FREE SPEECH, THE INTERNET, AND THE CDA: IS A "DECENT" OPINION JUST A DREAM?

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Author's Note: After a long day of work on March 19, 1997, I was up late "surfing the 'net." I came across a transcript of the Supreme Court arguments in Reno v. ACLU, the case involving the Communications Decency Act as applied to the Internet (many sites had such a transcript within hours of the arguments). As I read and re-read the questions and answers, the late hour overcame me and I drifted off into sleep at my desk. In the pre-dawn hours, I had a dream — a dream that the Court had ruled on the case. In my dream, their opinion looked something like this...

In the Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, et al.,
Appellants

v.

AMERICAN CIVIL LIBERTIES UNION, et al.,

No. 96-511

Argued March 19, 1997

Decided June 30, 1997

† Attorney, Dickinson, Mackaman, Tyler & Hagen, P.C., Des Moines, Iowa. (E-mail: bdublins@dickinsonlaw.com). A few important credits: Celeste L. Tito, Counsel, Chrysler Corporation, initially prompted me to write this article. Professors Nicholas Johnson and William Buss at the University of Iowa College of Law stirred my interest in Technology Law and Free Speech, respectively, some years back and each time I sat down to work on this I realized that I should have paid more attention in their courses. Colleagues at the firm, both by giving me the time and through our frequent, challenging discussions on issues of the day, made this a much better article. Finally, the two most important people in the process of getting this out the door: my legal secretary Karen and my wife Angie who typed, read, edited, revised, and — hardest of all — put up with me throughout. Any errors or logical flaws that remain are, however, all mine and are in spite of the diligent efforts of those mentioned above to keep an often stubborn author on the proper course.

While I have enjoyed taking advantage of the opportunity the timing of this case provides to indulge the fantasy of many lawyers to draft a Supreme Court opinion (the case was argued as I was writing), I cannot emphasize enough that this is not intended to be predictive, but rather, normative; in keeping with its setting in a law review, it also includes annotations (hopefully of interest) that I by no means suggest would be likely or appropriate in an actual opinion.
OPINION OF THE COURT

On February 8, 1996, the President signed into law Pub. L. No. 104-104, the Telecommunications Act of 1996, which includes as Title V of that Act the sections known as the Communications Decency Act ("CDA"), which is now codified primarily at 47 U.S.C. § 223(a)-(h). On the same day, the American Civil Liberties Union (ACLU) among others filed a challenge to two sections of the CDA in the United States District Court for the Eastern District of Pennsylvania. With their complaint, plaintiffs sought temporary and preliminary injunctive relief. On February 15, 1996, following an evidentiary hearing, the district court entered a temporary restraining order. Chief Judge Sloviter of the United States Court of Appeals for the Third Circuit then convened a special three-judge court, pursuant to section 561(a) of the CDA to hear the case. On February 27, 1996, the three-judge panel consolidated the ACLU challenge with a later challenge from a group of plaintiffs led by the American Library Association (ALA).

The lower court held five days of evidentiary hearings on the motion for preliminary injunction in March and April 1996, heard extensive oral arguments, and received, in addition to briefing and stipulated facts from the parties, amicus curiae briefs representing 27 groups and individuals supporting the plaintiffs' request for preliminary injunction and seven groups or individuals opposed.

On June 11, 1996, the three-judge panel entered a lengthy and thorough set of opinions granting the motion for preliminary injunction. Congress, anticipating an immediate challenge to the CDA, pro-

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4. ACLU, 929 F. Supp. at 826-84. The decision was presented in a lengthy per curiam opinion followed by individual opinions by each judge on the panel — Judge
vided for a direct, expedited appeal to the United States Supreme Court, which the United States (hereinafter, when referred to in its role as a party to this case, "the Government") utilized. We heard arguments on March 19, 1997, and for the reasons stated below, we now affirm the lower court.

I.

Although it is common parlance to refer to "the Internet" as a singular entity such as a book or a chair, it is actually a complex array in two senses. First, it is a complex array in a physical sense — it is an interconnected network of smaller computer networks and individual computers linked for the sharing of information and computing capability.\(^5\) Second, it is a complex array in a functional sense — there is no singular computer program called "Internet," rather reference to the Internet generally encompasses electronic mail,\(^6\) multi-party chat "rooms,"\(^7\) bulletin board systems,\(^8\) libraries of stored information,\(^9\) "pages" on the World Wide Web,\(^10\) and much more.\(^11\) The lower court,

Sloviter, Chief Circuit Judge for the Third Circuit, and District Court Judges for the Eastern District of Pennsylvania Ronald L. Buckwalter and Stewart Dalzell. \(\text{Id. at 849, 857, 865.}\)

6. Also known as "e-mail," a form of one-to-one communication much like traditional postal mail, only much faster. E-mail is often found not only on the Internet, but in intra-office networks as well.
7. Chat rooms are in some ways like old-fashioned telephone party lines. They provide real-time or near real-time conversations among groups of users by showing typed messages on a screen, with identifiers for each speaker. The conversation in a given room may be general in nature, or a chat room may be designated for discussion of a particular topic.
8. Much like a physical bulletin board, the bulletin board system (BBS) allows users to "post" notes in a one-to-many communications setting, which can be read later by all other users. Such systems are often subdivided into different topical fora or "rooms" which cover topics limited only by the human imagination.
9. An Internet function known as newsgroups is perhaps the best known example of this function (although a newsgroup is also somewhat like a bulletin board). Such libraries are often large archives of information or computer programs which are moved from a computer on the Internet to the user's local computer in a process known as downloading. This is commonly performed by an Internet function called "ftp" for File Transfer Protocol.
10. Such pages are likely the most well-known example of Internet use at present. Known as websites, webpages, or homepages these are multimedia documents utilizing a programming standard known as hypertext markup language, or HTML, and allow the author to incorporate on a single document text, pictures, animation, sounds, and links to other documents that allow the user to move from place to place on the Internet by clicking highlighted elements with their mouse.
11. \textit{A.C.L.U.}, 929 F. Supp. at 834-37. Some other common functions (and this is in no way an exclusive list) include "talk" which allows two users to type messages to each other in private, real-time conversations; list serv or mail exploders, which turn e-mail into a one-to-many format by sending each message to a pre-defined group. \textit{Id.}
with the benefit of live demonstrations,\textsuperscript{12} engaged in substantial findings of fact regarding the history and nature of the Internet, much of which is important to understanding the conclusions we reach and bears repeating.\textsuperscript{13}

While there has been much hype about the Internet being new and revolutionary, its origins go back more than 25 years to a 1969 project of the Advanced Research Project Agency ("ARPA"), and was called ARPANET.\textsuperscript{14} The original purpose was for defense-related research, and the network linked computers owned and used by the military, defense contractors, and university laboratories conducting defense research.\textsuperscript{15} The network later allowed researchers across the country to use the "supercomputers" at distant major research laboratories.\textsuperscript{16}

The design concept for the ARPANET was closely related to its early uses: it was designed to allow continued communication in the event of war.\textsuperscript{17} There is no central control of the communications network, and there are multiple paths to almost any point on the network.\textsuperscript{18} As a result, if any particular pathway is damaged, the network is designed to automatically find another path to get information to its destination without human intervention.\textsuperscript{19} As computer networking technology advanced and became more common, other, similar networks developed for other purposes — linking universities or businesses, for example, or for providing an alternative form of communications within a city — even as ARPANET grew and linked

\begin{itemize}
  \item \textsuperscript{12} A.C.L.U., 929 F. Supp. at 876. As one online article noted:
  \begin{quote}
  Court customs won't make it easy for justices to get up to speed on the Internet either. Only a half-hour is allowed for lawyers on each side of the case, so exhibits of any kind are discouraged.
  \end{quote}
  \begin{quote}
  By contrast, when a three-judge panel in Philadelphia examined the Communications Decency Act last year, a computer with Internet connection was wheeled into the court. The panel went online frequently over five days. The judges struck down the law.
  \end{quote}
  "The demonstration was invaluable in giving the judges first-hand experience with the Internet," said Carl Solano, a Philadelphia lawyer involved in the case.
  \end{itemize}

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  \item \textsuperscript{13} A.C.L.U., 929 F. Supp. at 830-49. The panel made 123 separate findings of fact, many of them the product of a stipulation entered into by the parties. \textit{Id.}
  \item \textsuperscript{14} A.C.L.U., 929 F. Supp. at 831.
  \item \textsuperscript{15} \textit{Id.}
  \item \textsuperscript{16} \textit{Id.}
  \item \textsuperscript{17} \textit{Id.}
  \item \textsuperscript{18} \textit{Id.}
  \item \textsuperscript{19} In fact, different parts of a single message may travel different paths to their destination due to a technical concept called packet switching. \textit{See A.C.L.U., 929 F. Supp. at 831-32.}
\end{itemize}
to overseas locations.\textsuperscript{20} Soon, these networks were themselves joined into a network and became the Internet as is known today.\textsuperscript{21}

There are two primary ways to access the Internet. First, one can use a computer that is linked directly to the Internet or a computer network that is itself connected to the Internet.\textsuperscript{22} This is common at universities and other institutions, in some large businesses, and at research facilities.\textsuperscript{23} Second, one can use a computer with a modem to connect via telephone to a computer network that is connected to the Internet.\textsuperscript{24} The lower court found that over 9.4 million host computers were linked to the Internet worldwide, a number that does not include home personal computers that connect to the Internet through dial-up access.\textsuperscript{25} It is estimated that there will be 200 million individual users of the Internet by 1999.\textsuperscript{26}

II.

In 1994 NBC's news program \textit{Dateline, NBC} aired a story concerning online pedophiles.\textsuperscript{27} Senator James Exon's reaction to this program was the stimulus for what would become the CDA.\textsuperscript{28} Although initial attempts to regulate online communications stalled, the idea found new life when a general overhaul of the telecommunications act began. On June 14, 1995, the Senate passed a version of the CDA on a vote of 84-16.\textsuperscript{29} The House passed a less restrictive measure that October.\textsuperscript{30} The measure was sent to a conference committee, and after a number of revisions to the standards to be used —

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20. \textit{A.C.L.U.}, 929 F. Supp. at 832-33. Among these were networks known as BITNET and USENET, and community-based BBSs such as the Cleveland Free-Net, a system that allowed local residents to get information on civic affairs and connect with one another through free access to the local network. \textit{Id}.
22. \textit{Id}.
23. \textit{Id}. at 832-33.
24. \textit{Id}. at 832. A modem is a device that converts digital computer information to analog signals that travel over a telephone line or from such analog signals back to digital information that a receiving computer can use. \textit{Harley Hahn, The Internet Complete Reference} 36 (2d ed. 1996). Most home users have so-called "dial-up" service through either an "online service" like CompuServe, Prodigy, America OnLine, etc., or through an "Internet Service Provider" or ISP. \textit{A.C.L.U.}, 962 F. Supp. at 833. ISPs are often small, local entities and generally sell access only, unlike online services which generally provide Internet access and in addition proprietary content, chat rooms, BBS functions, etc. \textit{Id}.
26. \textit{Id}.
28. \textit{Id}.
\end{flushright}
indecency — both houses of Congress voted to approve the Telecommunications Act, including the Communications Decency Act, on February 1, 1996.\(^{31}\)

Plaintiffs raise First and Fifth Amendment challenges to two provisions of the CDA, portions of 47 U.S.C. § 223(a), referred to as the "indecency" provision, and portions of § 223(d), the "patently offensive" provision.\(^{32}\) Section 223(a) provides criminal penalties of up to by two years in jail for anyone who

(1) in interstate or foreign communications. . .

(B) by means of a telecommunications device\(^{33}\) 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 the communication placed the call or initiated the communication; . . . [or]

(2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity.\(^{34}\)

Section 223(d) provides for criminal penalties for anyone who

(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.\(^{35}\)


\(^{33}\) It is not disputed that a modem is a telecommunications device for purposes of the CDA. A.C.L.U., 929 F. Supp. at 828 n.5.


\(^{35}\) 47 U.S.C.A. § 223(d) (emphasis added).
While not challenged, there are a number of other relevant provisions of the CDA. One section sets out defenses and “safe harbors.” See 47 U.S.C. § 223(e). Another provides the expedited judicial process through which this case comes before us.

36. See 47 U.S.C.A. § 223(e). Section 223(e) provides, in relevant part:

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

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

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

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

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

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

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


37. Section 561(a) provides, in relevant part:

§ 561. EXPEDITED REVIEW.

(a) THREE-JUDGE DISTRICT COURT HEARING — Notwithstanding any other provision of law, any civil action challenging the constitutionality, on its face, of this title or any amendment made by this title, or any provision thereof, shall be heard by a district court of 3 judges convened pursuant to the provisions of section 2284 of title 28, United States Code.


Section 2284 states, in relevant part:

§ 2284. Three-judge court; when required; composition; procedure (b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows: . . .

(3) A single judge may conduct all proceedings except the trial. . . . He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damages will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction . . .

III.

It takes little more than the cursory overview of the Internet above to see a pragmatic analytical concern that faces the Court in this case. The challenged provisions of the CDA are neither long nor complicated, and they speak in relatively broad terms about the use or control of any communications device or interactive computer service.\(^{38}\) They also sweep broadly in terms of the speech they, on their face, address — speech which is "indecent" and speech which is "patently offensive."\(^{39}\) Unfortunately, the mosaic created by 200 years of First Amendment jurisprudence is not so simple, nor is the entity to which the CDA is directed.

Whatever criticisms one may have about this Court not adopting a unitary free speech standard,\(^{40}\) the doctrine of stare decisis compels us to at least begin from the recognition that there are a variety of frameworks we have used in First Amendment cases. We have applied a different framework based on the nature of the regulation, e.g., content-based,\(^ {41}\) content-neutral,\(^ {42}\) or whether it was a non-speech regulation with incidental effects on speech.\(^ {43}\) We have applied different frameworks depending on the nature of the speaker, the primary distinction being between commercial\(^ {44}\) and non-commercial speakers. We have applied different frameworks based on the medium used for the communication such as: from the human voice in a public forum\(^ {45}\) to newspapers,\(^ {46}\) radio,\(^ {47}\) television,\(^ {48}\) telephone,\(^ {49}\) bill-
boards. Finally, we have protected some forms of expression that may not obviously be speech at first glance while excluding other expressions that in a common understanding, may be speech.

Applying the rudimentary mathematics of permutations to the above lists gives an idea of the complicated task this Court faces when it hears any First Amendment case. Normally, however, there is only one type of speaker and one communications medium at issue. One of the enormous difficulties of the present case is that the CDA is directed towards and this case in particular involves, the Internet.

As discussed in Section I above, the speech on the Internet includes both commercial and non-commercial speech.

Presenting a much larger analytical challenge, however, is the fact that the Internet can, in its various subsets of applications, arguably be best analogized to any of a number of media, each with an arguably different analytical framework. Is the Internet like a vast public square or the pamphlets through which colonials debated the

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46. Newspapers have traditionally had a particularly high level of protection. See Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974) (stating that the Court has "expressed sensitivity" to governmental compulsion of editorial contest in newspapers); New York Times v. Sullivan, 376 U.S. 254, 266 (1964).

47. F.C.C. v. Pacifica Found., 438 U.S. 726, 748 (1978) (applying something less than strict scrutiny due to the unique qualities of the medium).

48. Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 376-77 (1969) (considering factors such as scarcity of available frequencies and the need for government control to avoid frequency overlap in creating a standard where the needs of the listeners or viewers outweighs that of the content providers).


54. The following exchange occurred during oral arguments:

   [COURT]: I take it then that you would also defend the constitutionality of a statute which, tracking the words we have here, prohibited indecent conversations on a public street with minors present —

   MR. WAXMAN [for the Government]: I think that —

   [COURT]: — or between minors.

   MR. WAXMAN: Well, I think that a municipality certainly could. I think it is a harder case, but I think a municipality could make it a crime for an — for two adults to engage in patently offensive, sexually explicit communications in the presence of a minor child.

   [COURT]: Why is that a harder case? It seems to me easier. It's easier to verify.

   MR. WAXMAN: Oh, it's a harder —

   [COURT]: The presence of that minor.
Constitution? Is it like a physical community where zoning law is applicable? How do we evaluate the validity of possible CDA applications when electronic mail, which may be most analogous to traditional postal service mail, electronic newspapers or magazines, which are analogous to traditional printed newspapers, and one-sender-to-many-recipient video, which may be most analogous to television, are all part of and available on the "the Internet" and yet each is subject to a different analytical framework? Neither the Government nor the Appellees give us much insight on this question. It may be that some applications of the CDA to particular speakers using the Internet in particular ways would traditionally be constitutional while others are not. On the other hand, this may suggest that it would be preferable to avoid treating the Internet at the "micro" level and instead recognize it as a unique and unitary communications forum, even if that means discarding old frameworks or developing new ones.

While it is not clear whether the Government argues for a new "Internet speech" framework which is a hybrid of its cited cases or whether it believes they each support a separate application of the CDA, the Government does advocate the standards applied in a number of our prior First Amendment cases. The Government argues first that using criminal penalties to segregate materials into an "adult only" category is not per se unconstitutional. The Government next argues that specifically targeting "indecent" materials for less-favorable treatment for the purpose of keeping them away from minors has specifically been upheld. Finally, the Government ar-

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MR. WAXMAN: It's a harder case because a public part is a — it's a free space. It's an area where, unlike the Internet, speech is free, which —
[COURT]: You're asking us to say that the Internet is not a public forum.
MR. WAXMAN: The Internet is — we don't think it is, but if it is, in any event it certainly is, like other public forums, subject to reasonable time, place, and manner restrictions.
[COURT]: A public forum is something created by the Government, isn't it?
MR. WAXMAN: Right. Right. We don't think it's a public forum, whereas a park would be, but let me — if I can just —
[COURT]: Well, it's a pretty public place, though, because anyone with a computer can get on line —
MR. WAXMAN: Right, and — yes, and that is one —
[COURT]: — and convey information and images, so it is much like —
MR. WAXMAN: It's one of the —
[COURT]: a street corner or a park, in a sense.

55. ACLU, 929 F. Supp. at 881.
57. Brief for Appellant at 19-20, Reno (No. 96-511) (citing Ginsberg v. New York, 390 U.S. 629, 633 (1968)).
58. Id. at 28-31 (citing Pacifica, 438 U.S. at 748).
The basic principle the Government pulls from *Ginsberg v. New York* is unremarkable: there are some types of speech that can, constitutionally, be kept from minors even though they remain available for adults. Indeed, the parties challenging the CDA concede as much, but find that the argument weighs in their favor. There is no argument that, even without the CDA, laws could be enforced against soliciting minors for sexual purposes, providing obscene materials to minors, or engaging in the harassment of any person by way of the Internet. While the material at issue in *Ginsburg* may have been “variably obscene” depending on the maturity of the audience, it was nonetheless critical that all the targeted material was obscene, not merely indecent.

This means that the actual “fighting issue” here involves only the “extra” material within the CDA’s scope — material that is indecent or patently offensive. The “fighting issue” is whether *F.C.C. v. Pacifica Foundation* controls the case. The Government’s heavy reliance on *Pacifica* is misplaced. The holding in *Pacifica* is very narrow, and is

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59. *Id.* at 32-33 (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)).
60. 390 U.S. 629 (1968).
61. Brief for Appellant at 19-20, *Reno* (No. 96-511). This point, while not novel, was of great interest to Justice Scalia:

> [COURT] [JUSTICE SCALIA]: Let's take printed communications. It is certainly lawful — and we have upheld provisions that require pornographic materials to be kept away from minors and not to be sold in such a fashion that minors can obtain them. This effectively excludes the publishers of pornographic publications from vending their material on the streets in vending machines, where minors can get access to them. Do we say it’s unconstitutional because they cannot use that manner of communication? I don't think so. We say tough luck, you have to sell it in stores.

Transcript at 35, *Reno* (No. 96-511).

Appellees, however, in their brief very effectively distinguish *Ginsberg*. The Appellees stated that “[T]he Government’s reliance on [*Ginsberg*], is entirely misplaced. Unlike the CDA, the statute at issue in *Ginsburg* prohibited only the commercial sale of books deemed “harmful to minors” when the bookseller knew the purchaser was a minor, and it had no effect on sales to adults.” Brief for Appellee-American Library Ass’n, et al. at 10-11, *Reno* v. American Civil Liberties Union, __ U.S. __ (1997) (No. 96-511) available at 1997 WL 74380. In addition to the distinctions emphasized by the ALA, it is particularly difficult for Internet content providers to know or determine with certainty whether their “customers” are minors.

62. *See* *Ginsberg* v. *New York*, 390 U.S. 629 (1968). In *Ginsberg*, the court found sexual material to be obscene when viewed by minors even though it would not be obscene when viewed by adults. *Ginsberg*, 390 U.S. at 634-35. Both cases predate the modern definition of obscenity from *Miller* and it is unclear whether the variable obscenity concept survives. Presumably it is part of the calculus for determining the community standards, and, upon appropriate finding, it may be that certain material with redeeming “serious” value for adults is, in fact, used only for prurient purposes by minors.

expressly limited in the opinion where, among other things, we expressed doubt as to whether the result would have been the same had the sanctions been criminal rather than administrative.\textsuperscript{64} Further, while Appellees overstate the remoteness of the chance of a minor inadvertently stumbling across pornographic materials on the Internet, the Government equally fails to appreciate the very real difference between the radio and television context, where a listener turns on the apparatus and joins a broadcast in progress, and the Internet, where the user knows exactly the content of (and in fact has usually chosen) the first image shown.\textsuperscript{65} Everywhere the user goes after that requires an affirmative act. Finally, \textit{Pacifica} (and our broadcast radio and television cases generally involving FCC regulation) turns on the unique nature of the broadcast media.\textsuperscript{66}

While the Government characterizes this uniqueness as an issue of pervasiveness, it goes beyond that.\textsuperscript{67} Part of the uniqueness both of

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  \item \textsuperscript{64} \textit{Pacifica}, 438 U.S. at 750-51. The Court in \textit{Pacifica} noted:

  \textit{It is appropriate, in conclusion, to emphasize the narrowness of our holding. This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution. The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant. As Mr. Justice Sutherland wrote, a 'nuisance may be merely a right thing in the wrong place, - like a pig in the parlor instead of the barnyard.' [W]e simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.}\textsuperscript{Id.} In addition to distinctions addressed in the text, we would note the difficulty in applying to the Internet cases that have permitted "time channeling." On the Internet, time channeling is not an option: the content author has no control over when material, once released into cyberspace, will be viewed.

  \item \textsuperscript{65} Brief for Appellee-A.C.L.U. at 24, \textit{Reno} (No. 96-511); Brief for Appellee-American Library Ass'n, et al. at 26-27, \textit{Reno} (No. 96-511). Appellees suggest that accidental exposure to indecent materials is negligible. This overlooks the many examples of benign sounding site names that lead to imprecise search results. Brief for Appellant at 29, \textit{Reno} (No. 96-511). It also overlooks the real-world problem of the "forbidden fruit" effect: the "warnings" that Appellees claim prevent accidental exposure may entice the very minors that they were ostensibly (and the CDA was explicitly) designed to protect. On major browsers, such as Netscape Navigator, the user can select their own "home" or start-up page. For online services, such as America Online, they will have proprietary browser start-up screens, after one use, the user will know the content. References to radio or television in this opinion should be read as referring to traditional over-the-air broadcast of radio and television signals. References to such media as two-way radio or cable television will be specifically described as such.

  \item \textsuperscript{66} 438 U.S. at 748-50.

  \item \textsuperscript{67} \textit{Id.} at 748. \textit{But see} Brief for Appellee-A.C.L.U. at 24, \textit{Reno} (No. 96-511) (stating that "[t]he government improperly recharacterizes \textit{Pacifica} as a case about "pervasive-
those media and the Government's right to play a more active role in those media stems from the scarcity of broadcast frequencies. The technological realities of traditional broadcast media present a paradox: there must be a limit on speech for there to be any useful speech at all. An unregulated use of the limited broadcast spectrum would result in signal interference and overlaps that would result in a cacophony of static and noncommunicative noise. It is necessary, then, for the Government to limit the speakers who can use the available frequencies. This scarcity, and the monopoly that speakers have over certain frequencies in certain geographic areas, raise the economic value of those rights to speak through broadcast media even as the same factors deny most of the public the ability to use the broadcast media. In exchange, the Government has long taken the position that such media should be used for a more public interest than other media, and this Court has agreed.

While the Internet may be chaotic, there is no evidence that it is so much so as to diminish the ability to get one's message across. Scarcity of bandwidth, while not completely irrelevant, is not a problem of the same nature that makes rarity "rather than 'invasiveness.' If the government could justify a content-based regulation whenever a communications medium became 'pervasive' in American homes, bans on 'indecency' in books, on the telephone, or even in normal conversation would be constitutional. That is plainly not the law.).

68. Red Lion, 395 U.S. at 388. The court stated:
Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum

[...]

By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those whom licenses are refused. A license permits broadcasting, but the licensee has not constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

Id. at 388-89.

69. Red Lion, 395 U.S. at 386-88.

70. Id. at 388 (citing National Broadcasting Co. v. United States, 319 U.S. 190, 210-14 (1943)).

71. The absence of governmental regulation of Internet content has unquestionably produced a kind of chaos, but as one of plaintiffs' experts put it with such resonance at the hearing: What achieved success was the very chaos that the Internet is. The strength of the Internet is that chaos. Just as the strength of the Internet is chaos, so
dio and broadcast television unique. Any suggestion by the
Government that they should play a more active role in regulating the
Internet therefore lacks the force of the same argument applied to
traditional broadcast media. If the Government is to prevail in this
case, it cannot be on the force of Pacifica alone.

Some confusion may have arisen regarding the breadth of Pacifica
generally, and the import of the scarcity rationale in particular, in
light of our recent decisions in Playboy Entertainment Group, Inc. v.
United States and Denver Area Education Telecommunications Con-
sortium v. F.C.C. We reiterate here that the only change we have
made in the applicability of Pacifica is that we have found cable tele-
vision to be similar enough to radio and broadcast television to justify
application of Pacifica to cable. Playboy in particular is a very unique
factual setting, and our holding there is limited narrowly to those
facts. If there was any concern that our recent cases had overwrit-
ten the restrictive language in the Pacifica opinion, let it end here.
Although Pacifica itself is not directly before us today, we can in the
context of the present case draw the following boundary around
Pacifica: Pacifica does not extend to support criminal sanctions for
"indecent" material on the Internet.

Alternatively, the Government suggests that we adopt the CDA
as a type of "cyberzoning" ordinance. The steps required in the "de-
fenses" provisions of the CDA create, presumably, a different type of
Internet presence, limited to adult users, a sort of Internet "red light
district." While we are inclined to believe that Appellees have aptly
pointed out the limitations of this analogy, we neither adopt nor
foreclose it in declining to apply it today. The Government's theory is
novel and interesting, but ultimately premature. Without much more
evolution in both the Internet itself and the law that will inevitably

the strength of our liberty depends upon the chaos and cacophony of the unfettered
72. See Red Lion, 395 U.S. at 87-73. There is nothing in the factual record to sug-
gest that the type of bandwidth problems identified in the Red Lion exist with respect to
the Internet. Nonetheless, a system of wires, switches and servers undeniably has phys-
ical limitations, and the telephone companies have recently sounded the first warning,
asking for new billing structures for Internet service.
73. 117 S. Ct. 1309 (1997) (mem.).
75. At issue in Playboy was the unique problem of "signal bleed." Signal bleed is,
arguably, not speech at all as there is no intent to communicate through signal bleed.
Also important to the result in Playboy, households receiving indecent audio or video via
signal bleed were having the phenomenon forced on them after consciously deciding to
not subscribe to the pay channels in question.
76. Brief for Appellant at 16, 21-22, Reno (No. 96-511).
77. See supra note 36.
78. See Brief for Appellee-A.C.L.U. at 25-26, Reno (No. 96-511); Brief for Appellee-
American Library Ass'n at 28-29, Reno (No. 96-511).
arise in lower courts light of the Internet, caution counsels against hastily treating the ephemeral cyberspace too much like physical communities. While that may in time prove reasonable, it is not clear to us from the record or arguments presented in the case at bar what unforeseen consequences may arise from such a precedent. Accordingly, we conclude that the better course is to refrain from such a holding.

IV.

Pointing out that the Government's arguments fall short of their intended mark does not end our task. Statutes are presumed constitutional, and while we generally accept the well-developed findings of fact below except where there is clear error, we review application of law, and particularly construction of the Constitution, de novo. Moreover, discussing the limitations of the arguments advanced by the Government provides Congress, lower courts, and Internet users no practical, affirmative guidance in facing what is undeniably a rapidly changing and very important area.

It is important as a first step to note that there is no dispute that the expression at issue is "speech," and is protected. It is not obscenity. It is indecent or patently offensive material and one critical distinction between the material targeted by the CDA and that which is obscene is the consideration of whether the material, however offensive it may be to some, includes serious scientific, literary, artistic or political content. In its argument regarding the allegations of impermissible vagueness, the Government suggests that because the definition of indecency is merely a subset of the definition of obscenity, if obscenity is capable of sufficiently clear definition, the definition of indecency ipso facto is not vague. While the challenged sections of the CDA may be susceptible of interpretations of the terms "indecent" and

80. Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985). This is particularly useful where the lower court actually used the Internet as part of the hearing. See supra note 12.
81. The guidelines for determining whether material is obscene are:
    (a) whether the average person, applying contemporary community standards* would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether taken as a whole, lacks serious literary, artistic, political, or scientific value.
    Miller v. California, 413 U.S. 15, 24 (1973). While obscenity surely exists on the Internet and the scope of the CDA reaches such material, all that is being challenged in the present case is the impact of the CDA on the more protected class of "indecent" speech.
82. Brief for Appellant at 42-43, Reno (No. 96-511).
"patently offensive" that are narrow enough to survive the vagueness attack, the Government's argument here generally goes too far in that it treats as somewhat de minimis the importance of each element of the obscenity definition individually.\(^8^3\) The existence of serious scientific, literary, artistic or political content is not only not de minimis, it is an extraordinarily significant justification for the difference between speech that is fully protected and speech that is not.

There also can be no real dispute that these regulations are content-based. They single out certain materials because they contain a disfavored type of content — that which is indecent. Content-based regulation is presumptively violative of the First Amendment.\(^8^4\) There are exceptions, however: as noted above, some "speech" is not protected at all, and to the extent that the CDA attacks obscenity, such regulation is permissible.\(^8^5\) A less-settled, but undeniably extant concept in our free-speech jurisprudence is that of "low-value" content. The cases relied upon here by the Government — Pacifica and City of Renton v. Playtime Theatres, Inc.\(^8^6\) — are among those generally considered to represent this doctrine. Put simply, the low-value doctrine assumes as a premise that there is a core purpose behind the original passage of the First Amendment, that purpose being the explicit protection of political dissent and the type of unfettered political argument thought central to the well-tested political reasoning that would drive a successful democracy.\(^8^7\) Its second premise is that some types of expression have less relationship to that core purpose than others — some theoretically have little if any, i.e. live nude dancing.\(^8^8\) The conclusion is that live nude dancing is therefore less valued and hence less protected than political debate.

Were this a challenge to a specific application of the CDA, the low-value speech doctrine might provide a comfortable way to take a less scrutinizing look at the CDA. Before the lower court, the Government

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\(^8^3\) See generally id. at 42-45.


\(^8^5\) See R.A.V., 505 U.S. at 383.

\(^8^6\) 475 U.S. 41 (1986).

\(^8^7\) The "low-value" concept attempts to explain the treatment of indecent speech, commercial speech and other categories as compared to political discourse. It is often grounded in the relationship between the type of speech and the core philosophical justifications of a "free speech principle." See Frederick Schauer, Free Speech: A Philosophical Enquiry 15 (1981) (discussing philosophical underpinnings of free speech and noting the traditional reliance on the "argument from truth"). See also Harry Kalven, Jr., The Metaphysics of the Law of Obscenity, 1960 Sup. Ct. Rev. 1, 15-16; Alexander Meiklejohn, The First Amendment is an Absolute, 1961 Sup. Ct. Rev. 245, 256, 263 (debating whether the First Amendment applies to speech not directed at the "argument from democracy.").

attempted to argue the case as if it were in some sense an "as applied" challenge, urging plaintiffs and the court to trust its prosecutorial discretion, to trust that Congress and the Attorney General intended what appeared to be broad language in the statute to refer only to the type of explicit sexual material that the "author" intended for purposes of titillation, for example the "teasers" put out by commercial pornographer.89 The ACLU and ALA and their respective co-appellees have, however, brought a facial challenge to the CDA.

Undeniably, much of the content subject to the CDA would fall into our "low-value" doctrine were we to choose to extend it to the Internet. It is also easy to accept at face value the Government's representation that it is this content that Congress had in mind. Nonetheless, it is equally undeniable that the plain meaning of the text of the CDA is broader and more encompassing. It will in fact, either directly or through its chilling effect, impair a significant amount of speech that is in no way covered by our "low-value" cases. Because we err on the side of protecting the fundamental right of free-speech, we treat the mixed-content scenario under the standard appropriate to the most protected speech involved.90 In the present case, that means we apply strict scrutiny. Because the ACLU and ALA have made a prima facie showing that the challenged regulations are a content-based attack on speech, the burden shifts to the Government to prove the interest served is compelling and that the means chosen are appropriately narrow.

V.

A.

Without question, the protection of the social, emotional, and moral development of children, the physical safety of children, and the rights of parents to have the law support rather than hinder their control of the development of their children are, particularly as a constellation, a very compelling governmental interest.91 Appellees do not challenge this, and we accept it as self-evident. The heart of the dispute over the CDA relates to whether it is the least restrictive alternative or, as we have also phrased the second prong of the strict scrutiny standard, a narrowly tailored fit in light of the asserted interest. It is here that we must revisit the question left unresolved in Section III above of which framework or analogy to apply in cases involving the Internet. In addition, we must address the dispute between the par-

89. See A.C.L.U., 929 F. Supp. at 864.
90. See R.A.V., 505 U.S. at 385-88.
ties over the vagueness of the terms used in 47 U.S.C. §§ 223(a) and (d), and the concerns of over- and under-breadth which are highly probative of the narrowness of the "fit."

In demonstrating the analytical difficulties of applying existing First Amendment tests to the Internet, we dissected the Internet to look at its component parts separately. The casual user of the Internet who is not engaged in a lawsuit sees the lines less distinctly. A user may go to a webpage that allows them to download a file via file transfer protocol at the push of a button. A user may read a newsgroup message and respond immediately by sending a private e-mail to the author. A user may be reading a bulletin board and at the same time engaging in real time one-to-one messaging. Any given webpage may include printed information, audio, video, "hyperlinks" to e-mail, a bulletin board, forms to fill out, or another webpage where the process starts over.

The plain text of the CDA does not inform this Court or the millions of Internet users without benefit of constitutional law counsel how its broad proscriptions apply to each different situation. The Government suggests that we can provide whatever narrowing definitions we see fit to salvage the challenged provisions. To do so would amount to writing entirely new legislation, which is not the proper role of the Court. The legislative history suggests that Congress was

92. The following exchange occurred at oral arguments:
MR. WAXMAN: ... The district court threw up its hands and struck down a statute without attempting to narrow it, without attempting to make it more specific, and most significantly, without finding that any more narrowly tailored, constitutionally acceptable solution exists. That is error of law of the first order.
[COURT]: Mr. Waxman, the district court was concerned about legislating. You know, it would be one thing if you could just say, take out this sentence, or take out this section, but just the kind of thing you describe with respect to the parent, that's a lot. That kind of tinkering courts don't do.
MR. WAXMAN: Justice Ginsburg, all I can say is that — I mean, I could rattle off the name of a dozen or two dozen cases in which the Court in either the overbreadth context or the vagueness context has done just that even without a severability clause, and when there is a severability clause that includes the language of applications as well as provisions, this Court has always heeded that.

In fact, in Wyoming v. Oklahoma where the request was that, okay, if it's invalid as to one particular company, just strike them out, what this Court said was, severability clauses may easily be written to provide that if application of a statute to some classes is found unconstitutional, severance of those classes permits application to the acceptable classes. Now —
[COURT: ] It was my impression from Califano v. Westcott, which I think is the last time the Court dealt with that, and it dealt with it up front, that the point was made that you can lop off something, you can include or exclude, you can put a caret mark, but nothing fancier than that.

Transcript at 31-32, Reno (No. 96-511).

93. Justice Ginsburg was evidently quite concerned about this, see note 92, and the ALA Brief for American Library Ass'n, et al. at 47-49 provides some good reasons why. See, e.g., United States v. Reese, 92 U.S. 214, 221 (1875). See also A.C.L.U., 929 F.
concerned about "the Internet;" indecent material can become available to minors through web pages, newsgroups, bulletin boards, e-mail, and more. We conclude that the nature of the Internet is such that, in the context of the present case and on the record, it is appropriate to view it as a whole rather than trying to consider each of its many parts. We further conclude that the CDA as it stands was written with the entire Internet in mind, and was written without separate treatment of individual aspects or functions within the Internet. We therefore consider this facial challenge in the following manner: does the plain meaning of the challenged CDA sections, without any narrowing interpretation, unconstitutionally burden speech on the Internet as a whole?

B.

So far we have discussed only the First Amendment challenges to the CDA. Appellees also bring a due process challenge, based on the alleged vagueness of the terms of the CDA, specifically the terms "indecent" and "patently offensive." The First and Fifth Amendment issues have substantial overlap — a vague law is not likely a well reasoned response to the Government's asserted interests in that the hard-to-define boundaries will chill speech far beyond any permissible core to which the CDA is addressed.

As we mentioned in passing in Section III above, the Government argues that the term "indecent" has repeatedly been upheld in the face of vagueness challenges. The Government also asserts that as used in the CDA "indecent" and "patently offensive" are synonymous. A review of the plain language of the statute suggests that this interpretation is inaccurate.

The Government argues that the elements of indecency are a subset of the elements of obscenity (conversely, that obscene material is that subset of indecent material that meets additional tests showing it to have an even lower value). The Government here also argues that "patently offensive" is synonymous with "indecent." Yet when "patently offensive" is used in § 223(d)(1), it is qualified by "in context" and "by contemporary community standards." If "in context" means, as it reasonably could, that we check for serious scientific, literary,

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94. The government uses the term "indecent" interchangeably with "patently offensive" and advises that it so construes the statute in light of the legislative history and the Supreme Court's analysis of the word "indecent" in FCC v. Pacifica Foundation. A.C.L.U., 929 F. Supp. at 850.

artistic or political content, then § 223(d)(1) merely recites the Miller definition of obscenity.\footnote{See Miller, 413 U.S. at 18 n.2.} Regardless of what “context” is suggested, the presence of these modifiers that are not used in conjunction with “indecent” in § 223(a)(1) and the use of the term “patently offensive” rather than “indecent” in such proximate paragraphs leads inevitably to the conclusion that the terms are not, in fact, synonyms.

Even if the Government is correct that Pacifica stands for the broad proposition that the term “indecent” is presumptively not vague, the presence of the different language in § 223(d) greatly confuses the issue. Reading the sections as part of the a larger whole, rather than in isolation, the terms in § 223(d) may, and likely will, cause even the well informed reader to question what they know and can safely assume about the meaning of indecent in § 223(a).\footnote{See Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (stating that “where a vague statute [abuts] upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms.” Uncertain meanings inevitably lead citizens to “steer far wider of the unlawful zone” . . . than if the boundaries of the forbidden areas were clearly marked.”); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) (stating that as a matter of due process, a law is void on its face if it is so vague that persons “of common intelligence must necessarily guess at its meaning and differ as to its application. . . .”).}

Such ambiguity is of heightened importance here where the penalty for a wrong guess is a harsh criminal sanction. This is, of course, a critical difference from Pacifica. Our due process jurisprudence has always suggested a context-sensitive balancing: the process due is a product of the nature and context of the liberty or property interest involved and the harshness of the penalty or deprivation at stake.\footnote{See, e.g., Mathews v. Eldridge, 424 U.S. 319, 339-43 (1976).} In the present case there is no question that the penalty is high. The First Amendment right to freedom of speech is equally clearly an important liberty interest. The context is a new communications technology undergoing rapid growth and change. In this stark light, we find the process provided by the CDA wanting due to its vagueness, based not on any single bright-line factor, but rather based on the array of confusing (and hence chilling) factors that confront the Internet user under the CDA. The term “indecent” is inarguably less specific than the more restrictive term “obscene,” and in the criminal context, the use of that term raises a red flag. The confusion caused by the differences in language between § 223(a) and § 223(d) exacerbates the problem. Finally, there is concern regarding the use of “community standards” in a medium that neither knows nor recognizes traditional geographic jurisdictions. Taken together, the terms of the challenged sections of the CDA raise too many questions and provide too few an-
answers. We, therefore, conclude that the challenged provisions are void for vagueness.

C.

Such a conclusion strongly hints at problems with the tailoring of the law. Indeed, a more direct look at the question of whether the CDA is narrowly tailored to fit its purpose reveals problems of a magnitude that also demonstrate that the CDA's challenged provisions are unconstitutional.

The record before us includes examples of both the overinclusiveness and underinclusiveness of the CDA. The overinclusiveness is particularly problematic under § 223(d), which requires as an element of the offense, transmission of prohibited material “in a manner available” to minors. This is troubling because the sender has no way to verify that only the intended recipient will see the material, or even to verify with certainty the age of the intended recipient. The nature of the Internet is also such that once material is uploaded or transmitted, control over it is lost and, generally speaking, it may be retransmitted to anyone, anywhere, of any age.

An example: the original author of an offensive but non-obscene essay sends it via a list server to an online writers' discussion group accessible by only twelve people. He is reasonably sure all the official members are adults, but the list server requires no particular verification other than presence on the membership list, which is capped at twelve. The author is familiar with the Internet and knows that (1) you can never be sure of the identity of others online, and (2) that anything online is easily redistributed, quite possibly to areas where minors have access. Consider three scenarios. First, the group member is an adult, but his minor child knows how to access his newsgroup and does so, reading the indecent essay. Second, an adult group member really likes the essay, and copies it, with attribution to the original author, on the group member's personal, fully public web page. Third, a 16-year old male has created a false identity for purposes of the Internet as a 20-year-old female and joins the group not disclosing that he is “in character.” In which circumstances is the author liable?

This certainly is an example of the vagueness problem, but it also demonstrates why § 223(d), ostensibly aimed at protecting children, will inevitably chill (if not outright punish) constitutionally protected communications between adults and is therefore overbroad. The sheer number of similar examples that readily come to mind are powerful evidence of just how serious an overbreadth problem exists. Among the plaintiffs are anti-AIDS organizations. In some but certainly not all communities the frank manner in which these groups
address the nature of AIDS transmission and prevention would likely meet the definitions of indecency and offensiveness in §§ 223(a) and (d) respectively.\textsuperscript{99} The communication is not only available to minors, it is consciously aimed at them. While arguably this intrudes into the control of parents, it is also the type of important medical information and advocacy on important issues of the day that is entitled to the highest protection under the First Amendment. Again, this speech will be chilled and quite likely be punishable under the CDA. This result is unacceptable.

The challenged provisions are also underinclusive to the point of being completely ineffective at achieving the intended purpose. The lower court found that 40\% of all indecent material available to minors in the United States originates outside of the country, and for practical purposes, outside of the reach of the CDA.\textsuperscript{100} Some additional increment of certain types of indecent material cannot readily be traced to a source because of "randomizers" that allow posting of material without individually identifying information.\textsuperscript{101} To the extent that the Internet is like giving minors the keys to an adult bookstore in their own bedrooms,\textsuperscript{102} the CDA does not take away those keys, the CDA merely covers up some of the titles. We conclude that, due to the combination of vagueness, overbreadth, and underbreadth problems, the challenged provisions are not sufficiently narrowly tailored to pass constitutional muster.

D.

The Government attempts to rescue a drowning statute by arguing that the defenses and safe harbors in the CDA overcome the many identified problems.\textsuperscript{103} We are troubled from the outset by the suggestion that a criminal statute which defines the offense in an unconstitutional manner — as we have found is the case here — can be saved by potential defenses. As the lower court noted:

[i]t is difficult to characterize a criminal statute that hovers over each content provider, like the proverbial sword of Damocles, as a narrow tailoring. Criminal prosecution, which car-

\textsuperscript{100} Id. at 848.
\textsuperscript{101} Randomizers are particularly common in the context of newsgroups. A randomizer takes an author's message, strips it of the author's identifying information, and then forwards the message on to its destination, showing the author as "anonymous" or some other generic name, and showing the "domain" identification for the randomizer, not the original author.
\textsuperscript{102} 141 CONG. REC. S8332-S8333 (daily ed. June 14, 1995) (statement of Sen. Coats) (reporting the remarks of Sen. Coats comparing the Internet to "taking a porn shop and putting it in the bedroom of your children. . . .").
\textsuperscript{103} Brief for Appellant at 45-48, Reno (No. 96-511).
ries with it the risk of public obloquy as well as the expense of court preparation and attorneys' fees, could itself cause incalculable harm. No provider, whether an individual, non-profit corporation, or even large publicly held corporation, is likely to willingly subject itself to prosecution for a miscalculation of the prevalent community standards or for an error in judgment as to what is indecent. A successful defense to a criminal prosecution would be a small solace indeed.  

Moreover, the findings of fact below establish the the proffered defenses, such as credit card verification or third-party age verification systems, are impractical for a large number of speakers and receivers. We conclude with little difficulty that the presence of the statutory defenses does not solve the identified Constitutional infirmities of the challenged provisions of the CDA.  

104. A.C.L.U., 929 F. Supp. at 855-56. Query whether it is any comfort at all to inform an internet service provider, who is being prosecuted for misinterpreting the application of the definition of the criminal offense in the CDA to their content, that they need not have worried about being found guilty — if only their interpretive skills were more adept when they read the defenses section of the statute.

105. See, e.g., A.C.L.U., 929 F. Supp. at 846-48. Justice O'Connor appears to have picked up on the practical difficulties of these defenses:

MR. WAXMAN: The district court found that on the World Wide Web, where most of the material that concerned Congress is posted, it is technologically feasible for speakers to screen for age, and on commercial sites that is commonly done. . .

[COURT:] Mr. Waxman, does that technology require use of something called CGI —

MR. WAXMAN: It does —

[COURT:] — in order to screen it out, in effect? Is that the mechanism by which that can be done?

MR. WAXMAN: The — Justice O'Connor, the mechanism by which a Web site can screen for age, or a particular page, or indecent material on a Web site could screen for age, or at least at the time of the hearing was by the use of something called CGI script.

But the obtaining of an adult ID is something that the unrebutted evidence showed was a service that even at the time of the hearing, without the benefit of the [CDA] in effect, an adult . . . could, for five dollars a year, obtain an adult identification that would give that person access to any and all adult sites, and

[COURT:] Of course, the problem is not at that end. It is at the other end. How can a person putting material out in the system assure that it is only going to be accessible by somebody with that code?

Transcript at 4-6, Reno (No. 96-511). See also Brief for Appellee-A.C.L.U. at 43 n.25, Reno (No. 96-511). Indeed, the need for and limitations of the defenses only call attention to the poorly tailored design of the CDA as a regulatory scheme. One example — and there are many, each with its own strengths and limitations — of a solution that appears to be better fit to the identified concerns of Congress is a simple directive that requires each online service, Internet Service Provider, or network connected directly to the Internet to provide, as part of its “package” of Internet software, blocking software. Undeniably, blocking software is not perfect in its accuracy. Such a solution, however, would (a) avoid Constitutional problems as it does not infringe on content providers or on receivers; (b) ensure broad, uniform coverage — every person with Internet access would also have access to the blocking software; and (c) blocks content of foreign origin that the current CDA approach has difficulty reaching. It is also likely
VI.

We do not question that Congress passed the CDA with the best of intentions. We also are under no illusions that the Internet presents very real concerns and will, over time, test to its very core our faith in and fidelity to the First Amendment. Unfortunately, given the nearly dispositive nature of the often undisputed facts in this case regarding the nature of the Internet, it appears that Congress did not have a thorough grasp of the technology it sought to regulate. The Internet, as was pointed out in the lower court opinion, is chaotic. Whether or not one agrees that chaos is a strength, one implication of such chaos is that it does not lend itself to simplistic answers such as provided by Congress in §§ 223(a) and (d).

The Internet, especially when viewed as a single entity that due to the interconnected nature of its various functions really is more than the sum of its parts, is a unique communicative tool that is, at least at this stage in its evolution, uniquely democratic. We conclude that, as a medium, it is not subject to the reduced protection of radio and television. We further conclude that the challenged provisions inappropriately pressure speech on the Internet towards a standard of what would be appropriate for minors, depriving adults of appropriate and protected adult communication. We reiterate that nothing in this opinion, and nothing in the Appellees' challenges to these provisions, prevents prosecution of obscenity, child pornography, solicitation of minors for sex or pornography, or harassment. We hold, however, that the Government's attempt, through the methods of §§ 223(a) and (d) of the CDA, to extend its regulatory reach that extra increment of speech that is "indecent" or "patently offensive" oversteps what is permitted by the First and Fifth Amendments. Accordingly, the lower court was correct to conclude that the tests for a preliminary injunction were met, and the decision of that court is

Affirmed.

that the provision for such software at the time a household initiates its Internet access would serve an awareness and educational function, reminding parents of the potential risks to children using the Internet.

106. See supra note 18.

107. See A.C.L.U., 929 F. Supp. at 851. Although the procedural posture of this case is that the order appealed from is the grant of a preliminary injunction, it would be easy to understand if the casual observer overlooked that fact. Very little of the lower court decision was cast in terms of or in the framework of a preliminary injunction, the briefs of the parties hardly mentioned the injunction, and the procedural posture was not addressed at oral argument. All involved seemed willing to ignore the preliminary injunction question of whether, in light of the harm that would be caused by not enjoining the CDA provisions, it was sufficiently likely that plaintiffs would prevail on the merits. This is a much lower standard than would be required for ultimate success on the merits. Nonetheless, it seems all involved were willing to discuss the ultimate question of whether the CDA provisions are, in fact, constitutional or not. This proves more than is
Postscript:

On June 29, 1997, during production of this volume, the Supreme Court issued its ruling in *Reno v. ACLU*. The surprisingly unanimous decision (9-0 in part and 7-2 in part), while not as unambiguously supportive of Internet speech as the author proposed, nonetheless struck down the challenged sections of the CDA. The author is pleased that such an outcome was not just a dream after all.