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Technology and Pornography

*Dawn C. Nunziato**

I. INTRODUCTION

Over the past decade, legislators and industry players have undertaken valiant efforts to employ technology to remedy a problem that technology has created—the increased availability to minors of sexually-themed content on the Internet. Legislative efforts to restrict minors’ access to such content have relied on two types of technology: adult verification technology and user-based software filters.

Legislation relying upon adult verification technology, like the Communications Decency Act (CDA)¹ and the Child Online Protection Act (COPA),² attempts to zone Internet speech at its source into adult zones and minor zones by requiring content providers to ensure that minors are not granted access to harmful-to-minors material. Such legislation requires that content providers (1) segregate out their harmful-to-minors content, and (2) employ adult verification tools like adult identification cards or credit cards to ensure that minors are not granted access to such material.

The constitutionality of such zoning schemes depends on (1) the level of sophistication, efficacy, and deployment of adult verification technology and (2) the burdens that the required use of such technology imposes on content providers and Internet end users.³ And, as with all content-based restrictions on speech, the constitutionality of such schemes depends on whether there are less restrictive but equally effective alternatives for achieving the

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1. 47 U.S.C. § 223 (2000).

2. 47 U.S.C. § 231 (2000).

3. *See infra* Part III.

government's interest. For example, challengers to both the CDA and COPA pointed to the availability of software filters as less restrictive and (at least) equally effective alternatives.⁴

Legislation relying upon software filters to restrict minors' access, like the Child Internet Protection Act (CIPA),⁵ does not regulate content providers at all, but instead regulates Internet end users (or intermediaries like public schools, libraries, or Internet service providers (ISPs)), and essentially requires that these entities employ filtering software to restrict minors' access to harmful Internet content. As discussed below, the constitutionality of such filtering schemes depends on the sophistication of the filtering software, the extent to which it underblocks and/or overblocks users' access to harmful content, and the burdens that the required use of such filtering technology imposes on Internet end users.

The existence and efficacy of filtering technology have presented a double-edged sword for legislators in their efforts to regulate minors' access to sexually-themed content. If technology like software filters is found to be less restrictive than the adult verification-based zoning schemes embodied in the CDA and COPA, then the Supreme Court will likely strike down such schemes because they are not sufficiently tailored to address the government interest. Indeed, given their availability and comparative effectiveness, COPA opponents have heralded software filters as a less restrictive alternative—reason alone to strike down the statute. If, as some have argued, software filters are less speech-restrictive than, and at least as effective as, the criminal prohibitions on speech embodied in Internet zoning schemes like COPA, then such legislation will fail strict scrutiny.

Recently, an organization called CP80 proposed a different means of using filtering-type technology to zone the Internet.⁶ Under this proposal, all Internet content would be classified by content providers into one of two categories: "Adult/Harmful to Minors" or "Not Harmful to Minors." Certain Internet "ports," the rough equivalent of channels on television, would be designated as Adult Ports and used for the transmission of adult content, while

4. See *infra* text accompanying notes 60–62, 73.

5. 47 U.S.C. § 254(h)(5), (6) (2000).

6. See Cheryl B. Preston, *Making Family-friendly Internet a Reality: The Internet Community Ports Act*, 2007 BYU L. REV. 1471.

others would be designated as Community Ports and used for the dissemination of all other content. Individual Internet users would then direct their ISPs to provide Internet content to them either on all ports (Adult and Community) or only on Community Ports.⁷ Proponents contend that this legislative solution is superior not only to previous attempts at zoning the Internet but also to previous efforts relying on software filtering technology.⁸

This Article scrutinizes the various attempts to use technology to remedy the problem of minors' access to sexually-themed content on the Internet, with an emphasis on the relationship between the status of technology and the constitutionality of the government's efforts. The more effective user-based filtering technology becomes in restricting minors' access to sexually-themed content, the less likely courts are to uphold other legislative means of restricting minors' access to such content. In several leading cases, the Supreme Court has emphasized that the effectiveness of user-based filtering software as an alternative renders the government regulation under consideration constitutionally infirm. Part II of the Article analyzes the foundational First Amendment jurisprudence defining obscene speech and the regulation of minors' access to sexually-themed content. Part III then examines the fate of Congress's recent efforts to regulate in this area, emphasizing in particular the current status of COPA, the constitutionality of which has been under consideration by the courts for the past ten years. Part IV analyzes the constitutionality of the proposed Internet Community Ports Act (ICPA) in light of the constitutional scrutiny that courts have imposed upon prior efforts to regulate minors' access to sexually-themed content and the burdens the Act would impose on content providers and Internet users.

7. See CP80 Foundation, Solutions: Technology, <http://www.cp80.org/solutions/technology> (last visited January 10, 2008).

8. At the time of writing, the ICPA had not yet been introduced in either house of Congress. See CP80 Foundation & Cheryl B. Preston, The Internet Community Ports Act of 2007, http://www.cp80.org/resources/0000/0013/Internet_Community_Ports_Act.pdf; see also Preston, *supra* note 6, at 1471 app.

II. THE FOUNDATIONAL FIRST AMENDMENT JURISPRUDENCE

A. Defining Obscene Speech

Over the past fifty years, the Supreme Court has finely honed its obscenity jurisprudence⁹ and its derivative jurisprudence of obscenity-for-minors.¹⁰ While “obscene”¹¹ speech, properly defined, is wholly outside First Amendment protection for any and all speakers and listeners, “obscene-for-minors”¹² (or “harmful-to-minors”) speech is that speech which only adults have a constitutional right to access (and engage in). The government has a legitimate¹³ interest in restricting underage access to “obscene-for-minors” speech, but it does not have a legitimate interest in restricting adult access to such speech. Therefore, in order to restrict adults’ access to sexually-themed content, such content must be found to satisfy the constitutional definition of obscenity.¹⁴

Several principles follow from this basic structure of First Amendment jurisprudence regarding sexually-themed speech.¹⁵ First, adults have a constitutional right to access (non-obscene) sexual content that falls into the category of obscene-for-minors speech, while minors do not. Second, the definitions of “obscene” and “obscene for minors” speech take on critical importance, as they separate First Amendment-protected content from unprotected content. Third, because of the differences in the relevant First Amendment rights accorded to minors and adults, the ability to determine the age of the individual seeking access to content is of critical importance. Because the definitions of “obscene” and

9. See *infra* text accompanying notes 18–28.

10. See *infra* Part II.B.

11. See *infra* text accompanying notes 16–18.

12. See *infra* text accompanying notes 33–34.

13. As described *infra*, it is unclear precisely what type of showing needs to be made by the government in regulating minors’ access to sexually-themed expression.

14. See *infra* text accompanying notes 16–18. Sexually-oriented content can also be restricted if it constitutes child pornography. Because it raises separate issues and developed within a distinct line of First Amendment jurisprudence, the discussion of Congress’s efforts to restrict access to child pornography on the Internet is left to others. See, e.g., Symposium, *The Fate of the Child Pornography Protection Act of 1996*, 23 CARDOZO L. REV. 1993 (2002).

15. This analysis of obscenity and obscenity-for-minors law substantially tracks my analysis in Dawn C. Nunziato, *Toward a Constitutional Regulation of Minors’ Access to Harmful Internet Speech*, 79 CHI.-KENT L. REV. 121 (2004).

“obscene-for-minors” speech delineate unprotected speech from protected speech, these definitions are also of critical constitutional importance. After struggling for decades to define a meaningful test for distinguishing protected sexually-themed speech from unprotected obscene speech,¹⁶ the Supreme Court set forth this test in *Miller v. California* in 1973.¹⁷ In order for sexually-themed speech to fall outside the protection of the First Amendment for adults, *Miller* requires that:

- (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;
- (2) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and
- (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹⁸

In the years following this decision, the Supreme Court repeatedly emphasized that *Miller* set forth the definitive standard for regulating obscene speech.¹⁹ It is therefore important to focus carefully on each of the three prongs of this test. If sexually-themed expression falls outside *Miller*'s definition of obscene speech, adults enjoy a right to access it,²⁰ which the government cannot constitutionally restrict or substantially burden.

Miller makes clear that obscenity is to be judged by a local community standard, in particular, that of the average member of the community, to assess whether the expression at issue, taken as a whole, appeals to the prurient interest.²¹ This prong of the *Miller* test grants local (geographically-defined) communities the autonomy

16. Other categories of unprotected speech include “fighting words” and “defamation.” *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992) (confining unprotected speech to limited categories such as fighting words, defamation, and obscenity).

17. *Miller v. California*, 413 U.S. 15 (1973).

18. *Id.* at 24.

19. *See, e.g., Pope v. Illinois*, 481 U.S. 497, 498 (1987); *Jenkins v. Georgia*, 418 U.S. 153, 155 (1974).

20. This is assuming that the sexually-themed expression also does not fall within a constitutional definition of child pornography, which is another category of unprotected speech. *See supra* note 14.

21. *Miller*, 413 U.S. at 30–31.

to draw the line between sexually-themed speech that is to be protected by the First Amendment within and for their respective communities, and sexually-themed speech that is to be deemed outside of the First Amendment's protection within and with respect to their communities.²² Thus, although it might reasonably be believed that the First Amendment sets forth a national standard of protection for expression, in the context of regulating sexually-themed speech, the Supreme Court's obscenity jurisprudence grants local communities the autonomy to determine what subset of such speech (if any) is to be deemed outside the protection of the First Amendment within and with respect to their communities.

An inevitable concomitant of such community autonomy is the potential geographical variation in the classification of speech as obscene. Accordingly, the community of Salt Lake City may classify as obscene and unprotected expression that may be deemed protected and not obscene by the community of New York City. In *Miller*, the Supreme Court acknowledged the inevitable geographic variability of its definition of obscenity:

[O]ur Nation is simply too big and too diverse . . . to reasonably expect that such standards [of prurient interest] could be articulated for all 50 states in a single formulation. . . . To require a State to structure obscenity proceedings around evidence of a *national* "community standard" would be an exercise in futility It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.²³

Accordingly, *Miller* affirmatively establishes that local communities enjoy the prerogative to determine what sexually-themed expression is to be deemed obscene within their communities. In addition, *Miller* grants local communities the autonomy to determine what sexually-themed expression is to be deemed protected within their communities.

22. *But see* Ashcroft v. ACLU, 535 U.S. 564, 586–613 (2002) (O'Connor, J., concurring and Breyer, J., concurring) (arguing for a national community standard for obscenity for regulating the Internet).

23. *Miller*, 413 U.S. at 30–33.

Second, *Miller* requires that the government regulator specifically set forth a list of sexual acts, the depictions of which are unprotected if they are deemed, applying contemporary community standards, to be patently offensive.²⁴ The requirement that regulators set forth this list with specificity helps to reduce the potential for vagueness within obscenity statutes.²⁵ This specific determination of patent offensiveness, like the determination of appeal to the prurient interest, is also to be made by the average member of the local community.²⁶ Thus, under *Miller*, both the assessment of appeal to the prurient interest, and the assessment of patent offensiveness, are inevitably subject to geographic variability.

Local communities' autonomy to make such determinations is not unfettered, however. In assessing local determinations of obscene speech, the third prong of *Miller* requires that appellate courts retain the power to determine whether such speech nonetheless has redeeming social value—i.e., literary, artistic, political, or scientific—and therefore, whether such speech is protected by the First Amendment regardless of the local community's assessment.²⁷ Because this determination is not made by jury members, “the serious value requirement ‘allows appellate courts to impose some limitations and regularity on the definition [of obscenity] by setting, as a matter of law, a national floor for socially redeeming value.’”²⁸

In short, *Miller* embodies a principle of geographical variability of the definition of obscene expression. Each community enjoys the autonomy to determine whether sexually-themed expression is to be

24. *Id.* at 24.

25. *See Reno v. ACLU*, 521 U.S. 844, 873 (1997).

26. *See Ashcroft*, 535 U.S. at 576 n.7 (majority opinion).

27. *See, e.g., Jenkins v. Georgia*, 418 U.S. 153, 162–63 (1974).

28. *Ashcroft*, 535 U.S. at 579 (quoting *Reno v. ACLU*, 521 U.S. at 873). Thus, even if a less “tolerant” community made the determination that the book *The Joy of Sex* was obscene and unprotected by the First Amendment, *Miller* requires that such determinations be second-guessed by the judicial branch, which has the responsibility of applying this *Miller* savings clause to declare that the expression at issue nonetheless has serious redeeming social value and is therefore protected by the First Amendment. *See, e.g., Jenkins*, 418 U.S. at 160–61 (1974). Accordingly, despite the fact that a local jury in Georgia, applying its state obscenity statute, determined that the Academy Award-winning film *Carnal Knowledge* appealed to the prurient interest and described sexually-themed conduct in a patently offensive manner, the court in that case had the power to determine that the work nonetheless embodied serious literary value. The court was therefore able to rescue the film from the jury's classification of it as obscene and unprotected by the First Amendment. *Id.*

declared obscene and unprotected, or non-obscene and protected, within the geographical boundaries of that community. Determinations of obscenity made by communities, however, are subject to an appellate court's determination that such content is nonetheless protected because it has serious social value.

B. Defining Obscene-for-Minors Speech

In *Ginsberg v. New York*²⁹ and related cases,³⁰ the Supreme Court confirmed that legislators may constitutionally restrict minors' access to sexually-themed speech that is protected for adults, so long as they are careful not to restrict adults' rights (including adults' rights as parents)³¹ within such legislation. The Supreme Court upheld the seemingly common-sense principle³² that minors' First Amendment right to access sexually-themed content is more limited than adults' right to access such material. In this case, the Court upheld a New York statute that regulated minors' access to content that fell within the statute's definition of "obscene for minors."³³ The statute at issue, which was primarily aimed at restricting the sale of so-called "girlie" magazines to minors, prohibited the sale to those ages sixteen and under of material that was considered obscene as to that age category, even though it would not be obscene to adults.³⁴ The statute attempted to conform with Supreme Court precedent at the time that required the inclusion of a savings clause for regulations of obscene speech. Thus, the statute allowed for speech that had redeeming social importance to minors, as well as a community standards component for determining whether the expression was patently offensive.³⁵

In affirming this two-tiered, age-variable approach to regulating obscene content, the Supreme Court first emphasized the right of parents to direct the rearing of their children as "basic in the

29. 390 U.S. 629 (1968).

30. *See, e.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

31. *See infra* text accompanying notes 37–40.

32. This principle was not commonsensical to the plaintiff in that case, who advanced "the broad proposition that the scope of the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend upon whether the citizen is an adult or a minor." *Ginsberg*, 390 U.S. at 636.

33. *Id.* at 636–37.

34. *Id.*

35. *Id.* at 646 app. a.

structure of our society.”³⁶ The Court observed that “parents and others, teachers for example, who have this primary responsibility for children’s well-being are entitled to the support of laws designed to aid discharge of that responsibility.”³⁷ Finding that the prohibitions in the New York statute aided parents (and those standing *in loco parentis*) in discharging these responsibilities, the Court upheld the statute.³⁸ The Court also emphasized the fact that the statute’s operation did not usurp parental autonomy to determine what material was suitable for their children: “the [statute’s] prohibition against sale to minors does not bar parents who so desire from purchasing the magazines for their children.”³⁹ While the statute’s prohibition on the dissemination of obscene-for-minors speech might therefore be thought to aid parents in the discharge of their parental duties, a statute that went so far as to remove from parents the authority to determine what material was suitable for their children would be found to unconstitutionally restrict this aspect of parental autonomy.⁴⁰

The *Ginsberg* Court also recognized that, in addition to parents’ interest in regulating their children’s access to harmful speech, the State enjoyed an “independent interest in the well-being of its youth” that provided a separate justification for regulating minors’ access to harmful speech. The Court observed that:

While the supervision of children’s reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society’s transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in the legislation aimed at controlling dissemination of such material to adults.⁴¹

In short, the *Ginsberg* Court held that the government can regulate minors’ access to speech under a different standard than that

36. *Id.* at 639.

37. *Id.*

38. *Id.*

39. *Id.*

40. *See* text accompanying note 59.

41. *Ginsberg*, 390 U.S. at 640 (quoting *People v. Kahan*, 206 N.E.2d 333, 334 (N.Y. 1965) (Fuld, J., concurring)).

by which adult access to speech is regulated, so long as certain safeguards are included within such regulation. Such safeguards primarily include those definitional safeguards set forth in *Miller* and tailored to minors, including a patently offensive and prurient interest analysis undertaken in light of contemporary community standards and a savings clause for speech with redeeming social importance for minors. The constitutional requirement of including a savings clause in this context makes clear that any such regulation must preserve minors' access to expression that has serious literary, artistic, scientific, or political value for minors. Such safeguards also require that those disseminating sexually-themed speech will be able to determine the age of prospective recipients of such speech, and that adults' right to access non-obscene speech (as well as their right to consent to their child's access to such speech) not be abridged.

III. CONGRESSIONAL EFFORTS TO REGULATE MINORS' ACCESS TO SEXUALLY-THEMED CONTENT ON THE INTERNET

Over the past decade, Congress has undertaken three major efforts to regulate minors' access to sexually-themed Internet speech: the CDA,⁴² COPA,⁴³ and CIPA.⁴⁴ While the Supreme Court upheld CIPA's mechanism of encouraging schools and libraries to use software filters to restrict minors' access to such content, it has struck down and identified serious constitutional infirmities with the CDA and COPA. While the Supreme Court in each case found that the statutes satisfied the first prong of the two-pronged strict scrutiny analysis—by advancing the compelling government interest of protecting minors from harmful sexually-themed speech—the Court held that Congress failed to advance this interest using the least speech-restrictive means possible.

A. The Communications Decency Act of 1996

Congress's first attempt to regulate minors' access to harmful Internet speech was enacted as part of the CDA. Reacting to reports that a substantial percentage of the content available on the Internet

42. 47 U.S.C. § 223 (2000).

43. *Id.* § 231.

44. *See id.* § 254. Because it raises separate issues and has developed within a distinct line of First Amendment jurisprudence, I leave to others a discussion of Congress's efforts to restrict access to child pornography on the Internet. *See, e.g.*, Symposium, *supra* note 14.

contained hard-core pornography, Congress sought to criminalize the transmission and display of indecent materials that were available to minors.⁴⁵ The constitutionality of such regulation was complicated by a number of factors. First, as a content-based restriction of speech, the regulation would be deemed presumptively unconstitutional and subject to exacting scrutiny.⁴⁶ Second, given the state of technology, such regulation inevitably restricted adults' constitutional right to access non-obscene sexually-themed expression. Third, even to the extent that it restricted minors' access to indecent speech, the legislation failed adequately to protect minors' right to access sexually-themed expression that was not obscene for minors.

With *Ginsberg* and *Miller* as its guides, Congress in 1996 could have and should have carefully crafted a regulation of minors' access to sexually-themed content on the Internet, while at the same time preserving adults' right to access content that was protected for adults. Because Congress was not careful in drafting the CDA, the Supreme Court struck down the statute.⁴⁷ The CDA's efforts to regulate minors' access to harmful Internet content were set forth in two provisions. First, the CDA criminalized the knowing transmission of "obscene or indecent" communications to any recipient less than eighteen years of age.⁴⁸ Second, the CDA

45. See, e.g., Dorothy Imrich Mullin, *The First Amendment and the Web: The Internet Porn Panic and Restricting Indecency in Cyberspace*, <http://www.library.ucsb.edu/untangle/mullin.html> (last visited Jan. 10, 2008).

46. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (holding that the government cannot restrict speech on account of its content, "subject only to narrow and well-understood exceptions").

47. *Reno v. ACLU*, 521 U.S. 844, 849 (1997).

48. *Id.*

Whoever—

(1) in interstate or foreign communications—

...

(B) by means of a telecommunications device knowingly—

(i) makes, creates, or solicits, and

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

...

shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

criminalized the knowing sending or display to any person under eighteen any communication “that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.”⁴⁹ The Act provided certain affirmative defenses to these two criminal prohibitions, including defenses for those who undertook “good faith, . . . effective . . . actions” to restrict access by minors to the prohibited communications and those who restricted such access by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number.⁵⁰

The Supreme Court identified several constitutional infirmities in the CDA’s definitions. First, Congress failed to align the CDA’s statutory definitions of unprotected speech with the constitutional definitions of obscene and obscene-for-minors speech that the Supreme Court painstakingly set forth in *Miller* and *Ginsberg*, rendering the statute’s definitions of unprotected speech vague and overbroad.⁵¹ Beyond the problems of vagueness and imprecision in the CDA’s definitions, Congress also failed adequately to protect adults’ constitutional right to access Internet expression that was unprotected for minors but nonetheless protected for adults.⁵² Because of the formidable technological difficulties in ensuring that

47 U.S.C. § 223(a).

49. *Reno*, 521 U.S. at 860 (citing 47 U.S.C. § 223(d)).

Whoever—

(1) in interstate or foreign communications knowingly—

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

(B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or

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

shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.

47 U.S.C. § 223(d).

50. *Reno*, 521 U.S. at 860–61 (citing 47 U.S.C. § 223(e)(5)).

51. *Id.* at 874.

52. *Id.* at 875–76.

Internet communications that are unprotected for minors are communicated only to adults, the CDA's provisions essentially operated to restrict adults from engaging in and accessing expression that is constitutionally protected for adults.⁵³

In defending the constitutionality of the CDA, the Government contended that the Act's prohibitions, combined with its affirmative defenses based on the use of age-verification technology, did nothing more than zone the Internet into adult zones and minor zones. Because adults were allowed to disseminate adult content to recipients who could prove by use of age-verification technology that they were adults, the Government asserted that neither adult senders' nor adult recipients' constitutional rights were burdened.⁵⁴ The Court disagreed.⁵⁵ First, it upheld the district court's finding that there were no reliable means of age verification currently available.⁵⁶ Although content providers of adult material could condition access on receipt of a verified credit card, the Court found that credit card verification was effectively unavailable to a substantial number of non-commercial Internet content providers. It found further that "using credit card processing as a surrogate for proof of age would impose costs on noncommercial Web sites that would require many of them to shut down," and furthermore, that reliance on credit cards as proof of age would impose burdens on adults who do not have credit cards who wish to access such content.⁵⁷ Because the CDA's provisions restricted adults' access to speech that was constitutionally protected for them, the CDA "suppress[e] a large amount of speech that adults have a constitutional right to receive and to address to one another."⁵⁸

Furthermore, the CDA failed to protect parents' autonomy to determine what material their children should be able to access. In contrast to the statute upheld in *Ginsberg*, which permitted parents to override the state's determination of obscenity for minors and to purchase "girlie" magazines for their children, the CDA effected a

53. *Id.* at 876–77.

54. *Id.*

55. *Id.* at 868.

56. *Id.* at 856.

57. *Id.*

58. *Id.* at 874.

complete ban on minors' access to statutorily-proscribed materials and usurped parental autonomy in this regard.⁵⁹

In assessing the CDA's constitutionality under strict scrutiny, the Supreme Court explained that if there were effective means available to restrict minors' access to harmful material while imposing few or no restrictions on adults' free speech rights, the CDA would fail the "least restrictive means" component of this analysis.⁶⁰ In assessing this component, the Court found that other, less restrictive means of restricting minors' access to sexually-themed Internet content were or would soon be available. Specifically, the Court noted that "currently available user-based software suggests that a reasonably effective method by which parents can prevent their children from accessing material which the parents believe is inappropriate will soon be widely available."⁶¹ Because user-based filtering software⁶² presented a means of restricting minors' access to harmful material that would intrude less severely upon adults' right to access protected material—and upon adults' parental autonomy to determine which material to allow their children to access—the Supreme Court concluded that the CDA did not embody the least restrictive means of advancing Congress's compelling goal of protecting minors from harmful sexually-themed Internet expression. Thus, in part because of the potential availability of a better technological solution to the problem of restricting minors' access to sexually-themed expression (in the form of user-based filtering software), the Court rejected the solution offered by Congress in the CDA.

Justice O'Connor, concurring in part and dissenting in part, interpreted the CDA as a partially successful attempt by Congress to zone the Internet into adult zones and minor zones via the use of age-verification technology.⁶³ Finding that "the undeniable purpose of the CDA is to segregate indecent material on the Internet into certain areas that minors cannot access,"⁶⁴ she explained that analogous zoning laws—at least as applied to real space—have been upheld by the Court. Justice O'Connor's analysis leads to the

59. *Id.* at 865.

60. *Id.* at 874.

61. *Id.* at 877 (citing *ACLU v. Reno*, 929 F. Supp. 824, 842 (1997)).

62. *Id.*

63. *Id.* at 886 (O'Connor, J., concurring).

64. *Id.*

question of what type of zoning laws in cyberspace can withstand constitutional scrutiny. First, as Justice O'Connor explained, a constitutional zoning law must not unduly restrict adults' access to constitutionally protected material; and second, the content banned for minors must be content that minors have no constitutional right to access.⁶⁵ That is, in order for a cyberzoning statute to comply with the First Amendment, adults must have ready access to the adult zone, which contains—and does not restrict or chill—content that is constitutional for adults; and, minors must have access to the minors' zone, which contains all content that minors have a constitutional right to access. Zoning or content regulations that restrict or burden adults' access to the adult zone, or limit the content within the adult zone to that which minors have a constitutional right to access, will be found unconstitutional. For example, the Court found in *Butler v. Michigan* that a criminal statute prohibiting the sale, to minors and to adults, of materials “tending to the corruption of the morals of youth” was unconstitutional because it collapsed the minors' zone and the adult zone.⁶⁶ In contrast, in *Ginsberg v. New York*, the sale of “girlie” magazines was prohibited only as to minors; the statute preserved adults' constitutional right to access the adult zone by allowing them to purchase such non-obscene, sexually-themed content.⁶⁷

Accordingly, in order for a statute to constitutionally create adult zones and minor zones on the Internet, it needs to: (1) preserve adults' unburdened access to the full panoply of content that adults have a right to access; (2) grant minors access to the range of content that they have a constitutional right to access; and (3) incorporate a method of distinguishing between adult and minor Internet users that does not impose a burden on adults seeking to disseminate or to access protected-for-adults content. Although Justice O'Connor explained that legislation that created such adult and minor zones on the Internet in the above manner would be constitutional, she concluded that the CDA did not meet this constitutional requirement.⁶⁸

65. *Id.* at 888.

66. *Butler v. Michigan*, 352 U.S. 380, 383–84 (1957).

67. *Ginsberg v. New York*, 390 U.S. 629, 636 (1968).

68. *Reno*, 521 U.S. at 896–97 (O'Connor, J., concurring).

B. The Child Online Protection Act of 1998—Round One

Shortly after the Supreme Court struck down the relevant provisions of the CDA, Congress went back to the drawing board, this time directing its attention to the applicable Supreme Court obscenity (and obscenity-for-minors) jurisprudence. Legislators focused in particular on *Miller's* three-pronged test, as modified for minors by *Ginsberg*, and put forward a more serious effort at constitutionally regulating minors' access to harmful Internet speech. In COPA, Congress carefully imported the three prongs of the *Miller* test into its regulation, while also incorporating an age-dependent standard for determining harmful material, as sanctioned by *Ginsberg*.⁶⁹ And, like the CDA, COPA also provides an affirmative defense for those who in good faith restrict minors' access to material that is harmful to minors, by use of credit cards, adult codes, and other "reasonable measures that are feasible under available technology."⁷⁰ If one compares the requisite constitutional definition of obscenity set forth in *Miller*, and modified in *Ginsberg*, with the definition of "harmful to minors" set forth in COPA, one might predict that the statute would readily withstand constitutional scrutiny. As discussed below, in reviewing the constitutionality of

69. 47 U.S.C. § 231(e)(6) (2000). The relevant provisions of COPA are as follows:

(a)(1) Prohibited conduct—

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

.....
(e)(6) Material that is harmful to minors—

The term "material that is harmful to minors" means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—

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

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

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

47 U.S.C. § 231 (emphasis added).

70. *Ashcroft v. ACLU*, 535 U.S. 564, 570 (2002).

COPA, however, the courts have found substantial constitutional flaws in other aspects of the statute's definition and application to Internet content. At each level of review, courts have found different aspects of COPA to be constitutionally infirm. The Supreme Court has ruled twice on the constitutionality of COPA, and it will likely grant certiorari soon to make a final determination of the statute's constitutionality.⁷¹ The district court, in reviewing COPA and in response to the ACLU's motion to preliminarily enjoin the statute, emphasized the burdens that the statute imposed on speakers and publishers of sexually-themed, protected-for-adults expression. The court found that these burdens were substantial enough to render the statute unconstitutional.⁷² The court further held that, as with the CDA, Congress failed to establish that COPA embodied the least restrictive means of regulating minors' access to harmful-to-minors material, because "blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web site operators."⁷³ Accordingly, in its initial assessment of COPA's constitutionality, the district court concluded that COPA failed to withstand constitutional scrutiny because user-based filtering software was less speech-restrictive, yet equally effective means of achieving a compelling government interest.

On appeal, the Third Circuit emphasized a different aspect of the Supreme Court's obscenity jurisprudence—one that goes to the heart of regulating obscene and obscene-for-minors content on the Internet, viz., the autonomy of local communities to determine the contours of obscene (and obscene-for-minors) speech within their communities.⁷⁴ As discussed above, *Miller's* first prong requires that there be an inquiry into whether the average member of a community, applying that community's contemporary standards, would find that the work appeals to the prurient interest.⁷⁵ *Miller's* second prong (implicitly) carries over this communitarian inquiry to the assessment of whether the expression is patently offensive.⁷⁶

71. See *infra* Part III.D.

72. ACLU v. Reno (*COPA I*), 31 F. Supp. 2d 473, 495–97 (E.D. Pa. 1999).

73. *Id.* at 497.

74. See ACLU v. Reno (*COPA II*), 217 F.3d 162, 173–74 (3d Cir. 2000).

75. See text accompanying notes 21–23.

76. See text accompanying notes 24–26.

These required communitarian analyses would permit a jury in a community such as Salt Lake City to classify certain content as obscene and unprotected within its local community, where such speech might very well be deemed protected by another local community, such as New York City.⁷⁷ While this constitutionally-required, geographically-based determination of obscenity can operate to separate protected from unprotected expression in real space, this geographic variability becomes problematic when applied to expression on the Internet. Given the meaningful geographic boundaries in real space, it is feasible for Salt Lake City to effectively exclude expression contained in books, magazines, or videos that it considers obscene according to its local community standards. Likewise, it is feasible, even if somewhat burdensome for distributors of sexually-themed expression contained in books, magazines, videos, mailings, etc., to take steps to restrict the dissemination of such works into communities that consider such works to be obscene, in order to avoid being prosecuted for purveying obscenity within less “tolerant” communities. And, by exercising its right under *Miller* to determine the contours of obscenity within its local community, Salt Lake City does not necessarily restrict the ability of other communities to determine for themselves the contours of obscenity within their communities.

Given the absence of meaningful boundaries delimiting one local community from another within cyberspace, however, it becomes far more difficult for individual communities to determine the contours of obscenity within their borders without substantial spillover to other communities. Because it is not feasible for an Internet publisher of sexually-themed expression to restrict the dissemination of its expression only to those local communities that would likely not find such expression to be obscene, Internet publishers have only one realistic alternative to avoid being subject to obscenity prosecution—forgo dissemination of such expression on the Internet altogether.⁷⁸ Given the practical inability of Web publishers to

77. These communitarian analyses are subject to the judicially-determined floor described above. *See* text accompanying notes 27–28.

78. For example, it might come to pass that a Salt Lake City jury would find that a particular Web site was obscene for minors under a *Miller/Ginsberg* definition of obscenity, such as set forth in COPA. *See, e.g.*, *United States v. Thomas*, 74 F.3d 701 (6th Cir. 1996). If so, the only meaningful option for the Internet publisher of such material would be to take down such expression altogether for all communities throughout the United States (and

restrict the dissemination of expression by geographical location, one community's determination of obscenity spills over to all other communities, thereby impinging upon these other communities' autonomy to determine the contours of obscene and obscene-for-minors expression for themselves.

Addressing this issue, the Third Circuit held that the conflict between (1) the prerogative of a community to determine the boundary between obscene-for-minors speech and non-obscene-for-minors speech and (2) the inability to control the geographic dissemination of Internet content, was so severe as to render COPA's reliance on contemporary community standards constitutionally intolerable.⁷⁹ Accordingly, the Third Circuit struck down COPA as unconstitutional on these grounds alone.⁸⁰

Writing for a plurality of the Supreme Court, Justice Thomas rejected the Third Circuit's conclusion that the conflict between *Miller's* requirement of community-determined standards of obscenity and the inability to limit dissemination geographically on the Internet rendered COPA unconstitutional on its face.⁸¹ Justice Thomas explained that the Supreme Court historically has subjected speakers and publishers disseminating their content to nationwide audiences to potentially varying community standards of obscenity, and that "requiring a speaker disseminating material to a national audience to observe varying community standards does not violate the First Amendment."⁸² Those mailing materials to a nationwide audience,⁸³ as well as those operating commercial dial-a-porn operator services,⁸⁴ for example, have been subject to potentially varying local community standards under the Supreme Court's obscenity jurisprudence. Referring to these earlier obscenity cases, Justice Thomas observed:

indeed the world), even though some other communities, applying *their* contemporary community standards, would conclude that such expression was protected by the First Amendment and that members of their community had a First Amendment right to access such material.

79. *COPA II*, 217 F.3d 162, 173–76 (3d Cir. 2000).

80. *Id.*

81. *Ashcroft v. ACLU*, 535 U.S. 564, 580 (2002).

82. *Id.*

83. *Id.*

84. *Id.* at 581.

There is no constitutional barrier under *Miller* to prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others. [For example, if dial-a-porn operator] Sable's audience is comprised of different communities with different local standards, Sable ultimately bears the burden of complying with the prohibition on obscene messages.⁸⁵

The Third Circuit had held that these earlier obscenity cases involving different mediums of expression were distinguishable from COPA because the defendants in the earlier cases could control the geographic distribution of their material, whereas Internet publishers have no comparable control.⁸⁶ Justice Thomas rejected this distinction, explaining that in none of these earlier cases was "the speaker's ability to target the release of material into particular geographic areas integral to the legal analysis."⁸⁷

Justices Kennedy, Souter, and Ginsburg, who concurred in the judgment, disagreed. They found that the Court of Appeals' emphasis on COPA's incorporation of varying community standards was not misplaced, and they expressed concern about the conflict between geographical variability in the definition of obscene-for-minors speech and the inability of Internet publishers and speakers to control the geographic dissemination of their speech.⁸⁸ These Justices emphasized that *Miller's* contemporary community standards test grants individual communities the autonomy to determine what speech is and is not protected within their borders and observed that "variation in community standards constitutes a particular burden on Internet speech."⁸⁹

Yet, because the case involved a facial challenge to COPA—before it had been applied to restrict any speech whatsoever—the concurring Justices ultimately concluded that those challenging the statute at this stage had failed to meet their burden of identifying what, if any, speech would be unconstitutionally burdened by the statute.⁹⁰ Although they observed that the national variation in

85. *Id.* (quoting *Sable Comm'n of Cal., Inc. v. FCC*, 492 U.S. 115, 125–26 (1989)) (emphasis omitted).

86. *Id.* at 573.

87. *Id.* at 582.

88. *Id.* at 597 (Kennedy, J., concurring).

89. *Id.*

90. *Id.* at 602.

community standards constituted a particular burden on Internet speech, the concurring Justices found the Third Circuit's conclusion to be premature absent a comprehensive and careful analysis of the burdened speech.⁹¹

On remand, the lower courts were charged with expanding the focus of their inquiry into the constitutionality of COPA beyond the effect of the national variation in community standards on sexually-themed Internet expression.⁹²

C. The Children's Internet Protection Act of 2000

In the meantime, faced with the hostile judicial reception to the zoning schemes embodied in the CDA and COPA, Congress undertook a software filtering-based approach in CIPA. Enacted in 2000, CIPA operates by conditioning public schools' and libraries' eligibility to receive certain federal funds upon their implementation of filtering software to block access to harmful sexual expression on the Internet.⁹³ Within the regulatory scheme contemplated by CIPA, each community, acting through its community-based institutions, theoretically enjoys a measure of autonomy to determine for its own community the contours of obscene and obscene-for-minors expression. This determination is to be effectuated through the use of filtering software configured to block expression that falls within the definitions of speech that is harmful to minors set forth by the community-based institution itself (i.e., the public school or library). As such, CIPA's regulatory scheme enables communities to impose their "contemporary community standards" with respect to obscene content harmful to minors, in a way that potentially overcomes the constitutional obstacles⁹⁴ that the courts identified in COPA.

Under the CIPA scheme, each public elementary and secondary school and each public library theoretically enjoys the autonomy to determine what type of Internet speech is obscene and what type of Internet speech is obscene for minors. As a theoretical matter, under CIPA, each community, acting through its public schools and libraries, is permitted to specify the parameters of protected and unprotected speech, for minors and for adults, and to implement

91. *Id.*

92. *Id.* at 586 (plurality opinion).

93. *See generally* 47 U.S.C. § 254(h) (2000).

94. *See supra* Part III.B.

these parameters by configuring filtering software—to be used by members of its community only within the community’s public libraries and schools—to effectuate these restrictions. Thus, CIPA’s scheme quite nicely resolves the seemingly intractable problems to implementing a *Miller*-based constitutional regulation of minors’ access to obscene speech by allowing each community to determine the contours of protected and unprotected speech for its community, thereby protecting community autonomy and substantially limiting community-to-community spillover of such determinations. As discussed below, however, despite the fact that CIPA’s basic regulatory scheme embodies great promise for achieving a constitutional regulation of minors’ access to harmful speech, the details of this scheme have proven problematic.

CIPA conditions public schools’ and libraries’ receipt of certain federal subsidies on their use of software filters. In order to receive grants under the Library Services and Technology Act (LSTA) or “E-rate” discounts for Internet access and support under the Telecommunications Act, public libraries and schools are required to certify that they are using “technology protection measures” that prevent patrons from accessing visual depictions that are “obscene,” “child pornography,” or in the case of minors, “harmful to minors.”⁹⁵ While CIPA’s scheme allows library officials under certain circumstances to disable software filters for certain patrons engaged in bona fide research or other lawful purposes, the disabling of such filters on computers used by minors is prohibited if the library or school receives E-rate discounts.⁹⁶

CIPA modifies the federal E-rate program, under which telecommunications carriers are required to provide high-speed Internet access and related services to public schools and libraries at discount rates. CIPA also requires that a library “having one or more computers with Internet access may not receive services at discount rates” unless the library certifies that it is

enforcing a policy of Internet safety for minors that includes monitoring the online activities of minors and the operation of a technology protection measure with respect to any of its computers

95. 47 U.S.C. § 254(h)(5)(B) (2000).

96. 20 U.S.C.A. § 6777(c) (2002); 20 U.S.C.A. § 9134(f)(3) (2003). The disabling provision in the context of E-rate discounts applies only “during use by an adult.” 47 U.S.C. § 254(h)(5)(D) (2000).

with Internet access that protects against access through such computers to visual depictions that are— (I) obscene; (II) child pornography; or (III) harmful to minors; and (ii) . . . enforcing the operation of such technology protection measure during any use of such computers by minors.⁹⁷

Thus, libraries and schools, in order to receive E-rate discounts, must certify that, during any use of Internet-accessible computers by minors (i.e., those sixteen years of age and under⁹⁸), filtering technology is being used to block access to obscene material, child pornography, and material that is “harmful to minors.”⁹⁹ While the terms “obscene”¹⁰⁰ and “child pornography”¹⁰¹ are given their (constitutionally acceptable) standard meanings, CIPA defines material that is “harmful to minors” as

[A]ny picture, image, graphic image file, or other visual depiction that—

- (i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;
- (ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and
- (iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.¹⁰²

Although the third prong of the harmful-to-minors definition by its terms provides a savings clause for material that appellate courts determine possesses redeeming social value, CIPA appears to prohibit federal interference in local determinations regarding what Internet content is appropriate for minors:

A determination regarding what matter is inappropriate for minors shall be made by the school board, local educational agency, library, or other authority responsible for making the

97. 47 U.S.C. § 254(h)(5)(D) (2000).

98. *Id.* § 254(h)(7)(D).

99. *Id.* § 254(h)(7)(G).

100. *Id.* § 254(h)(7)(E).

101. *Id.* § 254(h)(7)(F).

102. *Id.* § 254(h)(7)(G).

determination. No agency or instrumentality of the United States Government may—

- (A) establish criteria for making such determination;
- (B) review the determination made by the certifying [entity] . . . ; or
- (C) consider the criteria employed by the certifying [entity] . . . in the administration of [CIPA's requirements].¹⁰³

Additionally, as a further condition on its receipt of E-rate discounts, a library or school must certify that, during any use of Internet-accessible computers—by minors or by adults, including staff members—it is “enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are— (I) obscene; or (II) child pornography”¹⁰⁴ Thus, a library or school, in order to receive E-rate discounts, must further certify that it is using filtering technology to block access to obscene and child pornographic materials during any use of computers with internet access.

With respect to adult use of Internet-accessible computers, CIPA provides that a library official is permitted to “disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose.”¹⁰⁵ Importantly, however, CIPA's amendments to the E-rate program do not permit libraries or schools to disable filters to enable bona fide research or other lawful use for minors.¹⁰⁶

In sum, CIPA requires that public libraries and schools, as a condition of receiving federal funding under the E-rate program, (1) utilize filtering software to block adults' access to obscene and child pornographic visual content, and (2) utilize filtering software to block minors' Internet access to the above content as well as to visual content that is harmful to minors. Although the filtering of adults' Internet access may be disabled for bona fide research or other lawful purposes, such disabling is not permitted for minors.

103. *Id.* § 254(1)(2).

104. *Id.* § 254(h)(5)(C)(i).

105. *Id.* § 254(h)(5)(D).

106. *Id.*

CIPA's modifications to the LSTA program generally track its modifications to the E-rate program. CIPA amends the LSTA to require that the funds made available under the Act will not be available unless the library has in place and is enforcing "a policy of Internet safety for minors that includes the operation of a technology protection measure with respect to any of its computers with Internet access" that protects against access through such computers of certain types of content.¹⁰⁷ When such computers are "in use by minors," the library must protect against access to visual depictions that are considered to be "obscene," "child pornography," or are "harmful to minors."¹⁰⁸ During any use of its computers, the library must use filtering software to protect against access to visual depictions that are "obscene" or "child pornography" in order to receive such funds.¹⁰⁹ In addition, the definition of the term "harmful to minors" in CIPA's amendment to the LSTA program is similar to the definition found in the amendment to the E-rate program.¹¹⁰ CIPA's amendment to the LSTA, like its amendment of the E-rate program, allows for library officials to disable filtering in order to "enable access for a bona fide research or other lawful purposes."¹¹¹ But the E-rate disabling provisions do not permit the disabling of filters during use by minors.¹¹²

CIPA's definition of material that is harmful to minors embodies the constitutionally necessary elements set forth by the Supreme Court in *Miller*. And, by enabling local community-based institutions to decide for their communities what material is harmful to minors within their communities, CIPA advances *Miller's* goal of granting local communities the autonomy to determine the scope of protected and unprotected speech within their communities, thus resolving the problem of community-to-community spillover identified by the Third Circuit in its initial consideration of the COPA case.

107. 20 U.S.C.A. § 9134(f)(1)(A)(i) (2003).

108. *Id.*

109. *Id.* § 9134(f)(1)(B).

110. Compare 47 U.S.C. § 254(h)(7)(G) (2000), with 20 U.S.C. § 9134(f)(7)(B) (2000).

111. 20 U.S.C.A. § 9134(f)(3) (2003).

112. *Id.*

In order to understand the constitutional issues at stake in CIPA, it is important to understand the mechanics of software filtering.¹¹³ Filtering software programs operate by blocking Internet users' access to certain Web sites as follows:

When a person types in [an Internet address or Uniform Resource Locator (URL)] indicating material they wish to read, the [filtering software] examines various parts of the URL against its internal blacklist to see if the URL is forbidden.

....

If the [URL] is found on the blacklist . . . then the program looks to see how extensively it should be banned [i.e., whether to blacklist the whole domain, a directory of the site, or only a particular file on the site].

....

Blacklists can have multiple categories of banned sites (e.g. one for "Sex," another for "Drugs," perhaps another for "Rock & Roll," and so on) , . . . But blacklists are almost always secret, so there's no way to know what sites are actually in the category.

....

The whole list-matching process above may be repeated all over again against exception lists or "whitelists." A few products consist only of whitelists, or can work in whitelist-only mode. [Some filtering software] can be set . . . so that everything not prohibited is permitted (blacklist-only), or only that which is explicitly allowed is permitted (whitelist-only). And of course the whitelist can override the blacklist. In general, such blacklist/whitelist settings are standard in server-level programs, along with the ability to create additional organization-specific blacklists or whitelists.¹¹⁴

113. My discussion of software filtering follows closely that provided by filtering experts Seth Finkelstein and Lee Tien in their extremely lucid article *Blacklisting Bytes*, Electronic Frontier Foundation, Mar. 6, 2001, http://w2.eff.org/Censorship/Censorware/20010306_eff_nrc_paper1.html; see also R. Polk Wagner, *Filters and the First Amendment*, 83 MINN. L. REV. 755 (1999) (describing the essential features of software filters).

114. Finkelstein & Tien, *supra* note 113.

The default blacklists and whitelists used by filtering software programs are created by the software developers and constitute a substantial portion of the programs' value to consumers. As such, these lists are typically protected as trade secrets.¹¹⁵ Thus, a library implementing a filtering software program typically has no way of knowing which Web sites will actually be rendered inaccessible by the filtering software program. Although the library may choose to configure the filtering software to filter out certain pre-defined categories of Web sites (such as "Adult/Sexually Explicit"¹¹⁶), it has no way of knowing the criteria used by the software developers to select which Web sites fall into this category, nor which Web sites will actually fall within this category.

The constitutionality of CIPA was initially considered by a special three-judge panel, which found first that the filtering software programs mandated by CIPA "erroneously block a huge amount of speech that is protected by the First Amendment."¹¹⁷ The panel held further that software filtering programs inevitably over-block harmless Internet content, which adults and minors have a First Amendment right to access, and under-block obscene and child pornographic content, which neither adults nor minors have a First Amendment right to access.¹¹⁸ This is partly because the categories used by such software for filtering purposes are broader than the constitutional categories of unprotected speech defined by CIPA and in part because of the imperfections in filtering software technology.¹¹⁹ Accordingly, the panel concluded that "[g]iven the substantial amount of constitutionally protected speech blocked by [filtering software]," CIPA was not narrowly tailored.¹²⁰

The Supreme Court reversed this decision, holding that the restrictions CIPA imposed on speech (or more precisely, the restrictions that CIPA required libraries to impose on speech) were not unconstitutional.¹²¹ The Justices, finding the statute constitutional on its face, articulated several rationales for their

115. *See, e.g.*, *Am. Library Ass'n v. United States*, 201 F. Supp. 2d 401, 429-30 (E.D. Pa. 2002), *rev'd on other grounds*, 539 U.S. 194 (2003).

116. *Id.* at 428.

117. *Id.* at 448.

118. *Id.* at 475-79.

119. *Id.* at 476-77.

120. *Id.* at 476.

121. *United States v. Am. Library Ass'n*, 539 U.S. 194, 199 (2003).

conclusion. Chief Justice Rehnquist, who authored a plurality opinion in which Justices O'Connor, Scalia, and Thomas joined, held that strict scrutiny was the wrong standard to apply. Chief Justice Rehnquist explained that because providing Internet access was not tantamount to creating a public forum, strict scrutiny was not the proper level of scrutiny for analyzing CIPA's constitutionality.¹²² Because CIPA—unlike the CDA and COPA—did not involve direct government regulation of Internet speech but rather the regulation of Internet speech within a governmental forum for speech, the Court turned to the public forum doctrine to determine what level of scrutiny to apply.¹²³ Under the public forum doctrine, the level of scrutiny applicable to government regulation of speech depends upon the characteristics of the forum in which the speech is being regulated.¹²⁴ If the governmental forum for speech at issue is a “traditional public forum” or a “designated public forum,” then strict scrutiny applies to any regulation of speech within that forum.¹²⁵ On the other hand, if the forum is a non-public forum, then reduced scrutiny applies to speech regulations within such forum.¹²⁶

Chief Justice Rehnquist first explained that Internet access in public libraries did not constitute a “traditional public forum” within the constitutional meaning of that term because “this resource—which did not exist until quite recently—has not ‘immemorially been held in trust for the use of the public and, time out of mind, . . . been used for purposes of assembly, communication of thoughts between citizens, and discussing public questions.’”¹²⁷ Chief Justice Rehnquist next explained that Internet access in public libraries did not constitute a “designated public forum.” In order to create a designated public forum, “the government must make an affirmative

122. *Id.* at 205–06. On this point, Chief Justice Rehnquist explained that “we require the Government to employ the least restrictive means only when the forum is a public one and strict scrutiny applies.” *Id.* at 207 n.3.

123. *Id.* at 204–07.

124. *Id.*

125. *Id.* at 205–06.

126. *Id.* at 206–07.

127. *Id.* at 205 (quoting *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992) (internal quotation marks omitted)). Of course, given Chief Justice Rehnquist's formulation of the test for traditional public forums, it will be impossible for any resource in a modern medium to fall within this definition.

choice to open up its property for use as a public forum.”¹²⁸ According to Chief Justice Rehnquist, “[a] public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, [but rather] . . . to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality.”¹²⁹ Chief Justice Rehnquist continued that “[e]ven if appellees had proffered more persuasive evidence that public libraries intended to create a forum for speech by connecting to the Internet, we would hesitate to import the ‘public forum doctrine . . . wholesale into’ the context of the Internet.”¹³⁰

Having concluded that libraries’ provision of Internet access did not constitute a public forum, Chief Justice Rehnquist analyzed CIPA’s constitutionality within a reduced-scrutiny framework, inquiring whether libraries’ use of filtering software as mandated by CIPA was “reasonable.”¹³¹

Chief Justice Rehnquist considered but rejected the argument that the “overblocking” inherent in filtering software rendered the statute unconstitutional.¹³² In reaching this conclusion, he relied upon representations of the Solicitor General at oral argument that libraries would allow any adult patron to have erroneously blocked sites unblocked and/or software filters disabled upon request:

Assuming that such erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled. When a patron encounters a blocked site, he need only ask a librarian to unblock it or (at least in the case of adults) disable the filter. As the District Court found, libraries have the capacity to permanently unblock any erroneously blocked site, and the Solicitor General stated at oral argument that a “library may . . . eliminate the filtering with respect to specific sites . . . at the request of a patron.” With respect to adults, CIPA also expressly authorizes library officials to

128. *Id.* at 206.

129. *Id.*

130. *Id.* at 207 n.3 (quoting *Denver Area Ed. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 749 (1996) (internal quotation marks omitted)).

131. *Id.* at 208 (“[I]t is entirely reasonable for public libraries to . . . exclude certain categories of content, without making individualized judgments that everything they do make available has requisite and appropriate quality.”).

132. *Id.* at 208–09.

“disable” a filter altogether “to enable access for bona fide research or other lawful purposes.” The Solicitor General confirmed that a “librarian can, in response to a request from a patron, unblock the filtering mechanism altogether,” and further explained that a patron would not “have to explain . . . why he was asking a site to be unblocked or the filtering to be disabled.”¹³³

Accordingly, the Supreme Court concluded that because libraries’ provision of Internet access did not constitute a traditional or designated public forum, strict scrutiny did not apply, and CIPA readily satisfied the scrutiny applicable to content-based restrictions of speech within non-public forums.¹³⁴

D. The Child Online Protection Act—Rounds 2 and 3

The Supreme Court considered the constitutionality of COPA for the second time in 2004. In *Ashcroft v. ACLU*,¹³⁵ the Court held that the ACLU was likely to prevail on its claim that COPA facially violates the First Amendment because it is not the least restrictive alternative to advancing Congress’s compelling interest.¹³⁶ Because COPA embodies a content-based restriction on speech subject to strict scrutiny, the Government was required to meet its burden of establishing that the ACLU’s proffered alternatives, including user-based software filters, were not as effective as and were less speech restrictive than COPA. As the Court explained in *Reno v. ACLU*,¹³⁷ a statute that “effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another . . . is unacceptable if less restrictive alternatives would be at least as effective in achieving the [statute’s purpose.]”¹³⁸ The Supreme Court held that the Government failed to prove that it would be likely to defeat the ACLU’s claim that software filters constitute a less restrictive alternative to COPA.¹³⁹ Contrasting the efficacy and speech restrictiveness of software filters and COPA, the Supreme Court credited the district court’s analysis of the greater

133. *Id.* at 209 (internal quotation marks and citations omitted; emphasis added).

134. *Id.* at 214.

135. 542 U.S. 656 (2004).

136. *Id.* at 666.

137. 521 U.S. 844 (1997).

138. *Id.* at 874.

139. *Ashcroft*, 542 U.S. at 666–67.

efficacy of software filters compared to COPA's criminal prohibitions.¹⁴⁰ Accordingly, the Court concluded that "blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web site operators."¹⁴¹

Justice Kennedy explained that the efficacy of software filters likely rendered COPA unconstitutional both because filters were less restrictive than COPA and because filters were likely more effective than COPA.¹⁴² First, "filters are less restrictive than COPA [because] [t]hey impose selective restrictions on speech at the receiving end, not universal restrictions at the source."¹⁴³ Accordingly, adults without children who wish to receive harmful-to-minors content can readily obtain such content by not using filters, and even adults with children who employ filters can simply disable the filters to access such content.¹⁴⁴ Most importantly, Justice Kennedy held, because a filtering regime does not "condemn as criminal any category of speech," the potential chilling effect on sexually-themed speech is greatly diminished under a filtering regime as compared to COPA's scheme.¹⁴⁵

Justice Kennedy explained further that filters are likely more effective than COPA because their use can prevent minors from viewing pornography that originates outside of the United States and from accessing pornographic content that is available via Internet avenues other than the World Wide Web.¹⁴⁶ Because COPA extends only to content that originates within the United States, it only reaches approximately 60% of harmful-to-minors content (the other 40% of which originates overseas).¹⁴⁷ Filters, in contrast, which are imposed on the receiving end, can block harmful-to-minors content regardless of its geographic origin, and extend to all forms of Internet communication, not just material originating from the

140. *Id.* at 666-73

141. *Id.* at 663 (quoting *COPA I*, 31 F. Supp. 2d 473, 495 (E.D. Pa. 1999)).

142. *Id.* at 665-70.

143. *Id.* at 667.

144. *Id.*

145. *Id.* at 657.

146. *Id.* at 667.

147. *Id.*

World Wide Web.¹⁴⁸ As Justice Kennedy noted, the Commission on Child Online Protection, created by Congress under the COPA statute, unambiguously found that filters were more effective than the adult verification schemes embodied in COPA.¹⁴⁹

Justice Kennedy acknowledged that filters were not a perfect solution because they inevitably underblock and overblock content. Nevertheless, he concluded that the Government failed to satisfy its burden of showing that filters were less effective than COPA.¹⁵⁰ Accordingly, he concluded that it was not an abuse of discretion for the district court to preliminarily enjoin the statute pending a full trial on the merits, in which the Government would be required to prove that filters were not less restrictive than COPA in order to save COPA from being permanently enjoined.¹⁵¹

Justice Breyer, in his dissent joined by Chief Justice Rehnquist and Justice O'Connor, criticized the burden that the majority imposed upon the Government of proving that filtering software was a less restrictive alternative than COPA.¹⁵² According to Justice Breyer, filtering software should not be analyzed as an alternative to COPA because it is not an "alternative legislative approach."¹⁵³ Rather, he explained, filtering software is

part of the status quo, *i.e.*, the backdrop against which Congress enacted [COPA]. It is always true, by definition, that the status quo is less restrictive than a new regulatory law. It is always less restrictive to do *nothing* than to do *something*. But "doing nothing" does not address the problem Congress sought to address—namely, that, despite the availability of filtering software, children were still being exposed to harmful material on the Internet.¹⁵⁴

Justice Breyer criticized the majority for requiring the Government to disprove the existence of "magic solutions"—filtering regimes in which, for example, the "Government [gave] all parents, schools, and Internet cafes free computers with filtering

148. *Id.*

149. *Id.* at 668.

150. *Id.* at 670.

151. *Id.* at 660–73.

152. *Id.* at 688 (Breyer, J., dissenting).

153. *Id.* at 684 (emphasis omitted).

154. *Id.*

programs already installed, hire[d] federal employees to train parents and teachers on their use, and devote[d] millions of dollars to the development of better software.”¹⁵⁵ It is unclear, however, why such an alternative would be infeasible. In regulating this area in the past, the government has compared blanket prohibitions on sexually-themed content to potential technological solutions that would empower parents and require them to exercise control over such content, and it has struck down such blanket prohibitions in favor of technological solutions for parents.¹⁵⁶ Furthermore, in the Internet context, Congress has already strongly encouraged the use of filters by public schools and libraries under CIPA,¹⁵⁷ and it could enter or intervene in the filtering software market to facilitate the translation of obscenity and harmful-to-minors constitutional standards to the software code that implements content filtering.

The Government attempted to meet its burden of sustaining the enforceability of COPA in a full trial on the merits held in November 2006 in the Eastern District of Pennsylvania.¹⁵⁸ In attempting to meet this burden, the Government focused primarily on the two aspects of the comparative analysis of COPA and the filtering schemes that were emphasized by Justice Kennedy.¹⁵⁹ First, the Government contended that COPA can be enforced against foreign Web site operators, either directly under multilateral treaties or indirectly by regulating the credit card companies that facilitate access to such content originating overseas under merchant agreements that require foreign merchants selling goods and services to U.S. customers to comply with laws that are unique to the United States (such as COPA).¹⁶⁰ Accordingly, the Government contended that filtering schemes (that filter sexually-themed content originating within and outside the United States) are not comparatively more effective than COPA on the grounds of their international reach.¹⁶¹

Second, the Government contended that a filtering scheme would not constitute a less restrictive and equally effective alternative to COPA because filters substantially underblock and overblock

155. *Id.* at 688.

156. *Id.* at 670.

157. 47 U.S.C. § 254 (2000).

158. *ACLU v. Gonzalez*, 478 F. Supp. 2d 775 (E.D. Pa. 2007).

159. *Id.* at 810–11.

160. *Id.*

161. *Id.* at 811.

material and are often implemented improperly and ineffectively.¹⁶² The Government presented the results of studies conducted by its experts using the best filters on the market as applied to three large representative data sets.¹⁶³ These experts concluded that if underblocking by filtering is minimized, then overblocking is prevalent, and vice versa, because configuring a filter to block all harmful-to-minors material inherently overblocks, while configuring a filter to allow receipt of all non-harmful-to-minors material inherently underblocks.¹⁶⁴ The Government contended further that, in addition to the underblocking and overblocking inherent in the use of even the best filtering software, minors are frequently able to circumvent such filters with the assistance of information that is readily available on the Internet.¹⁶⁵ COPA, by contrast, which imposes restrictions on the source, cannot be circumvented, and is therefore more effective than a filtering scheme.¹⁶⁶

The ACLU responded that, despite the Government's arguments that COPA was applicable to Internet content originating overseas, there were insurmountable obstacles to granting extraterritorial effect to COPA.¹⁶⁷ First, it would likely be difficult to establish personal jurisdiction over a foreign Internet content provider.¹⁶⁸ Even if the Government could establish jurisdiction, a criminal sanction imposed under COPA would be difficult or impossible to enforce in another country.¹⁶⁹ Extradition would not be a viable option in the COPA context because many extradition treaties require the offense to be a crime both in the United States and in the country from which the individual is being extradited, which would likely not be the case with a COPA violation. Thus, the ACLU argued, end-user filters are more effective than COPA because they can block the forty percent of harmful-to-minors content that originates overseas, while COPA cannot extend to such content.¹⁷⁰ Finally, the ACLU contended that filters are more effective than

162. *Id.* at 794.

163. *Id.* at 795-96.

164. *Id.* at 794-97.

165. *Id.* at 794.

166. *Id.* at 813.

167. *Id.* at 810-11.

168. *Id.* at 811.

169. *Id.*

170. *Id.* at 810-811.

COPA because, while COPA applies only to World Wide Web content, filters can also block other types of harmful Internet communications, including communications via email, chat, instant messaging, peer-to-peer, streaming audio and video, Voice over Internet Protocol, and television over the Internet.¹⁷¹

The district court essentially sided with the ACLU. First, it concluded that COPA was not narrowly tailored to serve Congress's compelling interest in protecting minors from exposure to sexually-explicit material on the World Wide Web because it is overinclusive, in that it prohibits far more speech than is necessary to advance the government's interest, and because it is underinclusive, in that it does not reach the significant amount of sexually explicit online material that originates overseas.¹⁷² Nor do the statute's affirmative defenses render it narrowly tailored. Age verification as currently implemented is ineffective and/or unduly burdens protected speech.¹⁷³ Age verification tools are not widely available or implemented, and content providers cannot effectively verify age through credit cards and debit cards because (1) card issuers prohibit their use to verify age, (2) a substantial number of minors have access to such cards, and (3) many adults do not own credit cards or are unwilling to provide credit card information online.¹⁷⁴

The district court also agreed with the ACLU's argument that COPA is not the least restrictive alternative available and that filtering technologies were less restrictive and at least as—and likely more—effective than COPA in restricting minors' access to harmful material online.¹⁷⁵ First, COPA embodies criminal provisions, which unavoidably chill some protected speech, while legislation relying on filtering would not similarly embody fines or prison sentences.¹⁷⁶ Congress could enact programs to promote and support the use of filtering software and provide parents with the ability to monitor their children's Internet access, without subjecting protected speech to severe criminal penalties, as COPA's scheme does.¹⁷⁷ Second, filters are at least as—and likely more—effective than COPA in

171. *Id.* at 815.

172. *Id.* at 810.

173. *Id.* at 811–13.

174. *Id.* at 812.

175. *Id.* at 813–16.

176. *Id.* at 813.

177. *Id.* at 814.

restricting minors' access to harmful Internet speech.¹⁷⁸ Filters can reach substantially more overseas-originating sites than COPA and can also reach a wide array of Internet content, whereas COPA is arguably limited to domestic sites using the HTTP or successor protocols.¹⁷⁹ Finally, the court concluded that COPA was unconstitutionally vague and overbroad.¹⁸⁰

The Government appealed the district court's decision to the Third Circuit, and the Supreme Court will likely grant certiorari to weigh in for the third time on the constitutionality of COPA (this time, with the benefit of a full trial on the merits). The Court's decision (like the district court's) will likely rest on the comparative efficacy and speech-restrictiveness of COPA and software-filtering schemes.

E. Lessons Learned

Several overarching themes emerge from the above analysis of the courts' scrutiny of the three major statutes restricting minors' access to sexually-themed Internet expression. First, courts prefer regulations that empower the end user to screen out harmful content on the receiving end, rather than regulations punishing the content provider for failing to initially screen out harmful content. As Justice Kennedy explained in *Ashcroft v. ACLU*, "filters are less restrictive than COPA [in that] they impose selective restrictions on speech at the receiving end, not universal restrictions at the source."¹⁸¹ Second, with regard to regulations empowering the end user to screen out harmful content on the receiving end, courts will look carefully at whether the choice to screen or filter can be easily undone (so that adults can ultimately access the full panoply of speech that they have a constitutional right to access).¹⁸² Third, in applying strict constitutional scrutiny to these statutes, courts will seriously inquire into whether there are less speech-restrictive alternatives for advancing the statute's goal. If the ACLU can identify one such

178. *Id.* at 813–14.

179. *Id.* at 815.

180. *Id.* at 821.

181. *Ashcroft v. ACLU*, 542 U.S. 656, 667 (2002).

182. *See* *United States v. Am. Library Ass'n*, 539 U.S. 194, 196 (2003) (upholding CIPA because librarians could unblock filtered material or disable the Internet software filter without significant delay on an adult user's request).

alternative, a court will likely strike down the statute. With these principles in mind, I turn to an analysis of the constitutionality of the proposed Internet Community Ports Act.

IV. THE INTERNET COMMUNITY PORTS ACT

One novel type of solution for restricting minors' access to sexually-themed Internet content is embodied in the proposed Internet Community Ports Act (ICPA). ICPA capitalizes on the fact that Internet content is transmitted via different ports or channels.¹⁸³ If the dissemination of harmful-to-minors content can be restricted to certain ports or channels, then users who choose not to receive such content can configure their Internet access, with the help of their ISPs, to ensure that they do not receive communications via such restricted ports or channels.¹⁸⁴ Under the port filtering scheme contemplated in ICPA, only users who wish to receive adult/harmful-to-minors Internet content will be able to receive it, while Internet users who choose to receive only content that is designated not harmful to minors will be shielded from adult content.¹⁸⁵ Below, I analyze the implementation and constitutional implications of such a filtering scheme.

A. Internet Ports

ICPA's regulatory scheme depends upon the ability to segregate Internet content for dissemination on different Internet ports. All Internet communications travel over ports, which are virtual pathways used to direct various types of Internet activity and content to their appropriate destinations.¹⁸⁶ Unlike USB ports or parallel ports on a computer, these Internet ports have no physical existence. Rather, an Internet port is a special number present in the header of

183. See Preston, *supra* note 6, at 1471 app. § V(44) (defining "Port(s)"); § V(9) (defining "Community Port(s)"); § V(41) (defining "Open Port(s)"); see also CP80 Foundation, Internet Community Ports Act of 2007, http://www.cp80.org/resources/0000/0013/Internet_Community_Ports_Act.pdf. Cheryl Preston, Professor of Law at Brigham Young University Law School, and the CP80 Foundation created and advocate adoption of the ICPA. At the time of writing, the ICPA has not yet been introduced in either house of Congress.

184. Cheryl B. Preston, *Zoning the Internet: A New Approach to Protecting Children Online*, 2007 BYU L. REV. 1417, 1431-34.

185. *Id.*

186. *Id.* at 1427-31.

each data packet of an Internet communication that is used to map that data packet to a particular destination.¹⁸⁷ Data packets are routed from one port through an ISP to another port on the intended recipient's computer. There are 65,535 possible ports for Internet communications, only a minor subset of which are commonly used.¹⁸⁸ By convention, certain ports are used for certain types of Internet traffic. For example, ports 80 and 8080 are used for Web page transmission over hypertext transfer protocol (HTTP traffic); Port 110 is used for POP3 email traffic; Port 5190 is used for AOL Instant Messenger traffic; Port 443 is used for encrypted transmission of credit card and other secure data; and Port 666 is used by the Internet game *Doom*.¹⁸⁹ As with many other types of standards on the Internet, the use of Internet ports is largely governed by convention among the Internet community.

The organization responsible for registering and allocating port numbers is the Internet Assigned Numbers Authority (IANA), which is operated by the Internet Corporation for Assigned Names and Numbers (ICANN), neither of which are governmental entities.¹⁹⁰ Rather, these entities are *sui generis* Internet standard-setting and policy-making bodies responsible for many aspects of Internet name and number management.¹⁹¹ Among other functions, IANA is responsible for maintaining a list of port assignments and uses. Ports 0–1023, designated the “Well Known Ports,” are assigned by IANA and generally reserved for system processes.¹⁹² Ports 1024–49,151 are designated the “Registered Ports” and are coordinated and approved by IANA.¹⁹³ Ports 49,152–65,535 are designated “Dynamic” or “Private Ports” and are unregulated by IANA.¹⁹⁴

The designation of which port an Internet communication will travel through is quite simple and straightforward and amounts to a

187. See Preston, *supra* note 6, at 1471 app. § V(33) (defining of “Port(s)”).

188. See Internet Assigned Numbers Authority, Port Numbers, <http://www.iana.org/assignments/port-numbers>.

189. Port Numbers, *supra* note 188.

190. See Internet Corporation for Assigned Names and Numbers, <http://www.icann.org/new.html>. For a discussion of the non-governmental status and policy-making functions of ICANN, see Dawn Nunziato, *Freedom of Expression, Democratic Norms, and Internet Governance*, 52 EMORY L.J. 187 (2003).

191. Nunziato, *supra* note 190.

192. Port Numbers, *supra* note 188.

193. *Id.*

194. *Id.*

few characters inserted in the HTML code associated with that content. For example, to direct an HTML file associated with the Smithsonian's Web site, www.si.edu, to be transmitted over Port 50,000, the following code could be inserted in the HTML code associated with the Web site: ``.

Content providers also have the ability to designate an individual component of their Web site, such as a particular image file, for transmission via a particular port. In order to direct only a particular image file (for example, `image.gif` on the www.si.edu Web site) to be transmitted and displayed on Port 50,000, the following code could be used: ``.

It is a relatively straightforward process to block receipt of Internet communications over certain ports. Using standard firewall software, an Internet user or ISP can restrict the receipt of Internet communications that are transmitted via designated ports. For example, if a user (directly or via her ISP) chooses to restrict all content transmitted via ports 50,000–65,535, she could employ standard software to restrict her access to such content made available through such ports. Unlike user-based filtering software, which users (especially teenage users) frequently disable with ease, port-filtering software imposed at the ISP level is much more difficult to circumvent.

B. The Internet Community Ports Act

In an effort to capitalize on the availability of a vast number of heretofore unutilized Internet ports, as well as on the ease with which Internet content can be channeled to designated ports, proponents of ICPA developed a proposal for regulating access to certain sexually-themed Internet content based on Internet port technology. ICPA would operate by setting forth a scheme for channeling or filtering such content to certain ports and away from those who choose not to access such content.¹⁹⁵

First, the regulatory scheme contemplated by ICPA would require the FCC to designate (1) a certain subset of available Internet ports as “Open Ports,” over which all legal (e.g., non-obscene) Internet traffic could be disseminated, and (2) another

195. Preston, *supra* note 184, at 1431–34.

subset of Internet ports known as “Community Ports,” which would be restricted for the transmission of content that was not harmful to minors.¹⁹⁶ ICPA defines “Harmful to Minors”¹⁹⁷ content in the same way that “Harmful to Minors” content is defined under COPA,¹⁹⁸ which definition was upheld by the Supreme Court in its first consideration of COPA.¹⁹⁹ The Act would make it a crime for a content publisher to make “knowingly and with knowledge of the character of the material, . . . by means of any Community Port, make[] or cause[] to be made any Communication that is Obscene Child Pornography, or Harmful to Minors.”²⁰⁰ While the Act also provides separately for the liability of Internet Service Providers,²⁰¹ I focus my analysis primarily on the direct liability of content publishers.

ICPA essentially operates by creating two zones for Internet speech: an adult zone for all First Amendment-protected content, and a minor zone for all content protected by the First Amendment and not harmful to minors. If we assume that content providers are able to determine which content properly belongs in which zone, then the burden ICPA imposes on them, to direct appropriate content to the appropriate zone, is insubstantial. That is, if we assume a state of affairs in which (1) the proposed statute’s mandate pre-existed the creation of the HTML code for each Web site and (2) all Internet Web sites are either clearly harmful to minors or

196. *See supra* note 183.

197. ICPA defines “Harmful to Minors” any communication that:

- i. the average adult, applying a contemporary national standard, would find, taking the Communication as a whole, is designed to appeal to, or is designed to pander to, the prurient interest;
- ii. depicts, describes, or represents, in a manner patently offensive with respect to Minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast, or describes or depicts Sexually Explicit Conduct; and
- iii. taken as a whole, lacks serious literary, artistic, political, or scientific value for Minors.

Preston, *supra* note 6, at 1471 app. § V(22).

198. 47 U.S.C. § 231 (2000).

199. *Ashcroft v. ACLU*, 535 U.S. 564, 579–81 (2002).

200. Preston, *supra* note 6, at 1471 app. § II(1). The statute defines Content Publisher as “any person who Transmits, publishes [or] broadcasts . . . a Communication,” *id.* § V(12), where the Communication, in turn, includes “all data types and materials [transmitted via the Internet, including] text, images, graphics, . . . video, [and] audio.” *Id.* § V(8).

201. *Id.* § II(1).

clearly not harmful to minors, then the burden on the content provider seems minimal. The content provider responsible for each Web site need only insert a small line of code in the site's HTML code at the time of the Web site's creation to designate the type of port—Open or Community—over which such content would be made available. Because ICPA appears to impose minimal burdens on content providers in designating their content for the adult zone or the minor zone, proponents of ICPA might prevail on the courts to scrutinize the proposed Act as a zoning law subject to less than strict scrutiny. Because the Act arguably channels but does not restrict or burden speech based on content, proponents may contend that the Act merely regulates the place or manner in which speech is communicated and that the Act is therefore properly subject to reduced scrutiny as a time, place, or manner regulation of speech.

Proponents may contend that ICPA operates in much the same way as real-space zoning laws that have been upheld by the Supreme Court. As Justice O'Connor explained in her concurrence/dissent in *Reno v. ACLU*,²⁰² the Court has upheld real-space zoning laws that create separate adult zones and minor zones, where such laws do not "unduly restrict adult access to [adult] material; and [] minors have no First Amendment right to read or view the banned material."²⁰³ Zoning laws that prohibit minors from accessing harmful-to-minors material, while allowing adults unburdened access to such material, have been upheld when applied to real space. If legislators could accurately map such a regulatory regime onto cyberspace, as Justice O'Connor envisioned in *Reno v. ACLU*, the Court would likely uphold that scheme as well.

Indeed, the Supreme Court has upheld real-space zoning laws that regulate the place in which adult content can be disseminated and has subjected such zoning laws to reduced scrutiny. In *City of Renton v. Playtime Theaters, Inc.*, for example, the Court upheld a city zoning ordinance prohibiting such theaters from operating near schools, residences, parks, and similar locations, against an adult theater's challenge.²⁰⁴ The Court held that because the ordinance did not ban such adult speech altogether, but rather sought to channel it into certain locations, the ordinance was properly construed as a

202. 521 U.S. 844, 886 (1997) (O'Connor, J., concurring).

203. *Id.* at 887–88.

204. *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 54 (1986).

time, place, or manner regulation subject to reduced scrutiny.²⁰⁵ Such regulations are acceptable, the Court held, as long as they “are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.”²⁰⁶ Under the Supreme Court’s First Amendment jurisprudence, however, time, place, and manner restrictions are subject to reduced scrutiny in part because they are content-neutral. A regulation that zones speech based on its content may be a “place” regulation but is not necessarily a content-neutral one. In construing the City of Renton’s regulation of sexually-explicit theaters, the Court wrestled with the issue of whether the ordinance was content-neutral or content-based and ultimately determined that because the City did not intend to suppress or restrict the message communicated by such theaters in enacting the ordinance, the ordinance did not regulate speech on the basis of its content.²⁰⁷ Quoting Justice Powell’s opinion in *Young v. American Mini Theaters, Inc.*,²⁰⁸ the *Renton* Court observed that “[i]f [the City] had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them down or restrict their numbers, rather than circumscribe their choice as to location.”²⁰⁹

Accordingly, the *Renton* Court rejected the conclusion that the ordinance was content-based and subject to strict scrutiny, holding instead that the regulation, like the one at issue in *Young*, involved “a decision by the city to treat certain movie theaters differently because they have markedly different effects on their surroundings.”²¹⁰ In particular, the Court credited the City’s findings that the un-zoned presence of adult theaters had an adverse effect on neighborhood children and contributed to declining neighborhood property values, both of which the Court found to be secondary effects of adult theaters on their surroundings, not primary effects of the content of such speech.²¹¹ Concluding that the *Renton* ordinance was aimed at reducing these harmful secondary effects and not at

205. *Id.* at 48–49.

206. *Id.* at 47.

207. *Id.* at 48, 51.

208. 427 U.S. 50 (1976).

209. *Renton*, 475 U.S. at 48 (quoting *Young*, 427 U.S. at 81 n.4 (Powell, J., concurring)).

210. *Id.* at 49 (quotation marks omitted).

211. *Id.* at 48.

suppressing the content conveyed by adult theaters, the Court found that the regulation was properly categorized as a content-neutral time, place, or manner regulation that was constitutional because it left open ample alternative avenues for communication (five percent of the City's area)²¹² and served substantial government interests (reducing adverse effects on neighborhood children and ameliorating neighborhood blight).²¹³

The *Renton* and *Young* line of cases has been strongly criticized for classifying the regulations involved as content-neutral and for applying reduced scrutiny to the regulations.²¹⁴ The zoning regulations at issue in these cases undeniably subject sexually-explicit speech to greater burdens than non-sexually-explicit speech.²¹⁵ Despite these trenchant criticisms, these real-space zoning cases appear to remain viable precedents from which to defend the constitutionality of statutes that regulate the place or manner of distribution of sexually-themed expression based on the effects of such expression on minors. Indeed, proponents of ICPA have a stronger argument in defense of the proposed statute's constitutionality than the proponents of the real-space zoning ordinances at issue in *Renton* and *Young*. ICPA's manner of zoning speech leaves open far more alternative avenues for communication than the real-space zoning regulations upheld by the Court in *Renton* and *Young*. Considering that the vast majority of Internet content is currently disseminated via only one port (Port 80, the conventional port for HTTP traffic), ICPA's proposed port limitation of sexually-themed Internet expression would easily satisfy the "ample alternative avenues of communication" component of this analysis.

In supporting the constitutionality of ICPA based on the real-space zoning line of cases, defenders of the statute would also need to identify and document the negative effects of "harmful-to-

212. *Id.* at 53.

213. *Id.* at 50–51; *see also* *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (ban on completely nude dancing is aimed at secondary effects of such dancing, not at message expressed by dancers, and therefore the ban is subject to intermediate not strict scrutiny); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (same).

214. *See, e.g.*, Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL L. REV. 49, 60 (2000) (criticizing the *Renton* Court for confusing content neutrality with the question of whether the law is justified).

215. *Id.* at 60–61.

minors” speech by providing evidence of the effects of such expression on the psychological well-being of children. If defenders of the statute could convince the Court that the legislation does not aim at suppressing or restricting adult content because it conveys harmful ideas, but rather aims at channeling such content away from minors because of the psychological or other harms that result from minors’ early exposure to such content, they might convince the court that intermediate scrutiny is appropriate and that the statute survives such scrutiny. Surely, if protection against declining property values is a substantial government interest (as the Court found in *Renton*), preventing harm to children’s psychological well-being would constitute a substantial government interest as well. Accordingly, if defenders of the proposed statute were able to convince the Court to scrutinize the statute as a content-neutral regulation aimed at reducing the harmful secondary effects of sexually-themed expression on minors under the *Young* and *Renton* line of cases, the statute would likely withstand such scrutiny.

If the reviewing court declined to subject ICPA to intermediate scrutiny and instead imposed strict scrutiny, the burdens imposed by ICPA on content providers and Internet end users, as well as the Court’s assessment of those burdens, would depend in part on which ports are designated for adult content and which are designated for minors’ content. If the default under ICPA were that all HTTP traffic would continue to travel over Port 80 (the conventional port for all HTTP traffic), then ICPA would merely impose an insubstantial (and optional) burden on providers of non-harmful-to-minors content to direct their content to be disseminated via a Community Port. For example, under ICPA’s scheme, the publishers of the National Zoo’s Web site would be encouraged to disseminate their content via Community Ports so that those individuals choosing to receive only non-harmful-to-minors content could access the Zoo’s site with the assurance that no harmful-to-minors content would be available to them.

Because ICPA imposes optional and technologically straightforward requirements, the burdens it imposes on content providers are minimal, but so are the likely benefits accruing from the statute. If the statute operates to leave the default port allocations in place and to require a Web site essentially to certify, upon pain of penalty, that its content is not harmful to minors (in order to designate transmission of such content via a Community

Port), then it is likely that very few sites will choose to do so. In this case, ICPA will probably share the same fate as the .KIDS.US domain name space, created in 2002 as a zone for guaranteed kid-friendly content—free of violence, pornography, and other material inappropriate for minors. The Dot Kids Implementation and Efficiency Act of 2002²¹⁶ directed the creation of the .KIDS.US domain space that would contain only content that is (1) not “harmful to minors,” as that term is defined in COPA, and (2) “suitable for minors” less than thirteen years of age.²¹⁷ This Act defines content “suitable for minors” as content that is “not psychologically or intellectually inappropriate for minors,” and “serves the educational, informational, intellectual, . . . cognitive . . . [,] social, emotional, or entertainment needs of minors.”²¹⁸ The Act charged NeuStar, the administrator of the U.S. country code top-level domain, with establishing and administering the .KIDS.US domain space, and with the responsibility of prescreening all content to determine whether it complies with the legal requirements for this domain space.²¹⁹

Although the .KIDS.US domain space imposed minor technological and financial burdens on content providers seeking to make their content available in this space, only a handful of content providers have made the determination that the burdens were worthwhile to assume; by all accounts, the .KIDS.US domain space is quite meagerly populated.²²⁰ And it is likely that ICPA would suffer the same fate if interpreted to require providers of not harmful-to-minors content to opt in to dissemination of such content via a Community Port, under pain of criminal penalties. Although the ICPA minors’ zone is slightly easier to opt into than is the .KIDS.US zone, and although it is easier for minors to hack around .KIDS.US content restrictions than to hack around the ICPA content restrictions, it is nonetheless likely that content providers

216. Dot Kids Implementation and Efficiency Act of 2002, Pub. L. No. 107-317, § 157, 116 Stat. 2766 (2002) (codified in scattered sections of 47 U.S.C.).

217. *Id.* § 157(j)(1)–(2).

218. *Id.* § 157(j)(5), 116 Stat. at 2770–71.

219. *See generally id.* § 157.

220. As of September 29, 2006, the top-level domain name “kids.us” contained twenty-two Web sites. One of those Web sites is an index for the other sites. Two of those Web sites are defunct.

would find that the benefits of opting into this minors' zone would not exceed its actual and potential costs.

Consider, for example, the National Zoo's likely cost-benefit analysis in determining whether to make its Web site available via a Community Port under ICPA. Although such a designation entails minimal financial and technological burdens, the publisher may nonetheless determine that the risk of penalty is too great and is not outweighed by the benefits of publishing its content via a Community Port. By publishing via a Community Port, the National Zoo must be prepared to certify that all content on its Web site—thousands of images, videos, and text pages, some of which may be interactive or created by third parties real-time—is not harmful to minors. Given that the Zoo's Web site may contain content that, for example, depicts or describes animals' sexual activity (and given that such conduct could fall within the statutory definition of harmful-to-minors content²²¹), the publisher of the Zoo's Web site might reasonably determine that the added benefit of publishing via a Community Port is not worth the risk. Proponents of ICPA might respond that a Web publisher like the National Zoo could easily designate any individual controversial image or video (e.g. the live Panda mating cam) on its Web site for dissemination via an Open Port, while the rest of the site's content could continue to be made available via Community Ports. Once again, however, although this segregation of the Web site's content is technologically feasible, the content provider would likely determine that the benefit of having part of its site accessible via Community Ports would not outweigh the costs of determining whether each individual item of content on its site was harmful to minors or not.

If ICPA is interpreted so that the default HTTP port 80 is designated as a Community Port, such an interpretation would have different and more profound constitutional implications. It would require all Web sites with any content that is arguably harmful to minors to reconfigure all of their HTML code and re-designate the port for the transmission of such content (e.g., to designate a port other than Port 80). Although, as discussed above, the designation itself is not technologically burdensome, such a requirement would substantially and unconstitutionally restrict speech.

221. Preston, *supra* note 6, at 1471 app. § V(22).

Upon passage of ICPA, the vast majority of content providers may determine that it is simply not worth the risk to publish any content via Community Ports, and/or that it is too complicated to parse out their sites' adult content from its minor content. Accordingly, most content providers would simply decide to designate all content for publication via Open Ports. This conclusion would apply with respect to Web sites that are interactive and that host content posted by third parties. The risk that third parties would post harmful-to-minors content cannot be ignored, and a Web site publisher would likely not risk penalties under the Act just for the benefit (if any) of making its content available via Community Ports. Because a great number of Web sites have some interactive component, ICPA may operate to encourage the vast majority of Web sites to publish via Open Ports.

ICPA proponents may emphasize that the statute's prohibitions apply only to content publishers who "knowingly and with knowledge of the character of the material" publish content that is harmful to minors via a Community Port²²² and that a provider of an interactive Web site would not necessarily be charged with knowledge of the character of content hosted by third parties. Prosecutors might contend that at some point it is reasonable to charge a Web site publisher with knowledge of the character of content made available on its Web site. Given the uncertainties in the statute's application, it is likely that an interactive Web site publisher would simply choose to publish all of its content via Open Ports, and avoid the risk inherent in publishing content via Community Ports.

C. The User's Perspective

The above analysis suggests that, regardless of whether Port 80 (the conventional port for HTTP Internet traffic) is designated as a Community Port or an Open Port under ICPA, the vast majority of Web sites will seek to avoid liability under ICPA and will simply choose to publish their content via Open Ports. The result will likely be similar to the experience under the .KIDS.US domain space, in which the majority of child-oriented Web sites have declined to risk liability for publishing content potentially harmful to minors and/or unsuitable for minors within this domain space. Accordingly, it is

222. See *id.* II(1).

likely that under ICPA, very few Web sites will choose to publish their content via Community Ports. For schools, libraries, and households that, pursuant to the ICPA regulatory scheme, instruct their ISPs to allow only Community Port content to be made available to them, ICPA will effectively operate to vastly limit the amount of Internet content available to such users. As a result, ICPA will substantially overblock harmful content, and as a result will not be narrowly tailored to achieve the compelling government interest of restricting minors' access to harmful Internet content. Under this scenario, ICPA will substantially overblock users' access to non-harmful Internet content.

Furthermore, once an Internet user has instructed her ISP to make only Community-Port content available to her, it will not be possible for anyone at any time to access Open-Port content on the user's computer while that designation is in place. Thus, if a household with minor children elects to receive only Community Port content to restrict the children's access to "Adult" content, it would not be possible for the parents to switch off this election and receive content via Open Ports once the children are asleep. User-based filtering software allows multiple users of the same computer to have different types of access, and allows parents unfiltered access to Internet content at designated times of day (or all the time). In contrast, as contemplated under ICPA, the decision to receive communication only through Community Ports cannot be readily modified. Indeed, the Supreme Court, in analyzing the CIPA statute, placed substantial emphasis on the fact that the software filters could be removed upon an adult's request so that adults were granted relatively easy access to the full panoply of Internet content that they had a constitutional right to access. ICPA's screening of Internet content is not so easily reversible. Accordingly, although ICPA imposes minor technological and financial burdens on content providers by designating which types of ports can be used, it would likely operate to substantially restrict the speech available to those who receive content over Community Ports. For this reason, a reviewing court would likely find that ICPA operated to substantially overblock harmful speech. As a result, a court scrutinizing the constitutionality of ICPA under a strict scrutiny standard would likely find that there are less speech-restrictive alternatives—viz., user-based software filters—available to advance Congress's compelling interest of protecting minors from harmful, sexually-themed

expression on the Internet. Accordingly, ICPA would ultimately suffer the same fate as COPA, in that a reviewing court applying strict scrutiny to the statute would likely determine that it was not the least restrictive means of restricting minors' access to sexually-themed Internet expression because user-based software filters are less speech-restrictive—in that they overblock less constitutionally-protected speech and can be turned off to allow adults to access the full panoply of Internet speech that they have a constitutional right to enjoy.

V. CONCLUSION

The above constitutional analysis of the three major statutes restricting minors' access to sexually-themed Internet expression suggests three conclusions relevant to an assessment of constitutionality. First, courts have indicated a clear preference for regulation empowering end users to screen out harmful content on the receiving end over regulation punishing content providers for failing to screen out harmful content at its source. Because ICPA ultimately regulates and punishes content providers for failing to screen out harmful content at its source, it will be disfavored by the courts relative to regulations empowering end users to screen out harmful content on the receiving end. Second, even if ICPA is styled as a regulation empowering end users to screen out harmful content on the receiving end, courts will look carefully at whether the choice to screen or filter can be easily undone (so that adults can ultimately access the full panoply of speech that they have a constitutional right to access). ICPA's port-filtering scheme operates between ISPs and end users to make it very difficult for end users to undo the decision to filter out content from certain ports and renders it virtually impossible for adults in a "Community Ports only" household to access the full range of Internet content that they have a constitutional right to access. Third, in applying strict constitutional scrutiny to ICPA, a court will inquire into whether there are less speech-restrictive alternatives for advancing the statute's goal. If the ACLU can identify one such alternative, the court will likely strike down the statute. Because user-based software filters overblock substantially less constitutionally-protected speech than does ICPA, and because the decision to screen content with software filters can be easily reversed, a court will likely conclude that there are indeed

less speech-restrictive alternatives to ICPA and that ICPA is therefore unconstitutional.