniform definitions for harmful material.[273] Moreover, the Court has repeatedly spoken to minors' lack of capacity concerning adult-oriented material,[274] and by employing filters based upon local community standards, the choice of whether or not to expose children to this material is left completely in the hands of parents.[275] By permitting the local community standards to control, the government not only narrows the statute's scope, but also finds a happy medium between freedom of speech and unnecessary offensiveness.[276]

In addition, the "safety valve" provision fortifies the proposed legislation by negating any deficiencies possessed by current filtering software that could implicate overbreadth problems. If, for some reason, the software denies access to a web site not harmful to minors, the safety valve provision provides minors with other avenues to gain access to the site.[277] By including this safeguard, Congress eases suspicions expressed

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273. Following along the lines of the Court's "obscenity" definition, the proposed statute ensures that it will not be labeled overbroad by incorporating three provisions: (1) the definition of "harmful to minors" containing a "local community standard" qualifier; (2) allocation of authority permitting the local librarians to block web sites according to local community standards; and (3) the safety valve provision.

274. *Compare Reno*, 117 S. Ct. at 2352 (O'Connor, J., concurring in part, dissenting in part) (advocating the creation of "adult zones" in the Internet because "zones" have been used throughout history to protect minors from speech "harmful to minors"), *with* Bellotti v. Baird, 443 U.S. 622, 634 (1979) (asserting that one element of a test providing broader discretion to the government in regulating minors is a child's lack of capacity to make informed, mature decisions).

275. *See Reno*, 117 S. Ct. at 2347 (arguing that Internet regulation should provide currently unavailable opportunities for parental control). Likewise, if parents wish to expose their children to this material, they can either purchase Internet service for their home or accompany their child to the public library and use the "adult" computer with their child.

276. *See* Miller v. California, 413 U.S. 15, 32 (1973) (including a "local community standard" provision within the definition for obscenity). According to the Court in *Miller*, "People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." *Id.* at 33. Often times, speech rights are better protected by giving more control over the regulation of speech and ideas, such as the Internet, to citizens, rather than to government officials. *See* Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1833-43 (1995) (discussing benefits of placing speech restrictions in hands of people).

277. By instituting the safety valve provision, Congress would demonstrate that the filtering program is intended to remove only sexually explicit material, nothing more and nothing less. This extra effort by Congress illustrates that it does not wish to suppress ideas on the basis of its disagreement with them. *Cf.* Board of Educ. v. Pico, 457 U.S. 853, 870-71 (1982) (establishing the motivation test for removal of material from the library as whether removal is based on age-appropriateness or general disagreement with ideas). The safety valve element can be implemented by displaying signs next to the computers in the minors' section which explain that upon inability to access a non-sexually explicit site, the user

by the Court in *Pico* and demonstrates that it is not intent on "prescrib[ing] . . . orthodox in politics, nationalism, religion, or other matters of opinion."[278] Instead, Congress would be expressing its intention to protect children from the recognized dangers of harmful material on the Internet.

Finally, the proposed legislation curbs any challenges based upon vagueness by employing the pre-approved definitions of the *Ginsberg* Court.[279] Realizing that the *Reno* Court chastised Congress for premising the CDA on conflicting and incomplete terminology,[280] the proposed statute can overcome vagueness problems by employing filtering software under circumstances that closely resemble the criteria established in Supreme Court precedent.[281]

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should contact the librarian. In those selective circumstances, the librarian can then provide access to the minor user on a fully-accessible computer. *Cf. Reno*, 117 S. Ct. at 2348 (discussing alternatives to the CDA). During its repudiation of the CDA, the *Reno* Court provided heavy hints to public libraries about how to constitutionally protect minors from "harmful" material on the Internet while reconciling the regulation with adult speech rights. *See id.* In fact, the Court stated, "The arguments in this Court have referred to possible alternatives such as requiring that indecent material be 'tagged,' . . . making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet . . . differently." *Id.* In addition, it is important to note that the invalidated filtering policy contained a provision similar to the proposed safety valve provision, but that the reviewing court did not comment upon the provision; instead, the court struck down the policy because it required both adults and minors to receive filtered Internet access. *See* Mainstream Loudoun v. Board of Trustees, 24 F. Supp. 2d 552, 556-57, 567 (E.D. Va. 1998) (examining the constitutionality of a public library filtering policy).

278. *See Pico*, 457 U.S. at 872 (asserting that the test for whether the removal of books is constitutional requires that the denial of access be premised not upon the suppression of ideas, but rather the inappropriateness of the material for a certain age group).

279. *See Ginsberg*, 390 U.S. 629, 645-46 (1968) (approving a definition of "harmful to minors" used in a speech regulation); *cf. Reno*, 117 S. Ct. at 2344-45 (striking down the CDA due in part to its inability to define the prohibited speech).

280. *See id.* at 2345 (holding that because the CDA focused on the terms "indecent" and "patently offensive," the statute was ambiguous, and simply because the CDA used one prong of the "obscenity" definition would not render the CDA immune from vagueness attacks).

281. *Compare* ACLU v. Reno, 929 F. Supp. 824, 840 (E.D. Pa. 1996) (defining the category of blocked material, "sexual acts," as "exposing anyone or anything involved in explicit sexual acts and lewd and lascivious behavior, including masturbation, copulation, pedophilia, intimacy and involving nude or partially nude people in heterosexual, bisexual, lesbian, or homosexual encounters"), *aff'd*, 117 S. Ct. 2329 (1997), *with* Ginsberg v. New York, 390 U.S. 629, 646 (1968) (defining the category of speech constitutionally prohibited from being sold to minors as, "sexual conduct," "acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast"). As with any power of authority, filters, if used improperly, can violate the constitutional rights of minors by removing much more than indecent web sites; however, by using filters in cooperation with contemporary

VI. Conclusion

The most prized aspect of our society, diversity of viewpoints, has often been a thorn in the side of our legal system. However, through compromise, courts have reconciled the need for limitations when embracing our country's diversity.[282] With the eruption of controversy surrounding the Internet, the need for compromise is evermore present. American children perusing the World Wide Web should not be forced to weed through the harmful matter to experience the incredible educational opportunities available on-line; conversely, public libraries providing Internet access should not be forced to choose between offering full Internet access or no Internet access to all.

Although the novelty of the interactive communications medium prevents prediction of judicial outcome, the Supreme Court has consistently held that the constitutional rights of children and adults are not co-extensive.[283] As a result, separating adult Internet users in the age of virtual intangibility has become something of a quagmire. Congress fell prey to this problem when the CDA was unable to overcome the Court's strict scrutiny analysis, mainly because it placed too heavy a burden on adult speech rights by reducing the Internet's entire content to a level acceptable for children.[284] However, by focusing on the receiver's end of Internet transmissions, the statute proposed herein takes a different route to overcome the anonymity and transmogrification elements of the Internet.

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community standards, filters will act as nothing more than the signs hanging on adult book stores that read "No minors under 17 allowed to enter."

282. *See* Miller v. California, 413 U.S. 15, 32-33 (1973) (determining that the local community standards serve as a means of determining what is obscene because it is "neither realistically nor constitutionally sound" to believe that community values in one city are identical to that in another).

283. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 651 (1995) (noting that unemancipated minors lack fundamental rights of "self-determination"); Hodgson v. Minnesota, 497 U.S. 417, 444 (1990) (affirming that the government has a compelling interest in the "welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely"); Bellotti v. Baird, 443 U.S. 622, 635 (1979) (stating that the government "is entitled to adjust its legal system to account for children's vulnerability"); *Ginsberg*, 390 U.S. at 649 (adjusting the standard of decency to what is fit for a minor, not an adult, to see); Prince v. Massachusetts, 321 U.S. 158, 168 (1944) (asserting that the "state's authority over children's activities is broader than over like actions of adults [and] [t]his is peculiarly true of public activities").

284. *See Reno*, 117 S. Ct. at 2346 (stating that although protecting children is compelling, the government cannot unduly burden adults' speech rights in the process). The language from the *Reno* Court suggests that absent the burden on adult speech rights, the Internet can be constitutionally regulated to protect minors. *See id.*

The Supreme Court has consistently permitted the government to deny children access to harmful material in adult book and video stores. The mere fact that the Internet's harmful material is not enclosed within a building should not alter the equation. Acting as a figurative security guard, filters deny minors access to the "Internet Adult Bookstore." If, among the copies of *Playboy*, *Hustler*, and *Penthouse*, the bookstore also contained non-harmful, protected speech, such as *Newsweek* and *National Geographic*, the Court would not demand that children be given full access to the *entire* bookstore. More than likely, the Court would require that minors' access be limited to the non-harmful, protected speech.

In our staunch pursuit of protecting the First Amendment guarantees and our insistence at being suspicious of governmental speech regulation, we should not fire the "security guard" simply because it occasionally denies access to a protected web site. Instead, by including a safety valve provision,[285] we can permit the "security guard" to provide minors with access to non-harmful, protected speech while continuing to protect them from the harmful speech. In the interest of our nation's children as well as the guarantees of the First Amendment, the proposed legislation is a technologically advanced solution to the challenges that the Internet poses in light of the First Amendment.

285. The proposed statute comes with the Achilles heel inherent in filtering software. Filtering software is flawed; in certain instances, the filter may block a protected web site, but in other instances, the filter will allow the minor to access harmful material. Nevertheless, imperfection does not constitute invalidity. By including certain provisions, such as the safety valve, Congress can rehabilitate filtering software.