Establishing the Boundaries of First Amendment Protection for Speech in the Cyberspace Frontier: Reno v. ACLU

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ESTABLISHING THE BOUNDARIES OF FIRST AMENDMENT PROTECTION FOR SPEECH IN THE CYBERSPACE FRONTIER: *RENO v. ACLU*

I. INTRODUCTION

The Internet presents a unique problem in regulating certain types of speech, because of its unique nature. Unlike radio and other mediums, the Internet is not controlled by a single entity, rather, it is a decentralized, self-maintained series of links between various computers and computer networks. This giant network interconnects what is estimated to be as many as 40 million people around the world. The Internet is a conduit for an almost infinite

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1. See Robyn Forman Pollack, *Creating Standards of a Global Community: Regulating Pornography on the Internet — An International Concern*, 10 TEMP. INT’L & COMP. L.J. 467 (“‘Almost like posters on telephone poles, the Internet appears to defy regulation.’ Messages pass from computer system to computer systems in milliseconds, crossing borders with incredible speed.”).

2. See *ACLU v. Reno* (Reno I), 929 F. Supp. 824, 830-31 (1996). The Internet is not administered by any one entity. *Id.* at 832. The Internet is essentially a system of hundreds of thousands of individual computer operators who are using a common date transfer protocol to exchange information with other computer users. *See id.* “There is no centralized storage location, control point, or communications channel for the Internet, and it would not be technically feasible for a single entity to control all of the information controlled on the Internet.” *Id.; see also* Alan Lewine, *Making Cyberspace Safe for Children: A First Amendment Analysis of the Communications Decency Act of 1996*, 18 HAMLIN J. PUB. L. & POL’Y 78, 81 (1996) (“[T]he Internet comprises a new type of communications medium, not analogous to existing broadcast or telephonic media. Neither the Communications Decency Act nor the courts have established a constitutional basis for federal regulation of this medium, as they have in the broadcast arena and in certain narrow areas of basic telephone service.”).

3. See *Reno I*, 929 F. Supp. at 831. It is very difficult to apply traditional legal precepts to this new form of media because of its global character. *See* Jose I. Rojas, *The Internet and Content Control: Liability of Creators, Distributors and End-Users*, 471 PLI/PAT 203, 206-07 (1997). Legal principals such as copyrights which are
amount of informative material ranging in topics as broad as the imagination. Among such material, one can find sexually explicit material ranging from "the modestly titillating to the hardest core."4

As a result, concern has grown over regulating content availability among children who are using the Internet at an increasing rate due to access at home, in school and in public libraries.5 This problem is compounded by a presidential administration which promotes Internet use among children.6 It is this use among children, combined with the types of material that can be accessed over the Internet, that led Congress to enact the Communications Decency Act of 1996 (CDA).7

One of the problems with regulating certain types of speech over the Internet is that regulation in this arena is fairly new.8 As a result, Congress is left with very few guidelines in determining the amount of protection that the First Amendment will provide sexual content found on the Internet.9 Those who have been affected by various provisions of the CDA have challenged it several times on the basis that the Act violated their First Amendment rights.10

widely accepted within the United States, may be treated differently in foreign countries; "what may be deemed pornographic in Tennessee or Germany may not be offensive to community standards in New York or California." Id. at 206. Many commentators have urged countries to avoid applying their differing and often conflicting laws to this new medium. See id. at 206-07.


5. See id. at 822-33. At the district court level, the three judge panel made numerous findings of fact as to the accessibility of the Internet. At home, children can access the Internet through one of the major commercial "online service providers." See id. at 833. These commercial providers include companies such as America Online, CompuServe, the Microsoft Network or Prodigy. See id. Children now also have the ability to access the Internet at many local libraries. See id. Many libraries also offer telephone modem access to the library’s computers. See id. These computers are often linked to the Internet and thus allow a patron to access the Internet through the library computers without ever actually entering the library. See id.


8. See Lewine, supra note 2, at 81.

9. See id.

10. See Shea v. Reno, 930 F. Supp. 916 (S.D.N.Y. 1996); Reno I, 929 F. Supp. 824 (challenging constitutionality of § 223(a)(1) which criminalized knowing transmission of obscene or indecent material to minors, and § 223(d) of Act which prohibits knowingly sending to person under age of 18 any message that depicts or
This Note looks at *Reno v. ACLU* (*Reno II*), which invalidated certain provisions of the CDA, holding that they restricted various types of constitutionally protected speech.11  *Reno II* serves as a benchmark regarding the amount of protection provided sexually explicit material on the Internet and establishes a standard which future legislation must meet in order to survive constitutional scrutiny.12

This Note begins with an analysis of the background of relevant law pertaining to the issues raised in *Reno II*.13 The next section examines the state of the Internet prior to the enactment of the CDA in an attempt to show what fueled Congress to enact the legislation.14 The Note then looks in-depth at the reasoning behind the Court's decision, and critically analyzes the Court's reasoning. The Note concludes by looking at the impact of *Reno II* on future legislation of the Internet, as well as the rippling effect *Reno II* may have upon the regulation of other types of media.15

II. BACKGROUND SECTION

Only recently has Congress attempted to regulate materials that are accessible over the Internet.16 Congress has, however, dealt at great lengths with the issue of limiting obscene and inappropriate materials in other mediums over the last fifty years.17 It is this regulation that has produced an abundance of case law that is applicable in many ways to the challenges made over the CDA.

In order to take a closer look into the Supreme Court's reasoning in *Reno II*, it is important to understand how the Court has historically treated similar types of legislation. First, this section begins

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11. See infra notes 148-256 and accompanying text for a discussion of the court's analysis in *Reno II*.
12. See infra notes 297-310 for a discussion of the impact of *Reno II*.
14. See infra notes 110-47 for a discussion of the Internet and the facts leading up to Congress enacting the CDA.
15. See infra notes 297-310 for the impact that this case will have on the future of the law in this area.
16. See Lewine, supra note 2, at 80.
by examining how the court has treated prohibition of obscene or indecent materials.\textsuperscript{18} Second, this section looks at how the type of medium which Congress is regulating affects the amount of protection that is provided under the First Amendment.\textsuperscript{19} Third, this section analyzes the language of the CDA and discusses some of the challenges made to the statute since its enactment.\textsuperscript{20}

A. Attempts at Restricting the Dissemination of Obscene and Indecent Material

One of the first Supreme Court cases to explicitly deal with whether the First Amendment afforded obscene material constitutional protection was \textit{Roth v. California}.\textsuperscript{21} In attempting to confine the types of speech afforded protection by the First Amendment, \textit{Roth} notes that the phrasing of the First Amendment was not intended to protect every single utterance.\textsuperscript{22} Rather, protected areas of speech only include ideas having the slightest redeeming social importance.\textsuperscript{23} The court went on to hold that "unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more impor-

\begin{itemize}
  \item \textsuperscript{18} See infra Part II.A.
  \item \textsuperscript{19} See infra Part II.B.
  \item \textsuperscript{20} See infra Part II.C.
  \item \textsuperscript{21} Roth v. California, 354 U.S. 476 (1957). The applicable statute in \textit{Roth} was a federal obscenity standard that made the mailing of material that is "obscene, lewd, lascivious, or filthy . . . or other publication of an indecent character" a criminal offense. See \textit{Roth}, 354 U.S. at 480. The appellant contested the constitutionality of the statute under the due process clause arguing that it did not contain an ascertainable standard of guilt. See \textit{id}. The Court rejected this argument, stating that the constitution does not require a legislature to create impossible standards in regulating against obscenity. See \textit{id} at 491. All that is required of such a regulation is that it provide a sufficient warning of the proscribed conduct "when measured by common understanding and practices . . .". See \textit{id} at 491. Justice Brennan stated that the fact "[t]hat there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense . . ." \textit{Id.} at 491-92 (citing United States v. Petrillo, 332 U.S. 1, 7 (1947)).
  \item \textsuperscript{22} See \textit{Roth}, 354 U.S. at 483.
  \item \textsuperscript{23} See \textit{id}.
\end{itemize}
tant interests." Conversely, the Court felt that obscenity had no social importance, and was therefore outside the scope of First Amendment protection.

In *Roth*, Justice Brennan defined the Court's test for obscenity as "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." The Supreme Court's test for obscenity has been refined several times since its introduction in *Roth*, but Brennan's test undeniably serves as the predecessor of the current obscenity test.

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24. Id. at 484.
25. See id. The decision in *Roth* built upon the ruling of a prior Supreme Court decision in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). *Chaplinsky* distinguished the types of speech that were not provided protection under the First Amendment because they are "no essential part of any exposition of ideas, and are of such slight social value as to step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Id. at 572. "In keeping with the reasoning of *Chaplinsky*, the Court denied constitutional protection to obscene materials on the basis of their lack of social value[.]" See generally Elaine M. Spiliopoulos, *The Communications Decency Act of 1996*, 7 DePaul-L.C.A. J. Art & Ent. L. 336 (1997) (stating that idea of low-value speech was first discussed in *Chaplinsky*, where Court labeled certain speech, including fighting words, profanity, libel and lewd obscene words, as unworthy of First Amendment protection); Donald T. Stepka, *Obscenity On-Line: A Transactional Approach to Computer Transfers of Potentially Obscene Material*, 82 Cornell L. Rev. 905, 915 (1997).

One of the pioneer cases in which the Supreme Court acknowledged that states had an interest in regulating obscene material was *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973). Chief Justice Burger highlighted several state interests which could be furthered by regulation of obscene materials. Among these interests are: (1) exposure of children and unconsenting adults; (2) the quality of public life and the community environment; (3) the "tone of commerce in the great city centers;" and (4) "possibly, the public safety itself." *Paris Adult Theatre I*, 413 U.S. at 57.


27. See Stepka, supra note 25, at 915. There were several problems with the test for obscenity which was set forth in *Roth*. See id. at 914. Among such problems are the difficulty in interpreting the term "prurient interest," determining whether "community standards" was referring to local standards or national standards, and "deciding whether the lack of social value of materials was a reason to prohibit them once they were found obscene or was part of the test for obscenity." Id.; see also infra notes 47-50 and accompanying text (discussing revision of *Roth* test set in *Miller v. California*, 413 U.S. 15 (1973)).

The difficulty in determining what standards the "community standards" aspect of the test was applying to can be seen in comparing two different Supreme Court cases, *Manual Enterprises v. Day*, 370 U.S. 478 (1962), and *Jacobellis v. Ohio*, 378 U.S. 184 (1964). See Stepka, supra note 25, at 916. In *Manual*, Justice Harlan interpreted the Roth "community standards" provision to apply to a national standard. See *Manual*, 370 U.S. at 478. His reasoning was based on the belief that a local standard would have "the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might
One year following Roth, the Supreme Court once again dealt with a state attempting to regulate the distribution of obscene materials in Ginsberg v. New York. The basis of the appellant's constitutional challenge in Ginsberg relied on the assertion that the denial to minors of material condemned within a New York statute, where the same material was not deemed obscene for those persons over the age of seventeen, "constitute[d] an unconstitutional deprivation of protected liberty." The issue before the Court was whether it was constitutional for a state to assure minors a more restrictive right than the similar right provided to adults in determining what sexual material they were permitted to read or see. The Court rejected the appellant's argument noting that even where there appears to be 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 . . . ." The Court emphasized the independent interest of a state in protecting the well being of its youth.

be considered offensive to prevailing community standards of decency." Id. at 488. This reasoning expounded upon the reasoning of Harlan in the Jacobellis case, but Chief Justice Warren, in his dissent, urged that the Court adopt a local standard. See Stepka, supra note 25, at 915.

Chief Justice Warren in his dissent urged the adoption of a local standard, arguing that there is "no provable 'national standard,'" and that because "communities throughout the Nation are in fact diverse," it is natural that material deemed obscene in the community against the rights of individuals, and worried that no nationwide standard could accommodate the diversity of local cultures in determining the correct balance.

Id. at 916-17.

28. Ginsberg v. New York, 390 U.S. 629 (1968). The fact situation of Ginsberg involved the owner of a luncheonette, in Long Island, who was convicted of selling "girlie" magazines in violation of a New York state criminal statute. See id. at 632. In reliance upon the decision in Redrup v. State of New York, 386 U.S. 767 (1966), the Court stated that the "girlie" magazines involved in Ginsberg were not obscene for adults. See id. at 634.

29. See Ginsberg, 390 U.S. at 636.

30. See id. at 631.

31. See id. at 638 (quoting Prince v. Commonwealth of Mass., 321 U.S. 158, 170 (1944)). The Court in Ginsberg held that the well-being of its children falls within a state's constitutional power to regulate. See id. at 639. The state therefore has an interest "to protect the welfare of children and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.'" Id. at 640-41 (quoting Prince, 321 U.S. at 165). The first rationale for this is based on the basic premise in our society that parents have authority in their households and they are entitled to laws by the state to help in performing this responsibility. See id. The second rationale is that the state has an independent interest in the well being of its children. See id. at 640.

32. See Ginsberg, 390 U.S. at 640.
One of the most important principles to come out of *Ginsberg* is the Supreme Court's interpretation of when a state may extend such protection to minors. In discussing this subject, Brennan states that for a state to protect such interests in minors, the law need only be able to withstand the rational basis test.\(^4\) The court relied on *Roth*, noting that obscenity is not a form of expression that is provided protection under the First Amendment.\(^5\) Thus, obscenity may be suppressed without the legislature having to show the furtherance of a compelling governmental interest.\(^6\)

Prior to *Ginsberg*, the Supreme Court dealt with a Michigan regulation which attempted to prevent certain obscene materials from being accessible to minors.\(^7\) The issue in *Butler v. Michigan*, however, did not revolve around whether a legislature could prevent such obscene materials from being obtained by minors, but rather focused on the validity of a statute that extends beyond protecting minors and affects adults as well.\(^8\) As a result of this overbreadth,

\[^33.\] See id. at 641. The Court states that for it to uphold the state statute excluding material defined as obscenity, the Court need only say that it was not irrational for the state legislature to find that exposure to the materials prohibited by the statute is harmful to minors. *See id.*

Strict scrutiny, however, is the appropriate test to apply where there is a restriction on constitutionally protected speech, such as speech that is "indecent" or "patently offensive." *See* Greg Ishkander, *American Civil Liberties Union v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996). The Provisions of the Communications Decency Act of 1996 Prohibiting the Transmissions of Obscene or Indecent Material and Patently Offensive Communications to Persons Under the Age of 18 Violate the First Amendment, 6 B.U. PUB INT. L.J. 816 (1997). The government must therefore show that it has a compelling interest behind enacting the legislation and that the act is tailored narrowly to meet that interest. *See id.*

In *Denver Area*, the Court struck down § 10(b) and § 10(c) of the Cable Act of 1992. 116 S. Ct. 2374 (1996). These sections required leased access channel operators to block "patently offensive" and "indecent" programming. *See id.* The court held that this was an unconstitutional ban imposed on speech protected by the First Amendment. *See id.* In this case the court did not apply strict scrutiny or the rational basis test; rather addressed whether the restrictions "addresse[d] an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech." *Id.* at 2385. The Court in *Shea v. Reno* clarified the reasoning behind the court, refusing to apply strict scrutiny in *Denver Area*. Shea v. Reno, 930 F. Supp. 916, 940 (S.D.N.Y. 1996). The decision was based upon the pervasiveness of cable television in the home and particularly its accessibility to children. *See id.* The court went on to say that there is no question that strict scrutiny is the test to apply when dealing with the Internet. *See id.*

\[^34.\] See *Ginsberg*, 390 U.S. at 635.

\[^35.\] See *id.* at 635.


\[^37.\] See *Butler*, 352 U.S. at 383. Michigan Penal Code, Comp. Laws Section 343, 750.343 (Supp. 1954) provides:

Any person who shall import, print, publish, sell, possess with the intent to sell, design, prepare, loan, give away, distribute or offer for sale, any book, magazine, newspaper, writing, pamphlet, ballad, printed paper, print, picture, drawing, photograph, publication or other thing, includ-
the Court held that the legislation was not restricted to the evil which it was intended to prevent.38 This being the case, the Supreme Court, led by Justice Frankfurter, stated that Michigan had essentially "burn[ed] the house to roast the pig," and accordingly, a state could not reduce the adult population to reading only material that was fit for children.39

The above mentioned cases clearly began to define certain limitations upon a legislature's ability to regulate the accessibility of sexually explicit materials to children. The real challenge to legislatures came in limiting such legislation to children while avoiding placing unreasonable restrictions upon the adult population.40 It was not until 1973, in Miller v. California, that the Court set forth a test to apply in determining when the language of a statute that regulated materials available to children would withstand constitutional scrutiny.41 In Miller, the Court was confronted with a California statute which stated that any individual who knowingly sent into the state, with an intent to "distribute or to exhibit or offer to distribute any obscene matter [was] guilty of a misdemeanor."42

Id. 38. See Butler, 352 U.S. at 383.

39. See id. at 383. In restricting the types of material that were accessible to adults as well as children, the court arbitrarily restricted one of the liberties protected for an individual under the Due Process Clause of the Fourteenth Amendment. See id. at 383-84.

40. See supra note 39 and accompanying text (discussing overbreadth of Michigan statute which attempted to limit accessibility of obscene materials to minors).

41. See Miller v. California, 413 U.S. 15 (1973). Miller involved a man who conducted a mass mailing of brochures in an attempt to advertise his books. See id. at 16. These brochures were sent to persons who had not requested the brochures and contained pictures and drawings that "very explicitly depict[ed] men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed." Id. at 18. The titles of the books that were advertised within the brochures were titled "Intercourse," "Man-Woman," "Sex Orgies Illustrated" and "Marital Intercourse." See id. The defendant in Miller was subsequently arrested when such materials were sent to unwilling recipients who in no way requested these materials. See id.

42. See Miller, 413 U.S. at 18 (citing Cal. Amended Stats. 1969, c. 249, § 1, at 598). The pertinent part of the statute reads as follows:

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addressing the ability of a state to regulate in this area, the Court agreed that a state has the right to prevent the distribution of such material when “the mode of disseminations carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.”

The main issue presented before the Court in *Miller*, however, focused on the amount of detail required by a state when regulating obscene material in order to avoid impinging on the First Amendment rights of individuals subject to such regulation. While acknowledging that the state interest in regulating obscene material is compelling, such a statute must be confined in its scope. The state legislature must avoid the suppression of materials which are constitutionally protected by the First Amendment. In confirming the notion set forth in *Roth* that obscene materials

§ 311.2 Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within the state
(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.

§ 311. Definitions
As used in this chapter:
(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor or description or representation of such matters and is matter which is utterly without redeeming social importance.
(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.
(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.
(d) 'Distribute' means to transfer possession of, whether with or without consideration.
(e) 'Knowingly' means having knowledge that the matter is obscene.

§ 311(e) of the California Penal Code was amended on June 25, 1969 as follows:
(e) 'Knowingly' means being aware of the character of the matter.

Id.
43. *Miller*, 413 U.S. at 18-19 (citations omitted).
44. See id. at 24.
45. See id. at 19-20.
46. See id. at 23-24. But see *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) (holding that invalidation of statutes is inappropriate unless substantial overbreadth and no limiting construction can be given to statute).
are provided no constitutional protection under the First Amendment, the court refined the *Roth* "obscenity test."

*Miller* established a three factor test that a court is to apply in establishing the validity of a statute restricting obscene material.\(^47\) The first guideline is whether the average person applying contemporary community standards would find that the regulation, when considered in its totality, appeals to the prurient interest.\(^48\) The second guideline to apply is whether "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law."\(^49\) Finally, the trier of fact must determine whether the work, taken as a whole, lacks serious literary, artistic, scientific, or political value.

\(^{47}\) See *Miller*, 413 U.S. at 24.

\(^{48}\) See id. at 24 (citing *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972) (quoting *Roth*, 354 U.S. at 489)). The issue of what community standards should be applied in the *Miller* test, in its application to messages sent over a computer bulletin board, was addressed in *United States v Thomas*, 74 F.3d 701 (6th Cir. 1996). This bulletin board contained thousands of pornographic images. See *Thomas*, 74 F.3d at 705. This material was downloaded onto a computer in Memphis, where the operators of the bulletin board were charged with the distribution of obscene materials in violation of 18 U.S.C. § 1465. See id. at 705-06. The Tennessee federal court applied the *Miller* test, applying the community standards of Memphis, Tennessee, rather than Milpitas, California from where the bulletin board was located. See id. at 710-11. The court applied the community standards of Memphis based on the notion that "obscenity is determined by the standards of the community where the trial takes place." See id. at 711. While the obscene material here was transferred over a computer bulletin board and not technically over the Internet, commentators have noted that the technological distinction is immaterial. See Michael W. Sanford & Michael J. Lorenger, *Teaching an Old Dog New Tricks: The First Amendment in an Online World*, 28 CONN. L. REV. 1137, 1146 n.41 (1996).

\(^{49}\) *Miller*, 413 U.S. at 24. At the trial court level in *Miller*, both the prosecution and the defense assumed that the relevant "community standards" to be applied were to be those of the state of California, as opposed to some hypothetical national standard. See id. At the appellate level, the appellant raised for the first time that the applicable standards to apply should have been a national standard, stating that application of the state standard was a violation of the First and Fourteenth Amendments. See id. at 30-32. Chief Justice Burger disagreed, pointing to his dissenting opinion in *Jacobellis* stating that "[n]othing in the First Amendment requires that a jury must consider hypothetical and unascertainable 'national standards' when attempting to determine whether certain materials are obscene as a matter of fact." Id. at 31.

Chief Justice Burger speaks directly to the issue dispelling the argument that was presented over whether a local or national community standard should be the relevant standard in applying the obscenity test. See *Miller*, 413 U.S. at 30. Chief Justice Burger states:

Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.' These are essentially questions of fact . . . .

*Id.* at 30; see also Donald T. Stepka, *supra* note 25, at 918 (stating that it is unrealistic and not constitutionally sound for different communities around country to have to comply with other community standards and attitudes; legislature should not try to force such uniformity).
political or scientific value. The purpose of these qualifications is to provide a precise definition that will give fair notice to the supplier of obscene material that such distribution may result in criminal prosecution.

The above cases illustrate how different classifications of speech have been treated by the Supreme Court under the First Amendment. Having looked at how different types of speech are provided different amounts of protection, it is important to observe how identical speech has been treated differently depending upon the medium by which it is being transmitted. These distinctions between mediums are based on different inherent characteristics of each respective medium. This Note now takes a look at the Court's treatment of differing forms of medium.

B. Historical Treatment of Other Medium

Throughout the last fifty years, the Supreme Court has dealt with legislation attempting to restrict obscene and indecent material over various media. Distinctions have been created within these different cases for determining the varying degrees of First Amendment protection to be provided to specific types of communications. This section takes a look at these cases and the reasoning developed in determining the varying standards.

In 1978 the Supreme Court dealt with the regulation of explicit material on the radio in FCC v. Pacifica Foundation. The issue before the Court dealt with whether the Federal Communications Commission (FCC) had the power to regulate sexually related speech that was not within the legal definition of obscenity. This issue was presented when a radio station con-

50. See Miller, 413 U.S. at 24.
51. See id. at 27 (citing Roth, 354 U.S. at 491-92).
52. See Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 386-87 (1969) (noting differences in new media forms may lead to differences in First Amendment standards applied to them).
53. See Dawn L. Johnson, It's 1996: Do You Know Where Your Cyberkids Are? Captive Audiences and Content Regulation on the Internet, 15 J. Marshall J. Computer & Info. L. 51, 65-66 (1996) ("The presence of certain features, such as the number of channels available to all speakers and the pervasive nature of the medium, may justify the appropriate level of restriction over the content of protected speech. Historically, the Supreme Court granted the print media virtually unlimited First Amendment protection under the hierarchy of First Amendment interests.").
56. See id. at 745.
trolled by Pacifica, broadcasted at approximately two o’clock in the afternoon, a twelve minute monologue entitled “Filthy Words.”\(^{57}\)

The FCC responded to the broadcast by regulating the “patently offensive” language in a manner similar to the law of nuisance.\(^{58}\) The FCC placed restrictions on the time of day in which such language could be broadcast instead of imposing a complete prohibition on indecent language.\(^{59}\) The goal of these restrictions was to limit the broadcast of such pieces to the times of day that children were not likely to be listening to the radio.\(^{60}\) The FCC found the power to create the regulation in 18 U.S.C. § 1464, which forbids the use of “any obscene, indecent, or profane language by means of radio communications,” and 47 U.S.C. § 303(g), which requires the FCC to “encourage the larger and more effective use of radio in the public interest.”

The Supreme Court took steps in its decision towards distinguishing the types of material that could be regulated over different forms of media.\(^{63}\) While the relevant broadcast lacked literary, political or scientific value, the Court held that even the most offensive phrases still maintain some protection under the First Amendment.\(^{64}\) The most important distinction made by the Court, however, was that while such language is afforded some constitutional protection, “the constitutional protection accorded to a communication containing such patently offensive sexual and excretory

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57. See id. at 726. The broadcast was a recording of comic satirist George Carlin listing those words and various colloquialisms that he described as those that could never be said over the airwaves. See id. at 751. A man who was driving in his car with his child at the time reported hearing the broadcast to the FCC. See id. at 726.

58. See Pacifica, 438 U.S. at 726.

59. See id. at 735.

60. See id. at 749.

61. 47 U.S.C. § 1464 (1976 ed.). The statute provides that “[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.” Id.

62. 47 U.S.C. § 303(g)(1934). The statute provides in part “[e]xcept as elsewhere provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—(g) . . . generally encourage the larger and more effective use of radio in the public interest.” Id.

63. See Pacifica, 438 U.S. at 731 & n.2. Some of the reasons are as follows: (1) children have access to radios unsupervised by adults; (2) radios may be found in the home where persons have an extra privacy interest and should be protected from intrusions; (3) unconsenting adults may tune into an offensive radio program without any forewarning; and (4) scarcity of spectrum space. See id. at 731 (citing Rowan v. Post Office Dep’t, 397 U.S. 728 (1970)).

64. See Pacifica, 438 U.S. at 746.
language need not be the same in every context."\(^65\) Thus, in order to determine when such language is afforded constitutional protection, it becomes important to look at the context in which the words are used.\(^66\) The Court proceeded to uphold the FCC's regulation in *Pacifica*, denying constitutional protection, because the speech was broadcast over the radio airwaves during the middle of the afternoon.\(^67\)

In reaching its conclusion, the Court distinguished between radio and other forms of media. The first distinction involved the limited amount of constitutional protection historically received by the radio industry.\(^68\) For example, radio broadcasters are licensed by the FCC. This license, however, is subject to revocation by the Commission if they should decide that such action would serve "public interest, convenience, and necessity."\(^69\) Aside from this historical treatment, the Court noted several other reasons why radio should be provided a lower level of protection than most other forms of media. First, radio has a pervasive presence in the lives of Americans as it confronts them not only in public, but also in the privacy of their own homes.\(^70\) Second, there is no warning of offensive material as there is with a book or magazine, the listener has no indication of the language about to come over the airwaves until they have already heard it.\(^71\) Third, children have the ability of listening to the radio even before they are capable of reading.\(^72\) While recognizing the significance of these reasons, the Court does note the narrowness of its holding to radio during the middle of the day.\(^73\) A court may have come to a different conclusion if the

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\(^{65}\) See *id.* at 746-47.

\(^{66}\) See *id.* at 747-48.

\(^{67}\) See *id.* at 750.

\(^{68}\) See *id.* at 747.

\(^{69}\) *Pacifica*, 438 U.S. at 748.

\(^{70}\) See *id.;* Erznoznik v. Jacksonville, 422 U.S. 205 (1975) (noting that speaker's interests may overcome interests of unwilling audience when outside privacy of home).

\(^{71}\) See *Pacifica*, 438 U.S. at 748-49.

\(^{72}\) See *id.* at 749.

\(^{73}\) See *id.* at 750. The Court limits its holding to the situation and variables presented before it. See *id.* The Court specifically notes that its decision rests entirely on the nuisance rationale applied in the facts before it. See *id.* Justice Stevens states "The concept requires consideration of a host of variables. The time of day was emphasized by the commission. The content of the program in which language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed circuit transmissions, may also be relevant." *Pacifica*, 438 U.S. at 750.
same content was transmitted over a different medium or communicated at a different time.74

Similar issues were brought up in the 1989 case of *Sable Communications of California, Inc. v. FCC*.75 This case involved a challenge to the 1988 amendments of § 223(b) of the Communications Act of 1934 which placed an outright ban on obscene and indecent interstate commercial telephone communications.76 Sable Communications was a Los Angeles based company who in 1983 began offering sexually oriented prerecorded messages over the telephone.77 These messages are commonly referred to as "dial-a-porn."78 Sable brought suit in district court in 1988, contesting § 223(b) which served as a blanket prohibition on obscene and indecent interstate phone messages.79 The Supreme Court upheld the constitutionality of this prohibition as it applied to obscenity, noting that the First Amendment does not extend to obscene speech.80

74. See id.; supra note 73.
77. See Sable, 492 U.S. at 117-18.
78. See id. at 118.
79. See id. The relevant parts of the statute at the time of the *Sable* challenge read as follows:

(b)(1) Whoever knowingly —

(A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or

(B) permits any telephone facility under such person’s control to be used for an activity prohibited by subparagraph (A), "shall be fined not more than $50,000 or imprisoned not more than six months, or both."


80. See Sable, 492 U.S. at 125. *Sable* also presented a challenge to the statute stating that it creates an impermissible national standard of obscenity which forces message senders to adapt their messages to the least tolerant community’s standards. See id. The Court rejected this argument stating that “[w]e have said before, the fact that ‘distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity.’” *Id.* (quoting *Hamling v. United States*, 418 U.S. 87, 106 (1974)). The Court stated that if Sable has an audience of several different communities, in which some view Sable’s material as obscene and others do not, Sable bears the burden of complying with the communities who do view the material as obscene. See id. Further, the Court stated that “[w]hile Sable may be forced to incur some costs in developing and implementing a system for screening the locale of incoming calls, there is no constitutional impediment to enacting a law which may impose such costs on a medium electing to provide these messages.” *Id.*
The Court then proceeded to deal with whether that portion of the statute prohibiting the dissemination of "indecent" messages was constitutional. As discussed previously in *Pacifica*, the Court concluded that sexual expression, which is indecent but not obscene, is still afforded protection under the First Amendment. The government, however, may still regulate this type of speech if in doing so it furthers a compelling governmental interest by the least restrictive means of achieving this compelling interest.

The Court has repeatedly held that protecting the physical and psychological well-being of minors is a compelling government interest. In order to legislate this area of the law, such legislation must be able to withstand constitutional scrutiny in that "it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." The legislature must not only show that it has a compelling interest, it must also show that the means are tailored as narrowly as possible to meet that interest.

81. See *Sable*, 492 U.S. at 125.
82. Id.
83. See id.
84. See id. at 126 (citing *Ginsberg*, 390 U.S. 629; New York v. Ferber, 458 U.S. 747 (1982)).
85. *Sable*, 492 U.S. at 127 (quoting Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1976) (holding invalid municipal ordinance requiring advance written notice to police of those desiring to solicit from house to house invalid due to vagueness)); see also Schaumburg v. Citizens for a Better Environment, 44 U.S. 620, 637 (1980) (holding ordinance prohibiting door to door solicitation of contributions by charitable organizations that do not use at least 75 percent of contributions for “charitable purposes” as overly broad and thus in violation of First and Fourth Amendments); First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (holding Massachusetts criminal statute prohibiting specified business corporations from contributing for purpose of influencing vote submitted to voters as unconstitutional and in violation of First Amendment).
86. See *Sable*, 492 U.S. at 126. The FCC set forth the argument that the only means of restricting minors from having access to these dial-a-porn messages was a complete ban. See id. at 129. The court rejected this argument because on January 15, 1988, in *Carlton Communications, Inc. v. FCC*, the Court of Appeals for the Second Circuit held that new regulations created by the FCC requiring the use of access codes, along with credit card payments and scrambled messages (where only an adult would be able to purchase a component to unscramble the message) as defenses to § 223(b) for dial-a-porn providers was a feasible means of meeting the states compelling interest of protecting minors. See id. at 128 (citing *Carlton Communications, Inc. v. FCC*, 837 F.2d 547 (2d Cir. 1988)). With these means being effective, the Court stated that a complete ban was not necessary. See id. The FCC argued, however, that such means were not effective and minors could still be provided access to communications to which they should be shielded. See id. The Supreme Court stated that there was no congressional support to back up this assertion and therefore no justification for concluding that there is no constitutionally acceptable less restrictive means. See id.
The Court in *Sable* brought up several distinctions between the total ban presented before them and the regulations that were upheld in *Pacifica*. The most distinguishing factor between *Pacifica* and *Sable* was the type of medium involved. As previously discussed, *Pacifica* involved radio broadcasting. Radio broadcasting is pervasive in nature in that it invades the privacy of one's own home and spreads its messages without any warning as to the content of the messages which are about to come. The telephone is very different in that affirmative steps actually need to be taken before an offensive message can be played. "Unlike, an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it." The second important distinction between these two cases is that *Pacifica* did not involve a complete ban as in *Sable*, but rather expressly limited its restriction to broadcasts played over that specific medium and at that time of the day. The holding in *Sable* clearly demonstrates the narrowness of *Pacifica*. It indicates that the extent that indecent communications can be limited without such restriction being held unconstitutional is dependent upon the type of medium involved and the time and context of the material being transmitted.

C. The Legislation of Obscene and Indecent Material over the Internet

In an attempt to regulate the types of material that may be dispersed over the Internet, Congress adopted the Communications

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87. *See* Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 386-87 (1969) (noting that different medium may lead to differing amounts of protection provided under First Amendment).
89. *See* id. at 748-49.
90. *See* Sable, 492 U.S. at 128.
91. *Id*. The telephone does not have the same problem as radio, in that there is no captive audience. *See id*. The context of "dial-a-porn" services is very different as the person wants the service as opposed to the unexpecting listener who is taken by surprise. *See id*. "Unlike, an unexpected outburst on the radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it." *Id*.
92. *See* Sable, 492 U.S. at 127.
93. *See* id. at 128.
94. *See* William Bennett Turner, *The First Amendment and the Internet*, 482 PLI/ Pat 33, 40 (1997). Each medium has its own characteristics which include advantages as well as problems. *See id*. How the First Amendment is applied to each medium should reflect the uniqueness of that medium. *See id*. 

http://digitalcommons.law.villanova.edu/mslj/vol5/iss2/8
Decency Act of 1996 (CDA). The CDA was intended to protect minors from being exposed to harmful material over the Internet. It criminalizes the knowing transmission of "obscene" or "indecent" messages to any recipient that is younger than eighteen years of age. Section 223(d) of the Act criminalizes "the knowing sending or displaying to a person under eighteen of any message that in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." The CDA also contains several "safe harbor" provisions.

95. 47 U.S.C.A. § 223 (Supp. 1997). The Communications Decency Act of 1996 is actually Title V of The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56. The primary purpose of this act was to reduce regulation and encourage the rapid deployment of new communication technologies. See Reno II, 117 S.Ct. at 2337-38. The major components of the statute have nothing to do with the Internet. See id. The original purpose of the act was to promote competition in the local telephone service market, the multi-channel video market and the market for over the air broadcasting. See id. at 2337-38.

96. 47 U.S.C.A. § 223(a)(1)(B)(ii) (Supp. 1997). This section of the Act prohibits the knowing transmission of obscene or indecent messages to any recipient under 18 years of age. It provides in pertinent part:

(a) Whoever —

(1) In interstate or foreign communications - -

(b) by means of telecommunications device knowingly - -

(i) makes, creates, or solicits, and

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

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

Id. § 223(a).

97. 47 U.S.C.A. § 223(d) (Supp. 1997). This section prohibits the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age. It provides:

(d) Whoever —

(1) in interstate or foreign communications knowingly —

(B) uses an 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.

Id. There are also two affirmative defenses, one that covers those who take "good faith, reasonable, effective, and appropriate actions" to restrict access by minors to
provisions aimed at protecting persons from criminal prosecution after they have taken the appropriate steps.\textsuperscript{98}

Id. § 223(e)(5)(A). The other defense covers those who restrict access to covered material by requiring certain measures of verifying age, such as tagging, verified credit card or an adult identification number or code. Id. § 223(e)(5)(B).

98. 47 U.S.C. § 223(e) (Supp. 1997). The “safe harbor” provisions read as follows:

(e) Defenses

In addition to other defenses available by law:

(1) No person shall be held to have violated subsection (a) or (d) of this section solely for providing access or connection to or from a facility, system, or network not under that person’s control, including transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or connection that does not include the creation of the content of the communication.

(2) The defenses provided in paragraph (1) of this subsection shall not be applicable to a person who is a conspirator with an entity actively involved in the creation or knowing distribution of communications that violate this section, or who knowingly advertises the availability of such communications.

(3) The defenses provided in paragraph (1) of this subsection shall not be applicable to a person who provides access or connection to a facility, system, or network engaged in the violation of this section that is owned or controlled by such a person.

(4) No employer shall be held liable under this section for the actions of an employee or agent unless the employee’s or agent’s conduct is within the scope of his or her employment or agency and the employer (A) having knowledge of such conduct, authorizes or ratifies such conduct, or (B) recklessly disregards such conduct.

(5) It is a defense to a prosecution under subsection (a)(1)(B) or (d) of this section, or under subsection (a)(2) of this section with respect to the use of a facility for an activity under subsection (a)(1)(B) that a person —

(A) has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication specified in such subsections, which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or

(B) has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.

(6) The [Federal Communications] Commission may describe measures which are reasonable, effective, and appropriate to restrict access to prohibited communications under subsection (d) of this section. Nothing in this section authorizes the Commission to enforce, or is intended to provide the Commission with the authority to approve, sanction, or permit, the use of such measures. The Commission shall have no enforcement authority over the failure to utilize such measures . . . .
The constitutionality of the CDA was addressed for the first time at the district court level in *ACLU v. Reno (Reno I).*99 The Supreme Court addressed this decision during the summer of 1997, and it is the focus of this casenote.100 In the time between when *Reno I* was decided at the district court level and when the appeal was presented before the Supreme Court, the constitutionality of the CDA was again addressed at the district court level in *Shea v. Reno.*101 *Shea* addressed the constitutionality of the CDA in what it felt was clearly a content-based restriction on First Amendment protected speech.102 In *Shea,* a three judge panel, sitting in the South-

101. *Shea* v. Reno, 930 F. Supp. 916 (S.D.N.Y. 1996). Plaintiff was the editor, publisher and partial owner of a newspaper that was disseminated solely by electronic means. *See id.* at 922. Plaintiff filed suit in response to the enactment of the CDA on the grounds that § 223(d) of the Act because it was (1) invalid due to the vagueness of the statute in that it did not give citizens a sufficient guideline as to what types of material would violate the act; and (2) the CDA was overbroad in that it affects a broader category of speech than necessary and particular some constitutionally protected speech among adults. *See id.* This case was first decided by a three judge panel pursuant to 28 U.S.C. § 2284. *See id.* The three judge panel held that the plaintiff did not sustain his burden of demonstrating that the statute was unconstitutionally vague, but the statute was held to be overly broad as it banned indecent speech between adults that is protected under the First Amendment. *See id.* at 922. The main reason for the three judge panel finding that the statute was overly broad was that compliance with the defense provisions under the Act depended on actions by third party software manufacturers, who were not required to do anything under the statute. *See id.; supra* note 97 for defenses provided under the CDA.

Accordingly, the impossibility of complying with these affirmative defenses makes § 223(d) overly broad and thus unconstitutional. *See id.*

102. *See Shea,* 930 F. Supp. at 939. The courts have distinguished two different types of regulations, based on their purpose, that have had an effect on the First Amendment freedom of speech. *See City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 46 (1986) (upholding zoning ordinance which banned adult motion picture theaters within 1,000 feet of any residential zones under First Amendment time, place and manner analysis); *Carey v. Brown,* 447 U.S. 455, 462-63 & n.7 (1980) (holding Illinois statute that prohibited picketing of residences or dwellings unconstitutional under First Amendment content analysis). Each type presents a different First Amendment analysis. *See Renton,* 475 U.S. at 46-47. It is essential to know which analysis is applicable when analyzing different types of restrictions on protected speech.

These two different forms of legislation are commonly referred to as "content-based" and "content-neutral" categories of regulation. *See id.* The distinction is very important, because the Court has continuously held that there is a presumptive violation of the First Amendment where a regulation is enacted for the purposes of holding back speech based on the content of that speech. *See id.; Carey,* 447 U.S. 462-63 (1980); *Police Dep't of Chicago v. Mosley,* 408 U.S. 92 (1972). Where a law or regulation is deemed "content-neutral" such as time, place and manner regulations, these regulations are acceptable to the extent that they are designed to serve a substantial government interest "and do not unreasonably limit alternative avenues of communication." *See Renton,* 475 U.S. at 47. These "content-neutral" regulations are without reference to the content of the speech that
ern District of New York, rejected the plaintiff's initial challenge that the provisions of § 223(d) were unconstitutional due to their vagueness. The court noted that substantially identical language has been validated in its application to other mediums and that there was no reason for the court to make a distinction in its holding based on the relevant medium. The court, however, did hold

the regulations affect, but rather the predominant purpose of the regulation is to control the secondary effects which result from the regulated acts. See id.

In Renton, the city enacted a zoning ordinance that prohibited adult movie theaters within 1,000 feet of any residential zone, single or multiple family dwelling, church, park or school. Renton, 475 U.S. at 43. Playtime Theatres, had purchased two theaters in the area of Renton, and planned on converting these two movie theaters into adult theaters. See id. Playtime filed an action stating that the ordinance was in violation of the First and Fourteenth Amendments. See id. The Court disagreed finding that the "predominant concerns" of the committee who created the ordinance were the secondary effects of adult theaters, and were not aimed at the content in the films themselves. See id. at 48. The Court stated that if the ordinance was intended to restrict the content of speech at the theaters, it would have attempted to close them or restrict their number rather than simply limit their choice of location. See id.

103. See Shea, 990 F. Supp. at 936. The court stated that a Federal Statute is too vague and therefore a violation of the Fifth Amendment where an act fails to give a "fair warning of what will give rise to criminal liability." See id. at 935. Vagueness may also violate the First Amendment where it creates a chilling effect on speech as a result of the confusion created by the standards within a statute. See id. The court upheld the statute in the face of the vagueness challenge based on virtually identical language being upheld in Pacifica. See id. at 935-36 (citing Pacifica, 438 U.S. 726); John Matosky, Shea on Behalf of American Reporter v. Reno, 930 F. Supp. 916 (S.D.N.Y. 1996). Section 223(d) of the Communications Decency Act of 1996, A Total Ban on Constitutionally Protected Indecent Communication Among Adults, is Unconstitutionally Overbroad, 6 B.U. PUB. INT. L.J. 812 (1997).

The court stated that Internet providers are faced with the same level of difficulty in complying with the community decency standards as publishers and broadcasters. See Shea, 990 F. Supp. at 937. The court specifically states that "liability for violation of indecency restrictions has not been tied to the ability of a content provider to marshal its resources to explore various community standards." Id. The court supports its finding with the notion that distributors of material over the Internet may be subject to varying community standards. See id. Due process requires that a statute provide a person of ordinary intelligence the opportunity to know what types of material the statute prohibits, not that it set a standard with mathematical certainty. See id. (quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)).

The court refused to address the issue that since a provider has no idea where its information is going that they must accordingly adapt the content of that material to the least tolerant community. See id. at 938.

104. See Shea, 990 F. Supp. at 939. Invalidation of a statute due to overbreadth is appropriate only where a statute is held to be substantially overbroad and no limiting construction can be applied. See Broadrick v. Oklahoma, 413 U.S. 601, 612-13 (1973). Accordingly, the test applied by the court in Shea became whether § 223(d) of the CDA restricted speech that was constitutionally protected, and if so, whether this category of speech affected was substantial in relation to the amount of speech validly restricted. See Shea, 930 F. Supp. at 939. The court never addressed this issue because it did not find it necessary to decide whether § 223(d) reaches a significant amount of Internet material with serious literary, artistic, political or scientific value. See id. at 940-41 (citing Broadrick, 413 U.S. at 615).
that the statute was substantially overbroad, and therefore invalid on its face. The court based its findings on the fact that the affirmative defenses provided in § 223(e)(5) of the Act were unavailable to Internet providers, and thus the Act was not narrowly tailored to meet the government's interest. The court declined to sever the statute in the hopes of preventing complete invalidity due to a fear of engaging in the practice of judicial legislation. The court

105. The plaintiff, Shea, asserted that § 223(d) of the CDA was unconstitutionally broad for two reasons. See id. at 940. First, he contended that the provision restricts a significant amount of material with literary, artistic, political or scientific value and the government was unable to reveal any compelling interest in restricting the availability of this material. See id. Secondly, Shea contended that when the provision was considered together with the affirmative defenses provided under § 223(e)(5), it was not narrowly tailored and failed to preserve the rights of adults to participate in several constitutionally protected forms of speech. See id. The court reached its conclusion that the statute was overbroad by touching on only the second of these claims. See Shea, 930 F. Supp. at 940. The major issue confronting the court here was that only if the § 223(5) affirmative defenses when taken in connection with § 223(d) would allow adults to partake in constitutionally protected indecent communications, the court could conclude that these provisions were narrowly tailored to meet the government's compelling interest in restricting access to these types of materials. See Shea, 930 F. Supp. at 942. The court concluded that current technology was unable to provide a means for Internet providers to avail themselves of the affirmative defenses provided by the Act, and accordingly, the statute was not narrowly tailored. See id. The court invalidated the statute. See id.

106. See id. at 941. The court applied the strict scrutiny test in establishing that § 223 was not narrowly tailored to meet the government's goals. See id. at 939. In applying this test the court assumes that the government has a compelling interest in protecting minors from all "patently offensive material." See Shea, 930 F. Supp. at 941. The statute fails the strict scrutiny test, however, because of a lack of means by which an adult may engage in constitutionally protected speech without criminal liability. See id. at 942. The court based this decision on the notion that even though the government may have a legitimate compelling interest, the state may not regulate it if it turns out that the least restrictive regulation is unreasonable when the limitations on speech from those regulations far outweigh the benefits gained. See id. at 941.

107. See id. at 949. The government urged that the court recognize the "elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected." Id. (quoting Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 502 (1985) (quoting Allen v. Louisiana, 103 U.S. 80, 83-84 (1881))). The court in this instance found that the statute in no way made itself susceptible to a narrowing construction, and as such, the court could not take it upon itself to do so in fear of creating "judicial legislation." See Shea, 930 F. Supp. at 949-50. The limitation in the Shea case that the court was referring to was a limitation of "any person" in § 223(d) to be "any commercial provider," or something to that effect. Id. at 949. The court held that doing so would be judicial legislation and accordingly refrained. See id.; United States v. National Treasury Employees Union, 514 U.S. 1002 (1995) (refusing to read nexus requirement into Ethics in Government Act stating that any attempt by Court to redraft might not identify nexus Congress was seeking); Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975) (refusing to construe city ordinance narrowly in order to prevent invalidation).
also refused a plea by the government to allow the statute to undergo a gradual narrowing through a case by case analysis.\footnote{108. See \textit{Shea}, 930 F. Supp. at 950. \textit{Broadrick} involved a situation where the Supreme Court confined its holding to the parties presented before it with the expectation that future cases would narrow the statute's scope. \textit{See id.} at 950 (citing \textit{Broadrick}, 413 U.S. at 616). The one important aspect to the court's holding there was that the court realized that the potential range of the law's unconstitutional applications was not "substantial . . . in relation to the statutes plainly legitimate sweep." \textit{See id.} at 950 (citing \textit{Broadrick}, 413 U.S. at 616).}

\textit{Shea} was the last case to deal with the constitutionality of the CDA prior to the Supreme Court's decision in \textit{Reno II}.\footnote{109. See \textit{Reno II}, 117 S. Ct. 2329 (1997).} This Note will take a look at the workings of the Internet to determine what led Congress to enact the CDA.

\section*{III. Facts}

The Communications Decency Act of 1996 was an attempt by Congress to control the types of information that were available to minors under the age of eighteen over what is commonly referred to as "cyberspace."\footnote{110. The World Wide Web ("WWW") is a series of inter-connecting documents that are stored world-wide in different computers in the network. When people refer to "surfing the 'Net," they are referring to jumping from link to link, document to document. Users may access these documents by typing in a "URL," or Universal Resource Locator, or by searching for content by key word. By accessing the Web, people can quickly and flexibly view information in the form of text, images, sound and animated video. Elaine M. Spiliopoulos, \textit{The Communications Decency Act of 1996}, 7 \textit{DePaul-LCA Journal of Art \\& Entertainment L.} 336 (1997).} Cyberspace includes everything from electronic mail, automatic mailing list services, news groups and chat rooms, to the World Wide Web ("WWW").\footnote{112. See \textit{Reno I}, 929 F. Supp. at 834.} To understand what led Congress to regulate this medium, it is essential to have an understanding of the accessibility of these systems, the types of material they may transmit and the available techniques and technologies for controlling the types of information transmitted over such systems.

In the last ten years, the availability of Internet access has grown tremendously.\footnote{113. See id. at 833. The major commercial online servers discussed in the above text have almost twelve million subscribers to their services across the United States. \textit{See id.} While these provide organized content within their own pro-}
tensive proprietary networks, but have offered links to the even larger resources of the Internet. 114 Aside from these systems which may provide links from one's personal computer, there are several other sources from which an individual can obtain access to the Internet. 115 Most colleges and universities provide free access to their students. In addition, many public libraries and other community facilities also provide free access. 116 Accessibility has expanded even further as many Americans are now able to access the Internet from work. 117 Although accessibility to the Internet is broad based, the greatest feature which distinguishes the Internet from many of the other communication media that have historically been regulated are the steps required in order to go online. 118 Receipt of information over the Internet requires a series of affirmative steps much more elaborate than turning a radio dial, or pressing the buttons on the television remote control. 119 In order to access the Internet, a person requires some sophistication combined with the ability to read and retrieve material in order to be able to access material. 120

The types of material that can be accessed over the Internet are virtually limitless. Information can be published by any person or organization with a computer connected to the Internet. 121 Among such publishers are government agencies, educational institutions, commercial entities, advocacy groups and private individuals. 122 Given the ease by which material can be published over the Internet, there exists an abundance of material deemed by various groups as being unfit for children. 123 The CDA is aimed in particular at sexually explicit material transmitted over the Internet. 124 Sexually explicit material over the Internet includes text, pictures and conversations that range from the "modestly titillating to the hardest core." 125 Most of this material however is preceded by

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114. See Reno II, 117 S. Ct. at 2334.
115. See Reno I, 929 F. Supp. at 833-34.
116. See id. at 832-34.
117. See id. at 832-33.
118. See Reno II, 117 S. Ct. at 2343-44.
119. See id. at 2336.
120. See id.
121. See Reno II, 117 S. Ct. at 2335.
122. See id.
123. See id. at 2336.
125. Reno II, 117 S. Ct. at 2336.

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warnings which let a browser know the type of material they are about to encounter, before they encounter it.\textsuperscript{126} It is for this reason that such material is rarely ever encountered accidentally, but rather its acquisition requires affirmative steps on the part of the Internet explorer.\textsuperscript{127}

Several different techniques have been examined in attempting to restrict the accessibility of minors to this type of material over the Internet. These techniques have involved two basic types of guarding methods, both of which have problems that have made them impractical in precluding minors from accessing sexually explicit material.\textsuperscript{128} The first type of control involves blocking access completely to certain cites over the Internet.\textsuperscript{129} The second type of control is not aimed at blocking accessibility in its entirety; rather, these controls allow access but only after the user has passed through some type of age verification control.\textsuperscript{130}

There have been several attempts to limit accessibility to the Internet through this first method of control. Among these controls are systems which are set to only allow accessibility to an approved number of sites, systems which block selected inappropriate sites and systems which are designed to detect certain identifiable words or characters and then deny access to these sites.\textsuperscript{131} Some of

\begin{itemize}
  \item \textsuperscript{126} See id.
  \item \textsuperscript{127} See id.
  \item \textsuperscript{128} See Reno II, 117 S. Ct. 2336.
  \item \textsuperscript{129} See id.
  \item \textsuperscript{130} See id. at 2336-37.
  \item \textsuperscript{131} See Reno II, 117 S. Ct. at 2336. Prodigy, America Online and Microsoft Network offer parents optional service that will allow the parents to play a role in the types of sites which are accessible to their children. Elaine M. Spiliopoulos, The Communications Decency Act of 1996, 7 DePaul L.C.A. J. ART & ENT. L. 336 (1997). These systems are all free of charge. See id. America Online allows a parent to create a separate account in the name of their child with access on that account being limited to a content which has been approved by the company. See id. Parents may decide which types of categories they want to have shielded from their children and that information will be inaccessible from the child's account. See id. Cyber Patrol and Surfwatch software programs are screening tools which maintain lists of sites which are known to contain sex-related materials, and attempts to access these sites are blocked. See id. The software programs also have the ability to screen certain trigger words and block any searches that contain these words. See id. at 336. Surfwatch also gives parents the ability to limit a child's access to only a certain limited number of sites which have been pre-approved by a parent. See id. Cyber Patrol is a product by Microsystems Software, Inc., which is an example of a program which allows a parent to deny their child access to certain categories of material. See id. The program contains a list of almost 7,000 sites which are divided into twelve different categories. See Reno I, 929 F. Supp. at 840. A parent can deny access to a specific category simply by checking off the specific category in the program manager. The twelve categories include: (1) violence/profanity; (2) partial nudity; (3) nudity; (4) sexual acts (graphic or text); (5) gross depictions (graphic or text); (6) racism/ethnic impropriety; (7) satanic/cult; (8) drugs/drug

\url{http://digitalcommons.law.villanova.edu/mslj/vol5/iss2/8}
the problems with these different control systems are obvious and make such techniques ineffective in achieving their intended purpose. First, with so many sites being available over the Internet, and new and expanding sites being established every day, a system which only allows access to a set number of approved sites would deny access to thousands of sites that are in no way sexually explicit or harmful to children. A similar problem results with a system that blocks out a certain number of selected sites. With new sites popping up every day, it is not possible to keep track of such sites and program the blocking device accordingly.\textsuperscript{132} The third method of blocking out specific words and characters seems to be the best suited control, but there are inherent problems with this method as well. The main problem with this type of control system is that words and characters can be blocked, but there is no system available that can block sexually explicit images from being accessible.\textsuperscript{133}

There are two main types of age verification systems that have been tested to prevent minors from gaining access to the Internet.\textsuperscript{134} The first of these is credit card verification systems.\textsuperscript{135} The problem with credit card verification systems is that non-commercial publishers of Internet material would be hurt by this because the cost of such a verification system is economically out of their reach.\textsuperscript{136} It has also been noted that such a verification system would serve as a complete bar to adults who do not have a credit card or lack the resources necessary to obtain one in order to use the Internet.\textsuperscript{137} The next possible verification system is for Internet culture; (9) militant/extremist; (10) gambling; (11) questionable/illegal; and (12) alcohol, beer & wine. See id. There are people employed by Microsystems to search the Internet and add sites to the different categories weekly, as sites are continually being added to the Internet everyday. See id.

132. See Robert W. Peters, \textit{There is a Need to Regulate Indecency on the Internet}, 6 \textit{Cornell J.L. & Pub. Pol'y} 363, at 367 (1997) ("Even if parents utilize screening technology, they cannot thereafter rest assured that the technology will protect their children. For example, programs which identify specific sites as unsuitable have difficulty keeping up with the exploding number of new and changing sites."); Thomas E. Weber, \textit{Entertainment & Technology: Child's Play: Keep Out!}, \textit{Dow Jones Wire Service}, Mar. 28, 1996.

133. See \textit{Reno II}, 117 S. Ct. 2336.

134. See id. at 2337.

135. See id.

136. See id.

137. See \textit{Reno II}, 117 S. Ct. at 2337; \textit{Reno I}, 929 F. Supp. at 846. Additional problems are also noted in the use of a credit card verification system. See \textit{Reno I}, 929 F. Supp. at 846. Witnesses have stated that neither Visa nor Mastercard is capable of handling transactions in this manner. See id. While items may be purchased over the Internet with a credit card, the seller must then process the transaction in the traditional way over the phone lines. See id. Additionally, when
site providers to issue adult passwords which must be typed into a site before access is provided to that site.138 Again this would cause a severe financial burden on non-commercial sites because of the cost of issuing these passwords.139 These passwords would also discourage ordinary users from accessing these sites if they felt their usage was in some way being monitored.140

The inadequacy of these methods is part of what led Congress to enact the CDA in 1996. The Act was directed towards controlling the dissemination of "indecent," "obscene" and "patently offensive material" to children on the Internet.141 Congress broke new ground with this legislation in that no standards had been previously set with regard to the types of material that could be regulated on the Internet.142 Accordingly, the CDA has faced several questions about the language of the statute, including First Amendment challenges to its validity.143

Soon after the enactment of the CDA, suit was filed by numerous plaintiffs challenging the constitutionality of § 223(a)(1) and § 223(d) of the Act.144 A three judge panel in the Eastern District

such a system does become operational, it will be unavailable to many non-commercial Internet site providers as verification companies would be unwilling to verify a card unless it involved a commercial transaction. See Reno I, 929 F. Supp. at 846.

139. See id. at 847.
140. See id. There are numerous other problems associated with using a verification system.
On a technical level, it would be difficult, if not impossible, to register every user of sexually explicit materials. Even if registration could be accomplished, there is no way that a provider could ensure that someone would not register under a false name or age —thus frustrating the very purpose of the CDA.
Spiliopoulos, supra note 131.

Adult users of the Internet would avoid using these sites because of the registration requirement. See Reno I, 929 F. Supp. at 847. The Internet has historically been favored because of the anonymity which it provides to its users. See Spiliopoulos, supra note 131, at 336. If users were required to register before they could access a particular site, users would be discouraged from doing so in fear of their identity being made known. See id.; see also Reno I, 929 F. Supp. at 847 (stating that some noncommercial organizations (ACLU, Critical Path AIDS Project) view charging viewers as contrary to their goals of getting their message out).

141. See Alan Lewine, supra note 2, at 80.
142. See id.
143. See Reno II, 117 S. Ct. at 2329; Shea, 930 F. Supp. at 916; Reno I, 929 F. Supp. at 824.
144. See Reno II, 117 S. Ct. at 2339. On February 8, 1996, twenty plaintiffs filed suit against the Attorney General and the Department of Justice challenging the constitutionality of CDA § 223(a)(1) and § 223(d). See id. Based on the court's conclusion that "indecent" was too vague of a standard to provide a basis for a criminal prosecution, District Judge Buckwalter placed a temporary restraining or-
of Pennsylvania convened pursuant to the Act and entered a preliminary injunction against enforcement of both challenged provisions. The panel held that the CDA’s “indecent transmission” and “patently offensive display” language violated the freedom of speech provisions provided in the First Amendment as a result of their overbreadth and vagueness. The government appealed the district court’s ruling to the Supreme Court arguing that the district court erred in holding that the CDA violated both the First and Fifth Amendments. The Supreme Court granted certiorari to the case in what has led to one of the most influential decisions by the Court in recent history. This paper will now examine the Supreme Court’s decision in *Reno II* and the reasoning that led to the Court’s conclusion.

In their complaint, the plaintiffs did not challenge the CDA to the extent that it covered obscenity or child pornography. *See Reno I*, 929 F. Supp. 824, 829. These are areas which are not provided any protection under the First Amendment, and were restricted under the law before the CDA came into effect. *See* 18 U.S.C. §§ 1464-65 (act criminalizing transfer of obscene material); 18 U.S.C. §§ 2251-52 (criminalizing dissemination of child pornography); *Reno I*, 929 F. Supp. at 829; see also *Miller*, 413 U.S. 15 (1973).

145. *See Reno II*, 117 S. Ct. at 2339. The three judges gave a unanimous decision, but each decided to write his own opinion. *See id*. Chief Judge Sloviter stated that the statute is broader than necessary to achieve the government’s purpose and that such breadth will create a chilling effect among adults. *See id*. at 2340. She noted that terms such as “patently offensive” and “indecent” were inherently vague and that the affirmative defenses provided were not technologically or economically feasible. *See id.* at 2340. Judge Buckwalter concluded that these terms were so vague that criminal enforcement of either provision “would violate the ‘fundamental constitutional principle’ of ‘simple fairness,’ and the specific protections of the First and Fifth Amendments.” *See id*. Judge Dalzell discussed his feelings of how the Internet should be entitled to the highest protection from government intrusion. *See Reno II*, 117 S. Ct. at 2340. He stated that the Act would abridge significant protected speech, particularly by noncommercial speakers, while “[p]erversely, commercial pornographers would remain relatively unaffected” by the Act because they would be able to take advantage of several of the defenses provided by the CDA. *Reno I*, 929 F. Supp. at 879 (emphasis added).

146. *See Reno I*, 929 F. Supp. 824 (1996). In commenting on how the vagueness of the provisions will affect their application, Judge Buckwalter notes “indecency has not been defined to exclude works of serious literary, artistic, political or scientific value.” *Id.* at 863. Moreover, the government’s claim that the work must be considered patently offensive “in context” was itself vague because the relevant context might “refer to, among other things, the nature of the communication as a whole, the time of day it was conveyed, the medium used, the identity of the speaker, or whether or not it is accompanied by appropriate warnings.” *Id.* at 864.

IV. NARRATIVE ANALYSIS

The Supreme Court, in an opinion written by Justice Stevens, affirmed the ruling of the Third Circuit based entirely on violations of the First Amendment without ever reaching the Fifth Amendment issue. The focus of the Court’s analysis is centered on the constitutionality of the indecency provisions of the CDA. The provisions of the Act creating criminal liability for the transmission of “obscene” material is not at issue here, as it was not challenged by the plaintiffs in their complaint. The Supreme Court takes several different steps in arriving at the conclusion that the indecency provisions of the CDA are unconstitutional. The Court begins by taking a look at some Supreme Court cases dealing with other media that were raised in defense of the Act by the government. Second, the Court takes a close look at the distinctions between different types of media, and accordingly the amount of First Amendment protection that each type demands. The Court then takes a look at the statutory language of the CDA in determining whether the language complies with the First Amendment. Finally, the Court looks to sever portions of the Act that are invalid in hopes of allowing the remainder of the Act to stand.

A. Cases Dealing with First Amendment Protection of other Mediums

The first case looked at by the Court was Ginsberg v. New York. As discussed earlier, Ginsberg involved a situation where the Court upheld the constitutionality of a New York statute that prohibited selling to minors, under the age of seventeen, material that was considered obscene to them, even if such material was not

148. See Reno II, 117 S. Ct. at 2341. The government made the assertion that the First Amendment does not prohibit them from imposing a blanket prohibition on all “indecent” or “patently offensive” material to minors under the age of 18. See id. at 2342. The Supreme Court did not make a decision on this assertion because it did not have to in order to decide the controversy before it. See id. The Court made its decision based on the vague language of the statute and the fact that the language of the statute was constructed so broadly. See id. Because it was so broad, it was not the most restrictive means of achieving the government purpose and affected an audience much larger than the one intended. See id. at 2346.

149. See Reno II, 117 S. Ct. at 2339.
150. See id. at 2339.
151. See infra Part IV.A.
152. See infra notes 170-92 and accompanying text.
153. See infra notes 193-208 and accompanying text.
154. See infra notes 209-27 and accompanying text.
deemed obscene to adults.\textsuperscript{156} The government relied on this case in arguing that the CDA was likewise constitutional.\textsuperscript{157} The Court distinguished the statute in \textit{Ginsberg} from the CDA in that the statute upheld in \textit{Ginsberg} was much narrower.\textsuperscript{158}

Four major distinctions were made between the prohibitions in \textit{Ginsberg} and those in the CDA.\textsuperscript{159} First, in \textit{Ginsberg}, if a parent wished, that parent could go out and purchase a magazine for their child, and the seller of the magazine would be free from criminal liability.\textsuperscript{160} Under the CDA, criminal liability cannot be escaped even where a parent has consented to their child viewing the material, or where the parent has actually aided in obtaining the material for the child.\textsuperscript{161} The second distinction is that the prohibition in \textit{Ginsberg} applied only to commercial transactions.\textsuperscript{162} Third, the CDA provides criminal penalties for the dissemination of "indecent material," but provides no definition of the term.\textsuperscript{163} With no definition of what is meant by "indecent material," it is conceivable that § 223(d) may include material which has literary, artistic, political or scientific value.\textsuperscript{164} These types of material are all provided protection under the First Amendment. The Court felt that the statute discussed in \textit{Ginsberg} did not include these types of work — instead, the work prohibited must be "utterly without redeeming social importance for minors."\textsuperscript{165} Last, the two statutes presented differing standards as to what constituted a minor. The \textit{Ginsberg} statute applied to minors under the age of seventeen, while the CDA is broader in its application and applies to minors under the age of eighteen.\textsuperscript{166}

The second case relied on by the government was \textit{Renton v. Playtime Theatres, Inc.}\textsuperscript{167} The Court completely dismissed the government's \textit{Renton} argument, stating that the present prohibition was a content-based prohibition and therefore the time, place and

\begin{flushright}
156. \textit{See} \textit{Ginsberg}, 390 U.S. at 636.
158. \textit{See id.}; \textit{supra} notes 28-35 and accompanying text (discussing statutory working of New York statute in \textit{Ginsberg}); \textit{supra} notes 95-98 and accompanying text (discussing statutory working of CDA).
160. \textit{See id.}
161. \textit{See id.}
162. \textit{See id.}
163. \textit{See id.}
166. \textit{See} \textit{Reno II}, 117 S. Ct. at 2341.
\end{flushright}
manner regulation applied in *Renton* was inapplicable.\textsuperscript{168} The Court stated that the ordinances in *Renton* were not intended to limit offensive speech and since the CDA is a content-based blanket restriction on speech, it cannot be properly analyzed under a time, place and manner analysis.\textsuperscript{169}

**B. Different Amounts of Protection Provided for Different Mediums**

In coming to its conclusion, the Court takes a careful look at the distinctions between certain types of media, noting that certain types of media have received limitations upon their First Amendment freedoms.\textsuperscript{170} The Court then proceeds with an analysis of why those types of media require differing amounts of First Amendment protection than the Internet.\textsuperscript{171} In distinguishing one medium from the next, the Supreme Court emphasizes two major factors in justifying a greater level of First Amendment protection required by the Internet.\textsuperscript{172} First, the Court notes that the Internet has never received the type of regulation that has been placed throughout history on other types of media, such as the broadcast industry.\textsuperscript{173} The second, more convincing factor, is the degree of invasiveness of each of the different types of media.\textsuperscript{174} Communications over the Internet are not as invasive as other forms of communication because they do not invade the privacy of one's home or appear on one's computer uninvited.\textsuperscript{175} Given the affirmative steps

\textsuperscript{168.} See *Reno II*, 117 S. Ct. at 2342. The Court distinguished the ruling in *Renton*, which stated that the committee that created the ordinances in *Renton* did not aim its regulations at the content of the films themselves, but rather the secondary effects of having such theaters in the community. See *id*.

\textsuperscript{169.} See *id*.

\textsuperscript{170.} See *id* at 2343-45.

\textsuperscript{171.} See *id*. "Each medium of expression . . . may present its own problems." Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975). Thus, some Supreme Court cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (relying on historical agency regulation to justify FCC regulation requiring radio station to provide person attacked in broadcast with summary of broadcast and provide attacked person free air time to respond to attack); FCC v. Pacifica Found., 438 U.S. 726 (1978) (relying on historical regulation of radio to justify FCC regulation prohibiting broadcast of broadcast entitled "Filthy Words").

\textsuperscript{172.} See *Reno II*, 117 S. Ct. at 2343.

\textsuperscript{173.} See *id*.

\textsuperscript{174.} See *id*.

\textsuperscript{175.} See *id*.
required in order to access an Internet site, users rarely ever encounter a site by accident.\textsuperscript{176}

Among other distinctions, the Court demonstrated the significance of the form of medium in distinguishing the regulation of radio in \textit{Pacifica}\textsuperscript{177} from that of the Internet in \textit{Reno II}. \textit{Pacifica} held that the validity of the regulation of a radio program which broadcasted words which were vulgar and offensive, yet not obscene, was dependant upon the context of the broadcast.\textsuperscript{178} \textit{Pacifica} involved radio rather than the Internet, and in justifying special treatment of indecent broadcasting, the Court placed particular importance on the ease with which children may hear a radio broadcast.\textsuperscript{179} The difference between the two different types of media proved to be the most important distinguishing factor between the cases.\textsuperscript{180} Radio is a medium that has historically been given the most limited First Amendment protection.\textsuperscript{181} One of the reasons for this is the susceptibility of radio to the unexpecting listener.\textsuperscript{182} A listener has no warning to the type of language they are about to hear until they have already heard it.\textsuperscript{183} This is not the case with most other forms of media. For example, on the Internet, a warning will flash across the screen where the viewer is about to view explicit materials.\textsuperscript{184} In this sense, affirmative steps must be taken by a knowing viewer in order to come across the types of material intended to be prevented by the CDA.\textsuperscript{185} This was a leading factor in why the Court determined that a greater amount of First Amendment protection should be provided to Internet providers.

A second distinction between the present case and \textit{Pacifica} is the nature of the punishment. The CDA provides for a criminal

\textsuperscript{176} See id. at 2336. The Court states, "[a]lmost all sexually explicit images are preceded by warnings as to the content," and suggested that the "'odds are slim' that a user would enter a sexually explicit site by accident." \textit{Reno II}, 117 S. Ct. at 2336.


\textsuperscript{178} See \textit{Reno II}, 117 S. Ct. at 2342.

\textsuperscript{179} See \textit{Pacifica}, 438 U.S. at 749-50.

\textsuperscript{180} See \textit{Reno II}, 117 S. Ct. at 2342.

\textsuperscript{181} See id. at 2341-42.

\textsuperscript{182} See id. at 2342.

\textsuperscript{183} See id.

\textsuperscript{184} See \textit{Reno I}, 929 F. Supp. at 844. Before coming across an Internet site, a document's title will usually appear and give the viewer some idea of the content within the site that is to follow. See id. at 844-45. Many times a user will receive detailed information about the content of a particular cite before she needs to take a step to access it. See id. The court also found that most sites with sexually explicit images contain warnings that precede access, warning viewers as to content. See id.

\textsuperscript{185} See \textit{Reno II}, 117 S. Ct. at 2336.
punishment, where no such punishment was provided with respect to the radio broadcast regulation in *Pacifica*. 186 The last important distinction between the two cases was that the FCC regulated when, rather than whether, a radio station could play vulgar language that deviated significantly from the traditional programming at the station. 187 The FCC has regulated radio for decades, whereas no such organization is familiar with the unique characteristics of the Internet. 188

The Court then distinguished *Pacifica* further by noting the distinctions that were made of the case in *Sable*. 189 *Sable* involved an amendment to the Communications Act that proposed a blanket prohibition on commercial telephone messages that were either obscene or indecent. 189 Similar to the situation in *Reno II*, the government in *Sable* relied on *Pacifica* in arguing that the statute was constitutional. 191 The Court acknowledged a compelling interest to prevent children from hearing these types of telephone messages, but distinguished *Sable* from *Pacifica* because it did not involve a complete ban and related to a different medium of communication. 192

C. The Statutory Wording of the Communications Decency Act of 1996

The language of the CDA becomes ambiguous because of the use of different terminology in different parts of the Act without any definition or embellishment as to what the terms mean. 193

186. See id. at 2342. The Court refused to determine whether the indecent broadcast which was the issue of *Pacifica* would justify a criminal prosecution. See id.

187. See id.

188. See *Reno II*, 117 S. Ct. at 2343 n.33. Borrowing language from *Pacifica*, the Court stated:

When *Pacifica* was decided, given that radio stations were allowed to operate only pursuant to federal license, and that Congress had enacted legislation prohibiting licensees from broadcasting indecent speech, there was a risk that members of the radio audience might infer some sort of official or societal approval of whatever was heard over the radio. No such risk attends messages received through the Internet, which is not supervised by any federal agency.

Id.

189. See *Sable* Communications of Cal., Inc. v. FCC, 492 U.S. 115, 128 (1989).

190. See id. at 126.

191. See *Reno II*, 117 S. Ct. at 2343. The government argued that the ban on indecent or obscene messages was constitutional because it was necessary to prevent children from gaining access to such messages. See *Sable*, 492 U.S. at 127.

192. See id.

193. See *Reno II*, 117 S. Ct. at 2344.
first part of the CDA refers to material that is "indecent," and the second part of the statute refers to material that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." The Court notes that because Congress failed to define either term, the difference in language will create confusion as to the meaning of each standard and how, if at all, they relate to each other. In demonstrating the ambiguity of the language, the Court poses the hypothetical question of whether serious discussions of contemporary issues such as prison rape, birth control or homosexuality would violate the CDA.

The vague language of the CDA creates an abundance of First Amendment issues as to its application. The most important potential problem of such vague language is the potential chilling effect that the statute may create. The CDA is a criminal statute, and accordingly it is noted that the severity of a criminal conviction may cause speakers to refrain from speech or communication that is even questionably included under the language of the statute. The government argued that the statute was no more vague than the standard that was held constitutional in *Miller v. California*.

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195. Id. § 223(d).
196. See *Reno II*, at 2344 n.35 ("'Indecent' does not benefit from any textual embellishment at all. 'Patently offensive' is qualified only to the extent that it involves 'sexual or excretory activities or organs' taken 'in context' and 'measured by contemporary community standards.'"). Cf. *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) ("Where Congress includes particular language in one section of a statute but omits it from another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion.").
197. See *Reno II*, 117 S. Ct. at 2344.
198. See id.
199. See id. at 2344-45. Violations of the CDA subject a person to a criminal sanction of imprisonment for no more than two years, or fines under Title 18, or both. See 47 U.S.C.A. § 223(d). The Court states that the increased deterrent effect, coupled with the risk of discriminatory enforcement of vague restrictions, poses greater First Amendment concerns than those implicated by the civil regulation reviewed in *Denver Area Ed. Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 2374 (1996). See *Reno II*, 117 S. Ct. at 2345.

*Denver Area* involved a challenge to the 1992 Cable Act which regulated "indecent" speech over the access channels of cable television. See *Denver Area*, 116 S. Ct. at 2378. The Court struck down part of the blocking provision citing the chilling effect that the Act would impose upon adult speech. For a discussion of *Denver Area*, see *supra* note 33.

200. 93 S. Ct. 2607 (1973). The government presented the argument that because the language of the CDA restricted material that was "patently offensive," which happens to be one part of the *Miller* test, the CDA cannot be unconstitutionally vague. See *Reno II*, 117 S. Ct. at 2345.
under the three-prong test developed by the Court. Looking at the three-prong test pronounced in *Miller*, the Court stated that the vague language of the CDA leads to a silencing of speech that is much broader than that required by the *Miller* test.201

After analyzing the language of the CDA, the Court concluded that its language does not satisfy the requirements of the *Miller* test.202 While the statute does restrict material that is "patently offensive," this is only the first portion of the second prong of the test.203 Absent from the CDA is a requirement that the patently offensive material must be "specifically defined by applicable state law."204 The language of the CDA is also much broader than that of the *Miller* test.205 The Court states that the *Miller* test is limited to "sexual conduct," while the language of the CDA extends beyond this and includes materials that include "sexual or excretory activities or organs."206 The CDA also fails to comply with the third prong of the *Miller* test as it does not limit the extent of the regulation to works that lack serious literary, artistic, political or scientific value.207 The government's contention that a court will be able to give such restrictions to the CDA's standards is rejected by the Court based on the belief that such questions are to be regarded as questions of fact.208

D. Could the Same End Be Achieved Through Less Restrictive Means?

While the government may have a compelling interest for restricting various types of speech, such restrictions will be invalid if there is a less restrictive alternative that would produce at least an equivalent effect as the statute in question.209 In enacting the CDA, the government intended to protect children from harmful materials. The Supreme Court has repeatedly recognized that the government has a legitimate interest in protecting children from such

201. See *Reno II*, 117 S. Ct. at 2345. For a discussion of the *Miller* test, see supra notes 47-51 and accompanying text.
203. See *id.* at 2345.
204. See *id.*
205. See *id.*
206. See *id.*
207. See *Reno II*, 117 S. Ct. at 2345. The Court stated that this "societal value" standard allows courts to impose some limitations and regularity by setting a national floor in determining what types of material have a socially redeeming value. *See id.*
208. See *id.*
209. See *Reno II*, 117 S. Ct. at 2346.
While the Court has continually recognized this interest in regulating the type of communication received by children, Congress cannot word the statute so broadly as to also affect adults where a less restrictive alternative would have accomplished the same purpose. In order to understand the Court’s reasoning here, it is important to examine the goals of the legislature as well as whether the statute was drafted to embody the least restrictive of the government’s alternatives in reaching their goal.

The Supreme Court concluded that the CDA was overly broad in its impact as the affected audience of the legislation will extend far beyond the minors whom the statute is intended to protect. The effect of this overbreadth could be enormous considering the available audience for a publisher who places a site on the Internet. Given the size of the potential audience, combined with the unavailability of an effective age verification device, it is inconceivable that an Internet provider could be charged with not knowing that at least one minor might be in the audience, thus leading to criminal sanctions under the CDA. This being the case, many

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211. See Denver Area, 116 S. Ct. at 2393 (Government cannot “reduc[e] the adult population . . . to . . . only what is fit for children” (quoting Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 128 (1989)); Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 74 (1983) (“The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for sandbox.”).

212. See Dawn L. Johnson, It’s 1996: Do You Know Where Your Cyberkids Are? Captive Audiences and Content Regulation on the Internet, 15 J. MARSHALL J. OF COMPUTER & INFO. L. 51, 94 (1996) (asserting that heavy-handed content-based legislation creates chilling effect on speech as such legislation denies adult access to constitutionally protected speech; and noting that legislation controlling content of computer speech through unlimited criminal liability is not least restrictive means that Congress may employ).

213. See Reno II, 117 S. Ct. 2346-47.

214. See id. at 2349.

215. See id. at 2347. The district court made several findings as to the ineffectiveness of other available tagging techniques at the trial that would serve as effective means to determine the age of the Internet user. See Reno I, 929 F. Supp. at 845. The court also found that it would be extremely uneconomical for non-commercial Internet providers to use any type of age verification system. See id. at 845-48. But the district court found that “[d]espite its limitations, currently available user-based software suggests that a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be widely available.” See id. at 842. As Justice O’Connor writes in her opinion:

Until gateway technology is available through cyberspace, and it is not in 1997, a speaker cannot be reasonably assured that the speech he displays will reach only adults because it is impossible to confine speech to an “adult zone.” Thus, the only way for a speaker to avoid liability under the CDA is to refrain completely from using the indecent speech. But this forced silence impinges on the First Amendment right of adults to make
Internet providers would simply refrain from sending messages which they felt were punishable by criminal sanctions under the CDA.\(^{216}\) This would clearly burden adults, as much of the information that would be withdrawn would not be inappropriate information for people over the age of eighteen.\(^ {217}\) The Court also distinguished the restriction in the present case from similar restrictions looked at in \textit{Ginsberg} and \textit{Pacifica} on grounds that the CDA affected not only commercial entities, but expanded to anyone who might post indecent messages.\(^ {218}\)

The effect of this legislation was deemed by the Court as not only broad in the audience affected, but overly broad as to the types of material restricted as well.\(^ {219}\) The terms "indecent" and "patently offensive" could apply beyond Congress’s initial intention and also restrict "large amounts of nonpornographic material with serious educational or other value."\(^ {220}\) The Court also feared that the community standard by which material will be judged could be the standard of the community most likely to be offended by the material.\(^ {221}\)

In its analysis, the Court applied the strict scrutiny test and found that the overbreadth of the statute was not enough, in itself, to invalidate the Act.\(^ {222}\) Congress may draft a statute that is overly broad, if such a statute is necessary in order to achieve the govern-
ment's purpose.\textsuperscript{223} As the Court states, however, the "burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve."\textsuperscript{224} The Supreme Court thus has a duty to make sure that Congress has designed the statute to "accomplish its purpose 'without imposing an unnecessarily great restriction on speech.'"\textsuperscript{225} The government, however, failed to meet its burden of showing that less restrictive means were not available.\textsuperscript{226} The Court therefore concluded that the CDA was too narrowly tailored and therefore unconstitutional.\textsuperscript{227}

E. Severability of the CDA

The last and final plea by the government in defense of the CDA was that the Court apply the severability clause contained in 47 U.S.C.A. § 608\textsuperscript{228} to save portions of the Act.\textsuperscript{229} This is an important aspect of the opinion because it is the only area where Justice O'Connor's concurring opinion diverges from the majority.

1. Justice Stevens' (Majority Opinion) Use of Severability Clause

The severability clause of the CDA requires the Court to sever any textual provisions of an act that can be severed and leave the rest standing.\textsuperscript{230} The Court found that there was only one provision of § 223(a) which could be severed and have the remainder of the statute stand on its own.\textsuperscript{231} The phrase "or indecent" was sev-
ered from § 223(a) and the rest of the provision was left standing. The rest of § 223(a) deals with the transmission of obscene material, and since this material is provided no constitutional protection under the First Amendment, it could be left standing. The government also made a plea to uphold the statute to “persons or circumstances” where the CDA could be applied constitutionally. The Court completely rejected this request, stating that such an application could not be made when challenging a provision on its face and that even if such an application could be made, the CDA was not readily susceptible to such a severing.

2. Justice O’Connor’s (Concurring in Part/Dissenting in Part) Use of the Severability Clause

Justice O’Connor, joined by Chief Justice Rehnquist, wrote an opinion which concurred in part and dissented in part, differing with the majority on the extent to which the CDA should be severed and left standing. O’Connor writes that there are two basic requirements that need to be met for an Internet zoning law to withstand a First Amendment challenge.

233. See Reno II, 117 S. Ct. at 2350.
234. See id. The government made a plea relying on 47 U.S.C. § 608 which states that a statute that is facially unconstitutional may be upheld to those persons and circumstances to which the act is constitutional. See id. Relying on Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985), the government argued that the Court had the power to declare the statute “invalid to the extent it reaches too far, but otherwise left intact.” Reno II, 117 S. Ct. at 2350 (citing Brockett, 472 U.S. at 503-04). The Court rejected this argument for two reasons. See id. First, the Court argued that the authority behind this expedited review is 47 U.S.C.A. § 561 and as such the statute only allows challenges to the CDA on its face. See id. Accordingly, the case to that point had been treated by all parties as a facial challenge. See id. The Court therefore stated that it had no authority to make a ruling on an “as-applied” challenge. See Reno II, 117 S. Ct. at 2350. Second, Brockett stated that when considering a facial challenge, the Court may apply the type of limiting construction which is requested by the government, but only where the statute is “readily susceptible” to this type of construction. See id. The Court then stated that as such the CDA lends no guidance to limiting its coverage and therefore is not “readily susceptible” to such a limiting construction. See id. The Court stated that where a statute provides such overly broad language and gives no indication where the line should be drawn, the court should decline to attempt to draw such a line because they risk violating the separation of powers. See id; United States v. Reese, 92 U.S. 214, 221 (1875) (“[I]t would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could rightfully be detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.”).
236. See id. at 2352-53.
restrict adult access to the Internet, and minors must lack a First Amendment right to obtain the material which is being restricted from them.\textsuperscript{237} In her departure from the majority opinion, she discusses both of these requirements.

In order to understand both the reasoning and conclusion of this opinion, it is important to understand how Justice O'Connor interprets the "patently offensive" provision. She writes that this provision should actually be broken down into two smaller provisions; the "specific person" provision and the "display" provision.\textsuperscript{238} The "specific person" provision refers to the portion of § 223(d)(1)(a) which makes it a crime to knowingly send a patently offensive message or image to a "specific person" under the age of eighteen.\textsuperscript{239} The "display" provision refers to the portion of § 223(d)(1)(b) which makes the display of patently offensive messages or images available to minors a criminal offense.\textsuperscript{240}

In Justice O'Connor's opinion, she writes that the CDA fails in its entirety only in respect to the "display" provision.\textsuperscript{241} The CDA fails only in some instances with respect to the "indecency transmission" and "specific person" provisions by unduly restricting adult access to protected material.\textsuperscript{242} Justice O'Connor would sever the CDA in these circumstances only and leave the Act standing in all other respects.\textsuperscript{243}

(a.) Does It Unduly Restrict Adult Access to the Material?

According to Justice O'Connor, the "display" provision is the only aspect of the CDA that is invalidated in its entirety.\textsuperscript{244} She states that the "indecency transmission" and "specific person" provisions are not unconstitutional in all instances.\textsuperscript{245} Her opinion suggests that both of these provisions are constitutional when ap-

\begin{itemize}
  \item \textsuperscript{237} See id. at 2353.
  \item \textsuperscript{238} See id.
  \item \textsuperscript{239} See id.
  \item \textsuperscript{240} See Reno II, 117 S. Ct. at 2352.
  \item \textsuperscript{241} See id. at 2354.
  \item \textsuperscript{242} See id. Justice O'Connor establishes some criteria in her opinion for determining when Internet zoning regulations similar to those in the CDA would be able to withstand a constitutional challenge. See id. In order for such a zoning system to be effective "(i) an agreed upon code (or "tag") would have to exist; (ii) screening software or browsers with screening capabilities would have to be able to recognize the "tag"; and (iii) those programs would have to be widely available—and widely used—by Internet users." Id. She also notes that none of these criteria was met at the time of the Reno II decision. See Reno II, 117 S. Ct. at 2354.
  \item \textsuperscript{243} See id. at 2351.
  \item \textsuperscript{244} See id. at 2354.
  \item \textsuperscript{245} See Reno II, 117 S. Ct. at 2355.
\end{itemize}
plied to a conversation involving one adult and one or more minors. But if a minor were to enter communications between all adults, the CDA requires these adults to refrain from using indecent language or face the risk of criminal prosecution. It is in this second situation where both the “specific person” and “indecency transmission” provisions come into conflict with the First Amendment. Accordingly, Justice O’Connor believes that the CDA should be applied in situations where its provisions are constitutional and invalidated in all other scenarios. O’Connor thus concludes “I would therefore sustain the ‘indecency transmission’ and ‘specific person’ provisions to the extent they apply to the transmission of Internet communications where the party initiating the communication knows that all of the recipients are minors.”

(b.) Do Minors Have a Right to Read or View the Banned Material?

Justice O’Connor was forced to deal with a crucial issue in her opinion that was never reached by Justice Stevens in the majority opinion. This question involves whether the CDA substantially interferes with the First Amendment rights of minors. She concludes in her opinion that the CDA does not violate the Constitution in this respect, relying heavily on the decision in Ginsberg.

The opinion points out that the CDA denies minors under the age of eighteen the ability to obtain material which has some re-

246. See id. at 2354-55. Justice O’Connor makes an analogy between the CDA and the statute of Ginsberg in this situation. See id. at 2355. She states that restricting what one adult may say when they are in the company of minors and no other adults in no way restricts that adult’s ability to communicate with other adults. See id.

247. See id.

248. See Reno II, 117 S. Ct. at 2355.

249. See id.; Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985) (“Where the parties challenging the statute are those who desire to engage in protected speech that the overbroad statute purports to punish... [t]he statute may forthwith be declared invalid to the extent that it reaches too far, but otherwise left intact.”).

250. Reno II, 117 S. Ct. at 2356.

251. See id.

252. See id. In Ginsberg v. New York, the Court held that minors could be restricted from receiving materials that were deemed obscene to minors. 390 U.S. 629, 631 (1968). Ginsberg set out a three prong test for determining what constitutes material that is obscene to minors. See id. at 635. Material will be considered obscene to minors if it: (i) appeals to the prurient interest of minors; (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and (iii) is utterly without redeeming social value to minors. See id. at 633.
deeming value even if the material does not appeal to their prurient interest. O'Connor acknowledges this possibility, but holds that this is not enough to prevail in a facial challenge of the constitutionality of a congressional act. In order for an act to be invalidated by a facial challenge, the overbreadth must be "real" or "substantial." In the opinion of Justice O'Connor, the loss of material to minors which is of redeeming social value is of such a minor significance that the CDA does not "burden a substantial amount of minors' constitutionally protected speech." Thus, Justice O'Connor would only invalidate the "display" provision of the Act in its entirety, and the "indecency transmission" and "specific person" provisions to the extent that they prohibit the use of indecent speech between two or more adults.

V. CRITICAL ANALYSIS

In Reno II, the Court dealt with the validity of an attempt by Congress to regulate the types of material that may be dispersed over the Internet. In doing so, the Court established some standards for the future regulation of the medium that appear to be consistent with past decisions involving application of the First Amendment to other types of media. This section will analyze some of the principles set forth by the Court, as well as address some of the early criticism the decision has received since it was handed down by the Court.

A. Regulation of a New Medium

Throughout the last 100 years, different media of communication have emerged and become standardized throughout society. Starting with radio, telephone, then came television, cable television and in the past twenty years has come interaction over computer networks. These forms of communication have undoubtedly helped our country progress in countless ways, but these media

253. See Reno II, 117 S. Ct. at 2356.
255. See id.
256. See Reno II, 117 S. Ct. at 2356. Justice O'Connor notes that although discussions about prison rape or nude art may have some redeeming educational value to adults, they do not necessarily pose the same value for minors. See id. She also states that the standard presented in Ginsberg required that the material be of redeeming social importance for minors. See id. The opinion also accuses the Appellees of presenting no examples of any speech falling under this category which is substantial in any way to the statute's legitimate sweep. See id.
have not been without their problems. As discussed throughout this Note, one of the largest problems associated with these media is their ability to transmit material that is unfit or unsuited for minors. One of the major problems in attempting to regulate a medium for the first time is being able to do so in a manner that does not trample upon the First Amendment rights that users of that medium may be provided under the Constitution.

In attempting to determine the amount of protection that a particular medium may be afforded, the most important factors to look at are the intrusiveness and pervasiveness of that medium. The Internet is relatively unintrusive when considered in light of other media whose content has historically been regulated. In order to access a particular site on the Internet, one must take affirmative steps need to be taken, telephone does not surprise unexpecting listener); Pacifica, 438 U.S. at 731 n.2 (noting that major factor was that radios are in homes and places where privacy interests are afforded extra deference); Erznoznik v. Jacksonville, 422 U.S. 205, 209 (1975) (holding that interest of speaker may have greater weight outside privacy of audience’s home). Commentators have also noted that the Pacifica decision was based on the Court’s analysis of intrusiveness and persuasiveness. See Lewine, supra note 2, at 121-22.

261. See Reno II, 117 S. Ct. at 2343.
firmative steps. A person must type in particular search phrases, then they must point and click on particular links in order to arrive at their desired location. These affirmative steps decrease the possibility of accidentally coming across some offensive material. Unlike other media such as television or radio, where a person may come across offensive material unexpectedly, the Internet requires a person to take affirmative steps to obtain that information. Internet sites containing indecent or patently offensive material are invited by a viewer into the home, and are, therefore, much less intrusive than identical material that may be unexpectedly viewed or heard over other media. Accordingly, the Supreme Court seems justified in providing a lesser amount of First Amendment protection to the Internet than has historically been given to other types of media.

B. Overbreadth of the CDA

As noted in the majority opinion, the language of the CDA was held to be overly broad in its application. The provisions of the Act extended not only to obscene materials, but to materials which were neither obscene nor pornographic, and as such, these materials are protected under the First Amendment. Many critics of the Supreme Court's decision have argued that the "indecency" provision is not overly broad because certain materials that may not be obscene may still be harmful when viewed by children.

Commentators have emphasized that, while sexual or excretory speech may have value for adults, this does not necessarily mean that it provides any value to a less mature audience, and therefore

262. See id.; Johnson, supra note 212, at 94 ("Hence, unlike the television, radio, or telephone message service, the Internet is not an uninvited guest. Instead, the virtual world must be invited in.").
263. See Reno II, 117 S. Ct. at 2336.
264. See id.
265. See id.
266. See William Bennett Turner, The First Amendment and the Internet, 482 PLI/PAT 33, at 42-43. The Internet possesses characteristics that make it difficult to justify any regulation of its content by the government. See id. Regulation is made difficult because the Internet is inexpensive, interactive, user-controlled, contains low barriers to entry, contains speech which is not concerned with ratings or bringing in money, and is democratic in nature. See id.
267. See supra notes 203-08 and accompanying text for a discussion of why the Court found the language of the CDA to be overly broad.
269. See Liz Willen, This Isn't Kid Stuff, N.Y. NEWSDAY, Mar. 23, 1994, at A6; see also Robert W. Peters, There is a Need to Regulate Indecency on the Internet, 6 CORNELL J.L. & PUB. POL'y 363, 373 (1997) (suggesting that educational information on topics such as safe sex, AIDS and prison rape can actually be harmful to minors).
the government has a lesser interest in protecting minors from this material.270 An advocate of the CDA cited an informational AIDS brochure which was distributed by the Gay Men's Health Crisis in New York City to a high school conference sponsored by the New York City Board of Education as an example of the type of material which was not obscene, was fit for adults, yet completely inappropriate for minors.271

In making this argument, critics of the Supreme Court decision overlook the rationale behind the Court's determination that the CDA was too broad.272 While much of the material provided over the Internet that provides educational value to adults may be harmful to minors, if a less restrictive means of restriction is available, Congress cannot restrict this material at the expense of material which is truly educational to minors.273

To understand some of the educational information on the Internet that provides value to minors, one need go no further than consider some of the plaintiffs which were represented by the ACLU in this suit.274 For example, one of the plaintiffs is Planned Parenthood who place speech involving safe sex on their web sites.275 The Critical Path AIDS Web page is another site which instructs visitors about safe sex practices, but uses street terminology, fearing that the use of the Latinate terms will lead teenagers to mis-

270. See Peters, supra note 269, at 373-74.

271. See Liz Willen, This Isn't Kid Stuff, N.Y. NEWSDAY, Mar. 23, 1994, at A6. In 1994, distribution of “safe sex” brochure which was prepared by adults was distributed at a high school conference, co-sponsored by the New York City Board of Education. See id. The Chancellor of New York Schools later commented on the brochure, stating that it “dealt with sexual practices, contained language that was totally inappropriate and possessed no educational value.” Id.

272. See Bruce W. Sanford & Michael J. Lorenger, Teaching an Old Dog New Tricks: The First Amendment in an Online World, 28 CONN. L. REV. 1137, 1152 (1996). In simple terms, the prohibition of “indecent” material restricts significantly more material than just what may be harmful to minors. See id. The effects of the CDA extend beyond material which has prurient appeal. See id. The CDA could lead to prohibition of works ranging from Michelangelo’s David, to The Catcher in the Rye, to Huckleberry Finn. See id. Writers have noted that the Supreme Court has suggested that the works of James Joyce, D.H. Lawrence, James Baldwin and Frank Harris may be classified as “indecent” in some communities. See id.

273. See Johnson, supra note 212, at 62 (discussing that First Amendment protects material which is crude or vulgar, provided material is not obscene, as such work may have some artistic value; such crude or vulgar material may, however, be restricted when it poses danger to children).


understand what is being taught. It is naive to pretend that this information is not educational, as well as extremely important to the country's teenage population.

C. Screening Systems Are Ineffective in Lessening the Effects of the CDA on Protected Speech

Many supporters of the CDA argue that, due to several screening techniques, the CDA does not have a negative effect on constitutionally protected speech. Case support for this assertion comes from Renton. Renton dispels the Court's emphasis on the economic unfeasibility of credit card and adult password gateway systems. This would eliminate one of the leading factors that the Court relied on in dismissing the effectiveness of such systems in Reno II. The use of these devices would provide an affirmative defense under the CDA and perhaps save the statute from invalidation.

This argument is moot however, because even if the economic feasibility of these systems becomes irrelevant in determining their practicality, there are still inherent problems with the operations of these devices that make them ineffective solutions to the CDA's

276. See id. at 507-08. In discussing the CDA, Chris Hansen, an ACLU lawyer, states that any discussion of homosexuality could be regarded as "patently offensive," given the lack of definition provided by the statute. He states further:

At a time when states and school boards are passing laws trying to take rights away from gay people and the Clinton Administration is trying to prevent gay people in the military from even saying out loud, "I'm gay," to suggest that no one is going to find speech about being gay patently offensive seems to me hopelessly naive. I certainly do not feel comfort, and nor should anyone, at the thought that I might have to go to prison for engaging in that kind of speech.

Id. at 508; see also Sanford & Lorenger, supra note 272, at 1152 (explaining how CDA threatens valuable medical, scientific, political topics, such as the "Virtual Hospital" site established by University of Iowa).

277. See Renton, 475 U.S. at 54.

That respondents must fend for themselves . . . on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. . . . [W]e have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kind of speech related businesses for that matter, will be able to obtain sites at bargain prices.

See id.

278. See id.

279. See Reno II, 117 S. Ct. at 2347 (noting that it would be prohibitively expensive for both commercial and noncommercial web site providers to verify users were adults).

280. See 47 U.S.C.A. § 223(e)(5)(B) (indicating that Internet site provider can avoid liability where it has restricted access through use of "verified credit card, debit account, adult access code, or personal identification number.")
overbreadth. As discussed previously, these gateway screening concepts are unable to keep children from accessing inappropriate material which may be accessed over the Internet.\textsuperscript{281} Screening systems have the ability to detect trigger words and phrases, but do not possess the capability of detecting sexually explicit images that may be contained in particular sites.\textsuperscript{282}

Even if credit card or password verification systems became economically feasible, there are still many inherent problems with these two devices which make them impractical. First, credit card verification systems for the Internet are not yet technically possible.\textsuperscript{283} While many credit card transactions take place over the Internet, the seller must then process the transaction with the creditor off-line using telephone lines.\textsuperscript{284} An adult verification by password system would most likely fail as well, as many experts suggest that casual Internet users would be discouraged from visiting certain sites if required to sign on with a password.\textsuperscript{285} Aside from the feasibility of either of these methods, the government failed to provide any evidence as to their effectiveness at trial and thus failed to meet their burden of evidence.\textsuperscript{286}

C. International Nature of the Internet

The above findings are heavily supported, but even if there were effective devices to prevent constitutionally protected speech between adults from being chilled, the statute is not an effective means to achieve Congress's intended goal.\textsuperscript{287} This is due to the

\textsuperscript{281} See supra notes 128-40 and accompanying text for a discussion of the inadequacies of different monitoring devices available for the Internet; see also Sanford & Lorenger, supra note 272, at 1153 (discussing that verification systems based on dial-a-porn services are not feasible for Internet and that most producers in cyberspace have no control over accessibility to their messages.

\textsuperscript{282} See Reno II, 117 S. Ct. at 2336.

\textsuperscript{283} See Reno I, 929 F. Supp. at 846.

\textsuperscript{284} See id.

\textsuperscript{285} See id. at 847.

\textsuperscript{286} See id.

\textsuperscript{287} But see Peters, supra note 269, at 378.

Law enforcement agencies are also having difficulty enforcing other laws, including those pertaining to copyright, theft, fraud, libel, harassment, gambling, child abuse, invasions of privacy, and terrorism. That "Internet outlaws" may now be winning is not a reason to repeal these laws or to declare them unconstitutional. The international dimension of the dial-a-porn industry has also created problems enforcing 47 U.S.C. 223(b), but to my knowledge, no one has argued that Section 223(b) is, therefore, unconstitutional.

\textit{Id.}
international nature of the Internet. Much of the material that is either pornographic or inappropriate for minors is material that is accessed from international servers and thus exempt from the laws of the United States. The CDA only restricts the actions of Internet providers in the United States, while it has been noted that as much as thirty percent of the sexually explicit material available over the Internet originates outside of the country. Thus, the CDA will not even resolve a significant portion of the problem to which it is directed. Thus, it seems highly doubtful that the CDA would be able to pass the government’s strict scrutiny test. The burden of the CDA on constitutionally protected adult speech would far outweigh the minimal benefit the statute would create in preventing indecent materials from being accessible to minors.

D. Case Law Does Not Permit O’Connor’s Severance

Justice O’Connor asserts that the Court should keep the CDA in place to the extent that it would not be unconstitutional. Unfortunately, the Court is not provided the luxury of severing the statute in order to satisfy this requirement. The majority opinion cites Brockett in limiting a court’s ability to sever a statute in an “as

288. See Jose I. Rojas, supra note 259, at 206-07. The Internet is truly “worldwide.” See id. at 206. What may be offensive to communities within the United States may not necessarily be offensive to communities in Germany or other foreign nations. See id. Some even claim that government should not get involved in the regulation of the Internet, but rather, allow the vastly thriving community to develop its own rules. See id.


The CDA is unconstitutionally overbroad as construed because it bans constitutionally-protected speech. It is important to note that only 12-15% of the total population of the United States is on-line. Just as there is only a small percentage of the population on the Internet, only a small percentage of the material found in cyberspace is pornographic. Furthermore, almost half of all pornographic material found on-line comes from outside the United States - and outside of the reach of prosecution by U.S. officials.

See id.


291. See id.

292. See id. “[T]he state may not regulate at all if it turns out that even the least restrictive means of regulation is still unreasonable when its limitations on freedom of speech are balanced against the benefits gained from those limitations.” See id. (citing Carlin Communications, Inc. v. FCC, 837 F.2d 546, 555 (2d Cir. 1988).

293. See Reno II, 117 S. Ct. at 2355.
applied" fashion where the statute's constitutionality is being challenged, as it was here, on its face.294

If the Court were to apply the CDA, as O'Connor suggested, on a case-by-case basis to the extent that it is constitutional, the Court would risk what the three judge panel in Shea referred to as "judicial legislation."295 This is precisely what Justice O'Connor recommended that the Court do in breaking up the CDA into several different provisions.296 The Court should leave it to Congress to enact legislation that will not violate constitutionally protected First Amendment rights and not play the role of the legislature itself.

Despite these varying opinions presented by different groups, the majority has a strong argument that is amply supported by relevant case law. Under the decision in Reno II, obscene material remains restricted, which is the heart of the government's compelling interest. The only thing lost by the case's ruling is the restriction of "patently offensive" and "indecent" material, to which there was no clear definition as to what was originally included under these terms.

V. IMPACT

Reno II will undoubtedly serve as a landmark case regarding First Amendment rights over the Internet. The effects of the decision are likely to go in several different directions as lawmakers attempt to restructure state and federal laws to accommodate this

294. See id. at 2350. The legislature can abridge expression in two different ways. The first of these ways is a content-based restriction on speech. See Lewine, supra note 2, at 108-09. These ways "aim at limiting communicative impact by singling out a message for government sanction or control because of the content of the message or the anticipated effects of the message." Id. The second method by which Congress can restrict expression is referred to as a non-content-based restriction. See id. at 109-10. These methods restrict "the flow of information or ideas by aiming at the non-communicative aspects of expression while pursuing other goals." Id. Examples of this non-content-based type of restriction include time, place and manner restrictions. See id. at 110. "The Supreme Court applies strict scrutiny to content-based regulations because 'at the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence.'" See Alan Lewine, supra note 2, 118 (citing Turner Broad. Sys. v. FCC, 114 S. Ct. 2445, 2458 (1994)).

295. See supra note 107 and accompanying text for a discussion of the Supreme Court's fear of applying congressional statutes in ways that may be construed as "judicial legislation."

296. See supra Part IV.E.2.
decision, while companies and Internet site providers feel a continual stress to create family-friendly access.\footnote{297}{See Peters, supra note 269, at 365 ("In order to head off regulation, the communications industry has embarked on a public relations campaign to promote parental use of screening technology to shield children from pornography on the Internet.").}

Industry observers have stated that a newly revamped CDA is highly unlikely, noting that the majority opinion in \textit{Reno II} is strong enough to rule out any such attempts.\footnote{298}{TELECOMMUNICATION REP. (Monday June 29, 1997).} Despite this assertion, many legislators have vowed to return with a new revision of the CDA.\footnote{299}{Commentators have stated that while Congress may make attempts to draft a replacement for the CDA that is more narrowly construed in an attempt to satisfy the Court, "it is difficult to see how Congress can define indecency in a way that survives this decision." See James C. Goodale, \textit{Big Surprises in the Internet Ruling}, 218 N.Y.L.J., July 2, 1997, at 1. Goodale states that Congress will have to be ingenious to come up with a definition of indecency that is different than obscenity, thus the concept of indecency as detached from the concept of obscenity may be over. See id.}

Along other lines, a few legislators in Congress have introduced legislation aimed at areas that were formerly covered under provisions of the CDA. Representative Zoe Lofgren, a Democrat from California, introduced the "Internet Freedom of Protection Act" (H.R. 774) which requires Internet Service providers to provide screening software to subscribers.\footnote{300}{See Richard Raysman \& Peter Brown, \textit{Reno v. ACLU: The First Amendment Meets the Internet}, N.Y.L.J., July 8, 1997, at 3.} Along similar lines, the "Family-Friendly Internet Access Act of 1997" (H.R. 1180) was introduced on March 20, 1997 by congressman Joseph McDade, a Re-

\footnote{297.}{See Peters, supra note 269, at 365 ("In order to head off regulation, the communications industry has embarked on a public relations campaign to promote parental use of screening technology to shield children from pornography on the Internet.").}

\footnote{298.}{TELECOMMUNICATION REP. (Monday June 29, 1997).}

\footnote{299.}{Commentators have stated that while Congress may make attempts to draft a replacement for the CDA that is more narrowly construed in an attempt to satisfy the Court, "it is difficult to see how Congress can define indecency in a way that survives this decision." See James C. Goodale, \textit{Big Surprises in the Internet Ruling}, 218 N.Y.L.J., July 2, 1997, at 1. Goodale states that Congress will have to be ingenious to come up with a definition of indecency that is different than obscenity, thus the concept of indecency as detached from the concept of obscenity may be over. See id.}

\footnote{300.}{See Richard Raysman \& Peter Brown, \textit{Reno v. ACLU: The First Amendment Meets the Internet}, N.Y.L.J., July 8, 1997, at 3.}
publican from Pennsylvania. This Act would require Internet access providers to supply screening software that would permit parents to limit their child's access to "unsuitable" material on the Internet. Finally, Senator Patty Murray, a Democrat from Washington, plans to introduce the "Child Safe Internet Act of 1997." This Act would also provide parents with access screening software, as well as create child-safe chat-rooms where it would be a felony to post indecent material.

Reno II will also have a significant impact on past, present and future legislation involving the Internet as well as other media. The main impact of the case will be the elimination of the concept of indecency as a viable concept for regulating speech on the Internet under the First Amendment. This may also have a ripple effect, as Justice Stevens' opinion noted, which may lead to a similar treatment of "indecency" concerning its application to the regulation of other media as well. For example, because parents can lock out programs that they do not want their children to see on cable television, this medium would seem no more invasive than the Internet, and could therefore be entitled to full First Amendment protection. Reno II has also set the standard in regards to First Amendment protection provided to the Internet. The Court set forth a distinction between the First Amendment protection provided in cyberspace as compared to lesser protections that have been provided to other media in prior Supreme Court cases.

The holding in Reno II will play a part in shifting the burden of protecting the nation's children from inappropriate non-obscene

301. See id.
302. See id.
303. See id.
304. See id.
305. See Goodale, supra note 299, at 1. Justice Stevens' opinion on the use of the concept of "indecency" may be so powerful that it may effect the use of that concept on other media as well. See id.
306. See id.
307. See Goodale, supra note 299, at 1. Justice Stevens' opinion on the use of the concept of "indecency" may be so powerful that it may effect the use of that concept on other media as well. See id.
308. See id.
309. See supra Part II.B. for a discussion of how the Court treated different media differently when determining the amount of First Amendment protection they should be provided.
material over the Internet. The invalidation of the Act makes parents responsible for protecting their children from the harms of such material on the Internet. The decision also places a further pressure on the industry to develop technology in the near future that may be available to create "adult zones," thus lessening the effect of similar prohibitions. Internet companies are under constant threat of new legislation if they do not develop and provide some solutions.

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310. *But see* Peters, *supra* note 269, at 366 (maintaining that one cannot assume that all parents are interested in what children are doing, that parents have overcome their fear of computers or that parents are informed of what types of material are on Internet).