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Can Congress Regulate "Indecent" Speech on the Internet?

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I. INTRODUCTION

In the wake of the invalidation of the heart of the Communications Decency Act ("CDA") by the United States Supreme Court, in the case of *Reno v. American Civil Liberties Union*,[1] is there any way in which Congress can constitutionally limit non-obscene speech on the Internet on the ground that such speech is "indecent," pornographic, or "harmful to minors"?[2]

The CDA provisions which were struck down as violative of the First Amendment essentially made it illegal to use the Internet to knowingly

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1. 117 S.Ct. 2329 (1997).

2. Even if Congress can constitutionally do so, it may well be that only Congress can do so, because any similar regulation enacted by a state might violate the Commerce Clause, as was held by a federal district court in *American Libraries Ass'n. v. Pataki*, 969 F. Supp. 160, 169 (S.D.N.Y. 1997).

transmit an "indecent" communication to a minor, or to display a "patently offensive" sexual communication "in a manner available to" a minor.[3]

The question that remains is whether Congress can do anything to cure the defects that led to the invalidation of the CDA. In exploring that question, the first part of this article will briefly review the relevant pre-*Reno* precedents at the Supreme Court level. It will then proceed to an analysis of the Supreme Court ruling in *Reno*, as well as a brief consideration of the two lower court decisions[4] that held the CDA invalid prior to the Supreme Court ruling. Finally, this article will consider, in light of those rulings, the constitutionality of the recently enacted Child Online Protection Act.[5]

II. THE RELEVANT PRE-*RENO* PRECEDENTS

Beginning in the early 1970s, the Supreme Court developed the general rules governing the validity of regulations of speech under the First Amendment. In the absence of a special rule applicable to the kind of regulation at issue, the Court typically asks whether a regulation of speech is content based or content neutral, and, if it is content based, the Court scrutinizes the regulation strictly, requiring the government to employ means narrowly tailored to accomplish a government interest of compelling magnitude.[6] The regulation must be necessary to the achievement of the important goal,[7] and it must represent the least restrictive means of doing

3. *See infra* text accompanying note 69.

4. ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997); Shea v. Reno, 930 F. Supp. 916 (S.D.N.Y. 1996), *aff'd*, 117 S. Ct. 2501 (1997).

5. Pub. L. No. 105-277, 112 Stat. 2681 (to be codified at 47 U.S.C. § 223 (1998)). Freedom of speech issues involving the Internet have also arisen in other contexts, which are beyond the scope of this article. Those contexts include: state regulations, *see* ACLU v. Johnson, 4 F. Supp. 2d 1029 (D.N.M. 1998); Urofsky v. Allen, 995 F. Supp. 634 (E.D. Va. 1998); American Libraries Ass'n v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997); ACLU v. Miller, 977 F. Supp. 1228 (N.D. Ga. 1997); university policies, *see* Loving v. Boren, 133 F.3d 771 (10th Cir. 1998); county library policies, *see* Mainstream Loudoun v. Board of Trustees, 24 F. Supp. 2d 552 (E.D. Va. 1998); city web site limitations, *see* Putnam Pit, Inc. v. City of Cookeville, 23 F. Supp. 2d 822 (M.D. Tenn. 1998); other aspects of the Communications Decency Act, *see* Apollomedia Corp. v. Reno, 19 F. Supp. 2d 1081 (N.D. Cal. 1998); federal obscenity laws, *see* United States v. Thomas, 74 F.3d 701 (6th Cir. 1996); and the Federal Child Pornography Prevention Act, *see* Free Speech Coalition v. Reno, No. C 97-0281VSC, 1997 WL 487758 (N.D. Cal. 1997). See also S.B. 97, 106th Cong. (1998) and H.R. Res. 368, 106th Cong. (1999), which would require blocking and filtering of Internet access via computers in public schools and libraries.

6. Burson v. Freeman, 504 U.S. 191 (1992); Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105 (1991).

7. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

so.[8] While the point is not clearly established, there is also some basis in the case law for contending that to survive this level of judicial scrutiny, a regulation must be effective in achieving its goal.[9] Because the CDA was undeniably a content based regulation of speech, "strict scrutiny" was in fact used by the Court in *Reno.*[10]

But some special rules, and some other important general principles, had been established prior to the emergence of those general rules pertaining to content based regulations of speech. In 1957, the Court held that "obscenity," properly defined, was entitled to no constitutional protection,[11] a position to which it has adhered ever since.[12] At about the same time, in a case called *Butler v. Michigan,*[13] the Court ruled that a state could not completely prohibit the distribution of literature deemed harmful only to minors, because it would have the effect of reducing the adult population to reading only that which was fit for children to read.[14] That proposition, stated at a time prior to the Court's development of the great bulk of the rules that govern free speech cases today, was put forth as an independent principle, and was apparently *the* basis for the result in *Butler.* In 1968, in contrast, in a case called *Ginsberg v. New York,*[15] the Court upheld a state statute that prohibited the sale of certain materials—defined as obscene *as to minors—only* to minors;[16] thus, the principle of *Butler* was not violated.[17]

A general principle that appears to be well established, first articulated in the 1971 decision in *Cohen v. California*[18] and reaffirmed by later rulings,[19] is that government may not suppress speech simply because

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8. Sable Communications v. FCC, 492 U.S. 115 (1989).

9. See *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 664 (1994), which borrows oft-quoted language to that effect from a commercial speech case, *Edenfield v. Fane,* 507 U.S. 761, 770–71 (1993). Since commercial speech is said to receive less protection than non-commercial speech, it follows logically that strict scrutiny must be understood as requiring at least as persuasive a justification for limiting non-commercial speech as is required in the case of a regulation of commercial speech. See also *Shaw v. Hunt,* 517 U.S. 899, 915–16 (1996), to the same effect, but applying strict scrutiny in the context of an Equal Protection Clause challenge.

10. *See infra* text accompanying note 54.

11. Roth v. United States, 354 U.S. 476 (1957).

12. *See* Miller v. California, 413 U.S. 15 (1973); Pope v. Illinois, 481 U.S. 497 (1987).

13. 352 U.S. 380 (1957).

14. *Id.* at 383.

15. 390 U.S. 629 (1968).

16. *Id.* at 639.

17. *Id.* at 643.

18. 403 U.S. 15 (1971).

19. Texas v. Johnson, 491 U.S. 397 (1989); Hustler Magazine v. Falwell, 485 U.S. 46 (1988); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

unwilling viewers or listeners may be offended thereby.[20] The Court has never explicitly stated that the government interest in shielding unwilling listeners from offensive speech fails to rise to the level of magnitude required of a content based regulation of speech. Instead, the Court has said, in effect, that we are inescapably subject to speech that offends us, outside the privacy of our homes, and that we are obliged to "[avert] our eyes" in such situations, at least when doing so is a feasible response to the offensive stimulus.[21] The Court has also recognized the difficulty of drawing workable lines when one begins to contemplate regulating speech according to its offensiveness or "outrageousness."[22]

But *FCC v. Pacifica Foundation*,[23] decided in 1978, was a special case, and the government's victory therein predictably encouraged the government to engage in further attempts to regulate in the name of protecting children from "indecent" speech.[24] *Pacifica* involved the famous George Carlin monologue, which a radio station broadcast at midday, concerning the "seven 'dirty words'"[25] that one could not say on radio or television. The station was consequently sanctioned by the FCC, acting pursuant to a federal statute which allowed the FCC to prohibit "obscene" or "indecent" speech on radio or television.[26] The Supreme Court, explicitly focusing only on the FCC's application of the law to this radio station in this instance, upheld the FCC's action, placing great weight on the facts that (a) radio broadcasts come into the home; and (b) children are in the audience.[27] The majority strongly implied that the time of day of the broadcast made a difference.[28] Although the Court appeared to recognize the FCC's action as based on the content of speech, references to strict judicial scrutiny were nowhere to be seen. In upholding the FCC's action, moreover, the Court devoted no time or energy to the constitutionality of the governing statute, which, again, prohibited "indecent" speech over the public airwaves. "Indecency," it is important to note, has never been a legal term of art, like obscenity, embodying an established meaning.

It has become a familiar, if somewhat fuzzy, tenet of First Amendment law that broadcasting receives less than the usual amount of First Amendment protection,[29] a maxim that provided some support for the

20. *Cohen*, 403 U.S. at 21.
21. *Id.*
22. *Id.* at 25; *Hustler*, 485 U.S. at 55.
23. 438 U.S. 726 (1978).
24. *Id.* at 738.
25. *Id.* at 770.
26. *Id.* at. 731 (citing 18 U.S.C. § 1464 (1976)).
27. *Id.* at 763–64 (Brennan, J., dissenting).
28. *Pacifica*, 438 U.S. at 750.
29. *See, e.g.*, Red Lion Broad. Co., v. FCC, 395 U.S. 367 (1969).

holding in *Pacifica*. Partly for that reason, *Pacifica* has proven to be fairly easy to distinguish from later cases involving different media of communication. When government has sought to protect minors from ostensibly harmful communications via mail[30] or telephone,[31] for example, *Pacifica* has been distinguished—mail, because its impact on small children was seen as so much smaller,[32] and "dial-a-porn" telephone communications, because they do not come into the home in an unsought and unexpected manner.[33]

The 1989 "dial-a-porn" decision, *Sable Communications v. FCC*,[34] is significant for another reason as well—namely the Court's use of strict scrutiny, which by 1989 had become a fairly dependable judicial response to a content based regulation of speech. Again, a well-established component of strict scrutiny is the insistence that the government employ the least restrictive means of regulating the targeted speech. In *Sable*, the Court recognized a compelling interest on the part of the government in protecting children from emotionally harmful communications,[35] and appeared willing to believe that the pornographic telephone conversations in question might be harmful. But, because there was evidence in the record of alternative methods of shielding children from these pornographic messages, the Court was not persuaded that a total ban represented the least restrictive means of doing so.[36] The principle of the *Butler* case, meanwhile, was again set forth.[37]

With respect to cable television, it appeared for nearly a decade that the Supreme Court perceived that medium as differing significantly from broadcast television,[38] but in a more recent opinion a plurality of the Court emphasized the similarities of those two media.[39] In that case, which involved federal regulation of "indecency" on cable television, a plurality of the court declined to employ strict scrutiny, despite the clearly content based nature of the regulation, because of uncertainty as to the appropriate

30. Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60 (1983).

31. Sable Communications v. FCC, 492 U.S. 115 (1989).

32. *Bolger*, 463 U.S. at 74.

33. *Sable*, 492 U.S. at 128.

34. 492 U.S. 115 (1989).

35. *Id.* at 122. *See also* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 755 (1996) (plurality opinion); *id.* at 806 (Kennedy, J., concurring in part).

36. *Sable*, 492 U:S. at 128–29.

37. *Id.* at 126–27.

38. Wikinson v. Jones, 480 U.S. 926 (1987), *aff'g* Jones v. Wilkinson, 800 F.2d 989 (10th Cir. 1986), *aff'g* Community Televison v. Wilkinson, 611 F. Supp. 1099 (D. Utah 1985).

39. *Denver Area Educ. Telecomm. Consortium*, 518 U.S. 727.

standards to apply to a medium of communication seen as new and unique.[40] The dissenters on this point, constituting a majority of the Justices, would have employed strict scrutiny.[41] A demanding level of judicial review was utilized nonetheless, but the possibility that the Court would depart from its general analytical framework, by virtue of the special nature of the medium of communication at issue, had arisen.

III. THE STATUTE

The two statutory provisions at issue, to be codified as sections 223(a) and (d) of Title 47,[42] came to be known as the "indecent transmission" provision and the "patently offensive display" provision.[43]

The "indecent transmission" provision, section 223(a), made it a federal crime, *inter alia,* to do the following acts, "knowingly," "in interstate or foreign communications," "by means of a telecommunications device": to create and initiate the transmission of any communication "which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age."[44]

The "patently offensive" display provision, section 223(d), made it a federal crime, *inter alia,* to do either of the following, "knowingly," "in interstate or foreign communications," by use of an interactive computer service:

> to send to a specific person or persons under 18 years of age, or . . . to display in a manner available to a person under 18 years of age, "any . . . communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs . . . ."[45]

Significantly, two affirmative defenses were provided by the statute, in section 223(e)(5), precluding conviction of a defendant who

> "(A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent

40. *Id.* at 741–42.

41. *Id.* at 783 (Kennedy, J., concurring and dissenting in part). *See also id.* at 832 (Thomas, J., dissenting in part).

42. Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (to be codified at 47 U.S.C. § 223(a), (d) (1998)).

43. *Reno*, 117 S. Ct. 2329, 2338 (1997).

44. *Id.* at 2338 (citing 47 U.S.C.A. § 223(a) (Supp. 1997)).

45. *See id.* at 2338–39 (citing 47 U.S.C.A. § 223(d) (Supp. 1997)).

> access by minors to a [prohibited] communication . . . which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; [sic] or
>
> "(B) has restricted access to such communication by requiring use of a verified credit card . . . or adult personal identification number."[46]

IV. THE JUDICIAL REACTION TO THE CDA

A. *The Supreme Court Decision in* Reno

1. The Majority Opinion

Justice Stevens wrote the opinion for a majority of seven Justices, affirming the decision of a three-judge District Court,[47] invalidating these provisions, except to the extent that section 223(a) bars "obscene" communications.[48]

In the first three sections of his opinion, Stevens summarized the district court's extensive findings of fact pertaining to sexually explicit material on the Internet and available mechanisms for restricting access thereto,[49] described the statute and the history of its enactment,[50] and briefly described the reasoning of the lower court.[51]

a. *Key Findings of Fact*

Some of the District Court's important findings of fact, restated in Part I of Justice Stevens' opinion, deserve restatement at this point.

Concerning sexually explicit material on the Internet, Stevens, quoting in part from the findings below, wrote:

> Though such material is widely available, users seldom encounter such content accidentally. . . . Almost all sexually explicit images are preceded by warnings as to the content. For that reason, "odds

46. *Id.* at 2339 n.26.
47. *ACLU*, 929 F. Supp. 824, 849 (E.D. Pa. 1996).
48. *Reno*, 117 S. Ct. at 2350.
49. *Id.* at 2334–37.
50. *Id.* at 2337–39.
51. *Id.* at 2339–41.

> are slim" that a user would enter a sexually explicit site by accident. Unlike communications received by radio or television, "the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended."[52]

Concerning age verification, again quoting in part from the findings below, he wrote this:

> The District Court categorically determined that there "is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups or chat rooms." The Government offered no evidence that there was a reliable way to screen recipients and participants in such fora for age.
>
> . . .
>
> Technology exists by which an operator of a Web site may condition access on the verification of requested information such as a credit card number or an adult password. Credit card verification is only feasible, however, either in connection with a commercial transaction. . . . For that reason, . . . credit card verification was "effectively unavailable to a substantial number of Internet content providers." . . . Moreover, the imposition of such a requirement "would completely bar adults who do not have a credit card and lack the resources to obtain one from accessing any blocked material."
>
> . . . [T]he District Court found that an adult password requirement would impose significant burdens on noncommercial sites, both because they would discourage users from accessing their sites and because the cost of creating and maintaining such screening systems would be "beyond their reach."
>
> . . .
>
> "Even if credit card verification or adult password verification were implemented, the Government presented no testimony as to

52. *Id.* at 2336 (quoting *ACLU*, 929 F. Supp. 824, 844–45 (E.D. Pa. 1996)).

> how such systems could ensure that the user of the password or credit card is in fact over 18. The burdens imposed by credit card verification and adult password verification systems make them effectively unavailable to a substantial number of Internet content providers."[53]

b. *Legal Analysis*

Justice Stevens began his analysis of the constitutionality of the CDA in Part IV of his opinion. However, instead of beginning by identifying the statute as content based, and therefore subject to strict scrutiny, he began by addressing the government's argument "that the CDA is plainly constitutional under three of our prior decisions,"[54] *Ginsberg v. New York*,[55] *FCC v. Pacifica Foundation*,[56] and a clearly inapplicable case, *City of Renton v. Playtime Theatres, Inc.*[57]

Stevens distinguished *Ginsberg* on several grounds, including: 1) *Ginsberg* involved a law that barred sales to minors, but not to adults;[58] 2) "the New York statute applied only to commercial transactions[;]"[59] and 3) the forbidden material in *Ginsberg*, unlike the material prohibited under the CDA, was defined in part by the absence of "serious literary, artistic, political, or scientific value."[60]

Pacifica was distinguishable on a variety of grounds as well, including the observation—foreshadowed by Stevens' summary of the district court's findings of fact—that, in contrast to the radio broadcast in *Pacifica*, "the risk of encountering indecent material [on the Internet] by accident is remote because a series of affirmative steps is required to access specific material."[61]

In Part V of his opinion, Stevens considered, in essence, whether the constitutional analysis in the case should be affected by the nature of the

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53. *Reno*, 117 S. Ct. at 2336–37 (quoting *ACLU*, 929 F. Supp. 824, 844–47 (E.D. Pa. 1996)).

54. *Id.* at 2341.

55. 390 U.S. 629 (1968).

56. 438 U.S. 726 (1978).

57. 475 U.S. 41 (1986). The Court in *Playtime Theatres, Inc.* divined a theory which allowed it to treat what appeared to be a content based regulation of speech as if it were content neutral. *Id.* at 47–49. By contrast, said Stevens, quite accurately, "the CDA is a content-based blanket restriction on speech." *Reno*, 117 S. Ct. at 2342.

58. *Id.* at 2341.

59. *Id.* (citing Ginsberg v. New York, 390 U.S. 629, 647 (1968)).

60. *Id.*

61. *Id.* at 2342.

communications medium involved.[62] The primary point of comparison, of course, was broadcasting, long deemed to be subject to greater regulation because of the "scarcity of available frequencies" and the "invasive nature" of radio and television.[63] "Those factors are not present in cyberspace,"[64] wrote Stevens, who went on to conclude there was "no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."[65]

In Part VI of his opinion, Stevens toyed with the arguable vagueness of the statutory provisions at issue, but stopped short of relying on that vagueness as a basis, under the Due Process Clause of the Fifth Amendment, for invalidating the statute.[66] He began by noting the "ambiguities" in the challenged provisions—namely, the word "indecent" and the phrase "patently offensive."[67] In the discussion that followed, he actually seemed to have regarded these words as "vague," yet, again, did not rest his decision on that basis.[68] Notably, he devoted little time to the word "indecent," focusing instead on the phrase "patently offensive," and rejecting the government's contention that that phrase could not be unconstitutionally vague because it constitutes one part of the Court's own three-part definition of unprotected "obscenity."[69]

But if the vagueness of these terms was not reason, in and of itself, to strike down the CDA, what was the significance of these observations? Early in this discussion, referring to the "uncertainty" that the CDA would create, Stevens stated that "[t]his uncertainty undermines the likelihood that the CDA has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials."[70] For this proposition he cited no precedent, and, indeed, this author can think of no prior decision that made this kind of connection between the problem of vagueness and the requirement, under strict scrutiny, that a law be narrowly tailored to accomplish the legislative goal. At the end of this section of his opinion, Stevens said:

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62. *Reno*, 117 S. Ct. at 2343.

63. *Id.*

64. *Id.*

65. *Id.* at 2344.

66. *Id.* "Regardless of whether the CDA is so vague that it violates the Fifth Amendment," he wrote, "the many ambiguities concerning the scope of its coverage render it problematic for purposes of the First Amendment." *Reno*, 117 S. Ct. at 2344.

67. *Id.*

68. *Id.* at 2344–48.

69. *Id.* at 2345 (discussing Miller v. California, 413 U.S. 15 (1973)).

70. *Id.* at 2344.

> Given the vague contours of the coverage of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional protection. That danger provides further reason for insisting that the statute not be overly broad. The CDA's burden on protected speech cannot be justified if it could be avoided by a more carefully drafted statute.[71]

But one would have expected the Court to have endorsed the latter proposition in any event, and to have "insist[ed] that the statute not be overly broad" regardless of any problems of vagueness.[72] Arguably, then, this discussion of vagueness contributed nothing to the Court's resolution of the case. But it suggests that the terminology at issue, if used in future legislation, might be deemed intolerably vague, even if Congress somehow found a way to overcome the defects that did lead the Court to invalidate the CDA.

Part VII of Justice Stevens' opinion contained the heart of his strict scrutiny analysis, and it is to this part of his opinion that one must look to determine, as best one can, precisely what was wrong, constitutionally, with the CDA.

"[W]e have repeatedly recognized," he wrote, "the governmental interest in protecting children from harmful materials."[73] That apparently meant that the government's goal was of sufficient importance to satisfy strict scrutiny; Stevens didn't say that explicitly, but the Court had previously so stated.[74]

The problem, then, in general terms, was that the statute was not sufficiently narrowly tailored to survive strict scrutiny. But why not? Here are the key passages from this part of Stevens' opinion:

> In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive

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71. *Id.* at 2346.

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

73. *Id.*

74. Sable Communications v. FCC, 492 U.S. 115, 126 (1989). *See also* text accompanying notes 8, 35. Precisely what harm would likely befall children as a result of exposure to non-obscene sexually explicit materials has never been identified by the Supreme Court. But see the discussion of this point in the Report of the House Committee on Commerce on the Child Online Protection Act, H.R. REP. NO. 105-775 (1998), 1998 WL 691067 at 27–28.

> alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.[75]

The government interest in protecting children, he continued, "does not justify an unnecessarily broad suppression of speech addressed to adults. As we have explained, the Government may not '[reduce] the adult population . . . to . . . only what is fit for children.'"[76]

The last sentence quoted represents, of course, the principle of the *Butler* case. But the preceding sentences appear, in and of themselves, to treat the *Butler* principle as something other than absolute; the burden on adult speech, it is said, is unacceptable *if* less restrictive alternatives would do the job as well. Because, under strict scrutiny, *any* burden on speech is unacceptable if less restrictive alternatives would do the job as well, the reference to the *Butler* principle arguably becomes superfluous.

At this point Stevens detoured slightly from his statement of governing principles, taking time to explain why communication between adults was burdened by the CDA:

> Given the size of the potential audience for most messages, in the absence of a viable age verification process, the sender must be charged with knowing that one or more minors will likely view it. Knowledge that, for instance, one or more members of a 100—person chat group will be minor—and therefore that it would be a crime to send the group an indecent message—would surely burden communication among adults.[77]

As noted previously, the district court had found that existing technology did not include any effective method for a sender to prevent minors from obtaining access to its Internet communications without also denying access to adults, and that the use of age verification devices would prove quite burdensome for many speakers.[78] Thus, the CDA would significantly burden adult communication on the Internet.[79]

Stevens continued, in characteristically unstructured fashion:

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

76. *Id.* (quoting Sable Communications v. FCC, 492 U.S. 115, 128 (1989)).

77. *Id.* at 2347.

78. *Id.* at 2336–37.

79. At that point, Stevens added this: "By contrast, the District Court found that . . . currently available *user-based* software suggests that a reasonably effective method by which parents can prevent their children accessing sexually explicit . . . material . . . will soon be widely available." *Id.* at 2347 (quoting *ACLU*, 929 F. Supp. 824, 842 (E.D. Pa. 1996)). The legal relevance of that observation is far from clear.

> The breadth of the CDA's coverage is wholly unprecedented. . . . [T]he scope of the CDA is not limited to commercial speech or commercial entities. . . .The general, undefined terms "indecent" and "patently offensive" cover large amounts of nonpornographic material with serious educational or other value. Moreover, the "community standards" criterion . . . means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message.[80]

The regulated subject matter, he went on to say, might "extend to discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalogue of the Carnegie Library."[81]

Stevens then invoked the government's argument that, in effect, the First Amendment surely does not protect the communication of all "indecent" or "patently offensive" messages to minors, regardless of whether the message contains "value."[82] The Court "need neither accept nor reject" that argument, said Stevens.[83] "It is at least clear," he continued, "that the strength of the Government's interest in protecting minors is not equally strong throughout the coverage of this broad statute."[84] He hypothesized further at this point: "[A] parent who sent his 17-year-old college freshman information on birth control via e-mail could be incarcerated even though neither he, his child, nor anyone in their home community, found the material 'indecent' or 'patently offensive', if the college town's community thought otherwise."[85]

Was the problem, then, that Congress had gone too far by shielding minors even from sex-related communication that contained serious artistic or educational value? Was the law overinclusive, to that extent, because such material does not give rise to the harms that Congress has a compelling interest in preventing? If that is what Justice Stevens was thinking, he did not say it.

Was there a particular constitutional infirmity stemming from the fact that "indecency" might be determined through the prism of the "community standards" of a distant, or nationwide, "community?" Stevens didn't say

80. *Reno*, 117 S. Ct. at 2347.
81. *Id.* at 2348.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Reno*, 117 S. Ct. at 2348.

that, either, nor has case law in the obscenity context suggested that such an approach raises constitutional problems.[86]

Instead of expressly basing the Court's ruling on any or all of those concerns, Stevens concluded this key section of his opinion with the following paragraph:

> The breadth of this content based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA. It has not done so. The arguments in this Court have referred to possible alternatives such as requiring that indecent material be "tagged" in a way that facilitates parental control of material coming into their homes, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet—such as commercial web sites—differently than others, such as chat rooms.[87]

Was Stevens saying here that less restrictive alternatives existed? Or merely that "*possible* alternatives" existed, which is to say that the existence of such alternatives was possible, but not certain? If the latter, was the constitutional infirmity a procedural problem of sorts—namely, that the government had simply not satisfied its burden of *proving* that no less restrictive alternatives existed? If so, was that a fair conclusion? Did any such less restrictive alternatives exist? Did Stevens identify any, in the language just quoted? Bearing in mind that a less restrictive alternative must be employed when it will accomplish the government's goal at least as well as the challenged regulation, can that be said of the "tagging" alternative to which Stevens referred?[88] Of the other "possible alternatives" he cited, how could it be said that: (a) "making exceptions for messages with artistic or educational value;"[89] or (b) regulating only "commercial" web sites,[90] would fully achieve the government's goal?

The final sentence of this apparently dispositive paragraph was this: "Particularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA, we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all."[91] A failure by Congress to utilize less restrictive

86. *See* United States v. Thomas, 74 F.3d 701 (6th Cir. 1996).

87. *Reno*, 117 S. Ct. at 2348.

88. *See* Butler v. Michigan, 352 U.S. 380 (1957); *infra* comments in note 129 and accompanying text.

89. *Reno*, 117 S. Ct. at 2348.

90. *Id.*

91. *Id.*

available alternatives would lead to the conclusion that the statute was not sufficiently narrowly tailored, which in turn would render the statute unconstitutional. But why the sudden and unexpected reference to the absence of Congressional findings or hearings?[92] Is Congress obliged to make findings, or to hold hearings, when it legislates in a manner that affects freedom of expression, or was the apparently hasty and spontaneous nature of the enactment of this statute simply an aggravating factor in the minds of the Justices?[93]

In Part IX of his opinion, Justice Stevens responded to, and rejected, the government's argument that the statute was constitutional by virtue of the affirmative defenses provided therein:

> First, relying on the "good faith, reasonable, effective and appropriate actions" provision, the Government suggests that "tagging" provides a defense that saves the constitutionality of the Act. The suggestion assumes that transmitters may encode their indecent communications in a way that would indicate their contents, thus permitting recipients to block their reception with appropriate software. It is the requirement that the good faith action must be "effective" that makes this defense illusory. The Government recognizes that its proposed screening software does not currently exist. Even if it did, there is no way to know whether a potential recipient will actually block the encoded material. Without the impossible knowledge that every guardian in America is screening for the "tag," the transmitter could not reasonably rely on its action to be "effective."[94]

As to the other affirmative defense, applicable when a transmitter restricts access by requiring the use of a verified credit card or adult identification, Stevens returned to the finding of the district court that "it is not economically feasible for most noncommercial speakers to employ such verification" techniques; "[a]ccordingly, this defense would not significantly narrow the statute's burden on noncommercial speech."[95] Additionally, the government "failed to adduce any evidence that these verification techniques

92. Earlier in his opinion, Justice Stevens briefly described the process by which the CDA had been enacted, observing that "[n]o hearings were held on the provisions that became law." *Id.* at 2338 n.24.

93. See *United States v. Lopez*, 514 U.S. 549, 549 (1995), in which Chief Justice Rehnquist, writing for the majority, commented on the absence of congressional findings, in the course of striking down a federal statute on the ground that the subject of the regulation did not have a substantial effect on interstate commerce. *Id.*

94. *Reno*, 117 S. Ct. at 2349.

95. *Id.*

actually preclude minors from posing as adults."[96] Thus, an "unacceptably heavy burden" on adult speech remained, and "the defenses do not constitute the sort of "narrowly tailoring" that will save an otherwise patently invalid unconstitutional provision."[97] But did not Justice Stevens' pronouncements concerning the inefficacy of these defenses tend to discredit his earlier suggestion that Congress had not employed the least restrictive means of achieving its goals?

2. The Concurring Opinion

The only other opinion written by any of the Justices in this case was that written by Justice O'Connor, joined by Chief Justice Rehnquist, partly dissenting and partly concurring in the judgment.[98] O'Connor began by stating that she viewed the CDA "as little more than an attempt by Congress to create 'adult zones' on the Internet."[99] She then proceeded to set down the following governing principles (which apparently exist, for her, outside of any structured strict-scrutiny analysis):

> The Court has previously sustained such zoning laws, but only if they respect the First Amendment rights of adults and minors. That is to say, a zoning law is valid if (i) it does not unduly restrict adult access to the material; and (ii) minors have no First Amendment right to read or view the banned material.[100]

For this proposition she relied on the holdings in *Butler v. Michigan*,[101] *Sable Communications v. FCC*,[102] and *Bolger v. Youngs Drug Products Corp*,[103] and distinguished *Ginsberg v. New York*,[104] which upheld a statute that in no way curtailed adult access to sexually explicit material.[105]

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96. *Id.*
97. *Id.* at 2350.
98. *Id.* at 2351 (O'Connor, J., concurring in part, dissenting in part). O'Connor's partial dissent was based on her view that the "indecen[t] transmission" provision and the "specific person" provision were constitutional, to the extent that they applied to Internet communications "where the party initiating the communication knows that all of the recipients are minors." *Reno*, 117 S. Ct. at 2356 (O'Connor, J., concurring in part, dissenting in part).
99. *Id.* at 2351.
100. *Id.* at 2352–53.
101. 352 U.S. 380 (1957).
102. 492 U.S. 115 (1989).
103. 463 U.S. 60 (1983).
104. 390 U.S. 629 (1968).
105. *Id.* at 673–75.

O'Connor then ruminated a bit on the nature of "zoning" in cyberspace—via "gateway technology," (*e.g.*, screening software)—and ultimately concluded: "Gateway technology is not ubiquitous in cyberspace, and because without it 'there is no means of age verification,' cyberspace still remains largely unzoned—and unzoneable."[106] "Although the prospects for the eventual zoning of the Internet appear promising," she continued, "we must evaluate the constitutionality of the CDA as it applies to the Internet as it exists today."[107] Given present conditions, she concluded, the "display" provision was unconstitutional, because its prohibition would "[impinge] on the First Amendment right of adults to make and obtain this speech and, for all intents and purposes, '[reduce] the adult population [on the Internet] to reading only what is fit for children.'[108] . . . As a result, the 'display' provision cannot withstand scrutiny."[109] For her, then, it appears that the *Butler* principle controlled, independently of any other mode of First Amendment analysis.

Returning to her two-part inquiry, stated above, O'Connor then considered "[w]hether the CDA substantially interferes with the First Amendment rights of minors."[110] Her response was that it did not, but that was because of the established rule that, for a statute to be stricken as facially overbroad under the First Amendment, it had to be *substantially* overbroad.[111] She did not deem the CDA to be substantially overbroad, but did seem to think that it did violate the First Amendment rights of minors in some of its applications.[112] In this analysis she was guided by the case of *Ginsberg v. New York*,[113] which "established that minors may constitutionally be denied access to material that is obscene as to minors."[114] She explained:

> Because the CDA denies minors the right to obtain material that is "patently offensive"—even if it has some redeeming value for minors and even if it does not appeal to their prurient interests—Congress' rejection of the Ginsberg "harmful to minors" standard

106. *Reno*, 117 S. Ct. at 2354 (O'Connor, J., concurring in part, dissenting in part) (quoting *ACLU*, 929 F. Supp. 824, 846 (E.D. Pa. 1996)).

107. *Id.* (O'Connor, J., concurring in part, dissenting in part).

108. *Id.*

109. *Id.* (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)).

110. *Id.* (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)).

111. *Reno*, 117 S. Ct. at 2356 (O'Connor, J., concurring in part, dissenting in part).

112. *Id.*

113. 390 U.S. 629 (1968).

114. *Reno*, 117 S. Ct. at 2356 (O'Connor, J., concurring in part, dissenting in part).

> means that the CDA could ban some speech that is 'indecent' (i.e., "patently offensive") but that is not obscene as to minors."[115]

But, again, the CDA was not, in her view, *substantially* overbroad in this regard: "In my view, the universe of speech constitutionally protected as to minors but banned by the CDA—i.e., the universe of material that is 'patently offensive,' but which nonetheless has some redeeming value for minors or does not appeal to their prurient interest—is a very small one."[116]

While this discussion did not affect the way in which these two Justices would have disposed of this case, it did reveal their belief that even minors have a First Amendment right to offensive, sexually explicit material when that material "has some redeeming value for minors."[117] If other Justices were to join them in taking this position (as seems likely, considering that O'Connor was joined in this opinion by Chief Justice Rehnquist), it would serve as an additional limitation on the ability of Congress to regulate speech deemed harmful to minors.

B. *The Lower Court Decisions*

1. ACLU v. Reno

While it is the Supreme Court decision that counts, the opinions written by each of the judges of the special three-judge court that initially decided the case of *ACLU v. Reno*,[118] may nonetheless shed additional light on the possible judicial response to any future variations of the CDA that may emerge from Congress. Those opinions foreshadowed Justice Stevens' reasoning to a considerable extent, but contained some additional analytical reactions to the CDA that were not addressed, and certainly not discredited, by the Supreme Court decision. Thus, even if Congress could cure every defect identified by Justice Stevens, a new statutory regulation of Internet speech might yet run afoul of a principle put forth in one of these three

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115. *Id.*

116. *Id.* Justice O'Connor clarified the role of "value" in this context, as follows: minors do not enjoy a right to all material having "value," rather, "under *Ginsberg*, minors only have a First Amendment right to obtain patently offensive material that has 'redeeming social importance *for minors.*'" *Id.* (quoting Ginsberg v. New York, 390 U.S. 629, 633 (1968)).

117. *Id.*

118. 929 F. Supp. 824 (E.D. Pa. 1996). Following an introduction, findings of fact, and a brief statement of conclusions of law, each of the three judges wrote an opinion representing only his own views. *Id.* at 824.

opinions. Those additional bases for striking down the CDA should thus be explored.

Chief Judge Sloviter took a bit of time questioning whether the government had a compelling interest "in regulating the vast range of online material covered or potentially covered by the CDA"[119]—in other words, whether the government truly had a compelling interest with respect to the full range of the CDA's potential applications.[120] This approach appears to confuse the question of whether the government's goal is one of compelling importance with the separate question of whether the statute is narrowly tailored to accomplish that goal. Still, a distinguished federal judge made this argument, although he disclaimed reliance upon it in striking down the statute.[121]

In addition, Judge Sloviter made observations that, in effect, give substance to an argument, though not explicitly offered as such, that the CDA was not *necessary* to achieve the government's purposes:

> Minors would not be left without any protection from exposure to patently unsuitable material on the Internet should the challenged provisions of the CDA be preliminarily enjoined. Vigorous enforcement of current obscenity and child pornography laws should suffice to address the problem the government identified in court and which concerned Congress. When the CDA was under consideration by Congress, the Justice Department itself communicated its view that it was not necessary because it was prosecuting online obscenity, child pornography and child solicitation under existing laws, and would continue to do so.[122]

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119. *Id.* at 853 (Sloviter, C.J.).

120. Chief Judge Sloviter concluded, for example, that "where non-pornographic, albeit sexually explicit, material also falls within the sweep of the statute, the interest will not be as compelling." *Id.* at 852 (Sloviter, C.J.).

121. This point found fleeting expression in Justice Stevens' opinion as well, when he remarked that "the strength of the Government's interest in protecting minors is not equally strong throughout the coverage of this broad statute." *Reno*, 117 S. Ct. at 2348.

122. *ACLU*, 929 F. Supp. at 856–57 (Sloviter, C.J.). The existence and applicability of federal obscenity and child pornography laws were noted by Justice Stevens only in a footnote, accompanied by the observation that "when Congress was considering the CDA, the Government expressed its view that the law was unnecessary because existing laws already authorized its ongoing efforts to prosecute obscenity, child pornography, and child solicitation." *Reno*, 117 S. Ct. at 2347 n. 44. *See* 18 U.S.C.A. §§ 1464–65, 2251, 2422(b) (West Supp. 1998).

Judge Buckwalter, writing separately, concluded that the words "indecent" and "patently offensive" were unconstitutionally vague.[123] With respect to the word "indecent," he did not regard the United States Supreme Court's decision in *Pacifica* as having precluded such an argument.[124] He was troubled, as well, by the ambiguity attendant upon the statutory reference to "community standards."[125]

Judge Dalzell, the third member of the court, concluded his lengthy opinion with this observation, bearing upon the inevitable ineffectuality of the congressional act: "Moreover, the CDA will almost certainly fail to accomplish the Government's interest in shielding children from pornography on the Internet. Nearly half of Internet communications originate outside the United States, and some percentage of that figure represents pornography."[126]

2. Shea v. Reno

In *Shea v. Reno*,[127] the other 1996 decision of a three-judge court striking down the CDA, the court, whose holding was based on reasoning that anticipated that of Justice Stevens to a great extent, made a comment similar to that made by Judge Dalzell regarding the likely ineffectiveness of the statute:

> It is . . . unnecessary, given our holding . . ., to decide whether the potential ineffectiveness of the CDA in eradicating the problem of minors' having access to sexually explicit material on the Internet renders the statute constitutionally defective. Because the CDA only regulates content providers within the United States, while perhaps as much as thirty percent of the sexually explicit material on the Internet originates abroad . . ., the CDA will not reach a significant percentage of the sexually explicit material currently available. . . . [T]he apparent ineffectiveness of the CDA underscores our holding today that the Government has failed to

123. *ACLU*, 929 F. Supp. at 858. Judge Sloviter indicated that he agreed with Judge Buckwalter on this point. *Id.* at 856 (Sloviter, C.J.).

124. *Id.* at 862. *See Reno*, 117 S. Ct. 2329, 2342. Judge Dalzell, in his supporting opinion, disagreed with Judge Buckwalter on this point. *ACLU*, 929 F. Supp. at 868–69 (Dalzell, J.).

125. *Id.* at 863 (Buckwalter, J.).

126. *Id.* at 882 (Dalzell, J.). This, too, was a point acknowledged by Justice Stevens only in a footnote, as follows: "Because so much sexually explicit content originates overseas, [appellees] argue, the CDA cannot be 'effective.' . . . We find it unnecessary to address those issues to dispose of this case." *Reno*, 117 S. Ct. at 2347–48 n.45.

127. 930 F. Supp. 916 (S.D.N.Y. 1996).

> demonstrate that the CDA does not "unnecessarily interfer[e] with First Amendment freedoms."[128]

This court made a link, it seems, between the ineffectiveness of the statute and the requirement that a content based regulation be "necessary" to the accomplishment of a compelling state interest. If an argument of this kind is taken seriously, it may well follow that *no* regulation of Internet speech can withstand First Amendment scrutiny.

V. WHAT DOES THE CDA LITIGATION SUGGEST, WITH REGARD TO THE VALIDITY OF FUTURE LEGISLATION?

The United States Supreme Court decision in *Reno* makes clear that the Courts' formal response to content based regulation of speech on the Internet will be strict judicial scrutiny. Again, that means that the government's goal must be a very important one—apparently not a problem when government seeks to protect children from emotional and psychological harm—and that any such regulation must be necessary to the achievement of that goal, and narrowly tailored to do so, regulating no more, and no less, than is required to accomplish the purpose. In addition, the law must represent the least speech-restrictive means of achieving the government's goal.

Can any regulation of speech on the Internet pass that test?

While the Stevens opinion in *Reno* purported to find the CDA inadequately tailored to the achievement of its goal, and, more specifically, to have failed to satisfy the "least restrictive means" requirement of strict scrutiny, his opinion is quite unclear as to why those conclusions were reached. Indeed, as noted earlier, there appear to be *no* less restrictive ways in which Congress might *just as effectively* achieve the goal of shielding minors from sexually explicit online communications. The Court's unpersuasive use of strict scrutiny makes it harder to evaluate the validity of prospective future legislative initiatives of this kind—but the fact that the United States Supreme Court said what it did will tend to lead lower courts, in future cases, to effectively presume that a regulation of this kind fails strict scrutiny, and perhaps to engage in similarly conclusory analyses.

Arguments flowing from the requirements of strict scrutiny that *might* provide more satisfying bases for striking down such a regulation, however, include the following: 1) such a regulation is unnecessary, because existing federal statutes already prohibit those communications, online or elsewhere, that pose the greatest risks to the emotional and psychological well-being of minors; 2) such a regulation is inescapably and fatally underinclusive (and thus not narrowly tailored to achieve its goal), because sexually explicit

128. *Id.* at 941.

communications emanating from foreign sources effectively cannot and will not be banned by American legislation; and 3) for the same reason, such a regulation cannot be effective in achieving its goal.

But the real meaning of the *Reno* decision may have nothing to do with the well-established "strict scrutiny" analysis. Instead, the decision may simply (although not unambiguously) make clear, forty years after the United States Supreme Court originally set forth this principle in *Butler v. Michigan*,[129] that government really may not, consistently with the First Amendment, shield minors from speech deemed harmful to them, but which is protected speech with respect to adults, by means of a regulatory scheme—even one limited to a specific medium of communication—that effectively deprives adults of access to that speech via that medium. If that is what *Reno* stands for, then no CDA-type regulation, taking the form of a blanket prohibition of speech deemed harmful to minors, will stand.

If that is indeed the key to *Reno*, then none of the more detailed grievances lurking in Stevens' opinion—including, most notably, the fact that the speech banned by the CDA was not defined by the absence of "value" [130](serious or otherwise)—should have any legal significance. Non-obscene material lacking "value" would, after all, still be protected speech with respect to adults. Likewise, the arguable vagueness of statutory terms such as "indecency" probably drops out of the analysis, in effect, because the *Butler* principle invalidates even a blanket prohibition that could survive a vagueness challenge.

But what is to be made of Stevens' observation that the CDA was not limited, in its application, to "commercial" websites?[131] Is there any good reason to believe that a CDA-like statute limited to commercial websites would be constitutional? That would narrow the reach of the regulation, and commensurately reduce—but not eliminate—the burden placed upon protected speech.

The *Butler* principle would not, however, prevent Congress from imposing upon online communicators an affirmative obligation to take specified steps designed to minimize the likelihood that minors would come into contact with sexually explicit communications. And that is what Congress has done, in the wake of the failure of the CDA.

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129. 352 U.S. 380 (1957). The Court reiterated the *Butler* principle in other decisions, most notably in *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126–27 (1989), and in *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 73 (1983), during the 1980s, but none of those decisions depended on that principle.

130. *Reno*, 117 S. Ct. at 2341, 2344 n.37, 2349.

131. *Id.* at 2347.

VI. THE CHILD ONLINE PROTECTION ACT

Congress enacted the Child Online Protection Act[132] ("COPA") on October 21, 1998. In assessing the constitutionality of the Act, it is useful to first consider two prior versions of the bill that ultimately became law.

When initially introduced in the House of Representatives on April 30, 1998, the Child Online Protection Act contained the following core provision: "Whoever in interstate or foreign commerce is engaged in the business of selling or transferring, by means of the World Wide Web, material that is harmful to minors shall restrict access to such material by persons under 17 years of age."[133]

Criminal penalties were provided in the event of violations. The bill went on to provide that one would not be liable if one restricted access to said material "by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number[,] or in accordance with such other procedures as the [FCC] may prescribe)."[134] The phrase "harmful to minors" was defined in a manner quite comparable to the definition, in the New York statute upheld by the Supreme Court in *Ginsberg v. New York*,[135] of material which was deemed obscene as to minors, and which could not legally be sold to minors.[136]

Would this bill, if enacted, have survived strict constitutional scrutiny?

Unless the Supreme Court repudiates the definition that even Justice Brennan found to be acceptable thirty years ago in *Ginsberg*, there appears to be no problem with respect to the scope of the targeted communications. Moreover, the concerns (of uncertain magnitude) expressed in *Reno* with regard to: (a) the CDA's inclusion of material with "value,"[137] and (b) the CDA's applicability to non-commercial sources of communications,[138] are here eliminated. Furthermore, the wording of this bill imposed an affirmative obligation on those sources—to "restrict access"—rather than a prohibition of the targeted communications.[139] Culpability would thus not have been imposed on communicators who are helpless to avoid making online communications accessible to minors, other than by censoring their communications to adults—the apparent primary vice of the CDA. Rather, one would be culpable only for failing to utilize existing screening devices. If one did utilize such devices, guilt would not be imposed simply because

132. Pub. L. No. 105-277, 112 Stat. 2681 (to be codified at 47 U.S.C. § 223 (1998)).
133. H.R. 3783, 105th Cong. § 3 (1998).
134. *Id.*
135. 390 U.S. 629 (1968).
136. *Id.*
137. *Reno*, 117 S. Ct. at 2341, 2344 n.37, 2349.
138. *Id.* at 2347.
139. *Id.* at 2339.

some minors gained access to the targeted communications. Thus, Reno's concern with the illusoriness of the CDA's affirmative defenses would apparently play no role in an evaluation of this bill. While this bill might still have been found to be unconstitutional, these points of distinction from the CDA would have bolstered its chances of surviving a First Amendment challenge.

However, by the time this bill emerged from the House Committee on Commerce in early October, its core provision had been significantly modified to read as follows:

> (a) Requirement to Restrict Access.-
>
> (1) Prohibited conduct.—Whoever, in interstate or foreign commerce, by means of the World Wide Web, knowingly makes any communication for commercial purposes that includes any material that is harmful to minors, without restricting access to such materials by minors pursuant to subsection (c), shall be fined . . ., imprisoned . . ., or both.[140]

Subsection (c) provided an affirmative defense, comparable to that in the original bill, that would preclude liability on the part of a defendant who took appropriate steps to restrict access by minors to "harmful" material.[141] The core provision of the bill had thus been transformed from a requirement that access be restricted to a ban on certain communications, *unless* access were restricted. The language of this provision evolved further during the month of October. The key language of the statute, as it was enacted, is as follows:

> SEC. 231. RESTRICTION OF ACCESS BY MINORS TO MATERIALS COMMERCIALLY DISTRIBUTED BY MEANS OF WORLD WIDE WEB THAT ARE HARMFUL TO MINORS.
>
> "(a) REQUIREMENT TO RESTRICT ACCESS.—
>
> "(1) PROHIBITED CONDUCT.—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

140. H. R. REP. No. 105-775, 105th Cong. (1998), 1998 WL 691067 at *4–5.
141. *Id.*

be fined not more than $50,000, imprisoned not more than 6 months, or both.[142]

"(c) AFFIRMATIVE DEFENSE.—

"(1) DEFENSE.—It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors—

(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;

(B) by accepting a digital certificate that verifies age; or

(C) by any other reasonable measures that are feasible under available technology.[143]

(e) DEFINITIONS.—For purposes of this subsection, the following definitions shall apply:

"(6) MATERIAL THAT IS HARMFUL TO MINORS.—The term "material that is harmful to minors" means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—

"(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

"(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

"(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

"(7) MINOR.—The term 'minor' means any person under 17 years of age.[144]

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142. COPA, Pub. L. No. 105-277, 112 Stat. 2681 (to be codified at 47 U.S.C. § 231(a)(1) (1998)).

143. *Id.* (to be codified at 47 U.S.C. § 231(c)(1)).

The statute also created a Commission on Online Child Protection, "for the purpose of conducting a study . . . regarding methods to help reduce access by minors to material that is harmful to minors on the Internet."[145]

As enacted, then, the COPA is no longer susceptible to being read as merely requiring that Internet content providers take certain prescribed steps to restrict access by minors to "harmful" material. Rather, like the CDA, it prohibits certain speech on the Internet, but provides that the use of prescribed methods of restricting access shall constitute an affirmative defense to liability. Thus, the resemblance between the COPA and the CDA is greater than we had been led to anticipate.

Still, there are significant differences between the CDA and the COPA. As has already been noted, those differences include: 1) a redefinition of the targeted communications that is probably constitutionally acceptable; and 2) a limitation of the scope of the targeted communications to those communicated: a) "by means of the World Wide Web;"[146] and b) "for commercial purposes."[147] Moreover, a "minor" is now defined as a person under seventeen years of age,[148] a year younger than a minor protected by the CDA.[149] In addition, and very significantly, there is no requirement in the COPA, as there was in the CDA, that a method of restricting access by minors must, in order to serve as an affirmative defense, be "effective." Recall that, in *Reno*, Justice Stevens stated that "[i]t is the requirement that the good faith action must be 'effective' that makes this defense illusory."[150] Presumably, the elimination of that flaw greatly enhances the prospect that the COPA will survive a First Amendment challenge. Note also that, for whatever it may be worth, Congress did a better job "procedurally," this time around, than it had in laying a satisfactory predicate for the ill-fated CDA. Both houses of Congress, during 1998, held hearings pertaining to the subject of this legislation, and, in its Report, the House Committee on

144. *Id.* (to be codified at 47 U.S.C. § 232(e)(6)–(7) (1998)). Also defined in section (e), most notably, are the phrases "by means of the World Wide Web" and "commercial purposes." *Id.*

145. Pub. L. No. 105-277, 112 Stat. 2681 (to be codified at __ U.S.C. __ (1998)).

146. This limitation is given emphasis in the House Report, which observed that the statute "does not apply to content distributed through other aspects of the Internet such as one-to-one messaging (e-mail), one-to-many messaging (list-serv), distributed message databases (USENET newsgroups); real time communications (Internet relay chat); real time remote utilization (telnet) or remote information retrieval other than the World Wide Web (ftp and gopher)." H. R. REP. NO. 105-775 (1998), 1998 WL 691067 at *30.

147. *Id.*

148. *Id.* at *31.

149. *See supra* text accompanying note 3.

150. *Reno*, 117 S. Ct. 2329, 2349 (1997).

Commerce set forth pertinent findings of fact with respect to both the need for regulation and the absence of sufficient regulatory alternatives.[151]

The COPA, then, is a more limited interference with freedom of speech than was the CDA. But is it nonetheless likely to fall to a First Amendment challenge? The answer may hinge on the extent to which even a prohibition that is limited to those web sites operated "for commercial purposes" is seen as placing too great a burden on freedom of speech.[152] The Supreme Court in *Reno* made much of the burdens placed by the CDA on those communicators who could not easily utilize available age verification devices.[153] In that part of his opinion in which he reviewed the district court's findings of fact, Justice Stevens observed that credit card verification was only feasible in connection with commercial transactions; by contrast, using that approach "would impose costs on non-commercial Web sites that would require many of them to shut down."[154] "Moreover," he went on to say, "the imposition of such a requirement 'would completely bar adults who do not have a credit card and lack the resources to obtain one from accessing any blocked material.'"[155] Later, in the core part of his analysis of the CDA, Stevens noted that the district court had "found that it would be prohibitively expensive for noncommercial—as well as some commercial—speakers who have Web sites to verify that their users are adults. . . . These limitations must inevitably curtail a significant amount of adult communication on the Internet."[156]

Narrowing the reach of the statute to "commercial" providers thus goes far toward reducing the extent to which online adult communications are burdened, or suppressed, by a requirement that age verification devices be employed. But Stevens' statement that "it would be prohibitively expensive for . . . [even] some commercial . . . speakers who have Web sites to verify

151. H. R. REP. NO. 105-775 (1998), 1998 WL 691067 at *3–4. Note also that, in the Congressional Findings that appear at the outset of the COPA itself, it is asserted that "(4) a prohibition on the distribution of material harmful to minors, combined with legitimate defenses, is currently the most effective and least restrictive means by which to satisfy the compelling government interest . . . ." *Id.* at *4.

152. "The decision in *ACLU* suggests that the constitutionality of an Internet-based 'harmful-to-minors' statute likely would depend, principally, on how difficult and expensive it would be for persons to comply with the statute without sacrificing their ability to convey protected expression to adults and to minors." L. Anthony Sutin, *Department of Justice Letter on CDA II* <http://www.aclu.org/court/acluvrenoII_doj_letter.html>. (L. Anthony Sutin, as Acting Assistant Attorney General, authored this letter dated October 5, 1998, to Congressman Thomas Bliley, the Chairman of the Committee on Commerce, wherein he outlined the Department's views on the COPA.).

153. *Reno*, 117 S. Ct. at 2337.

154. *Id.*

155. *Id.* (citing *ACLU*, 929 F. Supp. 824, 846 (E.D. Pa. 1996)).

156. *Id.* at 2347 (citing *ACLU*, 929 F. Supp. 824, 845–48 (E.D. Pa. 1996)).

that their users are adults,"[157] if still factually accurate, suggests that even this drastic narrowing of the field of regulatory targets may not suffice to save the statute. The clear argument to be made by a challenger is that a requirement that "prohibitively expensive" devices be employed amounts to a prohibition of protected communications between adults, with respect to those speakers for whom the devices are "prohibitively expensive." That would seem to bring the *Butler* principle back into play.

A legal challenge to the COPA has, in fact, already been launched. The ACLU, along with several other organizations, has filed a lawsuit seeking to have the COPA declared unconstitutional and to enjoin its enforcement.[158] In its complaint, the ACLU attempts to demonstrate the breadth of the coverage of the COPA, notwithstanding its limitation to web sites operated "for commercial purposes:"

> The Act purports to restrict only content provided on the Web "for commercial purposes," but in fact it explicitly bans a wide range of protected expression that is provided *for free* on the Internet by individuals and organizations. . . . [T]he Act targets all other communications made publicly accessible on the Web "for commercial purposes," defined very broadly as being "engaged in the business of making such communications." . . . The Act's definition of a person "engaged in the business" explicitly states that "it is not necessary that the person make a profit" nor that the making of the communications be the person's "principal business.". . . Just like many traditional print newspapers, bookstores, and magazine publishers, many Web publishers make a profit (or attempt to make a profit) through advertising. . . . Thus, the Act impacts a wide range of providers of free content, from fine art to popular magazines to news and issue-oriented expression.[159]

The ACLU goes on, in its complaint, to contend that, for many of these targeted online content providers, the methods of restricting access that give rise to an affirmative defense under the COPA are, in fact, "technologically and economically infeasible."[160]

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157. *Id.* at 2347.

158. *ACLU in Court: ACLU v. Reno Complaint* <http://www.aclu.org/court/acluvrenoII_complaint.html>. [hereinafter *ACLU Complaint*]. In November 1998, a federal district judge issued a temporary restraining order, enjoining enforcement of the statute. ACLU v. Reno, No. CIV.A.98-5591, 1998 WL 813423 at *1 (E.D. Pa. Nov. 23, 1998). This was followed by the entry of a preliminary injunction on February 1, 1999. ACLU v. Reno, No. CIV.A.98-5591, 1999 WL 44852 at *27 (E.D. Pa. Feb. 1, 1999).

159. *See ACLU Complaint*, *supra* note 158, ¶ 65.

160. *See ACLU Complaint*, *supra* note 158, ¶¶ 67–69.

The resolution of the constitutional question may, then, ultimately depend on further empirical developments of a technological and economic nature: *are* these means of restricting access to web sites technologically or economically infeasible, "prohibitively expensive," or otherwise intolerably burdensome? If they are feasible, and not prohibitively expensive, then the COPA may be constitutional.

In issuing a preliminary injunction against the enforcement of the COPA (and denying the government's motion to dismiss the complaint), Judge Reed made extensive findings of fact concerning the costs of compliance with the new statute,[161] leading him to conclude that "the plaintiffs have established a substantial likelihood that they will be able to show that COPA imposes a burden on speech that is protected for adults."[162]

Even if a significant amount of adult speech is burdened by the COPA, does the *Butler* principle admit of any flexibility? Might the concededly strong government interest, and the limited nature of the regulation, at some point outweigh the fact that some online communications that are constitutionally protected as to adults will not be permitted to be made? Of course, if a court finds that the government could have achieved its goals through less restrictive means, then the COPA will be struck down, just as was the CDA. In his memorandum of February 1, 1999, Judge Reed suggested that the case might be decided on that basis:

> On the record to date, it is not apparent to this Court that the defendant can meet its burden to prove that COPA is the least restrictive means available to achieve the goal of restricting the access of minors to this material. . . . The record before the Court reveals that blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web site operators. Such a factual conclusion is at least some evidence that COPA does not employ the least restrictive means.[163]

The arguable defect in this reasoning is that, as Justice Stevens observed in the process of invalidating the CDA, there is no assurance that parents will actually employ such blocking or filtering devices.[164]

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161. See *ACLU v. Reno*, 31 F. Supp. 2d 473, 488-92 (E.D. Pa. 1999) for findings of fact 41–64.

162. *ACLU*, 31 F. Supp. 2d at 495.

163. *Id.* at 497.

164. *See supra* text accompanying note 94.

More persuasively, however, Judge Reed went on to call attention to "other aspects of COPA which Congress could have made less restrictive[:]"

> Notably, the sweeping category of forms of content that are prohibited—"any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind"—could have been less restrictive of speech on the Web and more narrowly tailored to Congress' goal of shielding minors from pornographic teasers if the prohibited forms of content had included, for instance, only pictures, images, or graphic image files, which are typically employed by adult entertainment Web sites as "teasers."[165]

Finally, if all other bases for a First Amendment challenge fail, would a court invalidate this law simply because it cannot effectively rid the Internet of all such "harmful" communications, particularly those that emanate from abroad? Judge Reed made reference to this concern as well:

> [T]his Court's finding that minors may be able to gain access to harmful to minors materials on foreign Web sites, non-commercial sites, and online via protocols other than http demonstrates the problems this statute has with efficaciously meeting its goal. Moreover, there is some indication in the record that minors may be able to legitimately possess a credit or debit card and access harmful to minors materials despite the screening mechanisms provided in the affirmative defenses. . . . These factors reduce the benefit that will be realized by the implementation of COPA in preventing minors from accessing such materials online.[166]

These seem to be the considerations that are likely to govern the determination of whether the COPA is consistent with the First Amendment. Thanks to the ACLU and its fellow plaintiffs, it appears that a final judicial resolution of these issues will, in fact, be made in the near future.

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165. *ACLU*, 31 F. Supp. 2d at 497.
166. *Id.* at 496-97.