

## TAMING CYBERSPACE: BROADCASTING AS A MODEL FOR REGULATING THE INTERNET

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### I. INTRODUCTION

The Internet is a modern technological marvel, inundating users with information “as diverse as human thought.”<sup>1</sup> Web surfers can find affordable and convenient access to a variety of educational resources while partaking in unrestrained forums that debate religious, political, and social concerns.<sup>2</sup> Information diversity in an uncensored state, however, has brought an alarming amount of sexually explicit material to children with just a few clicks of a mouse. There are millions of Web sites now dedicated to the marketing and distribution of online pornography.<sup>3</sup> The increased availability of such material has led to an explosion of criticism regarding the legislative efforts to regulate this new medium of communication.

The legal context for restricting sexually explicit material is guided by the First Amendment of the U.S. Constitution, providing that “Congress shall make no law . . . abridging the freedom of speech.”<sup>4</sup> This protection exists to preserve a marketplace of ideas essential to the functioning of a democracy.<sup>5</sup> Yet this freedom is “not absolute.”<sup>6</sup> Although the First Amendment does not protect child pornography<sup>7</sup> or obscenity,<sup>8</sup> exceptions to this protection are rare because any legislation based on content is “presumptively invalid.”<sup>9</sup> Consequently, proposed legislation devoted to protecting children on the information superhighway is also struggling to uphold First Amendment speech rights.

Concern for protecting children has spawned two federal laws designed to regulate online pornography. Congress’s first attempt was the

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1. *ACLU v. Reno*, 929 F. Supp. 824, 842 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844 (1997).

2. *Id.* at 842-43.

3. Mark Kastleman, *It’s Not About the First Amendment*, [http://www.contentwatch.com/learn\\_center/article/102](http://www.contentwatch.com/learn_center/article/102) [hereinafter Kastleman, *First Amendment*].

4. U.S. CONST. amend. I.

5. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”); *Roth v. United States*, 354 U.S. 476, 484 (1957) (“The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”).

6. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (“[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances.”).

7. *See, e.g.*, *New York v. Ferber*, 458 U.S. 747 (1982).

8. *See, e.g.*, *Miller v. California*, 413 U.S. 15 (1973).

9. *See, e.g.*, *R.A.V. v. City of Saint Paul*, 505 U.S. 377, 382 (1992).

Communications Decency Act of 1996 (CDA), which criminalized the distribution of “indecent” material to minors. In June 1997, the Supreme Court struck down the CDA in *Reno*, finding that it violated the First Amendment because it restricted adult access to constitutionally protected speech.<sup>10</sup> In response to the Court’s decision, Congress drafted the Child Online Protection Act (COPA) more narrowly than the CDA. COPA criminalized the commercial distribution of material defined as “harmful to minors” by importing language from the obscenity standard used in *Miller v. California*. In 2002, the Supreme Court held that a certain section of COPA did not alone render the statute overbroad (*COPA III*),<sup>11</sup> but two years later in *Ashcroft v. ACLU (COPA V)* the Court held that COPA likely violates the First Amendment.<sup>12</sup> Finally, on remand, the Eastern District of Pennsylvania found COPA unconstitutional in *ACLU v. Gonzales*, a decision upheld in 2008 by the Third Circuit.<sup>13</sup>

Online pornography has still prospered, despite Congress’s efforts to devise legislation protecting children. This article focuses on the similarities of the Internet and broadcasting medium, which receives the most limited First Amendment protection, and why these similarities justify more limited First Amendment protection on the Internet. Part II reviews First Amendment jurisprudence dealing with obscenity and indecency and how these standards have been applied to various mediums of communication. Part III analyzes how these judicial doctrines have been applied to the Internet by discussing the Supreme Court’s decisions in *Reno* and *COPA V*.

Part IV argues that the Court erred when determining the standard of review in the CDA cases because the similarities between the Internet and broadcasting mediums justify the lowest level of judicial scrutiny for analyzing online content. This article then illustrates how COPA failed constitutional review when judged under strict scrutiny, because any alternative is less restrictive than *Miller’s* “community standards” language as applied to the Internet. Finally, this article uses the broadcasting case *FCC v. Pacifica Foundation* as a model for content regulation on the Internet and suggests ways in which an administrative agency with expertise in Internet technology would be more likely to implement rules designed to regulate cyber-speech that survive judicial review.

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10. *Reno v. ACLU*, 521 U.S. 844 (1997).

11. *Ashcroft v. ACLU (COPA III)*, 535 U.S. 564, 586 (2002), *remanded to* 322 F.3d 240 (3d Cir. 2003).

12. *Ashcroft v. ACLU (COPA V)*, 542 U.S. 656, 673 (2004).

13. *See ACLU v. Gonzales (COPA VI)*, 478 F. Supp. 2d 775 (E.D. Pa. 2007), *aff’d sub nom.*, *ACLU v. Mukasey (COPA VII)*, 534 F.3d 181 (3d Cir. 2008).

## II. SPEECH REGULATION IN MASS MEDIA

### *A. Obscene and Indecent Speech*

The Supreme Court in *Roth v. United States* held that the First Amendment does not protect obscene speech and defined such speech as that “which deals with sex in a manner appealing to the prurient interest.”<sup>14</sup> The decision in *Roth* overturned an obscenity test used since the nineteenth-century English case *Regina v. Hicklin*,<sup>15</sup> in which the obscenity standard was based on the person most sensitive to its influence, rather than a reasonable person.<sup>16</sup>

For sixteen years following the *Roth* decision, the Supreme Court grappled with whether a local or national standard should apply to the community standards test set forth in that case. In 1973, the Supreme Court in *Miller v. California*<sup>17</sup> ended the dilemma by confirming that the obscenity standard should be based upon the contemporary standards of each local community, not a national standard.<sup>18</sup> The *Miller* test retained the community standards language from *Roth* to create the obscenity test used today, but differed from *Roth* by articulating a new definition for obscenity. The *Miller* test considers:

- (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 . . . describes, in a patently offensive way, sexual conduct . . . ;

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14. 354 U.S. 476, 487 (1957). *Roth* was convicted for violating a statute that prohibited the distribution of sexually explicit advertising through the mail. *Id.* at 480. The question before the Court was whether obscenity was considered “protected speech” under the First Amendment. *Id.* at 481. The Court held that although obscenity is not protected, some sexually explicit material does not rise to the level of obscenity and is protected if it has some social value. *Id.* at 487. Obscene material is not protected when it “deals with sex in a manner appealing to prurient interest,” and the Court defined prurient interest as “material having a tendency to excite lustful thoughts.” *Id.* at 487 & n.20. Anything that does not excite lustful thoughts, such as the depiction of sex in art or literature, is protected speech:

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.

*Id.* at 484, 487 (citation omitted).

15. 3 L.R.Q.B. 360 (1868).

16. *Id.* at 361-63; *see also Roth*, 354 U.S. at 488-89 (overturning the former test for obscenity used since *Hicklin*, where obscenity was based on “the effect of an isolated excerpt upon particularly susceptible persons”).

17. 413 U.S. 15 (1973).

18. *Id.* at 37 (citations omitted).

and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>19</sup>

The *Miller* Court ultimately adopted a local standard to define a “contemporary community” because the nation is too diverse for one national standard.<sup>20</sup>

Although the *Miller* test provided a more detailed definition of obscenity, it did not define indecent speech, a similar type of speech that is protected by the First Amendment. Indecent speech is a category of expression which encompasses sexually explicit material that contains some redeeming social value.<sup>21</sup> Indecency has been defined in a few narrow circumstances. For example, the Federal Communications Commission (FCC) defined indecency for the broadcasting medium as material that “describes, in terms patently offensive as measured by contemporary community standards . . . sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.”<sup>22</sup> Justice Stevens’s opinion in *FCC v. Pacifica Foundation* emphasized that the First Amendment might protect indecent speech, depending on its context.<sup>23</sup> The FCC eventually borrowed its definition of indecency for broadcasting and applied it to the telecommunications medium, where the restrictions are more relaxed than in broadcasting because the context of the speech is different.<sup>24</sup> Affirmative

19. *Miller v. California*, 413 U.S. 15, 24 (1973) (citations omitted).

20. *Id.* at 30. The Court rejected the use of national standards because:

[O]ur 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 formulation, even assuming the prerequisite consensus exists. . . . To require a State to structure obscenity proceedings around evidence of a national “community standard” would be an exercise of futility.

*Id.* See also *id.* at 32 (“It is my belief that when the Court said in *Roth* that obscenity is to be defined by reference to ‘community standards,’ it meant community standards—not a national standard, as is sometimes argued. I believe that there is no provable ‘national standard’ . . .” (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 200 (1964) (Warren, C.J., dissenting))).

21. See *Roth*, 354 U.S. at 487.

22. *FCC v. Pacifica Found.*, 438 U.S. 726, 732 (1978) (quoting *Citizen’s Complaint Against Pacifica Found. Station WBAI*, 56 F.C.C.2d 94, 98 (1975)). The Supreme Court in *Pacifica* distinguished obscene and indecent material because “[t]he words ‘obscene, indecent, or profane’ are written in the disjunctive, implying that each has a separate meaning. Prurient appeal is an element of the obscene, but the normal definition of ‘indecent’ merely refers to nonconformance with accepted standards of morality.” *Id.* at 739-40. Thus, *Pacifica* established that profane language only rises to the level of indecency, rather than obscenity, because profane words lack prurient appeal. *Id.* at 739.

23. *Id.* at 746-48.

24. See *Dial Info. Serv. Corp. v. Thornburgh*, 938 F.2d 1535, 1540 (2d Cir. 1991) (“[T]he description or depiction of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the telephone medium.”); see also *infra* Part II.B.2, describing why the telecommunications medium is judged under the most

steps are required to access sexually explicit material over a telephone,<sup>25</sup> whereas radio listeners are an “unsuspecting” audience for offensive content because they may be inadvertently exposed to such material while tuning in and out of broadcasting stations.<sup>26</sup>

### B. Medium-Specific Approach

The Supreme Court has long recognized a need for differential treatment of mass media, which has now evolved into established First Amendment doctrine as each medium of communication presented unique constitutional concerns.<sup>27</sup> Courts are permitted to qualify the level of judicial scrutiny used to analyze laws restricting speech by considering the idiosyncrasies of each medium and “examin[ing] the underlying technology of the communication to find the proper fit between First Amendment values and competing interests.”<sup>28</sup> The “proper fit” with print media entails the highest amount of First Amendment protection by forbidding almost any regulation,<sup>29</sup> while the “proper fit” for other mediums may permit some regulation in both content and technology and thus limit First Amendment protection.<sup>30</sup>

#### 1. Print Media and Radio Broadcasting

Traditionally, the print medium has been afforded the greatest amount of First Amendment protection,<sup>31</sup> while radio and television broadcasting has been given the least protection.<sup>32</sup> In *Red Lion Broadcasting Co. v. FCC*, the Court

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stringent standard of review, while the broadcast medium is judged under the lowest standard of rational basis review.

25. See, e.g., *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 121 (1989); see *infra* Part II.B.2. An individual must actively dial that service's phone number and then provide a credit card number.

26. See, e.g., *Pacifica*, 438 U.S. at 748-50; see *infra* Part II.B.1.

27. See, e.g., *Pacifica*, 438 U.S. at 748 (“We have long recognized that each medium of expression presents special First Amendment problems.”).

28. *ACLU v. Reno*, 929 F. Supp. 824, 873 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

29. See, e.g., *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

30. *ACLU v. Reno*, 929 F. Supp. at 873; Debra M. Keiser, Note, *Regulating the Internet: A Critique of Reno v. ACLU*, 62 ALB. L. REV. 769, 775-77 (1998) (illustrating how “[c]ourts use this spectrum[,] with broadcasting on one end . . . and with print media on the other,” to define the appropriate level of First Amendment protection for each medium of communication).

31. See *N.Y. Times v. United States*, 403 U.S. 713, 714 (1971) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963))); *Tornillo*, 418 U.S. at 259 (White, J., concurring) (“[T]he First Amendment erects a virtually insurmountable barrier between government and the print media . . .”).

32. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 380 (1984) (explaining that there are more speech restrictions in the broadcast medium, as opposed to the newspaper medium, so the public can “receiv[e] a balanced presentation of views on diverse matters of public concern.”); *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (“[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection”); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969) (citation omitted) (“Although broadcasting is clearly a medium affected by a First Amendment interest,

upheld two doctrines enforced by the FCC that permitted content regulation in the broadcast medium.<sup>33</sup> Five years later, however, the Court held in *Miami Herald Publishing Co. v. Tornillo* that a right of reply statute was unconstitutional because it violated the First Amendment rights of newspaper publishers.<sup>34</sup>

The Court distinguished the two decisions in print and broadcasting based on spectrum scarcity, a rationale which recognizes that there are limited numbers of bandwidths in the electromagnetic spectrum, such that potential broadcasters outnumber available frequencies.<sup>35</sup> The *Red Lion* Court reasoned that because of the limited number of broadcasting frequencies, the FCC's regulation of the broadcasting industry "enhance[d] rather than abridge[d] the freedoms of speech and press protected by the First Amendment."<sup>36</sup> The Court also found that content restrictions exist for the interest of the public to ensure that the audience will have access to diverse information.<sup>37</sup>

The Supreme Court has identified additional characteristics unique to broadcasting that justify the lowest level of judicial scrutiny. In *Pacifica*, the FCC issued a declaratory order against the Pacifica Foundation for an afternoon broadcast of a George Carlin monologue called "Filthy Words" because the program violated a federal statute that prohibited the broadcast of obscene, indecent, or profane material.<sup>38</sup> The Supreme Court upheld the order because the program was aired at a time of day when children were likely to be in the audience.<sup>39</sup> Justice Stevens emphasized that the regulation was not a content-based restriction, but rather was content-neutral because it only

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differences in the characteristics of new media justify differences in the First Amendment standards applied to them.").

33. *Red Lion*, 395 U.S. at 369, 375. The Court upheld the fairness doctrine and the personal attack rule, which together required broadcasters to air information of public importance and take reasonable measures to ensure that opposing views would be equally represented. *Id.*

34. 418 U.S. 241 (1974). The right of reply statute required a newspaper to give extra space to a political candidate to respond to a personal attack made by the newspaper. *Id.* at 244.

35. *Red Lion*, 395 U.S. at 388. By the 1920s, the number of broadcasters outnumbered available frequencies. *Id.* at 388-89. The scarcity of electromagnetic spectrum led to the passage of the Radio Act of 1927 and the Communications Act of 1934, which authorized the government to assign frequencies so that broadcasters will not compete for the same airwave. *Id.* at 388. Otherwise, the broadcasters' signals would interfere and none would be heard. *Id.* This rationale also allows the government to regulate content even after they assign a frequency. *Id.* at 389.

36. *Id.* at 375.

37. *Id.* at 390. The Court stated that "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." *Id.* The Court continued: "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." *Id.* The government may force a broadcaster to offer certain material or punish them for using certain content during an unauthorized time. *See id.*

38. *FCC v. Pacifica Found.*, 438 U.S. 726, 729-30 (1978).

39. *Id.* at 749.

limited the particular time of day when the program aired.<sup>40</sup> Moreover, Justice Stevens described three factors unique to radio and television that warranted the lowest level of First Amendment protection: broadcasting's history of government regulation, its unique pervasiveness,<sup>41</sup> and its ease of access to children.<sup>42</sup> Ultimately, the monologue was judged under rational basis review because the regulation did not impose a blanket ban on indecent speech, but channeled content to a "safe harbor" period when children were not likely to be in the audience.<sup>43</sup>

## 2. Telephone Communications

The Supreme Court has drawn a sharp contrast between the telecommunications medium and radio broadcasting. As a result, the telecommunications medium has been judged under strict scrutiny and accordingly receives the highest level of First Amendment protection. In *Sable Communications of California, Inc. v. FCC*, a company sold pre-recorded telephone messages known as "dial-a-porn," which violated a law prohibiting obscene and indecent interstate commercial telephone messages.<sup>44</sup> The Supreme Court upheld the portion of the statute banning obscene calls, but struck down the portion that banned indecent calls.<sup>45</sup> The Court distinguished the telecommunications medium from broadcasting because the "dial-a-porn" services were not as "uniquely pervasive" or "uniquely accessible" as radio or television.<sup>46</sup> Moreover, the telecommunications medium imposed a blanket ban on speech, while the regulation in *Pacifica* channeled content to allow for alternative avenues of expression.<sup>47</sup>

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40. *Pacifica*, 438 U.S. at 746. Stevens stated that "[i]f there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content . . . First Amendment protection might be required. But that is simply not this case." Stevens explained that the restriction applied only "to the way in which [the viewpoint] is expressed." *Id.* at 746 n.22. Stevens also emphasized the narrowness of the Court's holding that limited the decision to the context of that particular case. *Id.* at 750-51.

41. *Id.* at 748. Stevens explained that broadcasting's pervasive nature causes it to invade the privacy of one's home, where "the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Id.* (citation omitted).

42. *Id.* at 749-50.

43. *See id.* at 733, 745-48, 750-51.

44. *Sable Comm'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 118-20 (1989).

45. *Id.* at 124, 131.

46. *Id.* at 127-28.

47. *Id.* at 127. Ultimately, the *Sable* Court established that the First Amendment still protects indecent expression in the telecommunications industry. *Id.* at 131.

### III. JUDICIAL STANDARDS APPLIED TO THE INTERNET

#### *A. The Communications Decency Act of 1996 and Reno*

On February 8, 1996, President Clinton signed the CDA, an amendment to the Telecommunications Act of 1996. The CDA was Congress's first attempt to regulate children's access to sexually explicit material on the Internet.<sup>48</sup> Shortly after President Clinton signed the bill, several parties, including the American Civil Liberties Union (ACLU), sued Attorney General Janet Reno and the Justice Department.<sup>49</sup> The plaintiffs sought a preliminary injunction against the enforcement of two provisions: §223(a)(1)(B), which criminalized the "knowing" transmission of "obscene or indecent" messages to anyone under 18 years of age, and §223(d)(1), which also criminalized knowingly "send[ing]" or "display[ing]" material "patently offensive as measured by contemporary community standards."<sup>50</sup>

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48. *ACLU v. Reno*, 929 F. Supp. 824, 826-27 (E.D. Pa 1996), *aff'd*, 521 U.S. 844 (1997). The CDA was enacted as Title V of the Telecommunications Act of 1996, and was designed to update the Communications Act of 1934 that was enacted to regulate sexually explicit telephone communications only. Communications Decency Act of 1996 (CDA), 47 U.S.C. §223 (1994 & Supp. III 1998), *invalidated by* *Reno v. ACLU*, 521 U.S. 844 (1997); *ACLU v. Reno*, 929 F. Supp. at 826-27. The first provision of the CDA, 47 U.S.C. §223(a)(1)(B), imposed criminal penalties on anyone who "knowingly" transmits "obscene or indecent" material to an individual under eighteen years of age "[b]y means of a telecommunications device." *ACLU v. Reno*, 929 F. Supp. at 828-29. CDA § 223(d)(1) further criminalized the transmission of material that, taken "[i]n context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs . . ." *See id.* at 829 (quoting 47 U.S.C. § 223(d)(1)). The final provision, 47 U.S.C. §223(e), provided affirmative defenses against prosecution for these provisions if a person:

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

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

47 U.S.C. §223(e).

49. *ACLU v. Reno*, 929 F. Supp. at 827. The plaintiffs were comprised of individuals and organizations associated with the computer and communications industry who used the Internet. *Id.* For a list of all forty-seven plaintiffs, see *id.* at 827-28 nn.2-3.

50. *Id.* at 828-29.

The district court conducted an extensive fact-finding to explore the history and nature of the Internet as a new medium.<sup>51</sup> Demonstrations conducted at the preliminary injunction hearing revealed that deliberate steps were required to enter cyberspace.<sup>52</sup> Consequently, when determining the standard of review, the district court found the Internet was more akin to telephone communication than to broadcasting:

[A]s with the telephone, an Internet user must act affirmatively and deliberately to retrieve specific information online. . . . [T]he user virtually always receives some warning of its content, significantly reducing the element of surprise or “assault” involved in broadcasting. Therefore, it is highly unlikely that a very young child will be randomly “surfing” the Web and come across “indecent” or “patently offensive” material.<sup>53</sup>

Therefore, the court applied the highest standard of judicial review by subjecting regulations of the Internet as a medium to strict scrutiny.<sup>54</sup>

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51. *ACLU v. Reno*, 929 F. Supp. at 830-49. Specifically, the district court described the simplicity of navigating through the Internet and the ease of access individuals have to all forms of information including sexually explicit material. According to the district court's factual findings, such material comes by way of, “text, pictures, and chat . . . and extends from the modestly titillating to the hardest-core.” *Id.* at 844 (factual finding 82). This material can be retrieved intentionally or accidentally through an imprecise search, in the same manner as one would retrieve material that is not sexually explicit. *Id.* (factual finding 82).

52. *Id.* at 844-45. According to the district court factual findings: “At the most fundamental level, a user must have access to a computer with the ability to reach the Internet (typically by way of a modem). A user must then direct the computer to connect with the access provider, enter a password, and enter the appropriate commands to find particular data.” *Id.* at 844 (factual finding 87).

53. *Id.* at 851-52. The district court's conclusion parallels its factual findings, which recount several reasons why the Internet should be distinguished from radio broadcasting:

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. A child requires some sophistication and some ability to read to retrieve material and thereby use the Internet unattended.

*Id.* at 845 (factual finding 89). In addition, the district court factual findings state 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.” A document's title or a description of the document will usually appear before the document itself takes the step needed to view it, and in many cases the user will receive detailed information about a site's content before he or she need take the step to access the document. Almost all sexually explicit images are preceded by warnings as to the content.

*Id.* at 844 (factual finding 88).

54. *Id.* at 851-52. The district court ultimately granted the preliminary injunction against the enforcement of the CDA indecency provision because it violated the First Amendment. *Id.* at 857.

The government appealed to the United States Supreme Court, which affirmed the lower court's decision that the challenged provisions of the CDA violated the First Amendment.<sup>55</sup> The Supreme Court affirmed the district court's decision to analyze the Internet under strict scrutiny, relying mostly on the district court's finding that online communications do not invade an individual's home in the same way as broadcasting.<sup>56</sup> Justice Stevens, writing for the majority, rejected the government's attempt to defend the constitutionality of the CDA by distinguishing three precedents in which the Court upheld restrictions on indecent speech to protect minors.<sup>57</sup> Justice Stevens further examined several precedents identifying alternative considerations that justified broadcasting's special treatment,<sup>58</sup> but nevertheless concluded that the Internet was not analogous to broadcasting and therefore could not receive more limited First Amendment protection.<sup>59</sup> Moreover, Justice Stevens found that the CDA was unconstitutionally vague because there were many ambiguities in the CDA's language.<sup>60</sup> This concern was intensified by the statute's criminal sanctions, because the severity of such penalties would chill protected speech.<sup>61</sup> Finally, Justice Stevens noted several aspects of the CDA that were overbroad,<sup>62</sup> imposing a high burden on the

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55. *Reno v. ACLU*, 521 U.S. 844 (1997).

56. *Id.* at 853-54.

57. *Id.* at 864-68. First, Justice Stevens distinguished *Ginsberg v. New York*, 390 U.S. 629 (1968), because the New York statute at issue in that case was more narrow than the CDA. *Id.* at 865-66. Second, Justice Stevens contrasted the CDA with the order in *Pacifica* by examining the differences between the Internet and broadcasting, particularly the government's extensive history of regulation of radio and television, the lack of spectrum scarcity with the Internet, and broadcasting's unique intrusiveness into the home. *Id.* at 866-67. Finally, Justice Stevens rejected the government's argument that the CDA was a content-neutral "cyberzoning" restriction comparable to the zoning ordinance in *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), which was analyzed "as a form of time, place, and manner regulation" warranting intermediate scrutiny. *Id.* at 867-68 (citations omitted). Instead, the majority held that the CDA was not tailored to protect children from the adverse "secondary effects" of offensive speech, but from the "primary effects" of the content; the zoning ordinance in *Renton*, by contrast, was not aimed at the content of the films, but at the "secondary effects" that the films fostered, such as higher crime and lower property values. *Id.* at 868. Furthermore, the CDA could not divide cyberspace into zones, but applied broadly, resulting in an unconstitutional blanket ban on Internet speech. *Id.*

58. *Reno v. ACLU*, 521 U.S. at 868-70. Unlike broadcasting, the Internet was not a "'scarce' expressive commodity" (*Turner*), was not historically subject to government regulation (*Red Lion*), was not invasive (*Sable*), and was not considered highly accessible to children (*Pacifica*). *Id.*

59. *Id.* at 870.

60. *Id.* For example, each provision of the statute used a "different linguistic form." *Id.* at 870-71. The statute did not define the word "indecent" or "patently offensive." *Id.* at 871. Online content providers will not know how to comply with the statute because the language allows for multiple interpretations of these provisions. *See id.*

61. *Id.* at 872. The sanctions include up to two years of prison for each violation. *Id.*

62. *Id.* at 877. The breadth of the CDA was "wholly unprecedented" because it called for a blanket ban on indecent speech. *Id.* First, the CDA had the potential to affect

government to explain why less restrictive alternatives “would not be as effective as the CDA”—a burden that the government failed to satisfy.<sup>63</sup>

*B. The Child Online Protection Act and Ashcroft v. ACLU*

After the CDA was found to violate the First Amendment, Congress passed COPA and the President signed it into law.<sup>64</sup> The statute imposed criminal liability up to a \$50,000 fine and six months in prison, as well as civil liability up to \$50,000 in damages, for any person who “knowingly and with *knowledge* of the character of the material, in interstate or foreign commerce by means of the *World Wide Web*,<sup>65</sup> makes any communication *for commercial purposes*<sup>66</sup> that is available to any minor and that includes any *material that is harmful to minors*.”<sup>67</sup> To define material “harmful to minors,” the government used the obscenity rule from *Miller*, but called for material to be evaluated

nonprofit groups, individuals, and commercial organizations, because the statute did not specify whether it applied to a particular entity. *Id.* Furthermore, the undefined terms “indecent” and “patently offensive” would potentially cover “large amounts of nonpornographic material with serious educational or other value.” *Id.* Finally, the “community standards” language, when applied to the Internet, meant that all communication would “be judged by the standards of the community [within its nationwide audience] most likely to be offended by the message.” *Id.* at 877-78.

63. *Reno v. ACLU*, 521 U.S. at 879. The Court held “that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech.” *Id.* at 874. The Court further recognized that there were other less restrictive alternatives than the CDA, and concluded that the affirmative defenses did not “constitute the sort of ‘narrow tailoring’ that will save an otherwise patently invalid constitutional provision.” *Id.* at 882.

64. *ACLU v. Reno (COPA I)*, 31 F. Supp. 2d 473, 476-77 (E.D. Pa. 1999), *aff’d* 217 F.3d 162 (2000), *vacated sub nom.*, *Ashcroft v. ACLU*, 535 U.S. 564 (2002). Congress limited the scope of COPA in three ways as a response “to [the] objections [made] to the breadth of the CDA’s coverage.” See *Ashcroft v. ACLU (COPA III)*, 535 U.S. 564, 569-70 (2002). First, while the CDA applied to all communications over the Internet, COPA was limited to material on the World Wide Web. *Id.* Second, COPA was limited to communications made “for commercial purposes,” whereas the CDA had also included nonprofit organizations. *Id.* Finally, while the CDA restricted “indecent” and “patently offensive” communications without any clear definition, COPA only restricts “material that is harmful to minors,” a narrower standard derived from the three-part test for obscenity established in *Miller*. *Id.* at 570.

65. COPA defines the phrase “by means of the World Wide Web” as the “placement of material in a computer server-based file archive so that it is publicly accessible, over the Internet, using hypertext transfer protocol or any successor protocol.” *ACLU v. Ashcroft (COPA IV)*, 322 F.3d 240, 245 (3d Cir. 2003) (quoting 47 U.S.C. § 231(e)(1) (2000)), *aff’d* 542 U.S. 656 (2004). Unlike the CDA, this definition does not encompass all methods of communication used on the Internet. *Id.*

66. COPA defines “commercial purposes” as those who are “engaged in the business of making such communications.” *Id.* (quoting 47 U.S.C. § 231(e)(2)(A)). A person is considered “engaged in business” if the Web posting is part of a “regular course of such person’s trade or business, with the objective of earning a profit.” *Id.* (quoting 47 U.S.C. § 231(e)(2)(B)).

67. *Id.* at 245 (quoting 47 U.S.C. § 231(a)(1), emphasis added). A “minor” is defined as any person less than seventeen years of age. *Id.* at 246 n.7 (citing 47 U.S.C. § 231(e)(7)).

from the perspective of what a minor, rather than an adult, would perceive as offensive.<sup>68</sup>

On October 22, 1998, various Internet content providers and civil liberties groups, including the ACLU,<sup>69</sup> sued the Attorney General to enjoin the enforcement of COPA because they feared their material could be construed as “harmful to minors” in some communities.<sup>70</sup> The district court granted the preliminary injunction and enjoined the enforcement of COPA.<sup>71</sup> The Third Circuit affirmed the district court’s ruling on the grounds that the “community standards” language made COPA unconstitutionally overbroad.<sup>72</sup>

The Supreme Court, however, rejected the Third Circuit’s reasoning and held that the community standards did not alone render the statute overbroad.<sup>73</sup> Justice Thomas led the plurality in distinguishing COPA from the CDA, and emphasized that community standards did not need to be defined by a particular geographic area.<sup>74</sup> Justice Thomas relied on the Court’s precedent in *Hamling v. United States*<sup>75</sup> and *Sable*,<sup>76</sup> to conclude that it is constitutional for Congress to require Web providers to comply with differing local standards because they have done so in the past.<sup>77</sup> In the end, Justice

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68. *COPA IV*, 322 F.3d at 246 (citing 47 U.S.C. §231). The “harmful to minors” standard is governed by the following test:

- (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to . . . the prurient interest;
- (B) depicts . . . in a manner patently offensive with respect to minors . . . an actual or simulated sexual act or sexual content, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
- (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

*Id.* (quoting 47 U.S.C. § 231(e)(6)). The statute also provides an affirmative defense for a provider that “has restricted access by minors to material that is harmful to minors” through age verification or “any other reasonable measures that are feasible under available technology.” *Id.* (quoting 47 U.S.C. § 231(e)(1)).

69. *COPA I*, 31 F. Supp. 2d at 476. The plaintiffs filed the lawsuit in the United States District Court for the Eastern District of Pennsylvania and were from several diverse organizations, most of whom own their own Web sites. *Id.* at 487.

70. *Id.* at 476, 478-79.

71. *Id.* at 498.

72. *ACLU v. Reno (COPA II)*, 217 F.3d 162, 173 (3d Cir. 2000), *vacated sub nom.*, *Ashcroft v. ACLU*, 535 U.S. 564 (2002).

73. *Ashcroft v. ACLU (COPA III)*, 535 U.S. 564, 585 (2002).

74. *Id.* at 580-81.

75. 418 U.S. 87 (1974).

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

77. *COPA III*, 535 U.S. at 583. Justice Thomas stated: “If a publisher wishes for its material to be judged only by the standards of particular communities, then it need only take the simple step of utilizing a medium that enables it to target the release of its material into those communities.” *Id.*

Thomas found that the plaintiffs failed to meet their burden of proving why COPA was overbroad.<sup>78</sup>

On remand, the Third Circuit reconsidered the statute, but affirmed its prior decision to grant the preliminary injunction on other grounds, finding that the statute would not pass strict scrutiny and was overbroad.<sup>79</sup> When the case returned to the Supreme Court in the spring of 2004, the majority held that the enforcement of COPA was properly enjoined since the statute “likely violates the First Amendment.”<sup>80</sup> The Supreme Court concluded that the district court did not abuse its discretion by granting a preliminary injunction because the government failed, at the district court level, to rebut the plaintiff’s argument that there were less restrictive alternatives at least as effective as COPA.<sup>81</sup> Consequently, the Supreme Court affirmed the decision of the Third Circuit, upholding the preliminary injunction, and remanded the case back to the district court for a full trial on the merits.<sup>82</sup>

Justice Kennedy delivered the opinion for the majority, following the reasoning of the district court by considering whether software and filtering technology were less restrictive alternatives than COPA.<sup>83</sup> The majority held that these alternatives were indeed less restrictive since they only imposed “selective restrictions on speech at the receiving end” rather than “universal restrictions at the source.”<sup>84</sup> Adults have the freedom to choose whether to use a filter; those who choose this regime may turn off the filter when they want to access material that they have a constitutional right to receive.<sup>85</sup> Furthermore, the use of software as an alternative to legislation will not criminalize any category of speech, so the potential chilling effect is significantly reduced.<sup>86</sup>

The Court also found several reasons why filters may be more effective than COPA.<sup>87</sup> Although the Court conceded that filter software is flawed because it can be both over- and under-inclusive,<sup>88</sup> the government did not satisfy its burden by showing why filters are a less effective alternative.<sup>89</sup> Congress could achieve the same goal of promoting non-legislative alternatives

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78. *COPA III*, 535 F.3d at 585-86.

79. *ACLU v. Ashcroft (COPA IV)*, 322 F.3d 240, 251, 266 (3d Cir. 2003), *aff’d*, 542 U.S. 656 (2004).

80. *Ashcroft v. ACLU (COPA V)*, 542 U.S. 656, 660 (2004).

81. *Id.* at 673.

82. *Id.*

83. *Id.* at 665-70.

84. *Id.* at 667.

85. *Id.*

86. *COPA V*, 542 U.S. at 667.

87. *Id.* at 667-68. Filters can prevent minors from seeing all pornography, including material posted online from outside the United States. *Id.* at 667. If COPA were upheld, providers of pornography could escape punishment by moving their operations overseas. *Id.* If COPA were passed, providers of pornography could escape punishment by moving their operation overseas. *Id.* Furthermore, filters may be used with all Internet communication, not just material on the World Wide Web. *Id.* at 668.

88. Filters often block material that has educational, political, and artistic value, but fail to block harmful pornographic material. *Id.*

89. *Id.* at 669.

by providing incentives to schools, libraries,<sup>90</sup> and parents to use the software, even if filters were not legally required.<sup>91</sup> Finally, the Court found there were practical reasons to sustain the preliminary injunction, particularly because “the factual record d[id] not reflect current technological reality.”<sup>92</sup> There was an unusually long time delay between the preliminary injunction stage in 1999 and when the case reached the Supreme Court in 2004.<sup>93</sup> Current facts were required for a proper First Amendment analysis, including information accounting for improvements in filtering software and the passage of two statutes<sup>94</sup> that may be less restrictive than COPA.<sup>95</sup>

With the preliminary injunction granted against it, the government was forced to follow through on its initial burden of establishing why COPA is a less restrictive method of protecting minors from accessing harmful Internet material. However, the district court held on remand that the government was unable to satisfy this burden and permanently enjoined enforcement of COPA, a decision the Third Circuit has affirmed.<sup>96</sup> The district court found that COPA was both over-<sup>97</sup> and under-inclusive,<sup>98</sup> reiterated the Supreme Court’s conclusion in *COPA V* that filtering software was a less restrictive

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90. See, e.g., Children’s Internet Protection Act (CIPA) of 2000, Pub. L. 106-554, 114 Stat. 2763A-335, upheld by the Supreme Court in 2003 in *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 199 (2003). CIPA requires libraries that wish to receive either federal subsidies, grants under the Library Services and Technology Act, or discounts for Internet access and support under the Telecommunications Act, to use Internet safety policies that protect adults and children from obscene material on the Internet. *Id.*

91. *COPA V*, 542 U.S. at 669.

92. *Id.* at 671.

93. *Id.* at 672.

94. See 18 U.S.C.A. § 2252B (West Supp. 2007) (prohibiting misleading domain names, which forces Web site owners to properly identify pornographic sites so that an uninterested person will not come across them by mistake); 47 U.S.C. § 941 (Supp. IV 2007) (creating a minors-safe “Dot Kids” second-level Internet domain, which only permits content appropriate for minors under the age of 13).

95. *COPA V*, 542 U.S. at 672-73. Consequently, many characteristics of the Internet were irrelevant, since “[t]he technology of the Internet evolves at a rapid pace.” *Id.* at 671.

96. *ACLU v. Gonzales (COPA VI)*, 478 F. Supp. 2d 775, 821 (E.D. Pa. 2007), *aff’d sub nom.*, *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008).

97. *Id.* at 810. The district court found that the definitions of “engaged in the business” and “commercial purposes” offered by the statute applied “to an inordinate amount of Internet speech,” covering far more than pornography. *Id.* Further, the definition of “minor” also encompasses material obscene for a “newborn,” rather than what is offensive for an older minor. *Id.*

98. *Id.* The district court found that there is a substantial amount of pornography that COPA would not cover—that which originates from outside the United States—because COPA does not have extra-territorial application. *Id.* There is also a question of whether the United States would have jurisdiction over a foreign offender, and even if jurisdiction could be established, there is no way to enforce a penalty against such an offender. *Id.* at 811. Finally, the court was concerned with the limited scope of COPA—it does not reach harmful material accessible by means other than the Web. *Id.*

alternative,<sup>99</sup> discredited the prospective application of age-verifying technology in COPA's affirmative defenses,<sup>100</sup> and again concluded that COPA is vague and overbroad.<sup>101</sup> So today, it appears that there is still no constitutional legislative limit on the uninhibited spread of sexually explicit material on the Internet.

#### IV. THE BROADCAST MEDIUM HAS SET A PRECEDENT FOR SPEECH REGULATION ON THE INTERNET

##### *A. The Internet Should Be Judged at a Lower Level of Scrutiny*

When determining the standard of review for judging speech on the Internet, the district court in *Reno* erroneously found that Internet communications were more analogous to telephone communications rather than radio broadcasting and thus warranted the highest standard of judicial scrutiny.<sup>102</sup> When reviewing the district court's decision, the Supreme Court used three precedents to examine the different attributes of broadcasting that justify a greater degree of government involvement, such as broadcasting's invasive nature, spectrum scarcity, and the extensive history of government regulation.<sup>103</sup> In addition, the district court had extracted other factors unique to the broadcasting medium from *Pacifica*, specifically broadcasting's pervasiveness and ease of access to children.<sup>104</sup> Yet, although the Court has continuously revisited the question of scrutiny, it still relies on the original evidence acquired over a decade ago to determine the appropriate standard of review. Contrary to the decision in *COPA V* to affirm strict scrutiny, the Court should have considered the Internet as a medium in light of its technological evolution. An updated analysis would instead convey a stronger

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99. *COPA VI*, 478 F. Supp. 2d at 813-14.

100. *Id.* at 811-12. Evidence acquired during the fact-finding stage suggested that age-verifying technology used to screen minors from accessing pornography would not be effective. *Id.* at 799-805. Minors have access to payment cards and drivers' licenses, so there is no way to verify the age of the user. *Id.* at 811-12.

101. Similar to the over- and under-inclusiveness arguments, the district court in *Gonzales* criticized the use of "commercial purposes" and "engaged in the business" as being unclear and too expansive. *Id.* at 817, 819. The court also took issue with COPA's definition of "minor," because material "patently offensive" to an eight year old would be vastly different than to a sixteen year old, making it impossible for publishers to know whether their content is permissible. *Id.* at 817-18. Finally, the court found that when the Internet is taken "as a whole," evaluation is not as easy as with books or magazines, since it is not clear whether the material is to be judged as a whole compared with "a single image on a Web page, a whole Web page, an entire multipage Web site, or an interlocking set of Web sites." *Id.* at 818 (quoting *Ashcroft v. ACLU (COPA III)*, 535 U.S. 564, 593 (2002) (Kennedy, J., concurring)). In addition, like the Supreme Court, the *Gonzales* court noted that all these concerns are worsened by the statute's criminal sanctions. *Id.* at 819.

102. *ACLU v. Reno*, 929 F. Supp. 824, 851-52 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

103. *Reno v. ACLU*, 521 U.S. 844, 868-70 (1997).

104. *ACLU v. Reno*, 929 F. Supp. at 874-77.

relationship with the broadcast medium and result in the Court applying a lower level of scrutiny when analyzing future laws enacted to regulate the Internet.<sup>105</sup>

1. Invasiveness

The *Pacifica* Court found that broadcasting's "uniquely pervasive presence in the lives of all Americans" warranted the most limited First Amendment protection, because viewers may be involuntarily exposed to offensive material simply by turning on the radio or television at the wrong time.<sup>106</sup> Such material has the potential to reach an individual in their home, where their privacy interest outweighs the First Amendment protection of the intruder.<sup>107</sup> Even though there are warnings when offensive material may be displayed, such warnings cannot protect an audience that may be tuning in and out of the programming.<sup>108</sup>

The district court in *Reno*, however, incorrectly distinguished the Internet from the "invasive" nature of broadcasting in *Pacifica*, finding that the Internet deserved the highest level of scrutiny because "the user virtually always receives some warning of its content, significantly reducing the element of surprise or 'assault' involved in broadcasting."<sup>109</sup> The Court affirmed this assertion by citing facts found at the preliminary injunction stage that claimed individuals "seldom encounter" online pornography by accident, or rarely have the content invade a home unbidden because almost all adult material is preceded by a warning.<sup>110</sup> Likewise, *Gonzales* affirmed that strict scrutiny applies to the Internet, but did not revisit the standard of review arguments in light of advancements in Internet technology.<sup>111</sup>

The Court's understanding of the Internet when determining the standard of review in *Reno* and *COPA V* was inaccurate, however, and its basis for using the highest level of scrutiny is outdated. During the *Reno* litigation, the Internet was just beginning to find its way into American households. Now, however, the number of homes accessing the Internet has more than tripled.<sup>112</sup>

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105. See Keiser, *supra* note 30, at 781-89 (comparing the *Reno* and *Pacifica* statutes and arguing that the Internet should be classified more similarly to broadcasting).

106. FCC v. *Pacifica Found.*, 438 U.S. 726, 748 (1978).

107. *Id.*

108. *Id.* at 748-49. "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place." *Id.*

109. ACLU v. *Reno*, 929 F. Supp. 824, 851-52 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

110. *Reno v. ACLU*, 521 U.S. at 854.

111. ACLU v. *Gonzales (COPA V)*, 478 F. Supp. 2d 775, 809 (E.D. Pa. 2007) *aff'd sub nom.*, ACLU v. *Mukasey*, 534 F.3d 181 (3d Cir. 2008).

112. JENNIFER CHEESEMAN ET AL., US CENSUS BUREAU, CURRENT POPULATION REPORTS, COMPUTER AND INTERNET USE IN THE UNITED STATES: 2003, at 3 (2005), *available at*

The Internet is now a major venue for accessing news,<sup>113</sup> it has changed the face of interpersonal communication,<sup>114</sup> and it has become an essential component of our nation's economy.<sup>115</sup> Moreover, children can access the Internet on cell phones,<sup>116</sup> iPods,<sup>117</sup> and even refrigerators.<sup>118</sup> Although the *Gonzales* court took judicial notice that the Internet is now used throughout the world,<sup>119</sup> it failed to re-evaluate its decision to apply strict scrutiny in light of this newly acquired evidence. The explosion of Internet use in the past decade suggests that there are many new characteristics relating to the Internet's degree of availability that the Court should reexamine.

The Internet's technological advancements have also increased the risk of children encountering pornography inadvertently. A 1999 study found that one in four minors had at least one accidental exposure to sexually explicit material.<sup>120</sup> By 2006, that percentage had increased to approximately one-third.<sup>121</sup> Most importantly, these children were "very or extremely upset[]" by the exposure, which suggests that the images were indeed unbidden.<sup>122</sup>

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<http://www.census.gov/prod/2005pubs/p23-208.pdf> (describing research that revealed the number of households in 1997 with Internet access was only eighteen percent, but by 2003 that percentage had risen to fifty-five percent).

113. CHEESEMAN ET AL., *supra* note 112, at 13. In six years, the proportion of adults who used the Internet for "news, weather, or sports," increased by over thirty percent, "from [seven] percent in 1997 to [forty] percent in 2003." *Id.*

114. *Id.* In 1997, twelve percent of all adults used e-mail or instant messaging, compared to fifty-five percent in 2003. *Id.*

115. *Id.* In 2003, Eighteen percent of all adults used the Internet for banking, twelve percent to search for a job, and forty-seven percent to research products or services. *Id.*

116. Cassell Bryan-Low and David Pringle, *Sex Sells on Cell Phones, Too: Wireless Providers Provide Erotic Videos, Games, Live Sex Chats*, CHI. SUN-TIMES, May 15, 2005, at 32. United States cell phone operator Amp'd Mobile Inc. has joined with Verizon Wireless's network to make pornography available to cell phone customers. *Id.* Analysts expect that worldwide spending on pornographic content will reach \$1 billion and could even triple within the next few years as the number of cell phones with downloading capabilities increases. *Id.*

117. Lisa Allison, *Parent iPod Alert on Sex Films*, ADVERTISER (Australia), Nov. 7, 2005, at A1, available at 2005 WLNR 17940627. "Flesh flicks" is a new technology being produced by United States web site operators capable of downloading pornography on handheld iPods. *Id.* This technology will make it harder for parents to monitor what their children view and easier for pedophiles to find new victims. *Id.*

118. Ken Doyle, *Moving On Up: IPV6 May Seem Like a Long Way Off, But It Doesn't Hurt To Be Prepared*, WIS. ST. J., Nov. 1, 2005, available at <http://www.madison.com/archives/read.php?ref=/wsj/2005/11/01/0510270111.php>.

119. *ACLU v. Gonzales (COPA VI)*, 478 F. Supp. 2d 775, 781-82 (E.D. Pa. 2007) *aff'd sub nom.*, *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008). The factual findings cite to U.S. Census Bureau statistics indicating that fifty-four percent of the United States population was using the Internet at any given location in 2001. *Id.* at 781. By 2003, that number rose to nearly sixty percent. *Id.* The court also noted that computers are now used throughout the modern world, in "homes, schools, hotels, businesses, public Internet cafes, and libraries and that portable computers . . . can be operated almost anywhere and have wide access to the Internet." *Id.* at 782.

120. JANIS WOLAK ET AL., NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, ONLINE VICTIMIZATION OF YOUTH: FIVE YEARS LATER 22 (2006), available at [http://www.missingkids.com/en\\_US/publications/NC62.pdf](http://www.missingkids.com/en_US/publications/NC62.pdf).

121. *Id.*

122. *Id.* at 23.

Consequently, the danger of minors being accidentally exposed to sexually explicit material has increased over time as children become more educated about new technology.<sup>123</sup>

In addition, children can access online pornography in many ways which do not require affirmative steps to retrieve the material. Web site operators who make money from pornographic sites have an incentive to increase traffic by choosing popular terms or creating misleading URLs that will attract more visitors.<sup>124</sup> Children who conduct an imprecise or misdirected search<sup>125</sup> can easily find pornography through “[o]ne click of the mouse, like turning the ‘on’ switch of a radio.”<sup>126</sup> A site may even contain popular brand names using children’s characters,<sup>127</sup> or come by way of instant messages or unsolicited e-mail.<sup>128</sup> Deliberate steps are rarely required for minors to access harmful material because pornographic websites are not properly identified.

These circumstances are intensified by the increasing presence of the Internet in homes. Just as the *Pacific* Court found that the broadcast medium deserved more limited First Amendment protection because indecent broadcasting may occur in one’s home where a listener has a higher expectation of privacy, the Internet now has a comparable presence in the

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123. WOLAK ET AL., *supra* note 120, at 24. The 2006 study by the National Center for Missing and Exploited Children cited examples of new technology that may contribute to the increase in unwanted exposure to sexually explicit material among youth:

Since [1999 and 2000] there have been large increases in the capacity of computers to receive and transmit images; increases in speeds of Internet access; increases in the availability of inexpensive, sophisticated digital cameras, web cameras, camera cell phones, and media players; and the development of new technologies such as peer-to-peer sharing, all of which may have contributed in different ways to unwanted exposures among youth.

*Id.*

124. Donna Rice Hughes, *How Children Access Pornography on the Internet* (2001), <http://www.protectkids.com/dangers/childaccess.htm>. For example, a child writing a report about the President might find himself at a pornographic web site if he visited [www.whitehouse.com](http://www.whitehouse.com), rather than the official site at [www.whitehouse.gov](http://www.whitehouse.gov). *Id.*

125. *Id.* (explaining that many innocuous word searches can expose a child to a pornographic site, including terms such as “toys, boys, Britney Spears and dogs”).

126. Keiser, *supra* note 30, at 788.

127. *See* Hughes, *supra* note 124 (citation omitted) (estimating that a quarter of all pornographic web sites misuse popular brand names such as Disney, Barbie, and Nintendo).

128. *Id.* Unsolicited e-mail is referred to as “spam.” *Id.* Many of these e-mails have elusive subject lines such as “Please Help Me,” providing children with no indication of what the e-mail contains until after the content is viewed and the harm is done. *Id.*; *see also* Daniel Weiss, *Children and Pornography Online*, FOCUS ON THE FAMILY CITIZENLINK, Aug. 11, 2005, <http://www.family.org/cforum/fosi/pornography/facts/a0037525.cfm> (“More than 80 percent of children using e-mail receive inappropriate messages, and 47 percent receive pornographic spam on a daily basis. Further, one in five children (21 percent) open and view spam e-mail.” (citation omitted)).

home to justify a similar level of First Amendment protection. It is estimated that somewhere between ten and thirty percent of all sites on the Internet are devoted to pornography, and the overall number of sites is growing everyday.<sup>129</sup> Furthermore, almost half of all young people go online from home,<sup>130</sup> increasing the risk that minors will access these websites in a place where they expect to be secure. Therefore, unwanted sexually explicit material is exposed in an area where an individual's right to privacy outweighs the First Amendment protection of the pornographic content providers.

Finally, warnings do not prevent minors from accessing pornographic material because most minors are not mature enough to possess the discretion needed to obey the warning. Similar to the broadcast industry, where viewers may miss warnings because they are tuning in and out of the programming, online users are involuntarily subjected to harmful content despite the presence of a warning. Some pornographic sites do not contain warnings,<sup>131</sup> or include "teasers" on the first page used to attract customers.<sup>132</sup> Moreover, unlike hanging up a sexually explicit telephone call, the harm incurred after seeing online pornography cannot be undone, as viewing a sexually explicit image is severely damaging to an impressionable young child.<sup>133</sup> Therefore, the invasiveness of the Internet is more comparable to broadcasting because its proliferation in the past decade has increased the "assault"<sup>134</sup> in the lives of Americans to justify a higher degree of government regulation.

## 2. Accessibility to Children

*Pacifica* held that a second factor warranting more government regulation in the broadcast medium is its ease of access to children, who are able to listen to broadcasting content when unsupervised by their parents.<sup>135</sup> The concern in *Pacifica* related to the context of language used in a medium where an offensive term could "enlarge[] a child's vocabulary in an instant," as opposed to other

129. Kastleman, *First Amendment*, *supra* note 3.

130. Enough.org, Statistics, <http://enough.org/inside.php?id=2UXKJWRY8>.

131. See Weiss, *supra* note 128 ("A 2001 survey of adult-oriented [web] sites showed that . . . [n]early two-thirds (66 percent) did not indicate the adult nature of the site" by way of a warning, while only eleven percent had a warning and no adult material on the first page.).

132. *Supreme Court Again to Review an Online Pornography Law*, USA TODAY, Oct. 14, 2003, available at [http://www.usatoday.com/tech/news/techpolicy/2003-10-14-porn-ruling\\_x.htm](http://www.usatoday.com/tech/news/techpolicy/2003-10-14-porn-ruling_x.htm) ("The free teasers are available to nearly anyone surfing the Internet, children and adults alike. The pictures sometimes appear even when computer users are not seeking out pornography. The teasers typically lead potential customers to a Web site that may require payment and age verification.").

133. See *infra* notes 184-188 and accompanying text.

134. See *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978).

135. *Id.* In addition, other forms of offensive material are restricted from minors even though they are permissible for adults. For example, bookstores and theaters are not allowed to make indecent material available to children. *Id.* *Pacifica* justified this decision because of the concerns raised in *Ginsberg v. New York*, where the "government's interest in the 'well-being of its youth' and . . . [the] 'parents' claim to authority in their household' justified the regulation of otherwise protected expression." *Id.* (quoting *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968)).

mediums of communication such as bookstores or theaters where indecent expression can be physically removed from the presence of children.<sup>136</sup> The district court in *Reno*, however, erroneously determined that the Internet was not “uniquely accessible to children” as compared to broadcasting, and the Supreme Court affirmed by referring to the district court’s factual finding that “[a] child requires some sophistication and some ability to read to retrieve material and thereby use the Internet unattended.”<sup>137</sup> The Internet, however, presents the same concern of being “uniquely accessible to children” as recognized in *Pacifica*, because online material is equally difficult to supervise.

As the Internet becomes more popular, advancements have made it simple for children to use the technology.<sup>138</sup> Just as minors can use the radio or television broadcast medium unsupervised, minors can access the Internet at home, school, a library, an Internet café, or a friend’s house.<sup>139</sup> Even the most watchful parents cannot prevent a child who is determined to access online pornography because it is “widely available to the public at large.”<sup>140</sup> Unlike the telecommunications medium where minors must dial specific numbers to find adult material, no effort is required to retrieve pornography on the Internet since objectionable content “comes to you.”<sup>141</sup>

In addition, the concern regarding minors and pornography is not only centered on those who are too young to read warnings identifying explicit content and who are not deliberately seeking pornography, but also on teenagers who are old enough to navigate the Web and retrieve pornographic material without parental consent. These images are especially tantalizing to young teenagers who do not have the maturity and willpower needed to resist a natural temptation.<sup>142</sup> Exposure to pornography at such a young age falsely teaches teenagers, whose morals are still developing, that viewing pornography is acceptable behavior.<sup>143</sup> As a result, young teenagers may seek more extreme and violent forms of sexually explicit material, an escalating craving that some observers compare to “giving crack to a baby.”<sup>144</sup> Just like a child develops an

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136. *Pacifica*, 438 U.S. at 749.

137. *Reno v. ACLU*, 521 U.S. 844, 854 (1997) (quoting *ACLU v. Reno*, 929 F. Supp. 824, 845 (1996)).

138. Keiser, *supra* note 30, at 786-87. Keiser illustrates the ease of encountering offensive material by describing a situation where a seventh grade student accidentally discovered pornographic material while researching a paper on *Little Women*.

139. See Hughes, *supra* note 124.

140. *Id.*

141. Lane Lambert, *Addicted to Internet Porn: Sex Sites Ruining Marriages, Warping Expectations*, THE PATRIOT LEDGER, Jan. 24, 2004, at A1, available at 2004 WLNR 17171603 (Internet addiction expert Dr. David Greenfield, author and founder for the Center for Internet Studies, explains that e-mail spam and other links pop up from non-sex sites and estimates that approximately half of all porn visitors probably did not deliberately pursue their first porn site).

142. See generally Mark Kastleman, *Teenagers as Victims*, [http://www.contentwatch.com/learn\\_center/article/149](http://www.contentwatch.com/learn_center/article/149).

143. See *id.*

144. *Id.*

enlarged vocabulary after hearing one indecent word on the radio, one look at a pornographic image on the Internet could forever alter a young teenager's expectations of sex.<sup>145</sup> Therefore, the Internet should be analogized with broadcasting because it shares broadcasting's unique accessibility to children and is worsened by the prospect that children may use the same medium to obtain increasingly extreme material.

### 3. Scarcity

The *Reno* Court also recognized that the decision in *Turner Broadcasting Systems, Inc. v. FCC* limited *Pacifica* by declining to adopt its broadcasting rationale for the cable television medium.<sup>146</sup> Like broadcasting, cable television is a medium "uniquely pervasive" and "uniquely accessible to children," but the *Turner* Court reasoned that the broadcasting rules were "inapt" for cable because of the "fundamental technological differences between broadcast and cable transmission."<sup>147</sup> Consequently, the *Reno* Court incorrectly understood that the holding of *Pacifica* "arose out of the scarcity rationale" relating to broadcasting's underlying technology.<sup>148</sup> Accordingly, when the Supreme Court determined the standard of review in *Reno*, the Court mistakenly held that the Internet was not a "'scarce' expressive commodity"<sup>149</sup> like broadcasting, and thus had to be analyzed as a content-based restriction under strict scrutiny.<sup>150</sup>

The Supreme Court in the same case, however, disregarded a later precedent involving cable television that revised the scope of *Pacifica* by clarifying that the prevailing factors used to distinguish broadcasting were its pervasiveness and ease of access to children. The 1996 case *Denver Area Educational Telecommunications Consortium v. FCC* held that the scarcity rationale had little relevance when the material affects children, suggesting that spectrum scarcity is not the only justification for government intervention.<sup>151</sup> Furthermore, *Pacifica* never mentioned spectrum scarcity in its opinion when permitting broadcast regulation, but relied only on the medium's pervasiveness

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145. See Kastleman, *supra* note 142.

146. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

147. *Id.* at 639.

148. *ACLU v. Reno*, 929 F. Supp. 824, 876-77 (1996), *aff'd*, 521 U.S. 844 (1997).

149. *Reno v. ACLU*, 521 U.S. 844, 870 (1997) ("[The Internet] provides relatively unlimited, low-cost capacity for communications of all kinds.").

150. *Id.*

151. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 748 (1996); see also Stephen J. Shapiro, *One And The Same: How Internet Non-Regulation Undermines the Rationales Used to Support Broadcast Regulation*, 8 MEDIA L. & POL'Y 1, 11 (1999) ("After *Denver* . . . it would appear that the new *Pacifica* rationales for differential regulation—the pervasiveness of broadcasting, the inability to adequately warn the broadcast audience about potentially offensive content and broadcasting's unique impact on children—were alive and well as the Court prepared to hear *Reno*.").

and accessibility to children.<sup>152</sup> In recent years, both the FCC and the Supreme Court have questioned the validity of the scarcity doctrine,<sup>153</sup> while scholars further argue that its rationale is obsolete.<sup>154</sup> Yet, despite the deterioration of the scarcity doctrine, the FCC still continues to regulate broadcasting content that it considers indecent. Consequently, the government should still be permitted to exercise more regulation on the Internet despite the absence of spectrum scarcity because online regulation is explicitly enacted to protect children, and the Internet as a medium shares *Pacifica's* unique pervasiveness and accessibility to children.

#### 4. History of Regulation

The *Reno* Court distinguished the CDA from the regulation at issue in *Pacifica* because the Internet as a medium did not have a history of regulation comparable to broadcasting. When distinguishing *Pacifica*, the Court first stated that the order in *Pacifica* “[was] issued by an agency that had been regulating radio stations for decades,” and continued by noting that “the Commission’s order applied to a medium which as a matter of history had ‘received the most limited First Amendment protection.’”<sup>155</sup> Broadcasting’s history of regulation, however, is derived from the scarcity doctrine and cannot stand alone to distinguish the Internet if the facts justifying spectrum scarcity are no longer relevant to the broadcast medium.<sup>156</sup>

The broadcasting medium has enjoyed a long history of regulation solely because of the scarcity rationale—a rationale that is deteriorating because of evolving technology.<sup>157</sup> It follows that *Reno's* effort to use broadcasting’s history of regulation for distinguishing the Internet is weak, since this fact is currently rooted in a dying doctrine.<sup>158</sup> Moreover, our legal system is

152. *FCC v. Pacifica Found.*, 438 U.S. 726, 750 (1978) (“The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting.”).

153. *See, e.g., FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 376-77 n.11 (1984) (“The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete.”).

154. Shapiro, *supra* note 151, at 17 (“Given the FCC’s recent move towards deregulation of broadcasting, it is not unreasonable to suggest that, if a broadcast regulation case came before the Supreme Court today, the Court might be inclined to explicitly put the spectrum scarcity doctrine to rest.” (citation omitted)). For more information on the history and criticisms of the scarcity rationale, see generally Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245 (2003) and Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687 (1997).

155. *Reno v. ACLU*, 521 U.S. 844, 867 (1997) (citation omitted).

156. *See* Shapiro, *supra* note 151, at 12-13, 18-19.

157. *See supra* Part II.B.1.

158. *See* Shapiro, *supra* note 151, at 12-13.

structured to adapt to new circumstances as times change.<sup>159</sup> The Court cannot rely on a theory intertwined with an already questionable rationale when determining the degree of judicial scrutiny for the Internet.

### B. *Strict Scrutiny Sets the Stage for COPA to Fail*

The Supreme Court erroneously analyzed the CDA, together with the Internet as a medium, under the highest standard of judicial scrutiny because of a weak medium-specific analysis.<sup>160</sup> In *Gonzales*, the Eastern District of Pennsylvania addressed the concerns raised in *COPA V*, but followed the former analysis in *Reno* without assessing whether COPA should be reviewed under a more deferential standard.<sup>161</sup> The current standard of strict scrutiny, however, creates such a high standard for judging online content that any technological alternative is arguably less restrictive. Therefore, there is virtually no chance that the Supreme Court will ever uphold legislation to regulate the Internet because any alternative is less restrictive than *Miller's* real-world obscenity standard as applied to cyberspace. Filtering software, however, cannot effectively identify objectionable material and is potentially more threatening to free speech than a “properly crafted statute.”<sup>162</sup>

#### 1. Standard of the Least Tolerant Community

When COPA is analyzed under strict scrutiny, the definition of “harmful to minors” that invokes “contemporary community standards” proves to be the most problematic section. This standard is derived from the obscenity test in *Miller*, except for the references to “minors” in each provision. Like the *Miller* obscenity test, COPA applies the standards of the recipient's community. A very significant limitation of the *Miller* test, however, is that the Court left the

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159. Shapiro, *supra* note 151, at 19.

160. See Keiser, *supra* note 30, at 789.

161. See *supra* Part IV.A.

162. See Lawrence Lessig, *What Things Regulate Speech: CDA 2.0 vs. Filtering*, 38 JURIMETRICS J. 629, 633 (1998) (proposing a new, “CDA-like” solution to regulating online pornography because filtering technology is more restrictive of free speech than proper legislation); see also Junichi P. Semitsu, Note, *Burning Cyberbooks in Public Libraries: Internet Filtering Software vs. The First Amendment*, 52 STAN. L. REV. 509, 513-19 (2000) (describing the First Amendment issues raised by filtering software in public libraries, and providing an introduction to how filtering technology works); Michael B. Cassidy, Note, *To Surf and Protect: The Children's Internet Protection Act Polices Material Harmful to Minors and a Whole Lot More*, 11 MICH. TELECOMM. & TECH. L. REV. 437, 450-56 (2005) (citations omitted). In order for private filters to work, companies collect and advertise lists of Web sites that may contain offensive material. For example, blacklists prohibit “access to any prohibited Web address contained in a predetermined database,” while allow lists only permit access to “a pre-approved list of Web sites.” Cassidy, *supra* at 451. Similarly, keyword software prohibits access to “Internet sites that include words contained in a list of prohibited words,” while protocol filters ban whole categories, such as “chat rooms, games, [or] newsgroups containing graphic images.” *Id.*

exact size of the community undetermined.<sup>163</sup> Instead, jurors are asked to use the standard of the “average person” in their own communities.<sup>164</sup>

The *Miller* standard analyzes obscenity using the standards of a real-world community, rather than the unique characteristics of cyberspace. In *COPA III*, Justice Thomas cited *Hamling v. United States*<sup>165</sup> and *Sable*<sup>166</sup> to explain why hypothetical jurors in COPA cases should consider the standards of their own community.<sup>167</sup> In both cases, the burden was on the distributor to comply with local standards.<sup>168</sup> This approach proved viable for non-Internet mediums because telephone and postal providers could target a particular geographic area and tailor their content to comply with the standards of that market.<sup>169</sup> As a result, the application of “community standards” in the real world properly led to a variation of obscenity standards appropriate in each locality.

In contrast, local community standards applied to the Internet raise due process concerns because online providers are denied the requisite notice needed to comply with exceedingly strict local standards.<sup>170</sup> There are innumerable communities whose standards may be applied to judge Internet content. Jurors are permitted to use the standards of any local community with access to the Web—even the most puritanical—to determine whether the material is offensive.<sup>171</sup> This standard creates an enormous burden on content providers to ascertain a user’s geographic community and comply with their standards.<sup>172</sup> Yet because online users are anonymous and can travel from site to site without geographic boundaries, it is virtually impossible for web site operators to know whether their content will be harmful to a minor in a

163. See *Miller v. California*, 413 U.S. 15, 30-34 (1973).

164. *Id.* at 33 (“[S]o far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one.”).

165. 418 U.S. 87 (1974). The Supreme Court considered whether content was obscene under 18 U.S.C. §1461, a federal statute that prohibits the mailing of obscene material. *Id.* at 87, 98. The Court held that requiring a speaker to comply with varying community standards who distributes material to a national audience does not violate the First Amendment. *Id.* at 104-05. Instead, jurors are instructed to rely on their own understanding of the community where they live, even if the defendants are not familiar with those standards. *Id.*

166. 492 U.S. 115 (1989). The Supreme Court in *Sable* reaffirmed its holding in *Hamling* that applying local community standards to a “dial-a-porn” service involving a national audience was constitutional. *Id.* at 124-26. The Court found that distributors in the telecommunications medium could use screening technology to make sure that their messages would not be aired in areas where the content would be considered obscene. *Id.* at 125-26.

167. See *supra* note 77 and accompanying text.

168. *Sable*, 492 U.S. at 125-26; *Hamling*, 418 U.S. at 104-05.

169. See *Ashcroft v. ACLU (COPA III)*, 535 U.S. 564, 587 (2002) (O’Connor, J., concurring); *Id.* at 594-95 (Kennedy, J., concurring); *Id.* at 602-06 (Stevens, J., dissenting).

170. See Mark Cenite, *Federalizing or Eliminating Online Obscenity Law as an Alternative to Contemporary Community Standards*, 9 COMM. L. & POL’Y 25, 51-54 (2004).

171. See *id.* at 51.

172. *Id.* at 52.

remote part of the country.<sup>173</sup> Providers could potentially be sanctioned for breaching standards that they did not understand because they are left to guess where community standards are most strict and which communities' standards will apply.<sup>174</sup>

## 2. Less Restrictive Alternative: Filtering Software Is Not a Solution

Although both the *COPA V* and *Gonzales* Courts conceded that filters were over- and under-inclusive, they casually dismissed this shortcoming without accessing the filters' tremendous degree of imprecision. Most filters block an inordinate number of safe sites, but simultaneously permit a striking amount of pornography.<sup>175</sup> The technology's under-inclusiveness is attributed to the Internet's enormous "size and rate of growth," as companies cannot keep up with the vast amount of material added to the Web by each hour.<sup>176</sup> The problem with the software's over-inclusiveness, however, is more complex. Filters identify objectionable sites by sensing controversial words without any regard to the language's context, which results in either drastically distorting or entirely prohibiting the retrieval of legitimate educational material.<sup>177</sup> Such crude detection of text often occurs without any justification.<sup>178</sup> Moreover, the

173. See Cenite, *supra* note 170, at 52.

174. See *id.* at 52-53.

175. See, e.g., MARJORIE HEINS ET AL., INTERNET FILTERS: A PUBLIC POLICY REPORT (2d ed., 2006), available at <http://www.fepproject.org/policyreports/filteringreport.html> (evaluating the current brands of filtering technology). For example, a software brand called Bess, manufactured by N2H2, filters content by using either a proxy server, where a Web request goes through a server located with N2H2, or through a dedicated server—the "Internet Filtering Manager"—installed in a local computer. *Id.* at 12. A study conducted by Peacefire examining the filter's treatment of human rights Web sites found that Bess's "Typical School Filtering" "blocked the home pages of the International Coptic Congress, which tracked human rights violations against Coptic Christians living in Egypt; and Friends of Sean Sellers, which contained links to the works of the Multiple Personality Disorder-afflicted writer who was executed in 1999 for murders he had committed as a 16-year-old." *Id.* at 13. Perhaps more disturbing, however, is that Bess permitted hundreds of pornographic sites. *Id.* at 10-14.

176. See Cassidy, *supra* note 162, at 454-55.

177. See *id.* at 453-54; Censorware Project, *Passing Porn, Banning the Bible* (2000), <http://censorware.net/reports/bess> (noting that searching a topic such as "testicle cancer" on Bess would return the same results as searching "cancer," as the software just blocks the objectionable word); Lessig, *supra* note 162, at 655 (explaining that because "homosexual" is on the list of Cybersitter's words, the filter simply erases the trigger word without indicating the change of text to the reader: "a CyberSitter routine . . . would therefore render 'President Clinton opposes homosexual marriage' as 'President Clinton opposes marriage.'" (citation omitted)).

178. Elec. Privacy Info. Ctr., *Faulty Filters: How Content Filters Block Access to Kid-Friendly Information on the Internet* (1997), <http://www2.epic.org/reports/filter-report.html> (last visited Dec. 2, 2005). The Electronic Privacy Information Center (EPIC) found that a family-friendly search engine blocked many Web sites appropriate for children without any apparent reason. EPIC conducted 100 searches using a traditional search engine and then did the same searches using Net Shepard Family Search (Family Search). EPIC first entered their search term into the AltaVista search engine, recorded their results, and performed the same request again using Family Search. EPIC used search phrases such as "American Red Cross," "Smithsonian Institution," "Christianity," and the "Bill of Rights," but in every case, the search engine

decision to block web sites is highly subjective, made by companies that may capitalize from sites<sup>179</sup> or have a political or economic bias.<sup>180</sup> Although filtering software has improved greatly since its inception, there are still many obstacles that render them ineffective at protecting children against harmful material. Therefore, filtering software is not desirable as the lone alternative to legislation.

*C. The Broadcast Medium Is a Still a Model for Resolution*

There must be some legislative action taken to regulate pornography on the Internet, but in order to do so, the standard for defining protected speech cannot be so strict. The faulty analysis in *Reno* that calls for restrictions on Internet speech to be judged at the highest level of scrutiny established a framework for any law regulating the Internet to fail constitutional review. The current technological alternatives were only considered less restrictive than COPA because strict scrutiny analysis created such a high criterion for defining protected speech that any flawed alternative was less restrictive. Filtering software, however, is highly burdensome to Internet users and should not suffice as an adequate substitute for government regulation. Consequently, the solution for assigning the proper level of future government regulation ultimately depends on the medium of communication analogized with the Internet. Therefore, in light of the Internet's profound similarities with the broadcast medium, the approach used to regulate explicit content in the broadcast medium—an administrative agency—could also be designed and instituted to regulate the Internet.

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restricted access to anywhere between ninety and ninety-nine percent of the material that would otherwise be available without a filter. *Id.* Yet, when EPIC examined the blocked pages, it could not find any inappropriate content.

179. See Heins, *supra* note 175, at 14 (research revealed that Clicksafe “blocked the home page of cyberlaw scholar Lawrence Lessig, who was to testify before the COPA Commission, . . . various pages on the COPA Commission site, as well as the Web sites of organizations and companies with which [COPA] commissioners were affiliated.”); see also Lessig, *supra* note 162, at 655 (explaining that the main problem with filtering software is that lists of blocked sites are held in secret, giving users “no simple way to verify that sites are not included for the wrong reasons”).

180. See Heins, *supra* note 175, at 9. On American Online Parental Control's “Kids Only” level, the software blocked Web sites for the “Democratic National Committee, the Green Party, and Ross Perot's Reform Party, but not those of the Republican National Committee and the conservative Constitution and Libertarian parties.” *Id.* The “Young Teen” setting blocked the pages of the Coalition to Stop Gun Violence, Safer Guns Now, and the Million Mom March, but did not block the sites of the NRA or the commercial sites for the Colt and Browning firearms. *Id.*

### 1. Creating an Administrative Agency

Although the *Reno* Court erred when determining the appropriate level of judicial scrutiny, there is still promise for regulating offensive online content by following the model of regulation used in the broadcast medium. When distinguishing the CDA from the order in *Pacifica*, the *Reno* Court noted the value of having an agency evaluate laws proposed to regulate a particular medium:

[T]he order in *Pacifica*, issued by an agency that had been regulating radio stations for decades, targeted a specific broadcast that represented a rather dramatic departure from traditional program content in order to designate when—rather than whether—it would be permissible to air such a program in that particular medium. The CDA’s broad categorical prohibitions are not limited to particular times and are not dependent on any evaluation by an agency familiar with the unique characteristics of the Internet.<sup>181</sup>

Following this logic, Congress could delegate authority to an administrative agency responsible for drafting rules with the force of law to regulate the Internet. A federal agency would be in a better position than Congress to tackle the issues raised in *Gonzales* that led to COPA’s likely demise, because an agency would be comprised of individuals familiar with the unique technology of cyberspace who are trained in drafting regulations targeted toward a specialized form of new media. For example, an agency could design a rule to thwart the surge of sexually explicit material coming from outside the United States.<sup>182</sup> An agency could also invent more appropriate ways to channel content away from minors, as opposed to using age-verifying technologies proposed by Congress in COPA’s affirmative defenses—an idea widely criticized by the *Gonzales* decision because such technology was “effectively unavailable.”<sup>183</sup> Finally, an agency could even articulate a national Internet “community” and impose administrative civil penalties, thus minimizing the rule’s potential for vagueness and overbreadth.

### 2. An Administrative Agency Addresses a Public Interest

The FCC was created to ensure the existence of diverse information available on radio airwaves—a public interest that arose because of the scarcity of electromagnetic frequencies. Although the public concerns raised when the FCC was created to regulate broadcast communications are not relevant to the Internet, uncensored speech in the context of cyberspace gives rise to public concerns of a far greater magnitude that justify the creation of an administrative entity with jurisdiction over Internet communications. Rules

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181. *Reno v. ACLU*, 521 U.S. 844, 867 (1997).

182. *See ACLU v. Gonzales (COPA VI)*, 478 F. Supp. 2d 775, 810 (E.D. Pa. 2007) *aff’d sub nom.*, *ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008) (charging COPA as “underinclusive” for lacking extra-territorial application).

183. *See id.* at 811-13.

enacted by the agency would be content-neutral regulations targeted at the deleterious societal hazards resulting from the speech, rather than the content of the speech itself, thus subjecting these laws to a lower standard of scrutiny and making them more likely to pass constitutional review.

Internet pornography has been directly linked with crimes such as rape, sexual assault, and child molestation, and the anonymous nature<sup>184</sup> of Internet chat rooms attracts thousands of pedophiles to engage in sexually explicit conversations with young children every year.<sup>185</sup> Family counselors, clergy and researchers all report that the habitual viewing of Internet pornography is now a leading cause of marital conflicts and divorces, as most spouses equate pornographic viewing activity with infidelity.<sup>186</sup> Exposure to pornography distorts attitudes and values, because young teenagers acquire warped ideas about sexuality that interfere with their development and identity.<sup>187</sup> These threats are all exacerbated by the ease and affordability of online pornography.<sup>188</sup> Accordingly, a federal agency equipped with the knowledge, technology, and resources to attack these problems would be more likely than Congress to craft content-neutral rules with suitable avenues for channeling Internet speech.

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184. Lambert, *supra* note 141 (“Those who visit web sites don’t risk being seen going into an adults-only theater or the back room of a video store. And the sites – which are mostly visited by men – are there every minute of the day.”).

185. See Enough.org, *supra* note 130 (citation omitted) (“One in five children who use computer chatrooms has been approached over the Internet by pedophiles.”); see also Keiser, *supra* note 30, at 797-98 (describing how a forty-three-year-old man sexually molested a fifteen-year-old boy after they met in an online chat room and how the boy subsequently molested a younger child); Donna Rice Hughes, *Harms of Porn and Resources* (2001), available at <http://www.protectkids.com/effects/harms.htm> (explaining study indicating that slightly more than one-third of child molesters and rapists had been motivated to commit offenses after viewing pornography).

186. See Lambert, *supra* note 141. At an annual meeting of the American Academy of Matrimonial Lawyers, “one third of the attorneys who attended said excessive interest in online porn was a major factor in the divorce cases they handled.” *Id.* Divorce attorney Tom Benner stated that “close to one-third of his recent cases ‘had something to do’ with online porn or chat-room affairs.” *Id.* Clients explain that living with a spouse addicted to pornography has “all the negative feelings of having an affair . . . [t]here is a sense of being rejected and isolated, and with porn, it’s compounded by the repulsion.” *Id.*

187. See Hughes, *supra* note 185; see also Kastleman, *supra* note 142 (describing how pornography is connected to anorexia and bulimia in women who strive to please men who, as a result of viewing pornography, desire an unattainable ideal).

188. Lambert, *supra* note 141 (Dr. David Greenfield states that “online pornography poses a more insidious threat . . . because those sites are all but unavoidable for anyone who spends much time on the Internet—including children and teenagers. ‘This is really the first time in history that you can access the most potent sexual content with such ease and affordability.’”).

### 3. An Agency Could Develop a National Community Standard

An administrative agency is also in a better position than Congress to articulate a national standard for defining obscenity. The FCC's decision in *Pacific* to apply a national standard in the broadcasting medium serves as a model for a national community standard for the Internet.<sup>189</sup> The FCC interpreted the Court's decision in *Pacific* as allowing a national standard for broadcasting, and affirmed this holding in a 2001 policy statement, in which it stated that community standards were to be judged by the "average broadcast viewer."<sup>190</sup> The FCC's decision to use a national standard in broadcasting was still consistent with *Miller*, because unlike other types of media, broadcasting comes from national networks.<sup>191</sup> Local standards applied to broadcasting interfere too greatly with the interstate flow of material and therefore would be impermissible under the Constitution's Commerce Clause.<sup>192</sup>

Similarly, when local community standards are applied to the Internet, a barrier to the interstate flow of commerce occurs because the burden on content providers to understand multiple local standards coupled with the veto power of the least tolerant community substantially inhibit the flow of valuable ideas.<sup>193</sup> The Internet is a "network of networks"<sup>194</sup> connected throughout the globe, causing Web publishers to refrain from publishing a large amount of protected material because variable local standards prevent them from knowing what standards to obey. Since the exact size of the *Miller* community is still left to the discretion of the courts, *Miller's* standard could still be expanded to include the entire nation.<sup>195</sup> Federalizing a national

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189. See Cenite, *supra* note 170, at 40-42.

190. *Id.* at 41 (citing Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7999 (2001)).

191. *Id.* at 41-42.

192. See *id.* at 57-58.

193. See *id.* at 57.

194. See *ACLU v. Reno*, 929 F. Supp. at 830-31. The findings of fact accumulated at the preliminary injunction stage described the Internet as:

not a physical or tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks. . . . Many networks . . . are connected to other networks, which are in turn connected to other networks in a manner which permits each computer in any network to communicate with computers on any other network in the system.

*Id.*

195. See Cenite, *supra* note 170, at 50-71. Justice O'Connor recognized that a national standard is consistent with *Miller* because *Miller* never explicitly barred a national standard: "[n]othing in the First Amendment requires' that a jury consider national standards when determining if something is obscene as a matter of fact." *Ashcroft v. ACLU (COPA III)*, 535 U.S. 564, 587-88 (2002) (O'Connor, J., concurring) (quoting *Miller v. California*, 413 U.S. 15, 31 (1973)). Moreover, Justice O'Connor referred to a later case, *Jenkins v. Georgia*, where the Court stated that although they approved local standards, "[they] did not mandate their use." *Id.* at 588 (quoting *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974)). As a result, this left the opportunity

Internet community would create a uniform structure of regulation similar to the broadcasting medium regulated by the FCC that would articulate predictable standards for online content providers to follow.<sup>196</sup> The predictability of agency-created regulations would eradicate the strain local standards have on the interstate flow of ideas because Web publishers would know exactly what constitutes protected speech. Consequently, consistent enforcement procedures would limit COPA's potential for vagueness by providing web site operators the requisite notice needed comport with due process.

#### 4. An Agency Administers Civil Sanctions

The FCC justified its decision in *Pacifica* to regulate indecent content under the nuisance rationale,<sup>197</sup> because the otherwise protected material was used at an inappropriate time,<sup>198</sup> had minimal social value,<sup>199</sup> and was worsened by the

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open for jurors to apply other standards—including a national standard—when defining a “community” for evaluating obscenity. *Id.* In fact, Justice O'Connor recalled the trial court's instructions to the jury in *Miller*, which based the relevant community standards on those of California rather than the whole nation. *Id.* If the jury could generalize the values for the whole state of California—a “State that includes both Berkley and Bakersfield”—Justice O'Connor suggested that they could also generalize the values of the Nation as a whole. *Id.* at 589. Although Justice O'Connor did not label this “generalization” as an “average” of what individuals across the country agree is obscene, she still illustrated that discerning a middle ground of national values is possible, and perhaps even the most reasonable option, when determining a community standard for the technology of cyberspace.

196. *See COPA III*, 535 U.S. at 589 (O'Connor, J., concurring). Justice Breyer wrote his own opinion to examine the statute's legislative history. Like Justice O'Connor, Justice Breyer asserted that the language of COPA never defines “community.” *Id.* (Breyer, J., concurring). Instead, Justice Breyer argued that a uniform view within Congress supports the proposition of a national standard, as the Committee Report on COPA demonstrated that community standards applied to the Web was understood as a “reasonably constant,” “adult” standard, rather than a “geographic” standard that would vary among communities. *Id.* at 590 (Breyer, J., concurring) (quoting H.R.Rep. No. 105-775, p. 28 (1998)). Furthermore, a national standard would avoid the problems arising in other precedents that used a local standard, such as the risk of granting veto power to the most conservative communities: “To read the statute as adopting the community standards of every locality in the United States would provide the most puritan communities with a heckler's Internet veto affecting the rest of the Nation.” *Id.*

197. *See FCC v. Pacifica Found.*, 438 U.S. 726, 732 n.6 (1978). In a separate concurrence to the FCC's decision, Commissioners Robinson and Hooks stated: “[W]e can regulate offensive speech to the extent it constitutes a public nuisance. . . . The governing idea is that ‘indecenty’ is not an inherent attribute of the words themselves; it is rather a matter of context and conduct.” *Id.* (citation omitted).

198. *See id.* at 750. A nuisance is simply the “right thing in the wrong place,—like a pig in the parlor instead of the barnyard.” *Id.* (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926))

199. *See id.* at 743, 746 (weighing the value of the indecent speech and concluding that such speech “lie[s] at the periphery of First Amendment concerns,” and thus has little significance in the “hierarchy of First Amendment values.”); *see also id.* at 746 (“[S]uch utterances

difficulties posed by technology of the broadcasting medium.<sup>200</sup> The *Pacifica* Court “emphasize[d] the narrowness of [its] holding,” however, by asserting that the enforcement of indecency only warrants administrative rather than criminal sanctions.<sup>201</sup> Ultimately, the nuisance rationale permitted the government to regulate indecent content by channeling material to a specified time rather than entirely prohibiting the objectionable content.<sup>202</sup>

Justice Stevens criticized COPA’s use of criminal penalties in his *COPA V* concurrence,<sup>203</sup> and asserted that these sanctions were “strong medicine for the ill that the statute seeks to remedy.”<sup>204</sup> Justice Stevens argued that attaching such harsh penalties to an already “ill-defined” concept like “obscenity” would infringe too greatly on First Amendment rights and were therefore not appropriate to use with COPA.<sup>205</sup> In accord with these criticisms, the similarities between the Internet and broadcasting would justify administrative civil sanctions for enforcing online pornography. Just as the “Filthy Words” monologue in *Pacifica* constituted a nuisance because it “offend[s] for the same reasons that obscenity offends,”<sup>206</sup> online pornography is a comparable nuisance because the social hazards linked to viewing online pornography outweigh the content’s negligible social benefits. Applying civil administrative sanctions would reduce a future rule’s potential for vagueness, as content providers would be more likely to distribute borderline material dealing with social or political concerns if penalties are less severe.

## V. CONCLUSION

Given that the reasons for analogizing the Internet with telecommunications are outdated, the standard of review used to analyze the constitutionality of laws enacted to regulate the Internet should be judged under a less rigorous standard of scrutiny more comparable to broadcasting. Although the district court in *Reno* conducted a weak medium-specific analysis, this mistake would not be fatal to future laws enacted to regulate the Internet if Congress could delegate legislative authority to an administrative agency with sole jurisdiction over this new medium. It appears that under strict scrutiny, any alternative would be less restrictive than *Miller’s* community standards language when applied to the Internet. The creation of an administrative agency, however, could address many of the concerns raised in the COPA cases by crafting particularized and technologically feasible rules

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are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

200. See *supra* notes 35-43 and accompanying text.

201. *Pacifica*, 438 U.S. at 750.

202. *Id.* at 731.

203. *Ashcroft v. ACLU (COPA V)*, 542 U.S. 656, 674-675 (2004) (Stevens, J., concurring).

204. *Id.* at 675.

205. *Id.*

206. See *Pacifica*, 438 U.S. at 746.

that are less restrictive than the current technological alternatives favored by the Court and are thus more likely to pass review.