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THE CYBERWAR OF 1997: TIMIDITY AND SOPHISTY AT THE FIRST AMENDMENT FRONT*

Gary D. Allison†

This is the universal law of vivisystems: higher-level complexities cannot be inferred by lower-level existences. Nothing—no computer or mind, no means of mathematics, physics, or philosophy—can unravel the emergent pattern dissolved in the parts without actually playing it out. . . .

[*Running a system is the quickest, shortest, and only sure method to discern emergent structures latent in it. . . . That leads us to wonder . . . what is contained in a human that will not emerge until we are all interconnected by wires and politics? The most unexpected things will brew in the bionic hive-like supermind.*]

[Regardless of the strength of the government’s interest in protecting children, “[t]he level of discourse reaching the mailbox simply cannot be limited to that which would be suitable for a sandbox.”]

I. INTRODUCTION

During the 1996 term, the United States Supreme Court decided one of the nation’s most important First Amendment cases, the first involving federal regulation of the Internet.3 *Reno v. ACLU*4 attracted great attention, because it was a cultural war. On one side were those who viewed the Internet as a moral cesspool threatening to engulf children in depravity.5 On the other were those

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* Based on remarks delivered at the Conference, Practitioner’s Guide to the 1996 Supreme Court Term, at The University of Tulsa College of Law, October 31, 1997.
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3. See *ACLU v. Reno*, 929 F. Supp. 824, 830 (E.D. Pa. 1996), “The Internet is not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks. It is thus a network of networks.” Id.
who believe the Internet, if left unregulated, is the gateway to earth’s final frontier, cyberspace, a vast network of computer networks containing unfathomed economic, technological and philosophical bounties.6 The champions of

Brenner’s article points out, among other things, the psychological dangers children face on the Internet, as follows:

Psychologists say that even though minors have always sought out medical books and other graphic pictures of body parts, the Internet is taking access to sexually explicit materials to new levels.

“The access is so much more immediate and comprehensive on the Internet,” said Dr. Michelle M. Welli, a clinical psychologist in Orange, Calif., and a national expert on the psychology of technology.

“The danger has to do with each child’s development and chronological age,” she said. “We can’t protect them from all of the ills of society, but we have to monitor their exposure to what they’re ready for.”

Dr. Welli said youngsters who are exposed to sexually explicit material that they are not emotionally or physically prepared for can become terrified, experience disrupted sleep and “get a skewed perspective” on life.

Id. In addition, it has been reported that Internet chat rooms have been sources of dangers to children, as they sometimes are entered by adults seeking to have cybersexual encounters with children. See Stacie Zoe Berg, Helping Kids to Surf Safely, WASH. TIMES, Aug. 4, 1997, at 42.

6. In Out of Control, Kevin Kelly gives a fascinating preview of what our future could be in a world where everyone is connected to the Net. He observes that: “Networking at that scale would truly revolutionize almost every business. It would alter:

* What we make
* How we make it
* How we decide what to make
* the nature of the economy we make it in.”

KELLY, supra note 1, at 186.

Kelly also offers an executive summary of the characteristics of the emerging net-economy. He believes the net-economy will exhibit the following traits:

* Distributed Cores—Companies . . . become societies of work centers distributed in ownership and geography.
* Adaptive Technologies—If you are not in real-time, you are dead. Bar codes, laser scanners, cellular phones, 700-numbers, and satellite uplinks which are directly connected to cash registers, polling devices, and delivery trucks steer the production of goods . . . .
* Flex Manufacturing—Smaller numbers of items can be produced in smaller time periods with smaller equipment . . . . Modular equipment, not standing inventory, and computer-aided design shrink product development cycles from years to weeks.
* Mass Customization—All products are manufactured to personal specifications, but at mass production prices.
* Industrial Ecology—Closed loop, no waste, zero pollution manufacturing; products designed for disassembly; and a gradual shift to biologically compatible techniques . . . .
* Global Accounting—Even small businesses become global . . . . Unexploited, undeveloped economic “frontiers” disappear geographically. The game shifts from zero-sum . . . to positive sum, where the . . . rewards go to those able to play the system as a unified whole . . . .
* Coevolved Customers—Customers are trained and educated by the company, and then the company is trained and educated by the customer. Products . . . become updatable franchises that coevolve in continuous improvement with customer use . . . .
* Knowledge Based—[D]ata is cheap, and in the large volumes on the network, a nuisance . . . . Coordination of data into knowledge becomes priceless.
* Free Bandwidth—Connecting is free, switching is expensive. [C]hoosing who, what, and when to send, or what and when to get is the trick. Selecting what not to connect to is key.
* Increasing Returns—A network’s value grows faster than the number of members added to it . . . because of the exponentially greater numbers of conversations between each member, both old and new.
* Digital Money—Everyday digital cash replaces batch-mode paper money. All accounts become real time.
* Underwire Economies—Creative edges and fringe areas expand, but now they are invisibly connected on encrypted networks. Distributed cores and electronic money drives economic activity underwire.

KELLY, supra note 1, at 200-91.

Kelly also offers a spiritually intriguing view of the philosophical challenges that may emerge from a networked world. He observes:

There is a sense in which a global mind also emerges in a network culture. The global mind is the union of computer and nature . . . . It is a very large complexity of indeterminate shape governed by an invisible hand of its own. We humans will be unconscious of what the global mind ponders . . . ,
Internet prevailed, but their victory may not be the complete and final victory they sought.

II. THE CDA

At issue in Reno was the constitutionality of the Communications Decency Act of 1996 (CDA).\(^7\) It was enacted at the height of the family-values political movement during the 1996 election year. The specific sections of the CDA at issue in Reno outlawed the use of:

1. a telecommunications device to make, create, solicit and transmit knowingly "any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient . . . is under 18 years of age . . .;" [the indecent transmission provision].\(^8\)
2. "an interactive computer service to send to a specific 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 . . . ." [the specific person provision].\(^9\)
3. "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 . . . ." [the display provision].\(^10\)

The CDA terms "indecent" and "patently offensive" signify that it is intended to regulate speech that is not obscene and, therefore is protected by the First Amendment despite being regarded by many as indecent with respect to adults or children.\(^11\) However, Congress did attempt to reduce the CDA's potential impact on protected speech by including in the CDA several affirmative defens-

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\(^7\) See ACLU v. Reno, 929 F. Supp. 824, 829 (E.D. Pa. 1996). In fact, at trial the appellees in Reno did not challenge the CDA as it applied to obscenity and child pornography since those types of speech were criminalized before the CDA's enactment. See 18 U.S.C. §§ 1464-64 (obscene material), 2251-52 (child pornography). See also N.Y. v. Ferber, 458 U.S. 747(1982) (holding that material not obscene as to adults may nevertheless be left unprotected by the First Amendment because it is obscene as to children); Miller v. California,413 U.S. 15 (1973) (articulating the constitutional standard of obscenity).
es for those who may be prosecuted under it. These defenses are available to those

(1) "tak[ing], in good faith, reasonable, effective and appropriate actions under the circumstances to restrict or prevent access by minors to... [unlawful] communication[s], which may involve any appropriate measures to restrict minors from such communications, including any measure which is feasible under available technology;"12
(2) "restrict[ing] access to... [unlawful] communication[s] by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number."13

III. THE DECISION OF THE THREE-JUDGE DISTRICT COURT

Almost immediately after its enactment on February 8, 1996, the CDA was attacked in federal district court on grounds that its indecent transmission, specific person, and display provisions are facially unconstitutional.14 All challenges to the CDA were consolidated into one action before a three-judge federal district court.15 After making exhaustive findings concerning the nature of cyberspace and the Internet,16 the content of material on the Internet,17 and technologies and procedures for protecting Internet surfers from exposures to indecent material,18 the three-judge district court ruled unanimously that the CDA is unconstitutional on its face.19 Nevertheless, each of the judges used reasoning significantly different from the reasoning of the others to come to that conclusion.

A. Judge Sloviter's Overbreadth Analysis

Judge Sloviter held that the CDA is constitutionally overbroad in that it "reaches speech subject to the full protection of the First Amendment, at least for adults."20 In support of this conclusion, she identified several examples of protected speech that might generate CDA prosecutions, including:

* The award winning play Angels in America, which graphically portrays homosexuality and the plague of AIDS;

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13. Id. § 223(e)(5)(B).
14. See ACLU, 929 F. Supp. at 827. President Clinton signed the act containing the CDA, the Telecommunications Act of 1996, into law on Feb. 8, 1996. Constitutional challenges to the CDA were filed in federal district court on the day of its enactment. See id. These challenges attacked the facial constitutionality of the CDA in order that the case could receive expedited review by the United States Supreme Court as provided for in the CDA. See CDA, § 561, 110 Stat. 142.
15. See id. at 827.
16. See id. at 828-38 (Findings of Fact 1-48).
17. See id. at 842-45 (Findings of Fact 74-89).
18. See id. at 838-42, 845-49 (Findings of Fact 49-73, 90-116).
19. See id. at 849. The court held the indecent transmission provision to be unconstitutional on its face as to indecency and specific persons and display provisions to be wholly unconstitutional on their faces. See id.
* News articles describing the disturbing practice of female genital mutilation;
* Photographs in National Geographic and travel magazines of sculptures in India that show couples copulating in various positions;
* News articles describing a brutal prison rape;
* Safer Sex advice from organizations seeking to prevent the spread of AIDS;
* "Contemporary films, plays and books showing or describing sexual activities," such as Leaving Las Vegas; and
* Controversial paintings and art photographs such as Francesco Clemente’s painting “Labyrinth” and Robert Mapplethorpe’s photographs of a nude man with an erect penis.21

While they are controversial, and maybe even indecent, these speech examples are not obscene because they “contain valuable literary, artistic, or educational value to older minors as well as adults.”22 Nevertheless, Judge Sloviter believed these examples of protected speech could generate CDA prosecutions because they might be deemed “indecent” or “patently offensive” in at least one community receiving them over the Internet.23

Most importantly, Judge Sloviter found there was a high risk that such prosecutions would occur because, with the exception of e-mail from one person to another, Internet speakers do not have any control or knowledge over who receives their messages.24

As a consequence, the CDA subjects Internet speakers to great risk of prosecution unless they confine their communications to what is appropriate for children.25 Such a limitation constitutes a complete ban on certain indecent, but constitutionally protected, communications among adults.26

21. See id. at 853, 855.
22. See id. at 852.
23. See id. at 853.
24. See id. at 854. Judge Sloviter’s finding was supported by the following findings of fact:
25. See id. at 854.
26. See id. at 854. Judge Sloviter’s finding was supported by the following findings of fact:

* "[A] user of the Internet may speak or listen interchangeably, blurring the distinction between 'speakers' and 'listeners.'" Id. at 843 (Findings of Fact 79).
* "[U]nlike traditional media, the barriers to entry as a speaker do not differ significantly from the barriers to entry as a listener. . . . [T]he receiver can and does become the content provider, and vice-versa." Id. at 843-44 (Findings of Fact 80).
* "Once a provider posts content on the Internet, it is available to all other Internet users worldwide." Id. at 844 (Findings of Fact 85).
* "Once a provider posts its content on the Internet, it cannot prevent that content from entering any community. Unlike the newspaper, broadcast station, or cable system, Internet technology necessarily gives a speaker a worldwide audience." Id. (Findings of Fact 86).
* "There is no effective way to determine the identity or the age of a user . . . accessing material through e-mail, mail-exploders, newsgroups, or chat rooms." Id. at 845 (Finding of Fact 90) (for details backing Finding of Fact 90 see Findings of Fact 91-92). Id.
* "Unlike other forms of communication on the Internet, there is technology [Common Gateway Interface (cgi) script] by which an operator of a World Wide Web server may interrogate a user of a Web site[,] . . . and thereby screen visitors by requesting a credit card number or adult password." Id. (Findings of Fact 95).
* "Content providers who publish on the World Wide Web via one of the large commercial online services . . . could not use an online age verification system that requires cgi script[,] . . . [and] there is no method current available for Web page publishers who lack access to cgi script to screen recipients online for age." Id. at 845-46 (Findings of Fact 96).
25. See id. at 854.
Judge Slottor also concluded that the inability of many Internet content providers to limit who receives their messages forces them to "choose between silence and the risk of prosecution" as to material that is arguably indecent, and that such a choice "strikes at the heart of speech of adults as well as minors." 27 This conclusion was closely tied to Judge Solviter's rejection of the government's arguments that the CDA's affirmative defenses effectively narrow its reach so that the CDA is narrowly tailored to effectuate a compelling government interest. 28 Both conclusions are premised on findings of fact that it is not feasible technologically or economically for many Internet speakers to use the CDA defenses. 29 Additionally, she noted that even if technology were

27. Id. at 855. See infra note 29.
28. See id. at 855-57.
29. See id. at 856. See especially the following Findings of Fact:
   * "Verification of a credit card number over the Internet is not now technically possible." Id. at 846 (Findings of Fact 97).
   * "Verification by credit card, if and when operational, will remain economically and practically unavailable for many . . . non-commercial [content providers]." Id. (Findings of Fact 98) (for supporting details see Findings of Fact 99-100).
   * "Credit card verification would significantly delay the retrieval of information on the Internet. [Excessive delay disrupts the 'flow' on the Internet and stifles both 'hedonistic' and 'goal-directed' browsing." Id. (Findings of Fact 101).
   * "Imposition of a credit card requirement would completely bar adults who do not have a credit card and lack the resources to obtain one from accessing any blocked material. At this time, credit card verification is effectively unavailable to a substantial number of Internet content providers as a potential defense to the CDA." Id. (Findings of Fact 102).
   * "Existing [adult verification] systems which appear to be used for accessing commercial pornographic sites, charge users for their services." Id. at 846-47 (Findings of Fact 103).
   * "At least some, if not almost all, non-commercial organizations . . . regard charging listeners to access their speech as contrary to their goals of making their materials available to a wide audience free of charge." Id. (Findings of Fact 104).
   * "It would not be [administratively and economically] feasible for many non-commercial organizations to design their own adult access code screening systems . . . ." Id. (Findings of Fact 105).
   * "There is evidence suggesting that adult users . . . would be discouraged from retrieving information that required use of a credit card or password . . . There is concern by commercial content providers that age verification requirements would decrease advertising and revenue because advertisers depend on a demonstration that the sites are widely available and frequently visited." Id. (Findings of Fact 106).
   * "Even if credit card verification or adult password verification was implemented, the government presented no testimony as to how such systems could ensure that the user of the password or credit card is in fact over 18." Id. (Findings of Fact 107).
   * "The feasibility and effectiveness of 'tagging' to restrict children from accessing 'indecent' speech . . . has not been established." Id. (Findings of Fact 108).
   * "[T]agging . . . would require all content providers that post arguably 'indecent' material to review all of their online content, a task that would be extremely burden some for organizations [such as public libraries] that provide large amount of material online which cannot afford to pay a large staff to review all of that material." Id. (Findings of Fact 110).
   * "The task of screening and tagging cannot be done . . . by using software which screens for certain words, . . . [because] determinations as to what is indecent require human judgment." Id. (Findings of Fact 111).
   * "To be effective, [tagging] would require a worldwide consensus among speakers to use the same tag to label 'indecent' material. There is currently no such consensus, and no Internet speaker currently labels its speech with . . . any . . . widely-recognized label." Id. at 848 (Findings of Fact 113).
   * Tagging also assumes the existence of software that recognizes the tags and takes appropriate action . . . Until such software exists, all speech on the Internet will continue to travel to whomever requests it, without hindrance." Id. (Findings of Fact 114).
   * "There is no way that a speaker can use current technology to know if a listener is using screening software." Id. (Findings of Fact 115).
   * "Tags can not currently activate or deactivate themselves depending on the age or location of the receiver. [Content providers] . . . would be unable to embed tags that block [their] speech only in communities where it may be regarded as indecent. [They] . . . must choose either to tag [their] site[s] (blocking [their] speech in all communities) or not to tag, blocking [their] speech
available for meeting these defenses, the CDA would still impose unacceptable burdens on the ability of some classes of Internet speakers to engage in protected speech.\textsuperscript{30} In the end, Judge Sloviter doubted that any defense could cure the CDA's potential to chill protected speech, because the CDA is too vague to enable Internet speakers to determine what speech is invalid.\textsuperscript{31}

B. \textit{Judge Buckwalter's Vagueness Analysis}

Although he agreed "that current technology is inadequate to provide a safe harbor to most speakers on the Internet,"\textsuperscript{32} Judge Buckwalter's conclusion that the CDA violated both the First and Fifth Amendments was based primarily on his determination that the CDA terms "indecent" and "patently offensive" are unconstitutionally vague.\textsuperscript{33} In support of his vagueness holding, Judge Buckwalter found that the CDA failed to define the meaning of the term "indecent," the FCC has not promulgated regulations defining indecency in the medium of cyberspace, and therefore "[i]ndecent in this statute is an undefined word which, standing alone, offers no guidelines whatsoever as to its parameters."\textsuperscript{34}

Judge Buckwalter also found the term "patently offensive," as used in the specific person and display provisions, to be unconstitutionally vague,\textsuperscript{35} even though it is expressly limited to speech about sexual or excretory activities or organs and is to be measured by contemporary community standards.\textsuperscript{36} In developing definitions for the word "indecent" as applied to telephone service or broadcasting, the FCC specified it should be measured by contemporary community standards for the telephone medium\textsuperscript{37} and the broadcast medium re-

\begin{footnotesize}
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\item in none." \textit{Id.} (Findings of Fact 116).
\item \textsuperscript{30} \textit{See id. at 856. \textit{See supra} note 29 (Findings of Fact 110).}
\item \textsuperscript{31} \textit{See id.}
\item \textsuperscript{32} \textit{See ACLU, 929 F. Supp. at 858.}
\item \textsuperscript{33} \textit{Id. at 858. Judge Buckwalter began his vagueness analysis by noting his belief "that an exacting or strict scrutiny of a statute which attempts to criminalize protected speech requires a word by word look . . . to be sure that it clearly sets forth as precisely as possible what constitutes a violation . . ." \textit{Id.} Judge Buckwalter believed this scrutiny is required to avoid the pitfalls of vague criminal statutes, which violate the Due Process Clause of the 5th Amendment in a variety of ways, including:}
\item * Failing to provide "a person of ordinary intelligence a reasonable opportunity to know what is prohibited[, thereby] trap[ping] the innocent[;]"
\item * Failing to provide "explicit standards for those who apply them[, so as to avoid] . . . the attendant dangers of arbitrary and discriminatory application[;]"
\item * "[A]but[ting] upon sensitive areas of basic First Amendment Freedoms . . . [so as to] inhibit the exercise of [those] freedoms."
\item \textit{Id. at 860} (quoting from Grayned v. City of Rockford, 408 U.S. 104, 108-09(1972)).
\item \textsuperscript{34} \textit{Id. at 861. In so doing, he rejected the government's argument that the term "indecent" in the indecent transmission provision should be equated with the term "patently offensive" as used in the specific person and display provisions. \textit{Id.} The term "patently offensive" was more specifically defined in the specific person and display provisions as being "measured by contemporary community standards" and referring to communications depicting or describing "sexual or excretory activities or organs." 47 U.S.C. § 223(d)(1) (Supp. 1997). Judge Buckwalter contended that if Congress intended the two terms to mean the same thing, the word indecent in the indecent transmission provision would have contained that same definition. \textit{ACLU, 929 F. Supp at 861.}
\item \textsuperscript{36} \textit{See 47 U.S.C. § 223(d)(1)(Supp. 1997).}
\item \textsuperscript{37} \textit{See Dial Info. Servs. v. Thornburgh, 938 F.2d 1535, 1540 (2d Cir. 1991).}
\end{itemize}
\end{footnotesize}
spective. This caused Judge Buckwalter to find it constitutionally fatal that Congress made no "effort to conform the restricting terms [contemporary community standards] to the medium of cyberspace." He also found that Congress' attempt to establish a national CDA community standard, so that CDA prosecutions would proceed only against speech deemed indecent in every U.S. community, conflicted with obscenity law precedent establishing the local community as the source of contemporary community standards. Judge Buckwalter then concluded that "[t]his conflict inevitably leaves the reader of the CDA unable to discern the relevant 'community standard,' and will undoubtedly cause Internet users to 'steer far wider of the unlawful zone' than if the community standard to be applied were clearly defined."

Attempting to save the CDA from the vagueness attack, the government virtually promised that it would not initiate CDA prosecutions unless the material was pornographic and lacked serious value. Judge Buckwalter rejected this offer, contending that the CDA covered more than pornographic speech without serious value, and well-intentioned prosecutors cannot protect citizens from the possibility of arbitrary enforcement.

Finally, Judge Buckwalter found that the CDA's affirmative defenses were also unconstitutionally vague, because they do "not contain any description of what, other than credit card verification and adult identification codes . . . will protect a speaker from prosecution." As a consequence, "individuals attempting to comply with the statute presently have no clear indication of what actions will ensure that they will be insulated from criminal sanctions under the CDA."

C. Judge Dalzell's Medium-Specific Analysis

In contrast to Judge Buckwalter, Judge Dalzell found that the terms "indecent" and "patently offensive" are not unconstitutionally vague. Nevertheless,

40. See id. at 863-64.
42. ACLU, 929 F. Supp. at 863.
43. See id. at 863.
44. See id. at 863-64.
45. See id. at 864. Indeed, he supported this conclusion by pointing to government evidence and testimony "illustrat[ing] the possibility of arbitrary enforcement." A government expert said that seven dirty words would probably trigger a CDA prosecution, but in its brief, the government denied this assertion. Id. Moreover, "[t]he Justice Department attorney could not respond to numerous questions from the court regarding whether . . . artistic photographs of a nude man with an erect penis, depictions of Indian statues portraying different methods of copulation, or the transcript of a scene from a contemporary play about AIDS could be considered indecent under the Act." Id.
46. Id. at 864. He also noted that the CDA authorizes the FCC "to specify measures that might satisfy this defense," but that the CDA will not permit the FCC's views to be definitive in any given case. Id. See also 47 U.S.C. § 223(e)(6).
47. Id. at 864.
48. See ACLU, 929 F. Supp. at 868-69. In reaching this conclusion, Judge Dalzell found that Congress intended for the terms "indecent" and "patently offensive" to have the same meaning. Id. at 868-69. He also
he still held the CDA to be unconstitutional primarily because of his conclusion that the Internet, a new medium with unique attributes, would be greatly disrupted if the CDA's restrictions were upheld.\(^49\) Judge Dalzell reached his conclusion by performing a medium-specific First Amendment analysis,\(^50\) an analysis he believed he was obligated to perform by the United States Supreme Court's doctrine that each medium is to be treated differently for First Amendment purposes.\(^51\) Such medium-specific analyses involve examining "the underlying technology of the communication to find the proper fit between First Amendment values and competing interests."\(^52\)

Of major importance to Judge Dalzell was his finding that the Internet did not suffer from a scarcity of operating resources.\(^53\) This was important, because scarcity of frequencies within the broadcast spectrum is the chief underlying technological characteristic that caused the United States Supreme Court to uphold government content regulation of protected speech disseminated by broadcast media.\(^54\) Therefore, Judge Dalzell concluded that it was inappropriate to apply precedents arising from the regulation of broadcast speech to issues concerning the regulation of speech on the Internet.\(^55\) In particular, he rejected the government's contention that FCC v. Pacifica Found.,\(^56\) a case in which the Supreme Court held that the government could impose content restrictions on offensive speech disseminated by the broadcast media and punish broadcast-

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concluded that this shared meaning was derived from the U.S. Supreme Court's definition of the term "indecency" in Pacifica, from which was fashioned an FCC definition of "indecency" that survived vagueness attacks in three U.S. Court of Appeal circuits. \(\text{id.}\) at 868 (citing to Alliance for Community Media v. FCC, 56 F.3d 105, 123-25 (D.C. Cir. 1995), cert. granted, 116 S. Ct. 471 (1995); Dial Info. Servs. v. Thornburgh, 938 F.2d 1535, 1540 (2d Cir. 1991); Info. Providers' Coalition v. FCC, 928 F.2d 866, 876 (9th Cir. 1991). He then opined it could be fairly implied that the U.S. Supreme Court "did not believe its own interpretation [in Pacifica of the term indecency] invite[s] arbitrary and discriminatory enforcement" or "bait[s] upon sensitive areas of basic First Amendment Freedoms." *ACLU*, 929 F. Supp. at 869. From this, he held that "plaintiffs' vagueness challenge is not likely to succeed on the merits." \(\text{id.}\)

49. \(\text{See id.}\) at 872-83.

50. \(\text{See id.}\) at 877-82.

51. \(\text{See id.}\) at 873-74 (efficiently documenting the development of the United States Supreme Court's doctrine that for First Amendment purposes different communications media are to be treated differently in accordance with their "differing natures, values, abuses and dangers"); \(\text{id.}\) at 873, quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J. concurring)). The documentation shows that the Supreme Court has been faithful to this doctrine by actually establishing different First Amendment rules for different media, including:

- drive-in movie theaters, *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975);
- print, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974); and

52. \(\text{id.}\) at 873.

53. \(\text{See id.}\) at 877 (where Judge Dalzell states that both the "plaintiffs and the government agree that Internet communication is an abundant and growing resource"). \(\text{id.}\)

54. \(\text{See ACLU}, 929 F. Supp. at 877. The Supreme Court has cited the scarcity of broadcast frequencies as a justification for upholding content regulation of broadcast speech in several cases, including:

- *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981);
- *FCC v. Pacifica Found.*, 438 U.S. 726 (1978);
- *CBS, Inc. v. Democratic Nat'l Comm.,* 412 U.S. 94, 110-11 (1973);

55. \(\text{See id.}\)

ers who did not comply,\textsuperscript{57} is relevant to the issue of the CDA's constitutional-
ity.\textsuperscript{58}

Turning to the technological characteristics of the Internet, Judge Dalzell identified several unique Internet attributes he believed "render unconstitutional any regulation of protected speech on this new medium."\textsuperscript{59} They include:

* very low entry barriers that are substantially identical for speakers and listeners;
* significant access to all who wish to speak;
* relative parity among speakers in their ability to disseminate their ideas;
* a system designed to promote the speed of message delivery without
consideration to message content; and
* astounding diversity in the content of messages disseminated.\textsuperscript{60}

According to Judge Dalzell, these attributes have enabled the Internet to become "the most participatory marketplace of mass speech that this country—and
indeed the world—has yet seen,"\textsuperscript{61} thereby entitling the Internet to "the highest
protection from governmental intrusion."\textsuperscript{62} Having documented how the CDA
would severely diminish the Internet's unique attributes and its ability to continue
being the most participatory marketplace of ideas,\textsuperscript{63} Judge Dalzell held,

\textsuperscript{57} See id. at 742-51.
\textsuperscript{58} See ACLU, 929 F. Supp. at 874-77. In Pacifica, the U.S. Supreme Court used two broadcast characteristics other than scarcity of broadcast frequencies—its "uniquely pervasive presence in the lives of all Americans" and the way it is "uniquely accessible to children"—to justify allowing government content regulation of broadcast speech. See Pacifica 438 U.S. at 748-49. Nevertheless, Judge Dalzell stated that the Supreme Court implicitly limited the application of Pacifica to media facing scarce operating resources when it declined to extend the First Amendment precedents established for the broadcast media to cable television. ACLU, 929 F. Supp. at 876-77. For he believed cable television is no less pervasive in Americans' lives or less accessible to children that are the broadcast media. Id.
\textsuperscript{59} Id. at 867. ACLU also addressed the Internet's key attributes and how the CDA will interfere with them. See id. at 877-82.
\textsuperscript{60} See id. at 877.
\textsuperscript{61} Id. at 881. Indeed, Judge Dalzell seems to have bought whole cloth the plaintiffs' view that the Internet has "democratized" communication as he delivered the following tribute to the wonders of the Internet:

\begin{quote}
(Individual citizens of limited means can speak to a worldwide audience on issues of concern to them. Federalists and Anti-Federalists may debate the structure of their government nightly, but these debates occur in newsgroups or chat rooms rather than pamphlets. Modern-day Luthers still post their theses, but to electronic bulletin boards rather than the door of the Wittenberg Schlosskirche. More mundane (but from a constitutional perspective, equally important) dialogue occurs between aspiring artists, or French cooks, or dog lovers or fly fishermen.
\end{quote}

Id. at 881.

\textsuperscript{62} Id. at 883. Judge Dalzell eloquently supported this conclusion in the penultimate paragraph of his opinion, wherein he stated:

True it is that many find some of the speech on the Internet to be offensive, and amid the din of cyberspace many hear discordant voices that they regard as indecent. The absence of governmental regulation of Internet content has unquestionably produced a kind of chaos, but as one of the plaintiffs' experts put it...: What achieved success was the very chaos that the Internet is. The strength of the Internet is that chaos.

Id. Just as the strength of the Internet is chaos, so the strength of our liberty depends upon the chaos and cacophony of the unfettered speech the First Amendment protects. (Footnotes omitted).

\textsuperscript{63} See id. at 881. Judge Dalzell identified several detrimental impacts the CDA would have on the Internet, including:

* Making, for the first time, speech content a major factor in determining the extent to which persons will choose to become Internet speakers; See ACLU, 929 F. Supp. at 877-78;
* Raising the barriers to entry of those who would have to deploy some type of technology capable of keeping children from being exposed to their speech; See id. at 878;
* Diminishing the diversity of speech disseminated on the Internet, as persons censor themselves rather than risk a possible CDA prosecution; See id.;
without hesitation, "that the CDA is unconstitutional on its face."\textsuperscript{64}

As to the notion that protecting children from indecent material should take priority over preserving the free-wheeling international dialogue taking place on the Internet, Judge Dalzell argued it "is as dangerous as it is compelling."\textsuperscript{65} Thus, he opined that "[r]egulations that 'drive certain ideas or viewpoints from the marketplace' for children's benefits . . . risk destroying the very 'political system and cultural life' . . . they will inherit when they come of age."\textsuperscript{66} After hypothesizing that laws designed to protect children from indecent speech would be held unconstitutional as applied to newspapers, novels, the village green, and the mail,\textsuperscript{67} he declared that the result should be the same for the Internet because it "is a far more speech-enhancing medium than print, the village green, or the mails."\textsuperscript{68} Moreover, Judge Dalzell noted that upholding the CDA would destroy the free-wheeling international Internet dialogue without really shielding children from Internet pornography, because much of it originates from foreign sources.\textsuperscript{69} He therefore suggested that society be content with the existing means of protecting children from pornography, which includes prosecution of those who expose children to obscenity, parental acquisition and installation of an increasing variety of screening technologies, and direct parental supervision of children while they use the Internet.\textsuperscript{70}

IV. THE UNITED STATES SUPREME COURT'S DECISION

The United States Supreme Court upheld the three-judge district court's holding that the CDA violated First Amendment Free speech rights,\textsuperscript{71} but it declined to consider whether it also violated Fifth Amendment Due Process Rights.\textsuperscript{72} In doing so, it managed to form a seven justice majority opinion on all relevant issues.\textsuperscript{73} Moreover, the two justices not joining the majority opinion disagreed in only one minor respect: they would have upheld the CDA only to the extent that its indecent transmission and specific person provisions "prohibit the use of indecent speech in communications between [one] adult and one or more minors."\textsuperscript{74}

The district court presented the Supreme Court with a menu of justifications for declaring the CDA unconstitutional. In supporting its decision, the majority employed a smorgasbord of justifications that ratified substantially the district court's vagueness and overbreadth holdings.\textsuperscript{75} It also adopted much of the district court's reasoning in rejecting various defenses offered by the gov-

\begin{itemize}
  \item Reducing significantly the relative parity among Internet speakers in favor of commercial speakers who can afford verification technology, would charge users of their sites, or engage in speech with mass appeal; See id. at 878-79; and
  \item Reducing adult participation in the Internet as speakers leave or refuse to enter Internet and others alter their speech to avoid CDA prosecutions. See id. at 879.
\end{itemize}

64. ACLU, 929 F. Supp. at 883.
65. Id. at 882.
66. Id. (citations omitted).
67. See id. at 882.
68. Id.
69. See id. at 882-83.
70. See ACLU, 929 F. Supp. at 883.
72. See id. at 2341.
73. See id. at 2333. Justice Stevens delivered the opinion of the Court, joined by Justices Scalia, Kennedy, Souter, Thomas, Ginsburg and Breyer. See id.
74. Id. at 2357 (O'Connor, J., concurring in part and dissenting in part).
75. See id. at 2344-46 (vagueness), 2346-50 (overbreadth).
A. Cases Allowing the Regulation of Indecent Speech Rejected

The majority rejected government arguments that this case should be controlled by three Supreme Court decisions which upheld government content regulations designed to protect children from material that is not obscene as to adults.77 These cases were:

* City of Renton v. Playtime Theatres, Inc.,78 in which the Court upheld zoning ordinances to keep adult movies out of residential areas;79

* Pacifica, which upheld administrative sanctions against a radio station that broadcast a monologue entitled “Filthy Words,” because the repeated use of certain words referring to sexual or excretory activities and organs were deemed patently offensive in the context of an afternoon broadcast with children in the audience;80

* Ginsberg v. New York,81 which permitted the government to forbid the sales to minors of materials not obscene as to adults because the state has an independent interest in the welfare of its youth and “the parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.”82

Renton was rejected as a controlling precedent because the purpose of the zoning was not to prohibit the dissemination of speech, but to protect the neighborhood from secondary effects of adult movie theaters, such as crime and lower property values.83 This made Renton a time, place and manner regulation case,84 which means it is inapplicable to Reno since “the CDA is a content-based blanket restriction on speech.”85

The majority joined Judge Dalzell in rejecting Pacifica as a controlling precedent, but it did so on grounds much different than those of Judge Dalzell.86 Whereas Judge Dalzell held that Pacifica applied only to media with scarce operating resources, the majority emphasized other differences between the circumstances facing the broadcast media and those faced by the Internet. First, the Pacifica administrative order was issued by an agency that had long regulated out-of-the-ordinary program content by determining when, not whether, it could be heard.87 In contrast, the CDA banned the dissemination of certain speech on the Internet without the benefit of an “evaluation by an agency familiar with the [Internet’s] unique characteristics.”88 Second, Pacifica did not

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76. See id. at 2341-43 (rejecting the use of prior precedents upholding government content regulations to insulate children from indecent material). Id. at 2343-44 (rejecting content regulation precedents from broadcasting cases because of the differences in operational characteristics between broadcast media and the Internet). Id.
77. See Reno, 117 S. Ct. at 2341-43.
78. 475 U.S. 41 (1986).
79. See id. at 54.
82. Id. at 639-40.
83. See Reno v. ACLU, 117 S. Ct. 2329, 2342 (citing Renton, 475 U.S. 41, 49 (1986)).
84. See id.
85. Id.
87. See Reno, 117 S. Ct. at 2342.
88. Id.
criminalize the targeted speech,\textsuperscript{89} whereas the CDA imposes criminal penalties on violators.\textsuperscript{90} Third, radio broadcasts have historically "received the most limited First Amendment protection,"\textsuperscript{91} primarily because of their propensity to subject listeners to unwanted material.\textsuperscript{92} At the time of the CDA's enactment, the Internet had never been subject to content regulation, and the district court expressly found "that the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material."\textsuperscript{93}

Finally, the majority distinguished the law at issue in \textit{Ginsburg} from the CDA in four important respects. First, unlike the CDA, the \textit{Ginsburg} law allowed parents to give their own children access to offensive materials.\textsuperscript{94} Second, the \textit{Ginsburg} law applied only to commercial transactions, while the CDA covers commercial and non-commercial dissemination of speech.\textsuperscript{95} Third, the \textit{Ginsburg} law required the material to be obscene as to minors, meaning it had to be "utterly without redeeming social importance for minors,"\textsuperscript{96} but the CDA applies to more material than that which would be deemed obscene and contains undefined terms that make it difficult for speakers to know what material is proscribed.\textsuperscript{97} Fourth, the \textit{Ginsburg} statute applied only to minors under age 17, while the CDA applies to minors under age 18, thus expanding by a year the class of persons who can be denied access to certain material.\textsuperscript{98}

\section*{B. Internet and Broadcasting Media Differences Identified}

As did the district court, the Supreme Court distinguished the characteristics of the Internet from those of broadcast media to justify refusing to apply content-restrictive precedents established in broadcast cases to the Internet.\textsuperscript{99} The Supreme Court and the district court agreed that broadcast precedents should not be applied to the Internet, however, they did not use the same reasoning to come to that conclusion. The district court relied simply on the Internet not sharing the broadcast media's scarce operational resource characteristic.\textsuperscript{100} The majority found that three characteristics that were important factors in the broadcast media being subjected to more speech regulation than other media:

\begin{itemize}
  \item A history of extensive government regulation;\textsuperscript{101}
  \item Scarcity of available frequencies;\textsuperscript{102} and
  \item An invasive nature.\textsuperscript{103}
\end{itemize}

It then observed that the Internet has never been subjected to government regulation,\textsuperscript{104} Internet "communications . . . do not 'invade' an individual's home or

\begin{footnotesize}
\textsuperscript{89} See \textit{id.} (citing FCC v. Pacifica Found., 438 U.S. 726, 750 (1978)).
\textsuperscript{90} See \textit{id.}
\textsuperscript{91} \textit{Id.} at 2342 (citing \textit{Pacifica}, 438 U.S. at 748).
\textsuperscript{92} See \textit{id.}
\textsuperscript{93} \textit{Reno}, 117 S. Ct. at 2342.
\textsuperscript{94} See \textit{id.} at 2341 (citing Ginsberg v. New York, 390 U.S. 629, 639 (1968)).
\textsuperscript{95} See \textit{id.}
\textsuperscript{96} \textit{Id.}
\textsuperscript{97} See \textit{id.}
\textsuperscript{98} See \textit{id.}
\textsuperscript{99} \textit{See Reno}, 117 S. Ct. at 2343-44.
\textsuperscript{101} See \textit{Reno}, 117 S. Ct. at 2343 (citing Red Lion Broad. Co. v. FCC, 395 U.S. 367, 399-400 (1969)).
\textsuperscript{102} See \textit{id.} at 2343 (citing Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994)).
\textsuperscript{103} See \textit{id.} (citing Sable Comms. of Cal. Inc. v. FCC, 492 U.S. 115,128 (1989)).
\textsuperscript{104} See \textit{id.}
\end{footnotesize}
appear on one's computer screen unbidden . . . " and, as a provider of low-cost communications capacity to over 40 million users world-wide, the Internet cannot be considered afflicted with a scarcity of operational resources.

Although it relied on all the differences between the Internet and broadcast media discussed above to justify treating them differently for First Amendment purposes, the Supreme Court gave primary emphasis to the Internet's non-invasive nature. It did so by extolling Sable as the case most applicable to this one, because the medium in Sable, telephones used to access pornography, "requires the listener to take affirmative steps to receive the communication." This finding in Sable is practically identical to district court finding 89, in which it was determined that "the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial.

C. The CDA Deemed Unconstitutionally Vague

The majority agreed with Judge Buckwalter that the CDA is unconstitutionally vague, however, without explanation, the majority declined to follow Judge Buckwalter's lead and hold that the CDA's vagueness constituted a violation of the Fifth Amendment. It did agree with Judge Buckwalter that the CDA's failure to define the terms "indecent" and "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs" left the CDA so vague as to violate the First Amendment. However, Judge Buckwalter's opinion provided a detailed analysis of why the CDA was unconstitutionally vague, while the majority opinion simply stated that the CDA's flaw was its failure to define further the terms cited above. Nevertheless, both opinions agreed on why this vagueness violated the First Amendment: it prevents speakers from understanding what speech is invalid and subjects them to criminal penalties if their best guesses prove to be incorrect, thus, the CDA "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images."

The bulk of the majority's vagueness analysis constituted a refutation of the government's allegation that the CDA's terms were no less vague than those of Miller's obscenity standard, a task not undertaken by Judge Buckwalter. Miller's obscenity test is:

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

105. Id.
106. See id. at 2344.
110. Compare id. at 2344 with ACLU, 929 F. Supp. at 858-65 (Judge Buckwalter's opinion).
111. See Reno, 117 S. Ct. at 2344.
114. See Reno, 117 S. Ct. at 2345-46.
At best, the CDA indecency and patently offensive terms mean the same as part (b) of the Miller obscenity standard. But, the majority noted that Miller requires the open-endedness of its patently offensive standard to be closed by state laws specifically describing what material the state deems to be patently offensive. The majority also noted that part (b) deals only with sexual conduct, while the CDA includes depictions of excretory activities and sexual and excretory organs.

Moreover, the majority stated that all three prongs of the Miller test are required to keep it from being unconstitutionally vague. The majority especially cited the importance of part (c), which sets a national floor as to what may be literary, artistic, political or scientific value so as to “impose some limitations and regularity on the definition . . . .” To the majority, this was very important because under Miller, parts (a) and (b) are judged by purely local opinion so each state has an opportunity to assert its unique values as to what appeals to the prurient interest and what is patently offensive. Thus, the majority found that the CDA’s exclusive reliance on the terms “indecent” and “patently offensive” to describe the expressions that it proscribes undermines the whole rationale, which is “to establish a uniform national standard of content regulation” of Internet speech.

D. The CDA Deemed Unconstitutionally Overbroad

As did Judge Sloviter, the majority held that the CDA is unconstitutionally overbroad. In coming to this holding, much of the majority’s overbreadth analysis substantially paralleled that of Judge Sloviter. Thus, the majority found that, in the cause of protecting children from harmful speech, the CDA “suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.” It found that a main cause of this overbreadth is the CDA’s failure to define the terms “indecent” and “patently offensive.”

The majority also found that the overbreadth of this case was unprecedented, because:

* Its coverage is not limited to commercial speakers, it reaches non-profits and private speakers; and
* “[T]he ‘community standards’ criterion as applied to the Internet means that any communication available to a nation-wide audience will be judged

116. See Reno, 117 S. Ct. at 2345.
117. See id.
118. See id.
119. See id.
120. Id.
121. See id.
123. Id. at 2346.
124. See id. at 2347, wherein the majority stated its belief that by leaving these terms undefined, the CDA covers large amounts of non-pornographic material.
by the standards of the community most likely to be offended by the message."\(^{125}\)

The majority recited two original hypothetical examples of the CDA’s overbreadth which were premised on the proposition that "[i]t is at least clear that the strength of government’s interest in protecting minors is not equally strong throughout the coverage of this broad statute."\(^{126}\) Thus, said the majority,

Under the CDA, a parent allowing her 17 year-old to use the family computer to obtain information on the Internet, that she, in her parental judgment, deems appropriate could face a lengthy prison term. . . . Similarly, a parent who sent his 17-year-old college freshman information on birth control via e-mail could be incarcerated even though neither he, his child, nor anyone in their home community, found the material “indecent” or “patently offensive,” if the college town’s community thought otherwise.\(^{127}\)

The majority also rejected the government’s defenses mostly for the same reasons Judge Sloviter rejected them. In essence, the majority found that the technology for using the CDA’s affirmative defenses does not exist, and, even if such technology did exist, there was no evidence introduced suggesting that it would effectively keep minors from being exposed to indecent material.\(^{128}\) It also found that such technology would be too expensive for non-commercial speakers and some commercial speakers to use.\(^{129}\) Moreover, the majority found that methods enabling Internet receivers to block offensive material were now, and likely to be in the future, as effective in protecting children from indecent material as screening methods enabling Internet speakers to select their audience on the basis of age.\(^{130}\) This finding is important, because the blocking methods impose less burdens on Internet speakers, and the burdens the CDA impose “on adult speech [are] unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose . . . [of] the statute . . . .”\(^{131}\) In short, the majority refused “to rely on unproven future technology to save the statute.”\(^{132}\)

Apart from the issue of technology effectiveness, the government argued that the CDA’s “knowledge” and “specific child” requirements save the CDA from overbreadth.\(^{133}\) The essence of this argument is that these requirements insulate Internet speakers from CDA prosecution unless they send indecent

\(^{125}\) Id.
\(^{126}\) Id. at 2348.
\(^{127}\) Id.
\(^{128}\) See Reno, 117 S. Ct. at 2349. So, for example, the majority noted that tagging material with content warnings would be ineffective unless third parties beyond the control of Internet speakers, such as parents, took steps to use the warnings. See id. Similarly, the majority expressed doubts that credit card and adult code verification processes could successfully keep all minors from accessing indecent material. Id.
\(^{129}\) See id. at 2347, 2349.
\(^{130}\) See id. at 2347.
\(^{131}\) Id. at 2346.
\(^{132}\) Id. at 2350.
\(^{133}\) See id. at 2349.
material to someone they know is under age 18.134 The government further argued that such a requirement does not affect speakers’ abilities to disseminate material to adults.135 Noting that “most Internet fora . . . are open to all comers,” the majority held that these requirements do not save the CDA because they:

would confer broad powers of censorship, in the form of a “heckler’s veto,” upon any opponent of indecent speech who might simply log on and inform the would-be discoursers that his 17-year-old child—a “specific person . . . under the age of 18 years of age,” . . . —would be present.136

On appeal, the government argued that the Act’s prohibitions are limited to material lacking “redeeming social value.”137 The majority rejected this notion, stating “we find no textual support for the government’s submission that material having scientific, educational, or other redeeming social value will necessarily fall outside the CDA’s ‘patently offensive’ and ‘indecent’ prohibitions.”138

Given the inability of Internet speakers to control who receives their messages, the majority concluded that the CDA effectively acts as a ban on the dissemination of indecent but protected speech on the Internet.139 Citing Sable, the majority asserted that it had no duty to “defer to the congressional judgment that nothing less than a total ban would be effective in preventing enterprising youngsters from gaining access to indecent communications,”140 especially when that judgment was made on a congressional record containing little supporting evidence.141 Thus, the majority reasserted the Court’s duty to make an independent judgment as to whether “Congress has designed its statute to accomplish its purpose ‘without imposing an unnecessarily great restriction on speech.’”142

In a vain attempt to get the district court’s overbreadth holding reversed, the government argued that censorship of chat rooms, newsgroups, and mail exploders should be accepted constitutionally because the World Wide Web is still available on the Internet for the restricted speech to occur.143 In response, the majority noted that unless existing Web sites accommodated the speaker, it would cost $10,000 plus the costs of database management and age verification to send his or her message over the Web.144 This, said the majority, “is equivalent to arguing that a statute could ban leaflets on certain subjects as long as

134. See Reno, 117 S. Ct. at 2349.
135. See id.
136. Id.
137. Id.
138. Id.
139. See id. at 2346.
140. Reno, 117 S. Ct. 2346.
141. See id. at 2346-47 n.41.
143. See id. at 2348.
144. See id.
individuals are free to publish books.”\textsuperscript{145} Constitutionally, the bottom line for the majority was that this is a time, place and manner argument inapplicable to the determination of whether the content regulations of the CDA are constitutional.\textsuperscript{146}

Finally, the majority concluded that the CDA’s speech restriction amounted to “burning the house to roast the pig.”\textsuperscript{147} As a consequence, “[t]he CDA . . . threatens to torch a large segment of the Internet community.”\textsuperscript{148}

E. The CDA Not Saved by Severance

In its oral argument, the government stated what the majority characterized as its “ultimate fall-back position:” asking the Court to use a severability clause applicable to the CDA to sever unconstitutional provisions that are severable, and to narrow the construction of questionable nonseverable provisions so they will be constitutional.\textsuperscript{149} The majority declared that only the indecent transmission provision had text that could be severed.\textsuperscript{150} It then excised the word indecent from the indecent transmission provision, leaving it intact as a valid restriction on the dissemination of obscene material.\textsuperscript{151}

As to the nonseverable provisions, the government asked the Court not to invalidate them as to “application[s] to ‘other persons or circumstances’ that might be constitutionally permissible.”\textsuperscript{152} In response, the majority noted that such action would violate the terms of the CDA’s expedited appeal provision, which permitted the CDA to be challenged only facially.\textsuperscript{153} It also found that “[t]he open-ended character of the CDA provides no guidance what ever for limiting its coverage.”\textsuperscript{154} Under these circumstances, the majority said it would be an inappropriate act of judicial legislation to provide a narrowing interpretation.\textsuperscript{155}

F. Internet Does Not Need Fostering by CDA

On appeal, the government alleged that the CDA should be upheld as a tool for fostering the growth of the Internet.\textsuperscript{156} This was summarily rejected by the majority as being unsupported by the facts, which reveal that the Internet has expanded dramatically in the last few years.\textsuperscript{157}

\textsuperscript{145} Id. at 2348-49.
\textsuperscript{146} See Reno, 117 S. Ct. at 2348 (citing Consolidated Edison Co. of N.Y. v. Public Serv. Comm’n of N.Y., 447 U.S. 530, 536 (1980)).
\textsuperscript{147} Id. at 2350 (quoting Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 127 (1989)).
\textsuperscript{148} Id.
\textsuperscript{149} See id.
\textsuperscript{150} See id.
\textsuperscript{151} See id.
\textsuperscript{152} Reno, 117 S. Ct. at 2350.
\textsuperscript{153} See id.
\textsuperscript{154} Id.
\textsuperscript{155} See id. at 2351.
\textsuperscript{156} See id.
\textsuperscript{157} See id. In that regard, the majority noted at the outset of its opinion that:
V. JUSTICE O'CONNOR'S PARTIAL CONCURRENCE, PARTIAL DISSENT

Justice O'Connor concurred with the majority that the display provision is unconstitutional, because the lack of screening technology makes it impossible to construe the display provision in a manner that does not bar adults from receiving constitutionally protected speech.\(^{158}\) However, she accepted the government's argument that the indecent transmission and specific person provisions should be construed to contain a knowledge requirement.\(^{159}\) As construed, she held that these provisions were constitutional as applied to one adult sending a message he or she knows will be received only by minors.\(^{160}\) She justified her holding by observing that this requirement "in no way restricts the adult's ability to communicate with other adults."\(^{161}\) As an example, she stated that restricting what one adult can say to one or more minors in a chat room does not restrict what he or she can say to other adults, because there are no other adults participating in the chat room conversation and the adult speaker remains free to send indecent messages to adults in other conversations not involving the minors.\(^{162}\)

In reaching these conclusions, Justice O'Connor analyzed the CDA in a much different manner than did the majority. She characterized the CDA simply as an attempt to create restricted cyberspeech zones where minors are not present and adults are free to receive indecent communications.\(^{163}\) She was prompted to pursue this analysis by prior First Amendment cases that permit the creation of restricted speech zones as long as:

* Adults' access to protected speech is not unduly restricted; and
* "minors have no First Amendment right to read or view the banned material."\(^{164}\)

Justice O'Connor recited how previous attempts to create restricted speech zones involved a physical world where adults can be effectively segregated by geography and identity.\(^{165}\) But, she asserted that this physical world model is

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\(^{158}\) See Reno, 117 S. Ct. at 2354.

\(^{159}\) See id.

\(^{160}\) See id. at 2355.

\(^{161}\) Id.

\(^{162}\) See id.

\(^{163}\) See id. at 2351. She adopted this characterization because in her view, the CDA does not purport "to keep indecent (or patently offensive) material away from adults, who have a First Amendment right to obtain this speech." Id. at 2352 (citing Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989)). "Thus, [she concluded that] the undeniable purpose of the CDA is to segregate indecent material on the Internet into certain areas minors cannot access." Id.

\(^{164}\) Reno, 117 S. Ct. at 2353. As an example of such zoning approved by the U.S. Supreme Court, Justice O'Connor cited the case of, Ginsberg v. New York, 390 U.S. 629, 634 (1967) where "the Court sustained a New York law that barred store owners from selling pornographic magazines to minors in part because adults could still buy them." Reno, 117 S. Ct. at 2353.

\(^{165}\) See id. at 2353 (citing Lawrence Lessig, Reading the Constitution in Cyberspace, 45 EMORY L.J. 869, 886 (1996)).
inapplicable to the Internet, because:
* Gateway technology, the means by which Internet speakers can exclude persons from receiving Internet communications based on their identities, remains unavailable to some Web speakers and "is just now becoming technologically feasible for chat rooms and USENET newsgroups;"166 and
* Blocking technology, the means by which Internet receivers can shield themselves and their families from certain Internet sites, is still not available.167

Therefore, she sustained the majority judgment that the display provision is unconstitutional, because "until gateway technology is available throughout cyberspace, ... the only way for a speaker to avoid liability under the CDA is to refrain completely from using indecent speech."168

As noted above, Justice O'Connor concluded that communications where a single adult knows he or she is communicating only with minors constitute segregated zones, so that prohibiting the adult from sending indecent communications to the minors within these zones will not interfere with any other adult's right to receive indecent communications at other Internet sites.169 As a consequence, she was willing to construe the indecent transmission and specific person provisions as covering only these type of Internet communications for purposes of denying minors access to "indecent" or "patently offensive" speech.170

This zoning analysis did not address the vagueness and overbreadth issues. Turning to these issues, Justice O'Connor stated that her narrowing construction would still not save the indecent transmission and specific person provisions if the CDA's prohibitions on sending "indecent" or "patently offensive" communications to minors deprive minors of speech they are entitled to receive.171 The range of speech minors are entitled to receive is narrower than the range of protected adult speech, for the U.S. Supreme Court has held that material not obscene as to adults may still be obscene as to minors.172 Speech is obscene as to minors if it "(i) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable . . . for minors, (ii) appeals to the prurient interest of minors; and (iii) is utterly without redeeming social importance for minors."173

Justice O'Connor concedes that the CDA could ban some material that is not obscene as to minors "[b]ecause the CDA denies minors the right to obtain material that is "patently offensive"—even if it has some redeeming value for

166. Id. at 2354.
167. See id.
168. Id.
169. See id. at 2354-55.
170. See Reno, 117 S. Ct. at 2355.
171. See id. at 2356.
minors and even if it does not appeal to their prurient interests . . . "¹⁷⁴ Nevertheless, she refused to deem the CDA to be unconstitutionally vague or overbroad, for she contended that in cases involving facial challenges there must be “proof of ‘real’ and ‘substantial’ overbreadth.”¹⁷⁵ Justice O’Connor asserted that the plaintiffs and the majority had not offered such proof, because they failed to state examples of speech that was indecent or patently offensive as to minors but still offered minors socially redeeming value.¹⁷⁶ In particular, she stated her opinion that “discussion about prison rape or nude art . . . may have some redeeming education value for adults, [but] they do not necessarily have any such value for minors . . . "¹⁷⁷ Astoundingly, she also asserted that e-mail conversations between minors and adult family members could be the basis of a CDA prosecution, because there is “no support for the legal proposition that such speech is absolutely immune from regulation.”¹⁷⁸

VI. CRITIQUE

A. The Internet’s Victory Could Be Statutorily Reversed

Thanks to Reno, all Internet speakers are free from government content regulation of their protected speech. But, the terms of that victory present a recipe for a content regulating statute that could possibly be imposed constitutionally on some classes of Internet speakers.

This statute would:

* Apply to Internet speakers who the FCC has determined through rulemaking proceedings belong to classes of Internet speakers that could deny minors access to their communications by using screening methods the FCC has found to be economically and technically feasible for such classes to use;

* Impose a duty on such Internet speakers to use an FCC approved screening method appropriate to their class if they have been found in an FCC complaint procedure to have disseminated over the Internet material which describes, depicts or shows sexual or excretory activities or organs in a patently offensive way as measured by contemporary community standards for the Internet medium;

* Establish a complaint procedure so that persons encountering “patently offensive” material over the Internet may initiate FCC proceedings to determine whether the Internet speaker responsible for the dissemination of that material should be required to deploy an FCC approved screening method;

* Provide as absolute defenses:

¹⁷⁴ Id.
¹⁷⁵ Id. (citing Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).
¹⁷⁶ See id.
¹⁷⁷ Id.
¹⁷⁸ Id. at 2356–57.
** the use of an FCC approved screening technology or
** a determination that the aggregate effectiveness of Internet receivers using FCC approved blocking methods in restricting minors' access to the patently offensive material will be equal to or better than the effectiveness of the Internet speaker using an FCC approved screening method;

* Authorize the FCC to:
** monitor developments of screening and blocking methods,
** determine through rulemaking proceedings which methods are effective in denying minors access to patently offensive material on the Internet,
** determine through rulemaking proceedings which classes of Internet speakers have available to them effective screening methods that are technically and economically feasible for denying minors access to their communications; and
** determine through rulemaking proceedings which classes of Internet communications can be kept from minors as effectively by Internet receivers using blocking methods as by Internet speakers using screening methods;

* Impose civil fines on Internet speakers who violate FCC orders to deploy an approved screening method.

Such a statute should have a fighting chance of surviving vagueness and overbreadth attacks, provided it is enacted after the Congress engages in in-depth hearings about the extent of patently offensive material on the Internet and the availability of technically and economically feasible screening and blocking methods.\(^{179}\)

First, the proposed statute eliminates the prospects of criminal prosecution by substituting administrative regulation backed by civil fines for penal regulations backed by criminal penalties. This substitution should go a long way toward convincing the Court to judge the statute by the relaxed First Amendment standards applicable to broadcast media and cable TV. For in eliminating the extraordinary chilling effect criminal penalties have on the exercise of protected speech,\(^{180}\) and subjecting the Internet to regulation by an agency charged with becoming expert about its unique characteristics, the statute possesses two of the criteria the Reno majority found were major factors in the Court adopting more relaxed First Amendment standards in Pacifica.\(^{181}\)

Second, the proposed statute will neither ban indecent speech from the

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179. Such hearings would overcome the Supreme Court's concerns that the CDA was not enacted on the basis of sound Congressional findings. See Reno, 117 S. Ct. at 2338 n.24, 2346 n.41.


181. See Reno, 117 S. Ct. at 2342-43, where the Court refused to apply the relaxed First Amendment standards of Pacifica to the CDA because it contained criminal penalties and the Internet has not been subjected to regulation by an expert administrative agency.
Internet nor deny adults access to material they have a right to receive. It frees from regulation all Internet speakers deemed by the FCC to not have access to technically and economically feasible screening methods for denying minors access to their indecent speech. Internet speakers complying with FCC regulations requiring them to use FCC approved screening methods may disseminate indecent speech to those who pass the screening process without fear of being penalized. Thus, the proposed statute operates only to insure that indecent speech is channeled away from minors whenever it is feasible to do so, which was precisely the goal of the FCC order and regulations at issue in Pacifica. 182 By merely mandating the use of means for channelling indecent speech, rather than effectively banning it from the Internet, the proposed statute possesses a third criterion that the Reno majority found was a significant factor in the Pacifica Court approving relaxed First Amendment standards. 183

Third, the substitution of administrative process for criminal prosecution may also help this statute withstand vagueness and overbreadth attacks, even though it uses language substantially identical to the CDA provisions struck down in Reno because their vagueness produced unconstitutional overbreadth. Just last term, in Denver Telecom, the Court upheld the constitutionality of section 10(a) of the Cable Television Consumer Protection and Competition Act of 1992 [the Cable Act], 184 in the face of a vagueness attack. 185 Section 10(a) permits cable operators to prohibit "programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." 186 This language is virtually identical to the language of the CDA’s display and specific person provisions, and therefore does not include the prurient interest and socially redeeming value prongs of the Miller obscenity test. Nevertheless, in the context of the permissive non-criminal content regulation scheme at issue in Denver Telecom, a four Justice plurality 187 rebuffed a vagueness attack on section 10(a) because it contained one of the three prongs of the Miller obscenity standard, came with a legislative history suggesting that it would not be applied to scientific or educational programs, and contained procedural safeguards to protect speakers against overly broad applications. 188 Similarly, the proposed statute contains one of the three prongs of Miller’s obscenity standard, provides procedural safeguards to protect Internet speakers from overly broad applications, and could come with a legislative or administrative history making it clear that it will not be applied to scientific and educational programs. It is true that, in not containing all the prongs of the Miller

183. See Reno, 117 S. Ct. at 2342-43.
187. The plurality consisted of Justice Breyer, writing for himself and Justices Stevens, O’Connor and Souter. See Denver Telecom, 116 S. Ct. at 2382-90.
188. See Denver Telecom, 116 S. Ct. at 2389-90.
obscenity standard, the proposed statute will cover more material than that which is deemed constitutionally obscene. But, this argument was rejected in *Pacifica*, where the regulations were expressly designed to regulate indecent speech that did not necessarily appeal to the prurient interest or might have socially redeeming value as to adults. For in *Pacifica*, the Court accepted content regulation of protected speech because, as does the proposed statute, the regulation was enforced by administrative, not criminal, process and it channelled, rather than banned, the offensive material.

Fourth, the proposed statute tailors its contemporary community standards requirement to the medium to which it is applied. This cures the omission Judge Buckwalter found made the CDA’s display and specific person provisions unconstitutionally vague. It also satisfies the medium-specific context requirement of *Pacifica*, where the Court emphasized that the *Pacifica* regulations were judged to be constitutional in light of the unique characteristics of the broadcast radio medium.

Fifth, even if the Court persists in holding that the Internet’s unique characteristics immunize it from *Pacifica*’s relaxed First Amendment Standards, the proposed statute can be easily modified to meet the *Ginsburg* standards so as to still permit the FCC to regulate some speech that is protected as to adults. The type of content regulation approved by the Court in *Ginsburg* amounts to adult speech zoning, where purveyors of communications deemed obscene only as to minors are required to take steps reasonably calculated to deny minors, but not adults, access to the proscribed speech.

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189. See Reno v. ACLU, 117 S. Ct. 2329, 2344-46 (1997) (wherein the majority finds the CDA to be constitutionally overbroad because its display and specific person provisions contain only one of the three prongs of the Miller obscenity standard).

190. See FCC v. Pacifica Found., 443 U.S. 726, 741 (1979) (where the Court stated that “neither our prior decisions nor the language and history of § 1464 supports the conclusion that prurient appeal is an essential component of indecent language...”). See also id. at 732 n.5, where the Court referred to an FCC suggestion that “If an offensive broadcast had literary, artistic, political, or scientific value, and were preceded by warnings, it might not be indecent in the late evening, but would be so during the day, when children are in the audience.” Id.

191. See id. at 733, 744-46, 747 (especially n.25), 750 (especially n.28), 751. As to the channeling aspect of the regulation, the Court concluded that “when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend upon proof that the pig is obscene.” Id. at 750-51. See also Reno, 117 S. Ct. at 2342 (where the majority refused to apply Pacifica to the CDA in part because the CDA involved criminal, rather than administrative, process and effectively banned, rather than channelled, the offensive speech).

192. See ACLU v. Reno, 929 F. Supp. 824, 862-63 (E.D. Pa. 1996) where Judge Buckwalter observed that:

Notably, . . . in [the] telephone and cable television cases the FCC had defined indecent as patently offensive by references to contemporary standards for that particular medium. . . . Here, the provision is not so limited. In fact, there is no effort to conform the restricting terms to the medium of cyberspace, as is required by *Pacifica* and its progeny.

Id.

193. See *Pacifica*, 443 U.S. at 748-51.

194. See Reno, 117 S. Ct. at 2351-54 (O’Connor, J., concurring in part, dissenting in part). Such adult speech zoning has been successfully applied by the states to movie theaters and live performance venues. See id. at 2352 n.1 (O’Connor, J., partial concurrence, partial dissent) (citing to a myriad of state statutes prohibiting the access of minors to various adult entertainments); *Pacifica*, 443 U.S. at 758 (Powell, J., concurring opinion) (citing Ginsberg v. New York, 390 U.S. 629, 634-35 (1967) for the proposition that “[s]ellers of printed and recorded matter and exhibitors of motion pictures and live performances may be

https://digitalcommons.law.utulsa.edu/tlr/vol33/iss1/9
The proposed statute would meet the Ginsburg adult speech zoning requirements if it were amended to apply only to Internet speech matching Ginsburg’s definition of material that is obscene as to minors. The required amendments need only make it clear that the Internet communications regulated by the proposed statute are “‘patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable ... for minors’; [appeal] to the prurient interest of minors; and [are] ‘utterly without redeeming social importance for minors.’” 195 By limiting its reach to Internet speakers with access to feasible screening methods, and providing that the use of those methods is an absolute defense, the proposed statute simply requires affected Internet speakers to take actions the FCC believes will be reasonably effective in denying minors access to their communications while leaving the Internet speakers fully capable of reaching their intended adult audiences. These limitations should also take care of two other concerns the Reno majority expressed in denying Ginsburg treatment to the CDA: the CDA’s lack of a parental consent exemption and its application to non-commercial speakers. 196 In contrast to the CDA, the proposed statute will permit minors to gain access to adult speech zones on the Internet only by giving the purveyors of those zones the proper screening information, which they will not be able to do without a parent’s cooperation unless they commit fraud or theft. The proposed statute may reach some non-commercial Internet speakers, but only those who can technically and economically screen minors from their intended audiences without significantly burdening their abilities to communicate with adults. Although the Ginsburg statute applied only to commercial speakers, it did not prohibit governments from regulating non-commercial speakers whose speech produces the harm the Ginsburg statute was designed to prevent. 197 Finally, even though the Reno majority seems to have found constitutional significance in the CDA covering minors up to 17 years of age while the Ginsburg statute covered minors below age 16, 198 it is hard to believe the Court would find unconstitutional a regulatory scheme that is administrative, produces no speech bans, and permits adults to have access to all protected adult speech simply because it covers minors 17 years of age.

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required to shut their doors to children, but such a requirement has no effect on adults’ access”).

196. See id. at 2341.
197. See id. at 2357 (O’Connor, J. partially concurring, partially dissenting) (where Justice O’Connor opined that there is “no support for the legal proposition that ... speech [between minors and family members] is absolutely immune from regulation”). It is also interesting to note that, presently, commercial pornographers comprise the one class of speakers that is making extensive use of screening methods. See id. at 2340, 2349; ACLU, 929 F. Supp. at 879 (Dalluli, J.).
198. See id. at 2341.
B. The Internet May Be Exempt From Protected Speech Regulations

Notwithstanding the above analysis, the Reno outcome was in part based on the majority’s view that First Amendment protections must be tailored to the Internet’s unique characteristics as a communication medium.\(^\text{199}\) It could be that the Court will ultimately find that the Internet’s unique characteristics qualify it for permanent exemption from regulation of protected speech.\(^\text{200}\)

In Reno, the majority focussed on two unique Internet characteristics to justify its decision not to apply the relaxed First Amendment standards applicable to broadcasting to the Internet.\(^\text{201}\) First, the majority found that the Internet is not afflicted by a scarcity of key operational resources as is the broadcasting industry.\(^\text{202}\) Second, the majority concurred with the district court’s findings that:

* "Communications over the Internet do not ‘invade’ an individual’s home or appear on one’s computer screen unbidden,"
* "Users seldom encounter content ‘by accident,’”
* "Almost all sexually explicit images are preceded by warnings as to the content,” and
* "[the] ‘odds are slim’ that a user would come across a sexually explicit sight [sic] by accident.\(^\text{203}\)"

In addition, the district court also found that:

* "Although content on the Internet is just a few clicks of a mouse away from the user, the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial,” and
* "A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended.\(^\text{204}\)"

Thus, the majority limited the reach of Pacifica to media that have the potential to surprise a receiver with unwanted offensive speech simply by being turned on and classified the Internet more as a communications medium with user access characteristics similar to the telephone than as an entertainment medium such as radio or television.\(^\text{205}\)

It would be foolish for Internet advocates to rely on the scarcity of opera-

\(^{199}\) See id. at 2343-44.

\(^{200}\) That certainly was the view of Judge Dalzell. See ACLU, 929 F. Supp. at 867, 872-83. But Judge Buckwalter expressly stated it was too early in the Internet's development to come to that conclusion See id. at 859. Justice O'Connor appeared to suggest that the Internet's constitutional status could change depending on future developments of screening and blocking technologies. See Reno, 117 S. Ct. at 2353-54. The majority placed heavy emphasis on Internet characteristics and the status of screening and blocking technologies that could change. See id. at 2343-44 (Internet characteristics), 2349-50 (screening and blocking technologies).

\(^{201}\) See Reno, 117 S. Ct. at 2343-44.

\(^{202}\) See id. at 2344, where the majority found that because the Internet "provides relatively unlimited, low-cost capacity for communication of all kinds," including "not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue, ... our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." Id.

\(^{203}\) Id. at 2343 (citing District Court Finding 88, ACLU, 929 F. Supp. at 844-45).

\(^{204}\) ACLU, 929 F. Supp. at 845 (citing District Court Finding 89).

\(^{205}\) See Reno, 117 S. Ct. at 2343-44.
tional resources rationale to provide the Internet with a permanent exemption from the regulation of protected speech. Just last term, in Denver Telecom, a four Justice plurality of the Court relied heavily on Pacifica’s rationale to uphold content regulation of protected speech on leased access cable TV channels, despite the Court’s express finding in Turner I that the First Amendment rules applicable to broadcasting were inapplicable to cable TV because cable TV was not afflicted with a scarcity of key operational resources. Moreover, rapid growth in the number of Internet users is straining the adequacy of key resources needed to handle the increased traffic, including the public switched telephone networks of local exchange telephone companies, the connections that carry information from one Internet computer to another (known as “pipes” or band-width), and the resources of Internet Service Providers (ISPs) for keeping up with their rapidly expanding points of presence (POPs). As a consequence, the Internet may soon experience scarcities of key operational resources, a key factor the Court has used to justify regulating the content of protected speech on broadcast media.

The district court’s findings accepted by the Supreme Court concerning the relative difficulty of children encountering indecent material on the Internet are questionable, inconsistent with other district court findings, not likely to be true in the future, and irrelevant to the adult speech zoning rationale for regulation. Every medium has a protocol that potential receivers must choose to follow to gain access to the expressive material it offers. In that sense, no communications on any medium, including radio, TV, telephone or Internet, “invade” a home or appear unbidden.

Nevertheless, the Supreme Court has three times in eight years attached great constitutional significance to the fact that some media require receivers to take more steps than others to access the expressive material they offer. In Sable, the Court refused to apply relaxed First Amendment standards applicable to broadcasting to telephone Dial-a-Porn services in great part because “[p]lacing a telephone call is not the same as turning on a radio dial and being

206. See Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2385-87 (1996), wherein Justice Breyer used Pacifica to justify regulating protected speech on cable TV because he found cable TV and broadcast TV subjected children to the risk of being exposed to patently offensive material in similar ways.

207. See Turner Broad. Sys., Inc. v. FCC, 114 S. Ct. 2445, 2456-57 (1994). Here, the Court expressly found that “given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium.” Id.


210. See id.

211. But see, William Schrader, Why the Internet crash will never happen; State of the Art; Internet/Web/Online Service Information, in 31 TELECOMMUNICATIONS 25 (1997) for an alternative view contending that “[t]he Internet is here to stay as the platform by which businesses routinely interact with suppliers, reach out to customers, and streamline their own internal functions,” and answering a number of charges, he calls myths, that the Internet is doomed to crash. Id.
taken by surprise by an indecent message." Moreover, the Court in Sable went on to state that "[u]nlike 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." Conversely, in Denver Telecom, the four Justice Plurality applied relaxed First Amendment standards to cable TV after finding that cable TV is as pervasive, accessible to children, and capable of exposing citizens without warning to patently offensive material in the privacy of their own homes as is radio. In Reno, the majority ignored the district court’s findings that a person using a computer in his or her home can “accidentally retrieve material of a sexual nature through an imprecise search.” The Reno majority also ignored the fact that chat room participants often have unwanted sexual advances or materials thrust on them by cybersexual predators. So, it would seem that the Internet is a medium where a receiver can be surprised by unwanted exposures to indecent material or communications.

What then is the great difference between the Internet and Cable TV that justifies treating them so differently? The Reno majority seems to say that the difference is that people are more likely to encounter indecent material accidentally on broadcast media than on the Internet. Intuitively, this assertion seems questionable. Given that many people have a good idea what they will encounter at various times on cable TV, the truly accidental encounters with indecent material on cable TV may be no greater on a percentage basis than those on the Internet. If there is such a difference, its magnitude is likely to diminish in the future as cyberentrepreneurs compete vigorously for technology breakthroughs that will permit the Internet to fuse seamlessly with televis-

213. Id.
216. As one recent article reported, "chat rooms offer still another challenge. Public chat groups aren’t always monitored and private ones never are monitored, unless improprieties are reported to service providers. Experts warn children to avoid private chat rooms-that’s where predators, often posing as children, work best." Stacie Zoe Berg, Helping Kids to Surf Safely, WASH. TIMES, Aug. 4, 1997, at Part Life, p. 42. And, another article reported on parents’ experience as follows:

Although she did spend some time with her boys while they chatted online, she could not sit with them all the time, and they found their way into private chat rooms, where they were offered, and accepted, pornographic pictures.

“Was any lasting damage done?” she wondered. “I would say ‘Yes’-not because my children have become victims of sexual predators-but because one of their early sexual images will, forever, be something which is not tender or beautiful, or even harmlessly titillating; but something which is coarse, vile and ugly.”

Debra Gersh Hernandez, Controlling Cyberporn: Numerous First Amendment questions arise as the government attempts to regulate content of online information services, ED. & PUB. MAG., Aug. 26, 1995, at 35.
218. See, e.g., Justice Thomas’ assertion in Denver Telecom that “[m]ost sexually oriented programming [on cable TV] appears on premium or pay-per-view channels that are naturally blocked from nonpaying customers by market forces.” Denver Telecom, 116 S. Ct. at 2428 (Thomas, J., concurring in part and dissenting in part).
In any event, one Internet characteristic certainly will continue to exist: Curious kids will be attracted to its many sexual offerings. In this respect, it is no different than the bookstores selling dirty books that were the subject of regulation in Ginsburg. The government still has an interest in the "well-being of its children" and in supporting "parents' claim to authority in their own household." A statute designed to establish adult speech zones, as proposed above, will further that interest in a manner likely to meet the Court’s strict scrutiny test, for it will keep minors away from material deemed obscene as to them while allowing adults to have access to all protected adult speech.

The Internet does possess one characteristic that could be the silver bullet enabling Internet supporters to fend off protected speech regulation permanently. "Once a provider posts its content on the Internet, it cannot prevent that content from entering any community." This means using contemporary community standards to judge whether an Internet communication is obscene as to minors will inevitably give control over whether an Internet speaker will be regulated to the community that least tolerates speech with sexual content. Just requiring an Internet speaker to screen its viewers imposes burdens on First Amendment rights, because potential receivers will be subjected to a process that will delay their access to the regulated speaker’s communications and strip them of their anonymity. The combination of delay and invasion of privacy could discourage potential receivers from attempting to gain access to the communications of Internet speakers subject to a screening requirement. If the community with the least tolerance of sexual materials can force an Internet speaker to implement screening technology, then receivers in communities not offended by the speaker’s communication must bear the costs of upholding the views of the complaining community. The Court may see this collective burden as too great a burden on the exercise of First Amendment rights. On the other hand, the Court may not permit the adoption of a national standard for determining what is patently offensive, since in Miller it determined that "our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 states in a single formu-

219. See John Markoff, A Face-Off on TV Link to the Internet, N.Y. TIMES, Sept. 11, 1997, at D5.
220. See Sonya Colberg, Sex.Com: Precocious Youths Can Search Net for Excitement, THE TULSA WORLD, Aug. 17, 1997, at D1, wherein it was reported that more that 937,000 matches appeared when "sex" is used as a search term, while more than a million more entries appeared in response to phrases like "hot girls" and "hot hunks." See also Stacie Berg, Helping Kids to Surf Safely, WASH. TIMES, Aug. 4, 1997 Part Life, at p.42 (wherein it was reported that "PC Meter, a market-research company, found that in May, 11 percent of kids between ages 2 and 11, and 25 percent of teens ages 12 and 17, visited Web sites containing nudity").
222. See Reno, 117 S. Ct. at 2351-57 (O’Connor, J., concurring in part and dissenting in part).
224. See Reno, 117 S. Ct. at 2347.
226. See id. at 849.
227. See id. at 846-47, 849.
C. Reno May Have Refuted Denver Telecom’s Relaxed Standards

In Denver Telecom, a four-Justice Plurality rejected the traditional strict scrutiny First Amendment standard applicable to content regulation in favor of a more flexible scrutiny standard.229 It did so out of concern that past First Amendment standards may not fit a rapidly changing telecommunications sector.230 Specifically, under this standard “government may directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech.”231 This standard is weaker than the traditional First Amendment standard, which states that content regulation of protected speech is unconstitutional unless it is narrowly tailored to meet a compelling government interest.232 The Court intended this standard to be weaker so as to give the government more flexibility to regulate protected speech as a means of meeting perceived new problems arising from rapidly changing technology.233 Given how rapidly telecommunications technology is changing, this more flexible scrutiny virtually licenses government to engage in greater censorship. Fortunately, in Reno, a case involving a medium awash in changing technology, the Court did not even mention the flexible scrutiny standard of Denver Telecom even though Reno’s two opinions were authored by two of its four creators. Perhaps this silence signifies the well-deserved death of the aberrational logic of the Denver Telecom Plurality.

VII. CONCLUSION

In the short term, Internet devotees will surely praise Reno because it saved Internet speakers from a government attempt to regulate their protected speech. Unfortunately, the terms of the Internet’s victory in Reno may not have provided the Internet with permanent relief from this type of censorship. For the majority opinion could be viewed either as a declaration that the Internet has been permanently exempted from protected speech regulation because of its unique characteristics or simply as a rejection of a flawed statute. The distinction is crucial, because if Reno is just a rejection of a flawed statute, the government may in the future succeed in subjecting the Internet to protected speech regulation by enacting a new statute with more precisely defined terms. Moreover, even if Reno is viewed as having classified the Internet as a medium exempt from protected speech regulation, the protection it extends may only be

230. See id. at 2384-85.
231. See id. at 2385.
temporary if the Internet does not continue to exhibit the characteristics used by the Court to justify the exemption.

Beyond its effects on the Internet, Reno may have a longer lasting impact as to what First Amendment standards the Court uses to determine the constitutionality of speech content regulations imposed on communications media undergoing profound technological and economic change. For although it did not expressly reject the woefully relaxed First Amendment standard newly created and applied last term in Denver Telecom, the Court appears to have impliedly rejected it simply by using without comment its traditional strict scrutiny standard.