AN ABSTRACT OF THE THESIS OF

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The Communication Decency Act became law in 1996 and was immediately challenged on Constitutional grounds. It was subsequently declared unconstitutional based on the First Amendment guarantee of free speech. Using Fantasy Theme Analysis, an analysis of the dramatic elements of the key players was accomplished. The dramatic elements of Overall Theme, Abstract Concept, Hero/Villain interaction and Emotion were the focus of this analysis. The key players have been named the Antiobscenity Crusaders, the Defenders of Liberty and the Homesteaders after the roles they play. The focus of the analysis was an examination of how these groups rhetorically construct the internet as they attempt to persuade the Supreme Court about the Constitutionality of the Communication Decency Act.
WHOSE COMMUNITY IS IT ANYWAY?
The CDA and Cultural Conflicts over Speech and Pornography

By

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The Communication Decency Act (CDA) was an amendment to the 1996 Telecommunications bill signed into law by President Clinton. The CDA was supported by the Republican members of Congress and by the Christian Coalition who had helped to get the Republicans elected. The CDA was designed to place limits on accessibility to obscene speech in cyberspace. Days after being signed into law, the American Civil Liberties Union (ACLU) filed suit stating that the CDA was an unconstitutional breach of the First Amendment. It was declared unconstitutional by both the District Court in Pennsylvania and by the U.S. Supreme Court.

The CDA came to my attention as a user of the technology. I am a frequent user the Internet participating in newsgroups, listservs, email conversations, and the World Wide Web (WWW). I was introduced to the technology in 1985 as OSU was beginning to connect to other campuses. This was prior to the introduction of Microsoft Windows and we used DOS to access our programs. It is also prior to the WWW so documents on other campuses were accessed by using Gopher. I have remained an involved participant in the growing technology. Over the years I have taught hardware and software classes, watched the growth of newsgroups, listservs and the WWW and in time, not only joined the conversations, but became a listserv administrator. My participation in listservs and the other dynamic parts of cyberspace have made me particularly interested in how the CDA legal debate would play out.

Further, I consider myself to both feminist and a civil libertarian. As a feminist I have worked for many years to end violence against women and children. Part of this work has included an exploration of how pornographic speech may contribute to domestic violence.
and rape. Through my work I have become convinced that there is a connection to the images that portray woman as one-dimensional, sexualized creatures, and crimes against women and children.

As a civil libertarian I believe equally in the values embedded within the Bill of Rights. I have long cherished the ability to say what I chose without having to be concerned about being arrested. I have enjoyed participating in rallies to protest a variety of things without fearing imprisonment. Further, I was given the opportunity to intern at the ACLU in San Francisco. This experience taught me a great deal about threats to the Bill of Rights, including legislative erosion. When I returned to OSU, I was elected President of the OSU/Corvallis chapter of Amnesty International. In this role I became more fully aware of how rare the guarantees in the Bill of Rights are. And I became more committed to working to preserve them. However, more often than not my feminist beliefs are in some conflict with my civil libertarian beliefs. I have from time to time trying to reconcile these two parts of my belief system, and the CDA was one more opportunity for this personal struggle.

Last, I have been privileged to serve as a member the Corvallis City Council. During those four years, I watched as citizens come before the Council and try to persuade us to create policy that reflected their world views. I was fascinated to listen to people structure their arguments. Through these arguments it would become clear what different people cherished and considered non-negotiable. Once the public testimony was over, we would discuss which set of values were salient as we created policy for 50,000 people.

As I watched the CDA debate unfolding in Congress and again before the courts, I was intrigued to watch the same process unfolding. Further, as a someone who participated in the growing cyber-culture I keenly aware that this group was all but absent in the larger
legislative and judicial conversations. As I embarked on my analysis of the CDA, I was interested to see if this seeming similarity in the process of creating policy continued. I was also interested to see if this invisible group ever became visible.

I was then left to choose a methodology and like all rhetoricians, I had many to choose from. I explored several methodologies but always came back to fantasy theme analysis (FTA) as the one with the greatest potential to tell me what I was interested in learning. I am at heart, a social scientist interested in why people do the things they do. I am curious about how the decisions people make, effect other people. In analyzing the CDA I could have chosen a strictly legal analysis and examined case law and precedence as an attorney would, but I would have learned very little about why the groups made the arguments they did and in turn, how they effected a judicial decision. Similarly, other rhetorical methods would not have provided me with the richness of information I eventually obtained. FTA provided a way to learn about how the three groups involved discussed pornographic speech, and in turn how they weigh that against the First Amendment of the U.S. Constitution. Last, it provided a way to examine how the three groups conceptualized the technology known as ‘cyberspace’ as it relates to the intermingling of pornographic speech and free speech.

Further, FTA allows for an examination of the larger issues the shape legal arguments and rulings. Legal decisions do not occur in a social vacuum. Attorneys, judges and legislators are aware of the larger cultural conversations surrounding the various issues they deal with. The relative harm and legality of obscene speech has been a part of the American dialogue for over a hundred years. The varying viewpoints are discussed in high schools and colleges, debated on radio call-in shows, and can be counted on to make an appearance in the
legislatures of the nation. These larger conversations appear to be about convincing parents, the general public and governing bodies that a danger exists that must be addressed. In the case of the CDA, the Christian Coalition was able to convince the US Congress that a particular social problem existed, that it had extended to cyberspace and that it needed a legal solution. Their solution was then challenged by the ACLU and it was left to the Supreme Court to make a legal ruling about a social phenomena. In this way they’re not only adjudicating a legal question, they are also acting as policy makers.

As policy makers, the Supreme Court stretched the reach of the U.S. Constitution and applied it to cyberspace. They determined which set of values would take precedence as conversations about the space evolved, at least within some audiences. They continued a tradition that free speech can be limited in only a few, well-defined and immediate cases. They may have considered pornographic speech to be a danger, but they did not see it as an immediate danger nor one big enough to risk criminalizing speech acts.

Having said this it must be restated that the actual decision wasn’t my real interest, the arguments leading to the decision were. I was interested to see who was present and absent from the conversation. And in how those who are present, structured the nature of the problem and in turn, the solution. There was potential for any of the players to assert that cyberspace was such as unique space that the US Congress lacked the authority to create laws there. In fact, this assertion was made by one of the District Court judges, but was not argued before the Supreme Court. There was also the potential for the dangers of pornographic speech or the promise of the First Amendment to be reaching reconceptualized. Neither of these happened either. Instead, this was much like every other debate that pits the First Amendment against pornographic speech. That part of the conversation was interesting
only in that it was so unoriginal.

There was one part of the argument that proved to be enlightening, the search for an analogy for the Internet. The current legal standard for determining whether something is obscene requires that speech be judged against a contemporary community standard. Further, legal procedure requires that judicial decisions be based in legal precedents. In this case the analogy would determine which set existing laws would be used to determine what would be allowed, but this conversation went beyond legal precedents. In this case, the attempts to compare the space to something known was also about determining what the community would be. Was the Internet like a local newspaper or more like a town crier? Or was it a completely unique space that requires a new conception of ‘community?’ And who would determine this? Would it be the Congress, the courts, the users of the space?

It was these different conceptions of community that intrigued me. This one concept seemed to lie at the heart of everything else. In the end, this analysis was an exploration of what a community might look like and really determines that.
Whose Community is it Anyway? The CDA and Cultural Conflicts over Speech and Pornography

INTRODUCTION

In 1996 President Clinton signed the Telecommunication Act of 1996, ending more than a year of debate and compromise. Embedded within the bill was the Communication Decency Act (CDA), an amendment intended to limit indecent speech in cyberspace. Within days of the President signing the law into effect, the American Civil Liberties Union (ACLU), on behalf of 9 plaintiffs, filed suit. They sought an immediate injunction and asked that the law be declared an unconstitutional breach of the First Amendment. The ACLU was quickly joined by a coalition that brought the number of plaintiffs to 47; the two complaints were consolidated into one case and sent to the Pennsylvania District Court for a ruling. The District Court agreed that the CDA not only violated the First Amendment, but also the Fifth Amendment guarantee of due process. To further strengthen the decision, the ACLU asked that the Supreme Court affirm the lower court ruling. The Supreme Court agreed to hear the case and, on June 26, 1997, the Supreme Court agreed that the CDA violated the First Amendment of the US Constitution. They did not rule on the Fifth Amendment issues.

This one case served to move the debate about cyberspace from the realm of academia to the front pages of popular magazines, the nightly news and into daily conversation. This one law has served to shape the discussion not only about what is appropriate in this new media, but also about the nature of the media itself. It has
also highlighted a tension between existing users, new users and world governments.

**CYBERSPACE**

Cyberspace, also called 'the internet,' or simply 'the net' is a world of electronic pulses generated and received by computers. These electronic pulses of information travel from computer to computer via telephone lines or satellite link. In this way, an international connection of connections has been developed, allowing instantaneous global communication. As it presently exists, the net can be accessed by anyone with a computer, a modem and the correct software.

This 'connection of connections' is an outgrowth of the Cold War. The decentralized network structure was originally developed by the Defense Department as a way to prevent sabotage of national defense computers. During the 1960's, Defense Department staff realized that if one computer was sabotaged, the entire national defense system was in jeopardy. The answer was to create a way for packets of information to travel along a variety of routes to the chosen destination. It was this separation of information that gave, and continues to give, the internet its strength as a communication medium. During the 1980's, the internet was opened to academia as a way to speed research. With the advent of the graphical user interface, the World Wide Web became possible, which in turn made the internet accessible to people with little computer experience. For the first time, it was available to the general public. In the late 1990's internet service providers became widely available, providing an easy way for people to log on and see what
all the excitement was about. Estimates in 1996 were that in excess of 40 million people worldwide are ‘seeing what all the excitement is about’ and that by the end of decade there may be more than 500 million (Mandel 5).

CDA HISTORY

The conservative Christian Coalition was a force to be reckoned with during the 1994 election. With their assistance, the Republican party regained control of the US Congress for the first time in forty years. This translated into not only a shift in the controlling party, but also a shift from a moderately liberal, to a fairly conservative Congress. The Christian Coalition drafted a document titled the *Contract with American Families* in which they outlined their legislative hopes. One goal of the Contract was to eliminate pornography on the increasingly popular internet:

Christian Coalition urges Congress to enact legislation to protect children from being exposed to pornography on the Internet. Criminal law should be amended to prohibit distribution of, or making available, any pornography, soft core or hard, to children, and to prohibit distribution of obscene hard core pornography to adults (Christian Coalition).

The entire *Contract with American Families* was presented to the 104th Congress.

For their part, the Republican majority within the 104th Congress was interested in asserting ‘traditional family values’ through the laws they created.

Soon after the Christian Coalition issued their *Contract with American Families*, the leadership of the 104th Congress presented the people of America with their *Contract with America*. This Contract set the Congressional goals for the first 100
days. Goal number four, The Family Reinforcement Act read,

Child support enforcement, tax incentives for adoption, strengthening rights of parents in their children's education, stronger child pornography laws, and an elderly dependent care tax credit to reinforce the central role of families in American society (Contract).

This goal may have seemed quite ambitious for the newly elected Congress, particularly given that there were nine others encompassing everything from a balanced budget to international relations; however, during those first 100 days, hundreds of bills were introduced with an eye toward fulfilling these “contractual agreements.” One bill introduced to meet these obligations was the Communication Decency Act (CDA). The CDA was intended to address pornography in cyberspace and stated

that any comment, request, suggestion, proposal, or other communication which is obscene, lewd, lascivious, filthy or indecent... in terms patently offensive as measured by contemporary community standards (US Congress, S314).

was a violation of the law, with criminal penalties. In drafting this language, the members of Congress combined language from the *Comstock Act of 1873* and the Supreme Court case *Miller v California*. Despite assistance from the Christian Coalition, the bills’ sponsor was unable to get the votes needed to pass the CDA. He was however, able to have it attached as an amendment to the larger Telecommunications bill, which was successfully passed by both houses of Congress. On February 8, 1996 President Clinton signed the Telecommunications Bill, including the CDA amendment, into law.

On February 11, the ACLU filed for an injunction in District Court to
prevent enforcement of the CDA. The ACLU believed that the CDA was an unconstitutional breach of First Amendment guarantee to free speech. They asserted that the law infringed on a speakers' ability to speak freely without government imposed restrictions on the content. They argued further that the guidelines for this content were unclear and contrary to existing law.

The District Court judges agreed. On June 11, 1996 the Court ruled unanimously that the CDA was unconstitutional. To further strengthen their position, on October 31, 1996 the ACLU filed a Motion to Affirm with the Supreme Court, requesting that they confirm the lower courts opinion. The Supreme Court heard this case and in June 1997 agreed with the lower court that the CDA did in fact, violate the first amendment of the Constitution. This action had the effect of nullifying the CDA.
The debate over obscenity is hardly a new one. Earliest discussions of what would later be called ‘obscene’ can be traced to blasphemy laws; laws that were concerned with crimes against Christian doctrine and teachings. The crime of ‘obscenity’ entered into English Common Law in 1727 (Tedford 121). The first antiobscenity law in the United States was passed in 1842 as a part of the Tariff Act. The law prohibited the “importation of all indecent and obscene prints, paintings, lithographs, engravings and transparencies” (39). In 1865 the Postal Act stated that “no obscene book, pamphlet picture, print, or other character, shall be admitted into the mails of the United States” (39). This law was amended by the Comstock Act of 1873 prohibiting mailing of any obscene material, or information about contraception or abortion. The law however, did not define ‘obscene’ although it is clear from its use that the material of concern was primarily sexual in nature.

These earliest struggles over speech with sexual content have continued well into the twentieth century. Twentieth century debates have centered on the use of particular words, the use of particular images, whether there was an appropriate time and place for words to be used, the relative harm of these words and images, and how all of this would appear over radio and video. Similarly, these concerns began to be seen once again within the halls of Congress. Over the years an assortment of legislation has been introduced to deal with this ‘filth.’ This legislation has attempted to address an assortment of media types, and in most
cases, the laws have then been referred to the Supreme Court for a ruling on whether they violated First Amendment rights to free speech.
SUPREME COURT & OBSCenity

The CDA was far from the first obscenity case the Supreme Court heard. The Supreme Court has reviewed and ruled on obscenity since the early days of the court. Through these rulings, a legal test for obscenity has emerged. The current test was established in 1973 when the Supreme Court ruled that something is legally obscene if:

the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interests, whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and whether the work taken as a whole, lacks serious literary, artistic, political, or scientific value (Miller v. California, 418 U.S. 915 (1974)).

This ruling came to be known as "the Miller test" after the name of the case, Miller v California and is the standard by which the CDA was judged. The Miller test has several layers, but the 'contemporary community standards' clause is the pivotal section of the standard, on which all else relies (Tedford 146).

The term 'community standards' was first used by Justice Hand in 1916 as part of the ruling in United States v. Kennerley. In his argument he discussed the "average conscience of the time," referring not to a local community, but to "'the community' as in the sense of society at large" (De Grazia, 426). In Pennekamp v Florida (1946) the Justices stated that they "refused to tolerate a result whereby the constitutional limits of free expression in the nation would vary with state lines." They went on to say "we see even less justification for allowing such limits to vary with town or even county lines...it is after all a national constitution" (426).
1962, Justice Harlan argued in *Manual Enterprises, Inc. v Day* that "a standard based on a particular community would have the 'intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency'" (426). This national standard was challenged and changed in 1973 when the court issued its opinion in *Miller v California*. In writing the opinion for the majority, Chief Justice Burger states,

> Under a National Constitution, fundamental First Amendment limitations on the powers of the state do not vary from community to community, but this does not mean that there are, or should be or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive." These are essentially questions of fact, and our nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 states in a single formulation, even assuming the prerequisite consensus exists (Supreme Court Reporter, 2618).

Despite this opinion from the Chief Justice, the 104th Congress was clearly striving to return to a national standard for obscenity as evidenced by the inclusion of language from the *Comstock Act* despite it having been earlier ruled invalid in the *Miller v California* decision (Tedford 146).

In the debate surrounding the CDA there is one additional complication in that legally, pornography is not a form of prohibited speech. Throughout the legislation and subsequent court briefs, the terms pornography, indecent speech and obscenity were used interchangeably. However, "'indecency' (unlike obscenity) is constitutionally protected speech ...[and is] Subject only to 'narrow and well-understood exceptions (ACLU)."
CRITICAL METHOD

Building on the work of Robert Bales’ small group communication work, Earnest Bormann developed a methodology he called Fantasy Theme Analysis. Bales had learned that groups create unique stories through their interactions. Bormann believed that in any given situation, the people involved will tell themselves a unique story based on their unique perceptions. These stories in turn create separate ‘realities,’ called fantasy chains. He recognized that not only do small groups create fantasy chains, but that social movements, political campaigns, and organizations do as well (Foss 289). The power of these realities can be seen in the way that the fantasy chain become part of the larger culture (Burgchardt 241). The success of the fantasy is in persuading others of the accurateness of your reality. Bormann developed symbolic convergence theory to explain the creation of these fantasies and extended this theory to a methodology designed to examine these fantasies.

There are two assumptions that undergird symbolic convergence theory, and by extension, fantasy theme analysis. First, that language creates rather then reflects reality. As explained by Foss "symbols create reality because of their capacity to introduce form and law into a disordered sensory experience. The chaotic and disorderly sensory world is organized and made manageable by the symbols that are devised to dominate it" (289).

The second assumption is that the meanings individuals create join to form
a shared reality. As people mingle and talk, they create a new reality, shared by both. They develop what Bormann called rhetorical visions, essentially, extended stories about how things are, should be or will be (Littlejohn 108).

Fantasy themes are a part of these larger rhetorical visions. In this case, fantasy refers to "the creative and imaginative interpretation of events" (Foss 290). According to Bormann, these fantasies follow the themes and structures commonly found in drama and include a hero, a villain, a setting, plot lines, minor and major characters, and emotion. All of these combine to create a fantasy chain that in turn, tells something about the motives of the rhetor or group of rhetors.

When a critic is interested in examining a fantasy chain, the first step is to gather information about the event. This can be accomplished through library research, manuscripts, interviews, or direct observations (Burgchardt 246). The next step is to look for recurring themes or patterns in the text or dialogue. These themes could be in setting, characterizations of the participants, or situations (246). Once a clear understanding of the pattern is acquired, an in depth analysis can begin.

The critic begins to examine who the involved parties are, and what roles they play. Is there a clear hero or villain? Is the hero or villain a concept, such as freedom, rather than a particular person? Who or what provides legitimization for the drama? This could be a God, the people, the government or another abstract concept. And, how are the members of the group portrayed? Are they unwilling participants? Tragic heroes? Agents of a higher power? (246)
Next, other elements, such as setting are examined. Where is the drama occurring? What events are common? What emotions are evoked or invoked by the characters? And, does the fantasy recruit new members? The end goal of the analysis is to determine the success of the fantasy chain in converting the uncommitted or unknowledgeable to the rhetorical visions. The "fantasy theme is rhetorically successful if it works to gain the active participation of listeners or readers. If the fantasy catches on, or to use Bormann's words "chains out," it is repeatedly referred to over time, with various people adding to the dramatized discourse" (Sharf 82).

MAJOR WORKS

Quite a variety of situations have been examined using this methodology. Bormann began in 1972 by examining the fantasy chains extant in Puritan communities of colonial America. By examining sermons of the era, he discovered that there were recurring fantasies within these communities designed to make colonial life a bit easier. Bormann states that "the Puritan rhetorical vision saw them as conquering new territories for God, saving the souls of the natives, and, most importantly, as setting up in the wilderness a model religious community" (Burgchardt 247). Bormann extended this inquiry into an examination of this fantasy as it chained out to shape the actions of Abraham Lincoln more than a hundred years later.

Bormann and other critics have not limited themselves to religious thought.
Bormann has also examined political events including those that led to Senator Eagleton withdrawing as Senator McGovern's running mate in the 1972 Presidential campaign. Other critics have examined how psychiatry was perceived during and after the Hinkley trial, the campaign strategies of the Carter and Ford campaigns, and the role the media played in connecting the Reagan inaugural and the Iran hostage release in 1981.

Analyses have also been done in such varied areas as romance novels, television shows, movies about nuclear war, media portrayals of homosexuality, and the rhetorical visions of unmarried mothers. Leigh Ford incorporates the good versus evil theme originally suggested by Bormann, into an examination of the 'Big Book' used by Alcoholic Anonymous. In this analysis, Ford finds that the fantasy serves to strengthen the bonds within the group, thereby making the struggle against alcoholism, a group struggle. The rhetorical vision itself is that "alcoholism is a treatable illness of body, mind and soul" (Ford 6). It is the will of the self, in the form of selfishness, pitted against the will of God. This competition serves to show the struggles between the villain and the hero. The 'Big Book' proceeds to lay out a twelve step process for overcoming the 'evil' of self-will and by extension, alcoholism. Each of the steps refers to giving oneself to a higher power, or the hero. The fantasy includes an explanation of why some alcoholics have not joined AA, simply that they have not hit bottom yet and have not therefore, recognized their own helplessness. This helplessness is a requisite step to surrendering to a higher power (13). Ford argues that this analysis supports Bormann's belief that there are
universal, recurring themes.

Critics have also incorporated Q-sort factor analysis into their fantasy analysis. By placing different fantasies onto cards and asking people to rank order them, the researcher is able to validate the proposed fantasy chain. This method has been employed in the aforementioned criticisms of unmarried mothers and the creation of Jimmy Carter's persona in the 1976 election.

CRITICISMS

The major critic of fantasy theme analysis is G. P. Mohrmann. Dr. Mohrmann argues that the "fantasy theme method is not a logically consistent extension of the theoretical bases from which writers contend it derives, and second published critiques tend toward circularity" (Essay 110).

By asserting that fantasy chains exist beyond the small group and in fact, permeate the larger culture, Mohrmann argues that Bormann misuses the work of Bales. Mohrmann states, "for Bales, fantasy is the product of psychodramatic interaction and is an idiosyncratic reality acting as a temporary buffer against the shock of reality at large. His formulation does not allow the assumption that vestiges of fantasies will appear in the manifest content of other messages" (131). Bales was a student of Freud and his theories permeate Bales' work. Mohrmann contends that Bormann ignores this, and in doing so, Bormann's overall theory falls apart.

From this, Mohrmann rejects that "a fantasy chain occurring in a small group will be replicated in form, content, and impact in newscast, a letter, a speech
or any other mode of communication" (Fantasy 308). Instead, he believes that there are common dramatic themes, plots, and arguments that recur. However, these are not necessarily connected to one another. And the tendency of fantasy theme critics to point to these themes as evidence is simply employing a circular argument to prove their own theory. He states that "the logic proceeds: fantasy dramas make up social reality impelling action; this is a fantasy drama; this is a social reality impelling action." (Essay 122).

Second, Mohrmann asserts that "misinterpreting Bales at almost every turn, the critics equate the naming of dramatistic parts with the discovery of social reality that compelled to action" (131). He goes on to argue that "the formulation lacks sophistication and invites mechanical application" (119). He believes that the methodology encourages people to announce the existence of a drama and then to set about proving its existence. Again, the theory uses a circular argument to prove the findings of the theory.

PROBLEMS/BENEFITS

Aside from the criticisms offered by Mohrmann, I believe that there are additional concerns with this methodology. The critic must be extra diligent in accounting for personal bias and experience, particularly if analyzing an event they have experience with. For example, if a Viet Nam veteran were to analyze fantasy themes among other Viet Nam veterans, he would have to account for his own experiences and memories. This points to a second area of concern, the impact of
time. In the above example, the researcher may find that he is measuring the effect of memory to change fantasy rather than an actual fantasy chain. The dramatis personae in 1970 may have changed by 1996. It may be that in 1970, the soldier saw Ho Chi Minh as the villain, but by 1996, the US Government has become the villain. This change in the chain must be addressed rather than being ignored.

Further, when examining historical data, the researcher must account for the 'filters' that they are looking through. By this I mean that each generation in each country is raised with a set of values slightly different from the generation before. Over time, these values may change greatly. It would not be appropriate to place twentieth century values on the events of the fourteenth. For example, in examining the fantasy chains surrounding Joan d'Arc, it would be inappropriate to consider the role of women based on the roles of 1999. This would tell us nothing about what the people of the time thought. The records of the time being studied must remain the central focus and voice for the research.

This is also a time consuming method. A great deal of research must be done before the analysis can begin. The researcher must consult a variety of sources in an attempt to fully understand the events and possible fantasy themes. In doing so, the researcher must not lose sight of the rhetorical vision being portrayed in the sources. It is not a method for those after 'objective truth.'

Having said that, I believe that this methodology has several strengths. Notably, that it attempts to account for the stories that a group tell themselves about an event, and in turn, about their world view. By examining the rhetorical
viewpoint of different sides of an issue, abortion for example, it may be possible to break a long standing impasse. It may also be possible to predict actions of the group. If the fantasy chain of suicide bombers is that their death will deliver them directly to a God, predictions can be made about their future actions. Predictions can also be made about possible reactions to an opposing rhetorical view.

Another advantage of this method is that attempts to account for the complexity of human interaction. It recognizes that people are ever changing and shape the world around them. It acknowledges that simply by interacting with other people, opinions and views change. And it is these changing views that lead to the actions people take.

Last, this is a method that allows for an examination of the effect of rhetoric, that is, persuasion. In charting changes in rhetorical visions over time, a researcher is charting changes in what is considered persuasive. If a fantasy chain continues and is reported, it has persuaded not only that it is the 'correct' version of reality, but that it is worthy of being recorded.

Fantasy theme analysis involves looking for recurring themes or patterns. This analysis of ‘group speak’ tells the rhetorician a great deal about what the group deems to be important, and by extension, what impact they are able to have in the larger culture.

The debate surrounding the CDA was in many ways about the creation and continuation of fantasy themes. Each of the groups involved was interested in persuading that theirs was the correct visualization of the space, the community,
and the dangers within the space. Each was interested in defining who had the regulatory authority to govern that space. Fantasy theme analysis provides a way to examine how the rhetor groups conceptualized these questions and then in turn, how they effected a legal decision.

There were three distinct groups of rhetors in this discussion. In this analysis, they are described as the Antiobscenity Crusaders, the Defenders of Liberty, and the Homesteaders. The ‘Antiobscenity Crusaders’ were represented by the US Congress, the Family Research Council, Enough is Enough and the Christian Coalition. The ‘Defenders of Liberty’ were represented by the American Civil Liberties Union and their 47 co-plaintiffs. The ‘Homesteaders’ were comprised of the users of the technology.

Using Fantasy Theme Analysis, I will explore the rhetorical arguments made by these three very different groups. Using the Supreme Court process as the analytic framework, I will examine the dramatic elements of hero, villain, the emotions that dominate the drama, the use of an abstract concept to justify actions, and the overall rhetorical theme of each group.
ANTIOBScenITY CRusADERS

"Each time the pornographers break through a new barrier, society’s best reaction should be the honorable one - to protect children first."

~US Congress Brief

The group known as the Antiobscenity Crusaders was made up of members of the US Congress, and Christian based organizations, the Christian Coalition, the Family Research Council and Enough is Enough. Additionally, 28 organizations filed a joint Amicus brief. The US Department of Justice argued the case before the Supreme Court.

The Antiobscenity Crusaders believe that pornography of all kinds is rampant across the internet:

Pornography, both soft core and hard core, is freely available on the Internet to virtually anyone with a home computer. Several magazines post pornographic images that can be viewed by anyone, including children, for free. There are also numerous sites on the Internet where hard core pornography depicting a variety of explicit sexual acts, even rape scenes and bestiality, are available free and can be accessed with a few clicks of a computer button (Christian Coalition).

They also believe that children are particularly vulnerable to harmful effects that include the stunting of normal development and the creation of criminal behavior in the form of rape. Enough is Enough, a Christian based antipornography group, explain in their court brief:

The danger to children stems, at least partly, from disturbing changes in attitude which pornography causes. Replicated studies have demonstrated that exposure to significant amounts of increasingly graphic forms of pornography has a dramatic effect on how adult consumers view women, sexual abuse, sexual relationships, and sex in general. . .This dulling of the moral senses can affect the safety of
women. As youth consume dramatically greater quantities of pornography, and as the Internet exposes them to a greater range of violent and deviant forms of sexual conduct than ever before available, it is not irrational to fear that society could regress in its sense of the viciousness and immorality of rape. Children and adolescents who "learn" by early exposure to pornography will more easily accept the idea of forced sex as reasonable and justified (Enough is Enough).

The Antiobscenity Crusaders considered the Internet to be more than the usual threat to the nation’s children. They were accustomed to challenging printed pornography, movies, music, and other forms of communication. The Internet however, provided a way to make material available without the content being monitored as it was in other mediums. This lack of centralized oversight concerned them because they believed that without it “the Internet threatens to give every child with access to a connected computer a free pass into the equivalent of every adult bookstore and video store in the country (United States, Oral Argument).

The Antiobscenity Crusaders recognized that they would be unable to eradicate indecent speech in cyberspace just as they had been unable in the physical world. This inability did not lessen their concern about the impact this material would have on any child who may access it. Their solution was the Communication Decency Act which they believed would force people to put indecent speech into areas children were unable to get. Effectively, they were arguing that cyberspace should be zoned in much the same way that physical world had been. In the physical world, zoning forced adult bookstores into areas distant from schools, day cares and churches. The Antiobscenity Crusaders believe that the CDA do the same for the internet by requiring an adult identification code for
To accomplish this, the Antiobscenity Crusaders had to show the court that this zoning scheme was rational and the goals of this legislation was consistent with prior laws. They drew the Courts’ attention to existing case law, and then tried to establish that the problems and therefore the solutions, were analogous. In this way they begin to build their case that there is a substantial problem with a Constitutionally sound solution.

Next, the Antiobscenity Crusaders had to show the courts that the media and environments were similar, so that the solution would make sense. This led to a search for an analogy for cyberspace. This analogy would be used to ground the CDA in existing law, and was of particular interest to the Supreme Court justices. During oral argument before the Supreme Court the attorneys present their case and are questioned by the Justices. When the Antiobscenity Crusaders presented their concept of zoning cyberspace, the justices were interested in examining how, or if, cyberspace was like other places where speech occurred. Specifically, the Justices asked whether cyberspace was similar to television, telephones and a public library. With respect to libraries, the Antiobscenity Crusaders argued that cyberzoning was the electronic equivalent of “tak[ing] the indecent stuff and put[ting] it in a different room” (United States, Oral Argument).

Last, they needed to show the Court that the CDA would not unduly restrict speech that was legally available to adults and that the rules in
cyberspace would be consistent with the rules in other public spaces.

Adults under the CDA need not avoid all the sex and nudity that would be prohibited or restricted to safe harbor hours on radio or TV under the broadcast standard of indecency and its enforcement policies. Adults need only avoid sending to children, or displaying to minors on sites that are available to children, that type of explicit sexual depiction or description that constitutes "online indecency" because its offensiveness is patently clear under the circumstances when considering the host of variables of value, intent, prurience, purpose, audience, subject matter, etc. As such, the type of pornographic indecency that is unlawful to display to minors online encompasses all that would be unlawful to display or sell to minors in all public streets, places, and stores (Congress).

This is particularly important given that for over 80 years the court has ruled that adult cannot be reduced to what is appropriate for children. Instead adults must have the opportunity to engage in speech encompassing adult subjects and language.

In short, the Antiobscenity Crusaders contend that indecent speech is a continuing threat to the nation’s children and that the Internet may be the greatest threat ever. The answer to this danger was a law that criminalized certain speech actions. They contend that their solution was the equivalent of requiring zoning ordinances in cyberspace that would protect both the nation’s children and the constitutionally protected speech of adults.

OVERALL THEME

Every good story, and every fantasy chain, has a theme that encompasses the dynamics of the overall story. This theme provides a common thread for the
other parts of the story. It also serves to reenergize believers, recruit new members and explain to outsiders the mission of the group.

The Antiobscenity Crusaders utilized a theme of rampant pornography that poses an overwhelming threat to children. They also use a secondary theme of a threat to women. In the face of this onslaught, they must do something. The "something" was the CDA and cyberzoning. Through their argument they hoped to show the Court that cyberspace was analogous to other public spaces and as such, could be zoned as other public spaces had been.

Through a primary theme of endangered children the Antiobscenity Crusaders chose the most vulnerable users of the technology. This theme enabled them to tie together the number of web sites, pornographic content, and existing laws that prevented children from accessing this material in other arenas. It also enabled them to recruit organizations that focus on protecting children such as Mothers Against Sexual Abuse, Kidz Online and CHILD HELP USA that may not have participated otherwise.

The secondary theme of danger to adult women stems from the initial theme, the threat comes from children damaged after viewing pornographic images. Through the consumption of these images children become predatory.

ABSTRACT CONCEPT

An abstract concept is tied to the overall rhetorical theme in that it can give a higher purpose to the struggle seen in the theme. Rather than struggling against
something for the sake of the struggle, a group relies on an abstraction to explain their activities. The abstraction provides an ultimate legitimization for the drama; it could be God, the people, the young or some other concept (Burgchardt 246). For example, the American colonists relied on the concept of ‘freedom from’ to explain why they were revolting from England. In their speeches and pamphlets, they discussed freedom from tyranny and unjust taxes. Frequently, these abstract concepts are embedded in the discourse of the rhetors and may not be visible to, or questioned by them.

In the CDA drama, the Antiobscenity Crusaders rely on the concept of ‘protection of innocence.’ They were interested primarily in protecting children from the damaging effects of obscene speech. Throughout their briefs and testimony they discussed how pornography influences the development of otherwise normal children, teaching them misleading belief sets about normal sexual activity, making them more prone to sex crimes, and leaving them “confused, changed, and damaged” (Enough is Enough). Once establishing the danger of pornography, they added the threat of the internet, “The risk of that harm coming to pass is magnified to an unprecedented degree because of the accessibility to children of indecent and obscene materials on Internet” (Enough is Enough). This links an established danger with a new medium and provides urgency to their case.

In addition to risks presented to children, the Antiobscenity Crusaders pointed to the risk to adult women after children have been exposed to internet
If you expose male subjects to six weeks’ worth of standard hard-core pornography...you find changes in attitudes toward women. The subjects become more callused towards women. You find a trivialization towards rape... As youth consume dramatically greater quantities of pornography, and as the Internet exposes them to a greater range of violent and deviant forms of sexual conduct than ever before available, it is not irrational to fear that the society could regress in its sense of the viciousness and immorality of rape (ibid).

The Antiobscenity Crusaders are able to use this theme of protection of innocence to explain what they are concerned about, but also to suggest the CDA as the solution. They paint a picture of helpless children being harmed by the insidious nature of pornographic speech. Through their rhetoric, they encourage the Justices to imagine children sitting alone in their bedrooms with pornographic images leaping off their computer screens. They invite the Justices to think of pedophiles waiting in cyberspace for children to turn their computers on so that they can be prayed upon. Further, they show that these children are so harmed by these experiences that they become a danger to adult women. This magnified danger of internet pornography makes it seem imperative that they do something to stop this threat.

HERO/VILLAIN

Like many stories, fantasy chains have a hero and a villain in constant tension, existing to thwart the efforts of the other. The villain encapsulates all of the things that the group opposes, and therefore must be defeated. The hero, on the
other hand embodies all of the values the group holds sacred and right with the world. In the fantasy chains of the Communication Decency Act there are very clear hero and villain interactions.

The Antiobscenity Crusaders had a very clear enemy in pornography, and by extension, pornographers. Their rhetoric paints an image of pornographers and pedophiles lurking throughout cyberspace waiting to pounce on unsuspecting children. Further, the Antiobscenity Crusaders had a lesser villain in the Defenders of Liberty, and particularly the ACLU who they portrayed as protectors of pornographers.

For this group the hero was the Communication Decency Act, specifically, the concept of cyberzoning. The Antiobscenity Crusaders recognized their historical inability to completely prohibit pornography and instead turned to cyberzoning as a way to limit access to adults. This would be accomplished by requiring that users of the internet add technological barriers to their speech if it could be deemed indecent. These barriers included requiring credit card numbers or installing screening programs that prevent pages that include particular words from being accessed.

EMOTION

Storytellers have long recognized that humans respond to the emotion of others and that the most effective stories are those that can evoke emotion (Wagner 7). This appeal to pathos is an effective way to carry people from one section of the
story to another.

This holds true in fantasy chains as well. In analyzing a fantasy chain we are concerned with which emotions dominate the drama and create a dynamic tension; something to keep the hero and villain at odds. Emotions are important in that fantasy chains, and political action, can continue over a long period of time. As time goes by there is a greater risk of attrition as people become tired, distracted or discouraged. A way to counter this is to evoke the emotion that drew the members to the fantasy chain initially.

The Antiobscenity Crusaders rely on the emotions of fear and protectiveness. In the Congressional debates that resulted in the Communication Decency Act, Senator Exon presented the U.S. Senate with a notebook of pornographic images that he asserted were available to any child capable of turning on a computer. He and his supporters presented research showing that sex offenders used pornography in the commission of their crimes. These same fear appeals appeared in the Enough is Enough amicus brief. They laid out for the court research showing that children would be irreparably harmed by pornographic images. They assert that “the scientific research is overwhelming that children are harmed by pornography in a multiplicity of ways” (Enough is Enough). They continue that viewing pornography will “short-circuit the normal development process permanently damaging even healthy and innocent children.” (ibid). This argument carried through to the Supreme Court. In his oral testimony the governments’ attorney, Mr. Waxman stated
there is a deadly serious point here, and that is ... that every child in this country who has access to a computer and can click a mouse has access in his or her own bedroom or home or library to Hustler Magazine and Penthouse magazine, and the kind of indecent speech that people sitting in the anonymity of their own bedrooms anywhere in the world or anywhere in the country want to make available to them (United States, Oral Argument).

By connecting the dangers of pornography to its availability on the internet, this combined appeal to fear and protectiveness seems reasonable. It also makes it rhetorically possible for them to in turn argue for their preferred solution.

In its entirety, the Antiobscenity Crusaders fantasy theme is:

*pornography is dangerous to the nations children and by extension to adult women because it creates sex addicts, criminals and crime victims. Pornography is rampant throughout cyberspace and there is nothing to stop it from destroying the nations’ children. As right thinking adults, we must do all we can to stop this threat. Prior efforts to completely ban obscene speech have been unsuccessful, but requiring that obscene speech be limited in place and time has been successful. The best way to protect the nations children while recognizing the limitations of the past is to require zoning within the technology. The Communication Decency Act will accomplish this while providing sanctions to pornographers who violate the law. In this way children are protected*

The Antiobscenity Crusaders were comprised of the Christian Coalition, the Family Research Council, Enough is Enough and the US Congress. They believed that pornographic speech was dangerous to children, and that it was widely, and easily, available through the internet. This combination of beliefs were the impetus
and driving force behind the CDA. Through their legal briefs and oral testimony
they attempted to persuade the Supreme Court that the provisions of the CDA were
the logical solution to the problem of internet pornography being accessed by
children.

The opposing viewpoint before the Court was expressed by a group I’ve
titled the Defenders of Liberty. The fantasy themes of the Defenders of Liberty will
be discussed in the next section.
DEFENDERS OF LIBERTY

The CDA would effectively place indecency in the same criminal category as child pornography and espionage.

~Reporters Court Brief

The American Civil Liberties Union (ACLU) was joined by 47 other organizations in their attempt to overturn the CDA. Among these groups were Stop Prisoner Rape, Feminists for Free Expression, the Speech Communication Association, the American Association of University Professors, Lambda Legal Defense, and the Coalition for Positive Sexuality. These groups believe that the free speech protections guaranteed by the First Amendment applied in this new media as it did in others. And as such, speech actions that may offend the sensibilities of some, were still permitted. They recognized that obscene speech was prohibited and that that standard would apply in cyberspace as it did in physical world.

Instead, the Defenders of Liberty were concerned that the CDA would define obscenity in a way that was broader than for any other medium. This meant that speech that was permitted in other arenas, would be sanctionable if it occurred in cyberspace. Further, they were concerned that the CDA would place an undue, and unconstitutional burden on the users of this technology through the threat of criminal sanction:

Specifically, the CDA makes it a crime, punishable by the two years in prison, for anyone to use online computer communications to transmit or "display in a manner available to minors" any material that is
"indecent" or "patently offensive." Because there's no way for the vast majority of Internet speakers to distinguish between adults and minors in their audience, the CDA is the most restrictive censorship scheme imposed any medium (ACLU).

One group, Feminist for Free Expression conceptualized the dangers of the CDA a bit differently. Rather than arguing that the CDA would criminalize speech available to adults in other arenas, they pointed to threats unique to women. Among these were the potential loss of a genderless realm where women could express themselves without concern:

Few forms of censorship, however, are as threatening to women's interests as the Communications Decency Act's restrictions on "indecent" and "offensive" speech on the Internet...Because women may speak online without revealing their gender, they may feel more free to speak candidly and openly about political, cultural, or moral issues involving sex and sexuality without facing social opprobrium. Indeed, a woman using the Internet may find her speech being taken seriously for the first time-- precisely because the audience does not know her gender, and thus does not automatically discount what she says (Feminists).

Other threats were the potential loss of an opportunity to ask sexually explicit questions, an avenue to seek help after a rape, and the loss of an educational source for adults and children:

Once establishing with the Court their concerns, the Defenders of Liberty turned their attention to answering the assertions of the Antiobscenity Crusaders. They began by examining the correct analogy for cyberspace, however, the individual members of the Defenders of Liberty were unable to agree on an analogy.

They used a strategy of 'not's.' In oral argument, they asserted that the
printed communication standard was incorrect because of the interactive nature of the medium. They also take this opportunity to remind the Court that the internet is more than web pages:

QUESTION: But, look. 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.

MR. ENNIS: Your Honor... in case after case, the Court has held... that the possibility of a functionally equivalent alternative does not save the Government. Here the alternative is not functionally equivalent. Let me say why.

In news groups, chat rooms and listservs, you are engaging in an interactive dialogue, a conversation, in which you speak and the listeners reply and you can reply to what they say. They can be outraged. They can be offended. They can have a good point to make.

A Web site is static. What the Government is saying is that the 40 million people who can speak in an interactive dialogue in the other modes of communication on the Internet should post a static message on their Web site. And maybe the people who are in the news group would come to see it, maybe not. But the speaker would not get any feedback. There would be no dialogue (United States, Oral argument).

Through this exchange the Defenders of Liberty hoped to clarify that cyberspace was not like printed communications therefore, the laws that applied to printed media did not apply.

In their written brief, the ACLU argued that the Internet was different than radio or television in that the internet was interactive and required the user to actively seek information rather than having the information come into the home unbidden. It is this difference that prevents the laws that govern conduct in radio and television inapplicable to cyberspace.
The Speech Communication Association (SCA), now known as the National Speech Association, joined the ACLU in their belief that cyberspace is different than radio or television. They asserted that "computer-mediated communications represent[s] the next step in the evolution of electronic communication" (SCA) and as such, it was inappropriate to apply the standards of broadcast media to cyberspace:

Participants can react and respond to the communications of others by creating and distributing their own communications that comment upon, criticize or build upon the earlier communications. These actions, and the ongoing discourse they create, can occur spontaneously and inexpensively. As a result, for the first time, almost any citizen can interact and engage in discourse instantaneously with hundreds of other citizens and debate the issues of the day...

More fundamentally, the CDA seeks to transform the nature of communication on the Internet. Congress based the CDA's regulations on the more static model of communication derived from broadcast cases such as Pacifica. As such, the CDA simply ignores the multilateral, fluid and participatory model of communication applicable to the Internet (Speech).

Other members of this coalition felt that if an existing media must be chosen, it should be print media as this provided the most liberal protections for users.

Among those arguing this viewpoint were Site Specific, Inc. and freelance writer Jon Lebkowski:

Like print, the Internet is a means for the replication, storage and transmission of huge amounts of text of every description on every topic. The Internet is like a giant library of all human knowledge, and imposing broadcast style indecency regulations would have the same profoundly destructive effects as such standards would have if imposed upon the Library of Congress. Only by recognizing the analogy between Internet and print media will this Court assure the proper protection of the medium likely to become the main conduit for personal, political and creative speech in the next century (Site
Specific).

Having addressed the ways that cyberspace was like or different from other forms of media, the Defenders of Liberty turned their attention to the concept of cyberzoning. The Antiobscenity Crusaders had argued for a way to limit speech activities to certain places within cyberspace in much the same way that adult bookstores had been limited to parts of town distant from schools. The Antiobscenity Crusaders relied upon prior Supreme Court rulings that allowed zoning in cases were secondary effects were seen from the activity. These secondary effects, and why they were not applicable in this case was explained by Apollomedia:

[T]he CDA is not a time, place and manner regulation aimed at containing the "secondary effects" of speech. Unlike City of Renton and Young, where the cities sought to control crime and protect retail business and property values through geographic zoning of theaters, the CDA criminalizes speech because of its content (Apollomedia).

Through this argument the Defenders of Liberty were attempting to get the Court to reject the idea that the CDA addressed secondary effects of speech. If they were successful, the legal basis for cyberzoning would be removed.

Last, the Defenders of Liberty addressed the concept of community standards that are at the heart of the Miller standard. Through Miller, the Court established that a local community was to determine what was considered indecent for that community. The Defenders of Liberty asserted that the CDA was an attempt to establish a national standard and as such was a violation of the standard defined in Miller v California:
Miller’s definition of obscene speech that enjoys no First Amendment protection attempted to minimize subjectivity by requiring that offensiveness be judged by “community standards.” The standards have come to be geographic. Miller itself said that it was permissible to use the State of California as the “relevant community.” 413 U.S. at 30-31... But the Internet is a non-geographic medium, and online communications can and do circulate throughout the nation in the world, with a speaker commonly having no idea who might read his or her words or in what geographic community readers might live. [11]/ In other words, the assumption of Miller that “patent offensiveness” will be judged by the standards of a given geographic community, where the defendant intends to sell the offending film or book, simply does not work with the Internet. Applying geographic community standards to speech that is available everywhere reduces all speech to what is acceptable in the least tolerant community a prosecutor can find (Apollomediala).

In summary, the Defenders of Liberty asserted that the CDA’s criminal sanctions for speech deemed ‘indecent’ would have a detrimental effect on the use of this technology, and at least one group, saw the CDA as a specialized threat to women and children. The Defenders of Liberty believed that the internet was a unique media that existing law may, or may not apply to. They were united in their assertion that cyberzoning as a concept left a great deal to be desired, as they were in the belief that a national community standard for indecent speech was legally impermissible.

OVERALL THEME

Like the Antiobscenity Crusaders, the Defenders of Liberty used a multilayered theme. Their primary theme was that the sacred values of the First Amendment were under attack and that an all out effort must be made to protect it.
The threat came from legislation that criminalized particular speech activities when they occurred in cyberspace.

The second layer built upon the first and asserted that the legislation included an arbitrary standard for what was punishable, leaving the speaker in jeopardy of criminal sanction. Several members of this group directed the Court to the Antiobscenity Crusader legal briefs which showed an inconsistent definition from brief to brief. The Defenders of Liberty asked the Court to consider how a local jury would decide something the supporters of the law could not even agree on. They continued that this lack of clarity would have the effect of speakers choosing not to engage in what may be legal speech acts.

Another layer of this theme was that the CDA was not supported by legal precedent. Through the attempt to find the correct analogy for cyberspace, the Defenders of Liberty hoped to show that the cyberspace was unlike other existing media. If they were successful, then the laws that governed speech acts in these other arenas would not apply. Without this precedence, a unique standard would have to be developed.

The final layer of this theme was that if allowed to stand, the standards of the CDA could be applied to other media through the establishment of a precedent that could be applied to future cases. This application to other media could then criminalize speech acts that are currently legal. This combination of arguments was for them a *prima facie* case against the CDA. This multilayered theme was able to gain the Defenders of Liberty a broad base of support as demonstrated by
the number and types of organizations that filed Amici briefs (Appendix A).

The Feminists for Free Expression went a step farther in their theme, the CDA was a much bigger threat to women and children than the obscene speech that the Antiobscenity Crusaders were attempting to eliminate. They stated that the Internet was the only place where women could be truly judged based on their ideas rather than their gender; that it was one of few places women could ask sexual questions they found embarrassing and that it was a unique educational tool for parents. They believed that “the freedom to put forth controversial feminist ideas into combat ignorance regarding sexuality, reproduction, and abuse are critical to women’s rights and well-being” (Feminists). They stated the feminist speech is by its nature political, and that the CDA could be used to limit this political speech. This theme was a direct counterpoint to the themes of the Antiobscenity Crusaders and points to a split within the feminist movement about how to address obscene speech.

ABSTRACT CONCEPT

The Defenders of Liberty relied on the concepts of liberty and free unmonitored speech as the higher values that justified their action. These values are culturally embedded within the First Amendment of the U.S. Constitution as explained by the Speech Communication Association in their brief to the Supreme Court:

These technologies represent a return to the Framers’ underlying
conception of the First Amendment. To the Framers, the expression of individual citizens had paramount significance for the First Amendment, and formed an essential element of our constitutional system...The Framers intended the First Amendment’s protection of “the freedom of speech and of the press” to guarantee and stimulate discourse among the citizenry, and not merely to protect the editorial judgment of the media (Speech Communication Association).

The Defenders of Liberty invoke the ‘Framers’ to give added weight to the argument that the CDA violates the intent and spirit of the First Amendment. In effect, if the CDA were upheld, it would require the Court to reject the intention of the men who created the nation's most sacred document, the Constitution.

HERO/VILLAIN

Like the Antiobscenity Crusaders, the Defenders of Liberty had a clear hero/villain interaction. The Defenders of Liberty saw government restricted speech as represented by the Communication Decency Act as the villain. In their brief, the ACLU referred to it as the “most restrictive censorship scheme imposed on any medium” (ACLU). Further, they invoked the Framers of the Constitution as a part of their argument,

The Framers conceived of the First Amendment as a means to facilitate the ability of citizens to debate issues of public concern. Participatory citizen discourse on matters of public interest lies at the very core of the First Amendment...Here, the CDA unnecessarily and severely restricts the ability of individual citizens to participate in the discourse so essential to the Framers’ conception of the First Amendment (Speech Communication Association).

Further, the villain of the CDA seeks to remove the judgment of
parents and replace it with the judgment of the federal government in determining the types of information that children may access,

the CDA officiously meddles in what is first and foremost the domain of parents, not government. It overrides parents' wishes and criminalizes speech that some parents may affirmatively want their children to have access to (Apollomedia).

To stand up to this villain of censorship was the First Amendment of the U.S. Constitution and the men who created it. The Defenders of Liberty connected the intentions of the framers of the Constitution with this new technology,

These technologies represent a return to the Framers' underlying conception of the First Amendment. To the Framers, the expression of individual citizens had paramount significance for the First Amendment, and formed an essential element of our constitutional system (Speech Communication Association).

They added a more recent expression of the connection between the First Amendment and the political life of the United States. This voice belonged to Supreme Court Justice Thomas ruling in an earlier case,

At the heart of the First Amendment is the principle that each person should decide for himself or herself the ideas or beliefs deserving of expression, consideration and adherence. Our political system and cultural life rest upon this ideal (Site Specific).

Last, they discussed the internet as a critical piece of the modern democracy, "by the nature of the Internet medium [it is] the most democratic [medium] ever invented" (Apollomedia). They argued that censoring it would be at the peril of an informed community at the heart of a functioning democratic nation, according to the government, because ordinary citizens can
communicate with each other directly, not as passive recipients of programming directed at them by powerful corporations, the government is entitled to step in and make criminal the citizen speech it disfavors. The perverse result is that the more democratic the medium...the greater the governments right to regulate the medium. If the First Amendment means anything, this argument must be rejected out of hand (Apollomedia)

Through their argument, the Defenders of Liberty attempt to make it rhetorically difficult for the Supreme Court to find the CDA constitutional without violating the intent and 'underlying conception' of Madison and Jefferson.

EMOTION

Emotion was salient for the Defenders of Liberty, as it was for the Antiobscenity Crusaders. Like the Crusaders they invoked fear however, theirs was a fear of criminal sanction, “the provisions of the CDA at issue in this case punish pure speech as a felony” (Apollomedia). Many of the Defenders discuss the chilling effect this sanction would have as people opted not to speak in cyberspace rather than risk imprisonment.

Additionally, they were afraid that specific types of material would be politically unpopular and as a result, would be sanctioned. They pointed to health information including safer sex techniques used to prevent HIV transmission, to breast-cancer information, to emotional support for sexual assault survivors; and political speech like that of Amnesty International or the ACLU itself.

The Defenders of Liberty also appeared quite frustrated to be having this debate which they likened to debates of the past. These prior battles, however, gave
strength to the argument that speech in cyberspace was in jeopardy and if they were not diligent, a criminal sanction would be established for engaging in speech.

In its entirety the Defenders of Liberty fantasy theme is:

the First Amendment of the US Constitution is under attack, again. This time in the form of the CDA which attempts to create speech standards within cyberspace. It is however, unclear in stating what violates the law leading to arbitrary enforcement. Further, the CDA is an attempt to criminalize speech. These points together violate all that was intended in the writing of the Constitution and the Bill of Rights. Only through vigilance and by fighting against laws like the CDA, can the First Amendment be protected.

The Defenders of Liberty were a coalition of over 40 organizations and individuals that believed the CDA was unconstitutional. They were concerned that the CDA included a broader definition for obscenity than applied to other media, while providing for criminal sanction for violating the law. They were further concerned that the ambiguous nature of the definition made it difficult to know what was permitted, resulting in people self-censoring rather than risking criminal penalties. Through their legal briefs and oral testimony they attempted to persuade the Supreme Court that the CDA was an unconstitutional burden on everyday citizens.

There is an additional group that was involved in this debate, the users of the technology. This group, however, was not able to access the Court and their views must be gleaned from within cyberspace. I have titled the users of the
technology the Homesteaders, and will discuss them in the next section.
HOMESTEADERS

This posting is not subject to any U.S. governmental agency regulations, nor congressional actions, as guaranteed in the US Constitution Bill of Rights, article 1.

~Davis

There was one additional perspective presented, that of the users of the technology. This particular viewpoint was not really seen by the court, in part because of the structure of the group. As a group the users of the technology are loosely affiliated individuals without the organization or expertise to access the Supreme Court. Despite their absence in front of the Court, they are a rhetorically interesting part of the conversation and are the most likely to be immediately impacted by the sanctions of the CDA.

The users of the space were keenly aware of the pending legislation and later court action. There were a myriad of views and responses to the legislation, but it was clearly unwelcome. It was viewed as a deprivation of liberty and freedom enacted by a group unfamiliar with the technology. The users of the technology sent their opinions to one another on listservs, web pages, and via email. A sample of these statements illustrate the displeasure of the self-described ‘cyberdenizens’:

The “Communication Decency Act” attached to the Telecommunications Act of 1996 is now a law, signed by President Clinton on Thursday, February 8. I thought the War on Drugs was bad enough. Now we have a war on speech as well. Legislating morality doesn’t work, as demonstrated by the failure of prohibition. Will the FCC use tactics against so-called indecency similar to those that the DEA has been using against drugs? Only time will tell (Miller).
ALERT!

Your liberties have been trampled by Congress.

The United States Congress, operating on the assumption that since the Internet wasn't written into the Constitution, it isn't covered by the Constitution, has passed a law completely ignoring your First Amendment rights (Trojan Democrats).

I am a Viet Nam vet I fought in I corp Dang and parts north Phi bai and i have seen my Friends die and yes I have killed in Viet Nam to stay alive and I thought I was fighting for a reason FREEDOM and now we have a draf dogeing jerk who wants to take it away? What did we fight for? The Land of the brave Home of the Free and That means Free Speech NO!! I will not stand by while it is stolen right under our feet and not say any thing I was willing to kill and be shot at for this right and a lot of my Friends died for this reason And Now some say what if Big brother does not like it He may put you in Jail we when I am in front of GOD I Don't think HE will ask me WHY I went to jail But he will ask you WHY You did not go if you stand by and let this happen we are still The Home of the brave and The Land of the FREE Please don’t give up with out a fight OR tell all the vets you’re fight was in vain we gave it away Stand tall and Fight if nesseray and remember the ones who has came before you to make this Land the Home of the brave A Vietnam Vet (LeFlore) [Spelling and emphasis remain as in original]

A common belief of the Homesteaders was that cyberspace was a unique community and that the CDA violated the customs of the space.

Further, this violation threatened the potential of this community:

On the Internet, a networked community, based entirely on speech, nothing is more important than freedom from censorship enjoyed up to the moment when President Clinton's pen puts an asterisk next to the First Amendment, an asterisk that says, "except on-line speech," an asterisk it will probably take the Supreme Court months, if not years to erase (Electronic Frontier Foundation).
The Communication Decency Act...has created a chilling effect on the Internet, and is likely to cause long-term complications if it remains intact. This provision of the law is overly broad and will cause so much chaos the internet will be hard-pressed to grow as a community. The vagueness of the provision will stifle growth and, perhaps more importantly, creativity and imagination on all manner of internet project.

As the present bill reads, 'community standards' will be used, among other things, to determine what is 'indecent' or 'morally offensive.' This is outrageous. The Internet is a global resource and community, and yet there are so many different sets of values across this country were offensive means different things, let alone in the world...And that is really the issue here: the CDA does not define the context of an offense well enough except to specify community standards (Lawless).

This belief that cyberspace was an autonomous, self-governing community led to an assertion that the world's governments were overstepping their bounds by attempting to create laws for this place. This argument is explained by long time user and co-founder of the Electronic Frontier Foundation, John Perry Barlow, in his Declaration of Independence for Cyberspace (Appendix C);

Governments of the Industrial World, you weary giants of flesh and steel, I come from cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather (Barlow).

Through his Declaration of Independence for Cyberspace John Perry Barlow begins to describe the unique nature of cyberspace. It is a place of the mind, where people are judged by their comments and dialogue, not their physical presence. Cyberspace is the future of community and conversation, and according to Barlow, is outside the reach of word governments.

The Homesteaders, like the other two groups had thoughts on the correct
analogy for cyberspace, although for them, it came from experience rather than legal precedent. First Howard Rheingold, a cyberspace expert and long time user used several analogies rather than only one to describe the experience of cyberspace:

Usenet is a place for conversation or publication, like a giant coffeehouse with a 1000 rooms; it is also a worldwide digital version of the speakers corner in London’s Hyde Park, an unedited collection of letters to the editor, a floating flea market, a huge vanity publisher, and a coalition of every odd special interest group in the world. It is a mass medium because any piece information put on the Net has a potential worldwide reach of millions. But it differs from conventional mass media in some respects. Every individual who has the ability to read a Usenet posting has the ability to reply or to creating a new posting. In television, newspapers, magazines, films, and radio, a small number of people have the power to determine what information should be made available to the mass audience. In Usenet, every member the audience is also potentially a publisher (Rheingold 130).

John Perry Barlow perceived the internet as a frontier village rather than a form of media:

The WELL (or Whole Earth ‘Lectronic Link) is an example the latest thing in frontier villages, the computer bulletin board. In this kind of small town, Main Street is a central minicomputer to which...[multiple] microcomputers may be connected at one time by phone lines and little blinking boxes called modems... Cyberspace, in its present condition, has a lot in common with the 19th-century West. It is vast, unmapped, culturally and legally ambiguous, verbally terse...hard to get around in, and up for grabs. Large institutions already claim to own the place, but most of the actual natives are solitary and independent, sometimes to the point of sociopathy. It is, of course, a perfect breeding ground for both outlaws and new ideas about liberty (Ludlow 460).

Like the other two groups, the Homesteaders searched for an analogy to describe and define the space. Unlike the other groups, the Homesteaders discussed the space as a place they inhabit rather than simply as a technology they
use. As Barlow states, “Cyberspace consists of transactions, relationships, and thought itself, arrayed like a standing wave in the web of our communications. Ours is a world that is both everywhere and nowhere, but it is not where bodies live.” (Barlow) For the Homesteaders, cyberspace was a place that they went for conversation, information and friendship. It is not a cold piece of technology but rather, an integral part of their social lives.

OVERALL THEME

The Homesteaders also use multiple layers in their theme, but theirs are tied to a deepening meaning of place and community. Their surface theme was that their individual freedoms and way of life were under attack. They believed that not only the ability to send and receive material as they chose was being threatened, but also their ability to create their own rules of conduct. This ability was being forcefully taken from them and put into the hands of the centralized real world government. This view is explained as one of colonization of a sovereign nation as expressed by John Perry Barlow in his Declaration of Independence for Cyberspace:

These increasingly hostile and colonial measures place us in the same position as those previous lovers of freedom and self-determination who had to reject the authorities of distant, uninformed powers. We must declare our virtual selves immune to your sovereignty, even as we continue to consent to your rule over our bodies. We will spread ourselves across the Planet so that no one can arrest our thoughts. (Barlow).

Barlow relied on the form of the United States Declaration of Independence
to format his Declaration. Specifically, he listed the grievances of the ‘colonists,’
described how the colony was different than the parent country, and made a
declaration of independence and sovereignty. In this way, Barlow was able to
invoke the image of the colonists standing up to a tyrannical government. The
cyber-denizens were frontiersmen defending their way of life as the early European
settlers had as they moved throughout North America. In this way an image of a
vast, open space is evoked as is the idea that ‘place’ no longer requires a physical
boundary.

As the Homesteaders discussed the threats to unfettered, unsupervised
speech, they inevitably came back to the concept that cyberspace was a free
community with a unique culture that should be left alone. This group discussed
being under siege from all sides, referring not only to the CDA but to similar
legislation being created around the world. They discussed laws being created for
them, their conduct and their space, but without their members being consulted. In
this way, participants from western nations, primarily the United States, shifted
from being the colonizers to being the colonized.

Through this multilayered theme, the Homesteaders portrayed cyberspace not
as a group of electronic impulses, but as a physical space that they inhabited. As the
aboriginal people of this space they create the rules and the culture. The CDA and
similar laws were anathema to what was held to be sacred in this new land. These
themes served to unite the users of the space to take action, but it was action within
the space rather than within the courts. Throughout the legislative and Court
proceedings, the Homesteaders engaged in self-directed speech acts such as postings to news groups and using a black background on web pages to express their displeasure.

ABSTRACT CONCEPT

At the heart of the Homesteaders theme are the abstract concepts of freedom and democracy. As the aboriginal people within the space they had established what would be valued within the space. Further, they had developed sanctions for violating this value set. Through the CDA, they were being threatened by the colonizing forces of a world government; the US Congress was colonizing cyberspace and establishing law for its inhabitants. Through this law the speech acts of the inhabitants now faced criminal sanctions for activity that had previously been governed by Homesteaders.

One of the responses to the CDA was the creation of a cyber-essay titled 24 Hours of Democracy, which included this statement, "In this "Brave New World" preservation of freedom of expression is more essential than ever because in such a virtual world there is concern by the narrow minded about wider dissemination of views contrary to their own "(Duane). Through his words Duane makes clear that for him, and many others, freedom of expression is a critical component of cyberspace. Howard Rheingold adds that "Democracy is what's at stake. It doesn't have anything to do with protecting children from pornography, because there are better ways to do that. It's about the power to determine what people are allowed to
say, write and believe” (Rheingold, Democracy) The Homesteaders were accustomed to self-determination and had determined that democracy was a desired concept, however, the CDA threatened that freedom in a fundamental way, it criminalized speech. Rheingold reminded other cyberdenizens that this attack on freedom had occurred before in history when the printing press was invented, when entire populations became capable of reading and writing about the issues that affected their lives, they demanded and won the power to determine their fate. There was a long struggle over the Crown's power to control the press. The American Revolution was founded in that struggle for individual liberties from State interference, and freedom of the press was at the core. This has all happened before, with the ultimately doomed effort to control and suppress the effects of the printing press (ibid).

In doing so, he not only reminds his fellow Homesteaders of what was at stake, but he continues the image of a young nation standing up to tyranny. In this way, he lays also addresses the Hero/Villain interaction as seem from cyberspace.

HERO/VILLAIN

Like the Defenders of Liberty, the Homesteaders drew on the values embedded in the First Amendment as their hero. Additionally, they saw the technical structure of the Internet and the many cyber-communities as additional heroes because they were seen as a way to technologically invalidate the CDA. They believed that the fact that messages crossed multiple jurisdictional boundaries would make enforcement difficult. Further, they saw the utopian communities they were creating as the location of community standard by which the message should
be judged. The Homesteaders saw both the Communication Decency Act and the supporters of the CDA as villains. They believed than the US Congress, the Christian Coalition, Enough is Enough, and other CDA supporters were completely unfamiliar with the technology or culture of cyberspace, though this ignorance in no way prevented their willingness to create legislation.

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EMOTION

As with the other players, emotions played a big role in the fantasy theme of the Homesteaders. Unlike the other two, the Homesteaders did not rely on fear, but instead rage. The Homesteaders were outraged that people who were largely unknowledgeable about the dynamics of the culture or the technology were attempting to create regulations for its use. They felt that they needed to protect this unique space and culture. They asserted that this legislation would “cause chaos and make it [difficult] for the internet to grow” (Lawless). Further, they were angry at what they perceived to be a misuse of governmental power. Their describe the US Congress as egotistical, vain, and narrow minded; everything cybeculture propertied to be moving away from. One reminded the US Congress
that he had gone to war to fight for the freedom they were attempting to limit. One stated that this was the “last gasp for the first amendment” (Electronic Frontier Foundation). Their combined anger was seen in by thousands of web pages turned black in protest (Electronic Frontier Foundation) and in the creation of a document entitled *24 Hours of Democracy* (Gulker) which chronicled the immediate reaction to this legislation.

In its entirety, the Fantasy Theme of the Homesteaders is:

*cyberspace is a unique and sovereign place. As users of the space we create the rules and determine what values will become a part of the culture. We will also determine what sanctions will be used if the rules are not followed. The governments of the world, and most especially the US Congress, have overstepped their authority. They are attempting to govern something they don’t understand and to address a problem that doesn’t exist, at least not in the way they have portrayed. They are unwelcome and should focus on what is theirs to control and leave us alone*

The Homesteaders are comprised of the users of the technology. They lack the structural ability to access the Supreme Court and as such, were unable to present their views on the CDA. There was one other group that did not present their views to the Supreme Court despite having the ability. I have called this group the Antipornography Feminists and they will be discussed in the next section.
government and the Christian Coalition, or with the American Civil Liberties Union.

The Antipornography Feminists agree with the Antiobscenity Crusaders that pornographic speech is harmful. They cite many of the same studies to show that it contributes to the rape of women and children, but this group goes a step farther. MacKinnon and Dworkin begin, "Pornography is central in creating and maintaining the civil inequality of the sexes. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women" (MacKinnon & Dworkin). In their writing they discuss the dehumanization of women that occurs as a result of the consumption of this material. Andrea Dworkin asserts that "(p)ornography plays a big part in normalizing the ways in which we are demeaned and attacked, in how humiliating and insulting us is made to look natural and inevitable (Dworkin 186). In this way she introduces the idea that pornography creates a view of women that maintains that women want to be treated as their counterparts in pornography are. Catherine MacKinnon continues, "(p)ornography constructs what a woman is in terms of its view of what men want sexually, such that acts of rape, battery, sexual harassment, prostitution and sexual abuse of children become acts of sexual equality." (MacKinnon 461) Through this change in the way women are viewed, a healthy equally powered sexual relationship is indistinguishable from rape and prostitution.

Dworkin continues,

I am describing a process of dehumanization, a concrete means of changing someone into something...being turned into an object is a
real event; and the pornographic object is a particular kind of object. It is a target. You are turned into a target... This object wants it. She is the only object with a will that says, hurt me. A car does not say, bang me up. But she, this nonhuman thing, says hurt me-and the more you hurt me, the more I will like it (Dworkin 182).

It is through this objectification that the real harm is done.

When we talk about pornography that objectifies women, we are talking about the sexualization of insult, of humiliation... there is a cruelty that does not have in it overt violence... (Dworkin 184).

Once women have been objectified, it is much easier not only to harm them, but to dismiss that harm as either imaginary or wanted. MacKinnon explains “The point is not only that when women can be coerced with impunity, the results, when mass produced, set standards that are devastating and dangerous for all women.” (MacKinnon 471) Through this objectification, women are injured, dismissed by those who might be able to help them, and learn that they are worthless and should expect nothing else.

The Antiobscenity Crusaders also believed that there was a change in attitude resulting from viewing pornography. However, they did not conceptualize pornography as something that would have the same far-reaching effect. The antiobscenity Crusaders discussed the warping of children’s morals who as a result, may become crime victims or criminals. Antipornography Feminists on the other hand, believe that pornography not only warps the individual, but also the culture. They assert that pornography teaches that women and children want to be mistreated and this teaching leads to harassment, discrimination, prostitution,
assault and rape. This different way of conceptualizing harm, made it difficult for the Antipornography Feminists to rhetorically join with the Antiobscenity Crusaders.

Making this rhetorical joining impossible is that the Antiobscenity Crusaders saw zoning as the way to address the availability of pornography. Through the CDA, they would require that legally protected pornographic material be placed in areas where minors could not access it. In contrast, the Antipornography Feminists expressly reject zoning because it moves rather than addresses the harm. Andrea Dworkin explained this view in her testimony to the Attorney General's Commission on Pornography convened by the US Department of Justice,

Zoning laws do not keep pornography out of cities. They are an official legal permission to traffic in pornography. And as a result politicians are able to denounce pornography moralistically while protecting it through zoning laws.

Zoning laws impose pornography on poor neighborhoods, on working-class neighborhoods, on neighborhoods where people of color live, and all of those people have to deal with the increase in crime, the terrible harassment, the degradation of the quality of life in their neighborhoods, and the politicians get to protect the property values of the rich. There is an equal protection issue here: why the state makes some people pay so other people can profit (Dworkin transcript).

This assertion that zoning is a benefit to pornographers at the expense of women and the poor, eliminates any rhetorical room for the Antipornography Feminists to join with the antiobscenity Crusaders in their appearance before the Supreme Court.

The other group making an appearance before the Court was the Defenders
of Liberty, led by the ACLU. There is a historical distrust of the ACLU by the Antipornography Feminists. The ACLU is viewed as being partners with racists and pornographers at the expense of every day citizens. Rather than being viewed as defenders of a sacred value, the ACLU and their supporters are seen as defenders of pornographers. In an interview MacKinnon and Dworkin assert that the ACLU has economic ties to pornographers,

The ACLU has taken money for a long time from the pornographers. Some money has been raised by showing pornography. The ACLU’s economic ties with the pornographers take many different forms, ranging from taking money from the Playboy Foundation to being housed for a nominal rent ($1 per year) in a building owned by pornographers (Russell 91).

Next, they make a connection between racists and pornographers,

The pornographers rank with Nazis and Klansman in promoting hatred and violence. Their targets are always sex-based and sometimes race-based. Like the Nazis and the Klansman, they commit the acts of violence they promote. They conduct a war against women that spreads terror (ibid).

Finally they state that the purpose of the ACLU is sometimes unclear,

The ACLU’s stated commitment is to protect the Bill of Rights...not pornography as such, though its hard to tell sometimes. Without a commitment to real equality of same magnitude as its commitment to those first ten amendments, the ACLU defends power, not rights (ibid).

Through this conceptualization of the ACLU as little more than puppets of pornographers, MacKinnon and Dworkin begin to create a rhetorical chasm between themselves and the Defenders of Liberty.

There is another difference between these two groups, the Antipornography Feminists view pornographic speech as harmful on its face. It is not viewed as
another speech act, but rather as something that is explicitly about harming women and children. The distinction between obscenity and pornography that is critical to the legal case, is deemed artificial. MacKinnon explains,

Obscenity is a moral idea; pornography is a political practice. Obscenity is abstract; pornography is concrete...Sex forced on real women so that it can be sold at a profit to be forced on other real women; women’s bodies trussed and maimed and raped and made into things to be hurt and obtained and accessed and presented as the nature of women...this is what bothers feminists about pornography. Obscenity as such probably does little harm; pornography causes attitudes and behaviors of violence and discrimination which define the treatment and status of half of the population. (Donnerstein 141)

In examining the Constitutional arguments, they reject the belief that in this case, more speech rather than less will be a remedy,

The situation in which women presently find themselves with respect to the pornography is one in which more pornography is inconsistent with the rectifying or even counterbalancing its damage through speech, because so long as pornography exists in the way it does there will not be more speech by women. Pornography strips and devastates women of our credibility...(w)e are deauthoritized and reduced and devalidated and silenced. (MacKinnon 483) [original emphasis]

In effect, MacKinnon is arguing that not only does pornographic speech lead to direct physical and sexual harm, but it also effects the way that women are viewed. Through this change women are robbed of the ability to be believed or to have the harm done to them seen as real. Through pornography, women are silenced both physically and orally. Dworkin is quite concise in explaining this view, “pornography is not speech for women, it is the silence of women.” (MacKinnon 485)
Further, MacKinnon asserts that the Miller standard that defines what is legally considered obscene, leaves the feminist with more questions than answers. Feminism doubts whether the average gender-neutral person exists; has more questions about the content and process of defining what community standards are than it does about deviations from them; wonders why prurience counts but powerless does not, and why sensibilities are better protected from offence than women are from exploitation...and questions why a body of law which has not in practice been able to tell the difference between rape and intercourse should, without further guidance, be entrusted with telling pornography from anything else. (MacKinnon 464)

For this group of feminists, the existing legal standards do not recognize or reflect the reality of pornographic speech in the daily lives of women, and is therefore, inadequate. It is this daily reality that led MacKinnon and Dworkin to propose a civil rights based law to address pornographic speech (Appendix D).

The ordinance was initially introduced in Minneapolis but was vetoed by the Mayor. It was then introduced in Indianapolis and eventually signed into law. It was immediately challenged by the ACLU as an unconstitutional breach of the First Amendment. The Seventh Circuit Court ruled that it was indeed a Constitutional violation. The US Supreme Court affirmed the lower court opinion, without comment. Subsequently, similar language has been introduced, and upheld, in Canada. Other countries including New Zealand, Germany and the Philippines have also introduced legislation that encompasses portions of the Minneapolis ordinance.

The ordinance defines pornography rather than obscenity as current United States law does. It also does not rely on the Miller standard. Instead the ordinance
the term "pornography" shall mean the graphic sexually explicit subordination of women through pictures or words, including by electronic or other data retrieval systems, and shall further include the presentation of women's body parts, including but not limited to, vaginas, breasts or buttocks, such that women are reduced to such parts or the presentation of women (MacKinnon)

To explain the need for this definition, the opening statement of the ordinance reads,

Pornography is a systematic practice of exploitation and subordination based on sex that differentially harms and disadvantages women through dehumanization, psychic assault, sexual exploitation, forced sex and prostitution, physical injury and social and sexual terrorism and inferiority presented as entertainment and existing laws have proven inadequate to solve such a problem. (ibid).

This radically different way of viewing pornography and its harm, combined with the belief that the First Amendment is being used to protect pornographers at the expense of women and children, presented an insurmountable barrier between the Antipornography Feminists and the Defenders of Liberty.

Antipornography Feminists have invested over 30 years to changing the terms of the pornography debate. They have educated an entire generation of feminists about the threat that pornography poses to women. They have successfully passed legislation that treats the harm of pornography as a civil rights violation. Despite all of these accomplishments, they were silent in the debate surrounding the availability of pornography on the internet. One possible reason for this silence is that as a group, they lacked a rhetorical place to join the conversation. The Antiobscenity Crusaders arguments were similar to what the Antipornography
Feminists have historically argued, but their solution was inadequate. Further, the political and social agendas of the Christian Coalition and Family Research Council are anathema to feminists. The Defenders of Liberty were also disliked and distrusted, because they were viewed as being little more than agents of the pornographers. The Defenders of Liberty conceptualized both the problem and the solution quite differently than the Antipornography Feminists did. The Antipornography Feminists were left to choose between joining with a group that they distrusted and that they didn’t agree with or with staying silent. They chose silence.
ANALYSIS

As a rhetorician, I am interested in the effect of persuasion on the intended audience. In this analysis, my interest is in why the rhetor groups used the particular fantasy themes they did. I am also interested in how these fantasy themes affected a legal decision. I am, however, limited to the public dialogue and legal opinion of the Court for this analysis as these are all that are available.

The discussion about obscene speech has been a part of the American culture from the earliest days. One question in this analysis concerns how the debate differed now that it involved a new medium. On the surface, it really was no different. Both the Antiobscenity Crusaders and the Defenders of Liberty structured their arguments as they had in the past. They altered their message slightly to show that the old arguments applied to the new medium, but the fantasy themes were essentially the same as when these groups have squared off over other media forms. As in the past, the Antiobscenity Crusaders discussed the danger that obscene speech posed to children and advocated for limiting that exposure. The Defenders of Liberty on the other hand, discussed the sanctity of the First Amendment and the danger of government monitored speech.

It was a different debate when the presence of the Homesteaders and the absence of the Antipornography Feminists are factored in. The Homesteaders change the conversation by asserting that this space is unique in structure, culture and ownership. They attempted to change the terms of the conversation through an assertion of sovereignty and self governance. If this assertion had been included in
the fantasy chains of the other groups, the other groups would have been required to fundamentally change their conception of the space and the arguments they made about pornographic speech in the space. If, for example, the antiobscenity Crusaders integrated the story of the Homesteaders, they would have had to recreate their story such that the threat of pornographic speech necessarily required them to go into a sovereign space and impose a solution. In effect declaring war on another sovereign space. This change to the fantasy theme could have far reaching effects given that the United States Congress was a key player in the Antiobscenity Crusaders. If they integrated a theme that encouraged them to invade recognized sovereign nations to solve national problems, the place that the United States government holds in the international world would be fundamentally different than it is. This singular change in the fantasy theme would move this from a discussion about speech, to one about foreign policy. As a foreign policy issue, the US Congress would be bound by international law and custom and would have to act accordingly. For example, if there was an interest in regulating commerce, the Congress would be required to enter into a treaty with the Homesteaders laying out the terms of the commerce regulations. If there were disputes about the implementation of that treaty, the world courts would be the avenue of redress. Additionally, if cyberspace is a sovereign space, by definition the US Congress cannot create law for the activities within cyberspace. Any attempt to do so would be viewed as an act of aggression just as it would if the US Congress attempted to create law for Mexico or Germany.
The religion based members of the Antiobscenity Crusaders may have fared better with viewing cyberspace as sovereign, in that they are not limited to what governments are able to do. They would however, have been required to find a new hero because the ability to create law would have been removed or fundamentally changed by this conception of sovereignty. The religion based groups could have relied on a missionary appeal as they have throughout history. This would have allowed them to cross national borders as they did during the Crusades. As missionaries, they could discuss the dangers that pornography poses to a persons' soul in more concrete terms than they are able to when they rely on a legislative hero.

Further, had the Defenders of Liberty adopted this theme of cyberspace as sovereign, they would also have had to change their basic theme. It may in fact, have been nullified. The Defenders of Liberty relied on the United States Constitution to give validity and urgency to their arguments, but this document does not apply outside the borders of the United States. The Defenders of Liberty would have been required to either find a different hero, or be absent from the conversation.

The Homesteaders were not however, able to affect the conversation in any significant way. This group is loosely affiliated and lacks the traditional structure of a government or organization preventing them from presenting a united voice in the legal or policy arenas. An additional complication for this group is that they inhabit both the world of cyberspace and the physical world. For those that are American
citizens, they have accepted the notion that the United States Congress has the
ability and authority to create law to govern their non-cyberspace activities. This
belief is challenged by the assertion that cyberspace is sovereign. For this group to
fully utilize the theme of sovereignty they must make the rhetorical leap to 'defense
of territory.' Through his Declaration of Independence, John Perry Barlow
compares the inhabitants of cyberspace with the American colonists as they sought
independence from England. Despite this attempted comparison, there was not a
conceptual leap by the cyberdenizens to defending a sovereign space. In their
dialogue throughout cyberspace this group discussed the structural limitations to
the implementation of the law. They did not however, discuss going to war or to
any of the international courts to protect their sovereignty. Rhetorically, they appear
to still be searching for a definition of the space. This search may in time, result in
an assertion of sovereignty as it did for the American colonists.

The Antipornography Feminists are also left in a rhetorically difficult
position. As a group they believe that pornographic speech is one of the largest
threats to the safety and well being of women and children ever created. They see
it as a way to teach a belief that asserting that women and children enjoy and
request victimization. Further, that it negates the belief that rape, prostitution, and
sexual harassment are harmful. Given this fundamental belief of the group they are
expected to be present in this discussion. As a world wide technology, the internet
has the potential to spread and multiply these harmful teachings. They were not
however able to find a rhetorical place to enter the legal conversation. Both the
Defenders of Liberty hero, the First Amendment, and the hero of antiobscenity Crusaders, the CDA were counter to the Hero of the Antipornography Feminists. The Antipornography Feminists are interested in redefining pornography as prohibited form of hate speech. They are not interested having pornography zoned into areas because they assert that this zoning not only doesn’t address the problem, it moves it into poor and minority communities. These very different conceptualizations of a Hero prevented the Antipornography Feminists from entering the legal dialogue. It is unclear why they did not engage in self directed speech through feminist journals or other writing.

The second analytic question is what story did the Supreme Court find persuasive? To be persuasive, each of the groups arguments must be embedded in a fantasy chain for the Court that includes a particular conception of community that will in turn, lead logically to a description of the problem and a solution. How community is conceptualized is critical given that the Miller standard relies on a “contemporary community standard” to define the reach of the law.

As a part of their decision making, the Justices had to decide which of the fantasy chains they found compelling. In the ‘give and take’ of the briefs and oral argument, the Court explores two very different conceptualizations of community. In one, community is constructed as a nation of people. In the other community is viewed as local in nature. Once the community is defined the solution to the problem flows quite logically. If a community is national then a person can be prosecuted for violating the sensibilities of people who live in another region of the
country. If community is local in nature, then a person can only be prosecuted for violating the sensibilities of their neighbors.

The legal solution to the problem must be grounded in prior legal decisions. The focus on the correct analogy attempted this while solidifying the vision of community. The court, however, did not adopt a particular analogy for cyberspace choosing instead to say that it was unlike other media.

They did address cyberzoning, a solution that relies on the concept of cyberspace as a place where boundaries can be constructed. These boundaries would permit speech acts to be limited in time and location in the same way that adult television shows or bookstores are. In their ruling the Justices wrote:

According to the Government, the CDA is constitutional because it constitutes a sort of “cyberzoning” on the Internet. But the CDA applies broadly to the entire universe of cyberspace. And the purpose of the CDA is to the children from the primary effects of “indecent” and “patently offensive” speech, rather than any “secondary” effect of such speech. Thus, the CDA is a content based blanket restriction on speech, and as such can not be properly analyzed as a form of time, place, and manner regulation (Supreme Court).

By writing this one paragraph, the Court rejected that the CDA provides the mechanism for a zoneable community. They state that instead, the CDA is too broad in its reach. In doing so, they remove the heart of the Antiobscenity Crusaders fantasy theme. The Antiobscenity Crusaders are left without a solution that applies to the community that the Supreme Court views as relevant.

Justices O’Connor and Rehnquist wrote a concurrent opinion and addressed the concept of cyberzoning which they believe may be constitutional in theory, but
Our precedent indicates that the creation of such zones can be Constitutionally sound. Despite the soundness of its purpose, however, portions of the CDA are unconstitutional because they stray from the blueprint our prior cases have developed for constructing a "zoning law" that passes constitutional muster. The Court in Ginsberg concluded that the New York law created a constitutionally adequate adult zone simply because, on its face, it denied access only to minors. The court did not question—and therefore necessarily assumed—that an adult zone, once created, would succeed in preserving adults' access while denying minors' access to the regulated speech. Before today, there was no reason to question this assumption, for the Court has previously only considered laws that operated in the physical world, a world with two characteristics that make it possible to create "adult zones:" geography and identity. The electronic world is fundamentally different. Because it is no more than the interconnection of electronic pathways, cyberspace allows speakers and listeners to mask their identities. Cyberspace differs from the physical world in another basic way: Cyberspace is malleable. Thus it is possible to construct barriers in cyberspace and use them to screen for identity, making cyberspace more like the physical world and consequently, more amenable to zoning laws (Supreme Court).

Through their minority opinion Justices O'Connor and Rehnquist recognized that cyberspace is a unique space. Unlike the physical world, a user of this space can hide their age and identity making it difficult to create or enforce a zoning law based on ones used in neighborhoods and communities. Further, they recognized that the space can be changed from what was presented to the Court; walls can be constructed, barriers can be created that reshapes an open space to one that can be zoned. They also leave a rhetorical opportunity for the Antiobscenity Crusaders to try again.

The Defenders of Liberty not only had to show the Court that cyberzoning was unworkable, but that it also violated principles of the Constitution. The same
Constitution that the Justices have sworn to protect. Throughout the fantasy chain, the Defenders of Liberty focus on everyday citizens being sent to prison for engaging in speech acts. They argued that the only way to know what was sanctionable was to violate the law and be prosecuted. They reminded the Justices that the Supreme Court has a 40 year history of defending the rights of everyday of people to engage in unpopular speech. Further, the Defenders of Liberty pointed to their interest and efforts to uphold these same values. This combination of arguments were ultimately successful in drawing the Court into the same rhetorical community as the Defenders of Liberty. In the end, the Supreme Court ruled unanimously that the CDA was a violation of the First Amendment, invalidating the Communication Decency Act.

In accepting the fantasy chain of the Defenders of Liberty, the Supreme Court established that the concepts embedded in the First Amendment apply to cyberspace. Further, they established a legal precedent for the ability of the United States government to create laws for the users of the technology. In this way, they reject the concept of cyberspace as a sovereign, self-regulating space.
CONCLUSION

Legal theorist Geoffrey Klinger asserts that a law is a moral taxonomy, and that each of the points on a moral map represent a situated discourse, or a contingent decision, one that reflects the mores of a particular culture. These principles, statutes and cases, in turn, are not the product of divine intervention with timeless legitimacy, but they are the product of a contingent social paradigm. They arise as a reflection of the values that a particular social community endears (Klinger 238).

His observations hold true in the debate surrounding the constitutionality and existence of the Communication Decency Act. In their own way, each of the players in this discussion were attempting to define the community known as "cyberspace" and to set the values that the community would engender. The Antiobscenity Crusaders were attempting to have the values of the Christian Coalition and its allies adopted, as they had been with the 104th Congress. Through the Communication Decency Act the Antiobscenity Crusaders were attempting to return to a national standard of indecent speech.

The Defenders of Liberty were trying to establish that the values they held sacred specifically, those of the Bill of Rights as expressed in the First and Fifth Amendments, would be applied not only to this new technology, but also to a community without physical boundary. They wanted to extend their values into a new community.

The Homesteaders were interested in having the First Amendment values in the realm of cyberspace, not because the law had been expressly adopted, but rather...
because it was held to be valuable by the users of the technology. They wanted to continue to develop a unique community with its own set of rules; a community that included places that were objectionable to some. They were interested in the continued creation of community rather than the creation of law. The Homesteaders were most interested in maintaining their sovereignty from outside forces attempting to define and recreate their space.

Each of these value sets were discussed in what Bormann calls fantasy chains. Each fantasy chain reflects the rhetorical reality of the members. Through the telling and retelling of this fantasy chains a rhetorical community is formed of people who accept the ‘truth’ of the rhetorical reality. Both the Defenders of Liberty and the Antiobscenity Crusaders presented their fantasy chain to the Supreme Court and through the judicial process, invited them into their rhetorical community. The Homesteaders were unable to access the Court and as such, were unable to present their rhetorical community. Ultimately, the Court accepted the fantasy chain of the Defenders of Liberty and overturned the CDA.

The Supreme Court ruling on the Constitutionality of the CDA occurred during the 105th Congress. Both the 105th and 106th Congresses introduced legislation similar to the CDA. The Defenders of Liberty and Homesteaders have reacted to these new bills much as they did to the CDA. The attempts to define the space known as ‘cyberspace’ continues.
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United States Department of Justice. ACLU v Reno 117 S. Ct. 2329. US Supreme Court, 1996


APPENDICES
Appendix A

*Amici Curiae* Filed

*Amici Curiae* briefs are 'friend of the court' briefs and are filed in support of a main brief. The primary Antiobscenity Crusader brief was filed by the Department of Justice. The primary Defender of Liberty brief was filed by the American Civil Liberties Union.

ANTIOBSCENITY CRUSADERS

**Brief for Members of Congress**

**SENATORS**

Dan Coats (R)  
Jesse Helms (R)  
Christopher Bond (R)  
Rick Santorum (R)  
James Exon (R)  
Charles Grassley (R)  
James Inhofe (R)  
Rod Grams (R)

**REPRESENTATIVES**

Henry Hyde (R)  
Bob Goodlatte (R)  
Jim Sensenbrenner (R)  
Steve Schiff (R)  
Chris Smith (R)  
Duncan Hunter (R)  
Roscoe Bartlett (R)  
Dave Weldon (R)  
Tony Hall (D)  
Jim Ryun (R)  
Steve Largent (R)  
Mark Souder (R)  
Sherwood Boehlert (R)  
Walter Jones (R)

*AMICI CURIAE FOR Enough is Enough*

The Salvation Army  
National Political Congress of Black Women, Inc.  
The National Council of Catholic Women  
Victims’ Assistance Legal Organization  
CHILDHELP USA  
Legal Pad Enterprises, Inc.  
Focus on the Family  
The National Coalition for the Protection of Children and Families  
Citizens for Family Friendly Libraries (Georgia)
Computer Power Corporation
D/TEX Investigative Consulting
Family Friendly Libraries
Focus on the Family Help Us Regain the Children (H.U.R.T)
JuriNet, Inc.
Kidz Online
Laura Lederer, J.D
Log-on Data Corporation
Legal Pad Enterprises, Inc.
Mothers Against Sexual Abuse
National Association of Evangelicals
Omaha for Decency
One Voice/The American Coalition for Abuse
Oklahomans for Children and Families
Religious Alliance Against Pornography
Weitzman, Lenore, Ph.D.,
WheelGroup

DEFENDERS OF LIBERTY

American Association of University Professors
American Society of Journalists and Authors
Authors Guild, California Museum of Photography/University of California at Riverside
Coalition for Positive Sexuality
Creative Coalition of Artists
Tri Dang Do
Margarita LaCabe
LAMBDAL Legal Defense and Education Fund
Maggie LaNoue
LOD Communications
Peter Ludlow
Chuck More
PEN American Center
Philadelphia Magazine
PSINet Inc.
Eric S. Raymond
Don Rittner
The Sexuality Information and Education Council of the United States
Lloyd K. Stires
Peter J. Swanson
Kirsti Thomas
WEB Communications
Miryam Ehrlich Williamson
ApolloMedia Corp
Bay Area Lawyers for Individual Freedom
Association of National Advertisers and the Media Institute
Chamber of Commerce of the United States of America
Feminists for Free Expression
National Association of Broadcasters
ABC Inc.
CBS Inc.
National Broadcasting Company
Playboy Enterprises Inc
Reporters Committee for Freedom of the Press
Student Press Law Center
Site Specific, Inc. and John Lebkowski
Speech Communication Association
Volunteer Lawyers for the Arts
Two provisions of the Communications Decency Act of 1996 (CDA or Act) seek to protect minors from harmful material on the Internet, an international network of interconnected computers that enables millions of people to communicate with one another in "cyberspace" and to access vast amounts of information from around the world. Title 47 U. S. C. A. §223(a)(1)(B)(ii) (Supp. 1997) criminalizes the "knowing" transmission of "obscene or indecent" messages to any recipient under 18 years of age. Section 223(d) prohibits the "knowing" sending or displaying to a person under 18 of any message "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." Affirmative defenses are provided for those who take "good faith, ... effective ... actions" to restrict access by minors to the prohibited communications, §223(e)(5)(A), and those who restrict such access by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number, §223(e)(5)(B). A number of plaintiffs filed suit challenging the constitutionality of §§223(a)(1) and 223(d). After making extensive findings of fact, a three-judge District Court convened pursuant to the Act entered a preliminary injunction against enforcement of both challenged provisions. The court's judgment enjoins the Government from enforcing §223(a)(1)(B)'s prohibitions insofar as they relate to "indecent" communications, but expressly preserves the Government's right to investigate and prosecute the obscenity or child pornography activities prohibited therein. The injunction against enforcement of §223(d) is unqualified because that section contains no separate reference to obscenity or child pornography. The Government appealed to this Court under the Act's special review provisions, arguing that the District Court erred in holding that the CDA violated both the First Amendment because it is overbroad and the Fifth Amendment because it is vague.

Held: The CDA's "indecent transmission" and "patently offensive display" provisions abridge "the freedom of speech" protected by the First Amendment. Pp. 17-40.

(a) Although the CDA's vagueness is relevant to the First Amendment overbreadth inquiry, the judgment should be affirmed without reaching the Fifth Amendment issue. P. 17.
(b) A close look at the precedents relied on by the Government—Ginsberg v. New York, 390 U. S. 629; FCC v. Pacifica Foundation, 438 U. S. 726; and Renton v. Playtime Theatres, Inc., 475 U. S. 41—raises, rather than relieves, doubts about the CDA's constitutionality. The CDA differs from the various laws and orders upheld in those cases in many ways, including that it does not allow parents to consent to their children's use of restricted materials; is not limited to commercial transactions; fails to provide any definition of "indecent" and omits any requirement that "patently offensive" material lack socially redeeming value; neither limits its broad categorical prohibitions to particular times nor bases them on an evaluation by an agency familiar with the medium's unique characteristics; is punitive; applies to a medium that, unlike radio, receives full First Amendment protection; and cannot be properly analyzed as a form of time, place, and manner regulation because it is a content-based blanket restriction on speech. These precedents, then, do not require the Court to uphold the CDA and are fully consistent with the application of the most stringent review of its provisions. Pp. 17–21.

(c) The special factors recognized in some of the Court's cases as justifying regulation of the broadcast media—the history of extensive government regulation of broadcasting, see, e.g., Red Lion Broadcasting Co. v. FCC, 395 U. S. 367, 399–400; the scarcity of available frequencies at its inception, see, e.g., Turner Broadcasting System, Inc. v. FCC, 512 U. S. 622, 637–638; and its "invasive" nature, see Sable Communications of Cal., Inc. v. FCC, 492 U. S. 115, 128—are not present in cyberspace. Thus, these cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to the Internet. Pp. 22–24.

(d) Regardless of whether the CDA is so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render it problematic for First Amendment purposes. For instance, its use of the undefined terms "indecent" and "patently offensive" will provoke uncertainty among speakers about how the two standards relate to each other and just what they mean. The vagueness of such a content-based regulation, see, e.g., Gentile v. State Bar of Nev., 501 U. S. 1030, coupled with its increased deterrent effect as a criminal statute, see, e.g., Dombrowski v. Pfister, 380 U. S. 479, raise special First Amendment concerns because of its obvious chilling effect on free speech.

Contrary to the Government's argument, the CDA is not saved from vagueness by the fact that its "patently offensive" standard repeats the second part of the three-prong obscenity test set forth in Miller v. California, 413 U. S. 15, 24. The second Miller prong reduces the inherent vagueness of its own "patently offensive" term by requiring that the proscribed material be "specifically defined by the applicable state law." In addition, the CDA applies only to "sexual conduct," whereas, the CDA prohibition extends also to "excretory activities" and "organs" of both a sexual and excretory nature. Each of Miller's other two prongs also critically limits the uncertain sweep of the obscenity definition. Just because a definition including
three limitations is not vague, it does not follow that one of those limitations, standing alone, is not vague. The CDA's vagueness undermines the likelihood that it has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials. Pp. 24–28.

(e) The CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. Although the Government has an interest in protecting children from potentially harmful materials, see, e.g., Ginsberg, 390 U. S., at 639, the CDA pursues that interest by suppressing a large amount of speech that adults have a constitutional right to send and receive, see, e.g., Sable, supra, at 126. Its breadth is wholly unprecedented. The CDA's burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the Act's legitimate purposes. See, e.g., Sable, 492 U. S., at 126. The Government has not proved otherwise. On the other hand, the District Court found 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. Moreover, the arguments in this Court referred to possible alternatives such as requiring that indecent material be "tagged" to facilitate parental control, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet differently than others. Particularly in the light of the absence of any detailed congressional findings, or even hearings addressing the CDA's special problems, the Court is persuaded that the CDA is not narrowly tailored. Pp. 28–33.

(f) The Government's three additional arguments for sustaining the CDA's affirmative prohibitions are rejected. First, the contention that the Act is constitutional because it leaves open ample "alternative channels" of communication is unpersuasive because the CDA regulates speech on the basis of its content, so that a "time, place, and manner" analysis is inapplicable. See, e.g., Consolidated Edison Co. of N. Y. v. Public Serv. Comm'n of N. Y., 447 U. S. 530, 536. Second, the assertion that the CDA's "knowledge" and "specific person" requirements significantly restrict its permissible application to communications to persons the sender knows to be under 18 is untenable, given that most Internet forums are open to all comers and that even the strongest reading of the "specific person" requirement would confer broad powers of censorship, in the form of a "heckler's veto," upon any opponent of indecent speech. Finally, there is no textual support for the submission that material having scientific, educational, or other redeeming social value will necessarily fall outside the CDA's prohibitions. Pp. 33–35.

(g) The §223(e)(5) defenses do not constitute the sort of "narrow tailoring" that would save the CDA. The Government's argument that transmitters may take protective "good faith actio[n]" by "tagging" their indecent communications in a
way that would indicate their contents, thus permitting recipients to block their reception with appropriate software, is illusory, given the requirement that such action be "effective": The proposed screening software does not currently exist, but, even if it did, there would be no way of knowing whether a potential recipient would actually block the encoded material. The Government also failed to prove that §223(b)(5)'s verification defense would significantly reduce the CDA's heavy burden on adult speech. Although such verification is actually being used by some commercial providers of sexually explicit material, the District Court's findings indicate that it is not economically feasible for most noncommercial speakers. Pp. 35–37.

(h) The Government's argument that this Court should preserve the CDA's constitutionality by honoring its severability clause, §608, and by construing nonseverable terms narrowly, is acceptable in only one respect. Because obscene speech may be banned totally, see Miller, supra, at 18, and §223(a)'s restriction of "obscene" material enjoys a textual manifestation separate from that for "indecent" material, the Court can sever the term "or indecent" from the statute, leaving the rest of §223(a) standing. Pp. 37–39.

(i) The Government's argument that its "significant" interest in fostering the Internet's growth provides an independent basis for upholding the CDA's constitutionality is singularly unpersuasive. The dramatic expansion of this new forum contradicts the factual basis underlying this contention: that the unregulated availability of "indecent" and "patently offensive" material is driving people away from the Internet. P. 40.

929 F. Supp. 824, affirmed.

Stevens, J., delivered the opinion of the Court, in which Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer, JJ., joined. O'Connor, J., filed an opinion concurring in the judgment in part and dissenting in part, in which Rehnquist, C. J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES
No. 96–511
JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, et al., APPELLANTS v. AMERICAN CIVIL LIBERTIES UNION et al.

on appeal from the united states district court for the eastern district of
Justice Stevens delivered the opinion of the Court.

At issue is the constitutionality of two statutory provisions enacted to protect minors from "indecent" and "patently offensive" communications on the Internet. Notwithstanding the legitimacy and importance of the congressional goal of protecting children from harmful materials, we agree with the three-judge District Court that the statute abridges "the freedom of speech" protected by the First Amendment.

I

The District Court made extensive findings of fact, most of which were based on a detailed stipulation prepared by the parties. See 929 F. Supp. 824, 830–849 (ED Pa. 1996). The findings describe the character and the dimensions of the Internet, the availability of sexually explicit material in that medium, and the problems confronting age verification for recipients of Internet communications. Because those findings provide the underpinnings for the legal issues, we begin with a summary of the undisputed facts.

The Internet

The Internet is an international network of interconnected computers. It is the outgrowth of what began in 1969 as a military program called "ARPANET," which was designed to enable computers operated by the military, defense contractors, and universities conducting defense-related research to communicate with one another by redundant channels even if some portions of the network were damaged in a war. While the ARPANET no longer exists, it provided an example for the development of a number of civilian networks that, eventually linking with each other, now enable tens of millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet is "a unique and wholly new medium of worldwide human communication." (4)

The Internet has experienced "extraordinary growth." (5) The number of "host" computers—those that store information and relay communications—increased from about 300 in 1981 to approximately 9,400,000 by the time of the trial in 1996. Roughly 60% of these hosts are located in the United States. About 40 million people used the Internet at the time of trial, a number that is expected to mushroom to 200 million by 1999.

Individuals can obtain access to the Internet from many different sources, generally
hosts themselves or entities with a host affiliation. Most colleges and universities provide access for their students and faculty; many corporations provide their employees with access through an office network; many communities and local libraries provide free access; and an increasing number of storefront "computer coffee shops" provide access for a small hourly fee. Several major national "online services" such as America Online, CompuServe, the Microsoft Network, and Prodigy offer access to their own extensive proprietary networks as well as a link to the much larger resources of the Internet. These commercial online services had almost 12 million individual subscribers at the time of trial.

Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely. But, as presently constituted, those most relevant to this case are electronic mail ("e-mail"), automatic mailing list services ("mail exploders," sometimes referred to as "listservs"), "newsgroups," "chat rooms," and the "World Wide Web." All of these methods can be used to transmit text; most can transmit sound, pictures, and moving video images. Taken together, these tools constitute a unique medium—known to its users as "cyberspace"—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.

E-mail enables an individual to send an electronic message—generally akin to a note or letter—to another individual or to a group of addressees. The message is generally stored electronically, sometimes waiting for the recipient to check her "mailbox" and sometimes making its receipt known through some type of prompt. A mail exploder is a sort of e-mail group. Subscribers can send messages to a common e-mail address, which then forwards the message to the group's other subscribers. Newsgroups also serve groups of regular participants, but these postings may be read by others as well. There are thousands of such groups, each serving to foster an exchange of information or opinion on a particular topic running the gamut from, say, the music of Wagner to Balkan politics to AIDS prevention to the Chicago Bulls. About 100,000 new messages are posted every day. In most newsgroups, postings are automatically purged at regular intervals. In addition to posting a message that can be read later, two or more individuals wishing to communicate more immediately can enter a chat room to engage in real-time dialogue—in other words, by typing messages to one another that appear almost immediately on the others' computer screens. The District Court found that at any given time "tens of thousands of users are engaging in conversations on a huge range of subjects."(6) It is "no exaggeration to conclude that the content on the Internet is as diverse as human thought."(7)

The best known category of communication over the Internet is the World Wide Web, which allows users to search for and retrieve information stored in remote computers, as well as, in some cases, to communicate back to designated sites. In
concrete terms, the Web consists of a vast number of documents stored in different computers all over the world. Some of these documents are simply files containing information. However, more elaborate documents, commonly known as Web "pages," are also prevalent. Each has its own address—"rather like a telephone number."(8) Web pages frequently contain information and sometimes allow the viewer to communicate with the page's (or "site's") author. They generally also contain "links" to other documents created by that site's author or to other (generally) related sites. Typically, the links are either blue or underlined text—sometimes images.

Navigating the Web is relatively straightforward. A user may either type the address of a known page or enter one or more keywords into a commercial "search engine" in an effort to locate sites on a subject of interest. A particular Web page may contain the information sought by the "surfer," or, through its links, it may be an avenue to other documents located anywhere on the Internet. Users generally explore a given Web page, or move to another, by clicking a computer "mouse" on one of the page's icons or links. Access to most Web pages is freely available, but some allow access only to those who have purchased the right from a commercial provider. The Web is thus comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.

From the publishers' point of view, it constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can "publish" information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals.(9) Publishers may either make their material available to the entire pool of Internet users, or confine access to a selected group, such as those willing to pay for the privilege. "No single organization controls any membership in the Web, nor is there any centralized point from which individual Web sites or services can be blocked from the Web."(10)

Sexually Explicit Material

Sexually explicit material on the Internet includes text, pictures, and chat and "extends from the modestly titillating to the hardest-core."(11) These files are created, named, and posted in the same manner as material that is not sexually explicit, and may be accessed either deliberately or unintentionally during the course of an imprecise search. "Once a provider posts its content on the Internet, it cannot prevent that content from entering any community."(12) Thus, for example, "when the UCR/California Museum of Photography posts to its Web site nudes by Edward Weston and Robert Mapplethorpe to announce that its new exhibit will travel to Baltimore and New York City, those images are available not only in Los
Angeles, Baltimore, and New York City, but also in Cincinnati, Mobile, or Beijing— wherever Internet users live. Similarly, the safer sex instructions that Critical Path posts to its Web site, written in street language so that the teenage receiver can understand them, are available not just in Philadelphia, but also in Provo and Prague."(13)

Some of the communications over the Internet that originate in foreign countries are also sexually explicit.(14)

Though such material is widely available, users seldom encounter such content accidentally. "A document's title or a description of the document will usually appear before the document itself . . . and in many cases the user will receive detailed information about a site's content before he or she need take the step to access the document. Almost all sexually explicit images are preceded by warnings as to the content."(15) For that reason, the "odds are slim" that a user would enter a sexually explicit site by accident.(16) Unlike communications received by radio or television, "the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended."(17)

Systems have been developed to help parents control the material that may be available on a home computer with Internet access. A system may either limit a computer's access to an approved list of sources that have been identified as containing no adult material, it may block designated inappropriate sites, or it may attempt to block messages containing identifiable objectionable features. "Although parental control software currently can screen for certain suggestive words or for known sexually explicit sites, it cannot now screen for sexually explicit images."(18) Nevertheless, the evidence indicates that "a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be available."(19)

Age Verification

The problem of age verification differs for different uses of the Internet. The District Court categorically determined that there "is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups or chat rooms."(20) The Government offered no evidence that there was a reliable way to screen recipients and participants in such fora for age. Moreover, even if it were technologically feasible to block minors' access to newsgroups and chat rooms containing discussions of art, politics or other subjects that potentially elicit "indecent" or "patently offensive" contributions, it would not be possible to block their access to that material and "still allow them access to the
remaining content, even if the overwhelming majority of that content was not indecent."(21)

Technology exists by which an operator of a Web site may condition access on the verification of requested information such as a credit card number or an adult password. Credit card verification is only feasible, however, either in connection with a commercial transaction in which the card is used, or by payment to a verification agency. Using credit card possession as a surrogate for proof of age would impose costs on non-commercial Web sites that would require many of them to shut down. For that reason, at the time of the trial, credit card verification was "effectively unavailable to a substantial number of Internet content providers." Id., at 846 (finding 102). Moreover, the imposition of such a requirement "would completely bar adults who do not have a credit card and lack the resources to obtain one from accessing any blocked material."(22)

Commercial pornographic sites that charge their users for access have assigned them passwords as a method of age verification. The record does not contain any evidence concerning the reliability of these technologies. Even if passwords are effective for commercial purveyors of indecent material, the District Court found that an adult password requirement would impose significant burdens on noncommercial sites, both because they would discourage users from accessing their sites and because the cost of creating and maintaining such screening systems would be "beyond their reach."(23)

In sum, the District Court found:

"Even if credit card verification or adult password verification were implemented, the Government presented no testimony as to how such systems could ensure that the user of the password or credit card is in fact over 18. The burdens imposed by credit card verification and adult password verification systems make them effectively unavailable to a substantial number of Internet content providers." Ibid. (finding 107).

II

The Telecommunications Act of 1996, Pub. L. 104–104, 110 Stat. 56, was an unusually important legislative enactment. As stated on the first of its 103 pages, its primary purpose was to reduce regulation and encourage "the rapid deployment of new telecommunications technologies." The major components of the statute have nothing to do with the Internet; they were designed to promote competition in the local telephone service market, the multichannel video market, and the market for over-the-air broadcasting. The Act includes seven Titles, six of which are the product of extensive committee hearings and the subject of discussion in Reports prepared by Committees of the Senate and the House of Representatives. By
contrast, Title V—known as the "Communications Decency Act of 1996" (CDA)—contains provisions that were either added in executive committee after the hearings were concluded or as amendments offered during floor debate on the legislation. An amendment offered in the Senate was the source of the two statutory provisions challenged in this case. They are informally described as the "indecent transmission" provision and the "patently offensive display" provision.

The first, 47 U. S. C. A. §223(a) (Supp. 1997), prohibits the knowing transmission of obscene or indecent messages to any recipient under 18 years of age. It provides in pertinent part:

"(a) Whoever—

"(1) in interstate or foreign communications—

"(B) by means of 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; . . . .

"(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,

"shall be fined under Title 18, or imprisoned not more than two years, or both."

The second provision, §223(d), prohibits the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age. It provides:

"(d) Whoever—

"(1) in interstate or foreign communications knowingly—

"(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, or imprisoned not more than two years, or both."

The breadth of these prohibitions is qualified by two affirmative defenses. See §223(e)(5).(26) One covers those who take "good faith, reasonable, effective, and appropriate actions" to restrict access by minors to the prohibited communications. §223(e)(5)(A). The other covers those who restrict access to covered material by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number or code. §223(e)(5)(B).

III

On February 8, 1996, immediately after the President signed the statute, 20 plaintiffs(27) filed suit against the Attorney General of the United States and the Department of Justice challenging the constitutionality of §§223(a)(1) and 223(d). A week later, based on his conclusion that the term "indecent" was too vague to provide the basis for a criminal prosecution, District Judge Buckwalter entered a temporary restraining order against enforcement of §223(a)(1)(B)(ii) insofar as it applies to indecent communications. A second suit was then filed by 27 additional plaintiffs,(28) the two cases were consolidated, and a three-judge District Court was convened pursuant to §561 of the Act.(29) After an evidentiary hearing, that Court entered a preliminary injunction against enforcement of both of the challenged provisions. Each of the three judges wrote a separate opinion, but their judgment was unanimous.

Chief Judge Sloviter doubted the strength of the Government's interest in regulating "the vast range of online material covered or potentially covered by the CDA," but acknowledged that the interest was "compelling" with respect to some of that material. 929 F. Supp., at 853. She concluded, nonetheless, that the statute "sweeps more broadly than necessary and thereby chills the expression of adults" and that the terms "patently offensive" and "indecent" were "inherently vague." Id., at 854. She also determined that the affirmative defenses were not "technologically or economically feasible for most providers," specifically considering and rejecting an argument that providers could avoid liability by "tagging" their material in a
manner that would allow potential readers to screen out unwanted transmissions. Id., at 856. Chief Judge Sloviter also rejected the Government's suggestion that the scope of the statute could be narrowed by construing it to apply only to commercial pornographers. Id., at 854–855.

Judge Buckwalter concluded that the word "indecent" in §223(a)(1)(B) and the terms "patently offensive" and "in context" in §223(d)(1) were so vague that criminal enforcement of either section would violate the "fundamental constitutional principle" of "simple fairness," id., at 861, and the specific protections of the First and Fifth Amendments, id., at 858. He found no statutory basis for the Government's argument that the challenged provisions would be applied only to "pornographic" materials, noting that, unlike obscenity, "indecency has not been defined to exclude works of serious literary, artistic, political or scientific value." Id., at 863. Moreover, the Government's claim that the work must be considered patently offensive "in context" was itself vague because the relevant context might "refer to, among other things, the nature of the communication as a whole, the time of day it was conveyed, the medium used, the identity of the speaker, or whether or not it is accompanied by appropriate warnings." Id., at 864. He believed that the unique nature of the Internet aggravated the vagueness of the statute. Id., at 865, n. 9.

Judge Dalzell's review of "the special attributes of Internet communication" disclosed by the evidence convinced him that the First Amendment denies Congress the power to regulate the content of protected speech on the Internet. Id., at 867. His opinion explained at length why he believed the Act would abridge significant protected speech, particularly by noncommercial speakers, while "[p]erversely, commercial pornographers would remain relatively unaffected." Id., at 879. He construed our cases as requiring a "medium-specific" approach to the analysis of the regulation of mass communication, id., at 873, and concluded that the Internet—as "the most participatory form of mass speech yet developed," id., at 883—is entitled to "the highest protection from governmental intrusion," ibid.(30)

The judgment of the District Court enjoins the Government from enforcing the prohibitions in §223(a)(1)(B) insofar as they relate to "indecent" communications, but expressly preserves the Government's right to investigate and prosecute the obscenity or child pornography activities prohibited therein. The injunction against enforcement of §§223(d)(1) and (2) is unqualified because those provisions contain no separate reference to obscenity or child pornography.

The Government appealed under the Act's special review provisions, §561, 110 Stat. 142–143, and we noted probable jurisdiction, see 519 U. S. __ (1996). In its appeal, the Government argues that the District Court erred in holding that the CDA violated both the First Amendment because it is overbroad and the Fifth Amendment because it is vague. While we discuss the vagueness of the CDA
because of its relevance to the First Amendment overbreadth inquiry, we conclude that the judgment should be affirmed without reaching the Fifth Amendment issue. We begin our analysis by reviewing the principal authorities on which the Government relies. Then, after describing the overbreadth of the CDA, we consider the Government's specific contentions, including its submission that we save portions of the statute either by severance or by fashioning judicial limitations on the scope of its coverage.

IV

In arguing for reversal, the Government contends that the CDA is plainly constitutional under three of our prior decisions: (1) Ginsberg v. New York, 390 U. S. 629 (1968); (2) FCC v. Pacifica Foundation, 438 U. S. 726 (1978); and (3) Renton v. Playtime Theatres, Inc., 475 U. S. 41 (1986). A close look at these cases, however, raises—rather than relieves—doubts concerning the constitutionality of the CDA.

In Ginsberg, we upheld the constitutionality of a New York statute that prohibited selling to minors under 17 years of age material that was considered obscene as to them even if not obscene as to adults. We rejected the defendant's broad submission 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 on whether the citizen is an adult or a minor." 390 U. S., at 636. In rejecting that contention, we relied not only on the State's independent interest in the well-being of its youth, but also on our consistent recognition of the principle that "the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." (31) In four important respects, the statute upheld in Ginsberg was narrower than the CDA. First, we noted in Ginsberg that "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children." Id., at 639. Under the CDA, by contrast, neither the parents' consent—nor even their participation—in the communication would avoid the application of the statute. (32) Second, the New York statute applied only to commercial transactions, id., at 647, whereas the CDA contains no such limitation. Third, the New York statute cabined its definition of material that is harmful to minors with the requirement that it be "utterly without redeeming social importance for minors." Id., at 646. The CDA fails to provide us with any definition of the term "indecent" as used in §223(a)(1) and, importantly, omits any requirement that the "patently offensive" material covered by §223(d) lack serious literary, artistic, political, or scientific value. Fourth, the New York statute defined a minor as a person under the age of 17, whereas the CDA, in applying to all those under 18 years, includes an additional year of those nearest majority.

In Pacifica, we upheld a declaratory order of the Federal Communications
Commission, holding that the broadcast of a recording of a 12-minute monologue entitled "Filthy Words" that had previously been delivered to a live audience "could have been the subject of administrative sanctions." 438 U. S., at 730 (internal quotations omitted). The Commission had found that the repetitive use of certain words referring to excretory or sexual activities or organs "in an afternoon broadcast when children are in the audience was patently offensive" and concluded that the monologue was indecent "as broadcast." Id., at 735. The respondent did not quarrel with the finding that the afternoon broadcast was patently offensive, but contended that it was not "indecent" within the meaning of the relevant statutes because it contained no prurient appeal. After rejecting respondent's statutory arguments, we confronted its two constitutional arguments: (1) that the Commission's construction of its authority to ban indecent speech was so broad that its order had to be set aside even if the broadcast at issue was unprotected; and (2) that since the recording was not obscene, the First Amendment forbade any abridgement of the right to broadcast it on the radio.

In the portion of the lead opinion not joined by Justices Powell and Blackmun, the plurality stated that the First Amendment does not prohibit all governmental regulation that depends on the content of speech. Id., at 742–743. Accordingly, the availability of constitutional protection for a vulgar and offensive monologue that was not obscene depended on the context of the broadcast. Id., at 744–748. Relying on the premise that "of all forms of communication" broadcasting had received the most limited First Amendment protection, id., at 748–749, the Court concluded that the ease with which children may obtain access to broadcasts, "coupled with the concerns recognized in Ginsberg," justified special treatment of indecent broadcasting. Id., at 749–750.

As with the New York statute at issue in Ginsberg, there are significant differences between the order upheld in Pacifica and the CDA. First, the order in Pacifica, issued by an agency that had been regulating radio stations for decades, targeted a specific broadcast that represented a rather dramatic departure from traditional program content in order to designate when—rather than whether—it would be permissible to air such a program in that particular medium. The CDA's broad categorical prohibitions are not limited to particular times and are not dependent on any evaluation by an agency familiar with the unique characteristics of the Internet. Second, unlike the CDA, the Commission's declaratory order was not punitive; we expressly refused to decide whether the indecent broadcast "would justify a criminal prosecution." Id., at 750. Finally, the Commission's order applied to a medium which as a matter of history had "received the most limited First Amendment protection," id., at 748, in large part because warnings could not adequately protect the listener from unexpected program content. The Internet, however, has no comparable history. Moreover, the District Court found that the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material.
In Renton, we upheld a zoning ordinance that kept adult movie theatres out of residential neighborhoods. The ordinance was aimed, not at the content of the films shown in the theaters, but rather at the "secondary effects"—such as crime and deteriorating property values—that these theaters fostered: "It is th[e] secondary effect which these zoning ordinances attempt to avoid, not the dissemination of "offensive" speech." 475 U. S., at 49 (quoting Young v. American Mini Theatres, Inc., 427 U. S. 50, 71, n. 34 (1976)). According to the Government, the CDA is constitutional because it constitutes a sort of "cyberzoning" on the Internet. But the CDA applies broadly to the entire universe of cyberspace. And the purpose of the CDA is to protect children from the primary effects of "indecent" and "patently offensive" speech, rather than any "secondary" effect of such speech. Thus, the CDA is a content-based blanket restriction on speech, and, as such, cannot be "properly analyzed as a form of time, place, and manner regulation." 475 U. S., at 46. See also Boos v. Barry, 485 U. S. 312, 321 (1988) ("Regulations that focus on the direct impact of speech on its audience" are not properly analyzed under Renton); Forsyth County v. Nationalist Movement, 505 U. S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation").

These precedents, then, surely do not require us to uphold the CDA and are fully consistent with the application of the most stringent review of its provisions.

V

In Southeastern Promotions, Ltd. v. Conrad, 420 U. S. 546, 557 (1975), we observed that "[e]ach medium of expression . . . may present its own problems." Thus, some of our cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers, see Red Lion Broadcasting Co. v. FCC, 395 U. S. 367 (1969); FCC v. Pacifica Foundation, 438 U. S. 726 (1978). In these cases, the Court relied on the history of extensive government regulation of the broadcast medium, see, e.g., Red Lion, 395 U. S., at 399–400; the scarcity of available frequencies at its inception, see, e.g., Turner Broadcasting System, Inc. v. FCC, 512 U. S. 622, 637–638 (1994); and its "invasive" nature, see Sable Communications of Cal., Inc. v. FCC, 492 U. S. 115, 128 (1989).

Those factors are not present in cyberspace. Neither before nor after the enactment of the CDA have the vast democratic fora of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry. (33) Moreover, the Internet is not as "invasive" as radio or television. The District Court specifically found that "[c]ommunications over the Internet do not `invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content `by accident.'" 929 F. Supp., at 844 (finding 88). It also found that "[a]lmost all sexually explicit images are preceded by warnings as to the
content," and cited testimony that "'odds are slim' that a user would come across a sexually explicit sight by accident." Ibid.

We distinguished Pacifica in Sable, 492 U. S., at 128, on just this basis. In Sable, a company engaged in the business of offering sexually oriented prerecorded telephone messages (popularly known as "dial-a-porn") challenged the constitutionality of an amendment to the Communications Act that imposed a blanket prohibition on indecent as well as obscene interstate commercial telephone messages. We held that the statute was constitutional insofar as it applied to obscene messages but invalid as applied to indecent messages. In attempting to justify the complete ban and criminalization of indecent commercial telephone messages, the Government relied on Pacifica, arguing that the ban was necessary to prevent children from gaining access to such messages. We agreed that "there is a compelling interest in protecting the physical and psychological well-being of minors" which extended to shielding them from indecent messages that are not obscene by adult standards, 492 U. S., at 126, but distinguished our "emphatically narrow holding" in Pacifica because it did not involve a complete ban and because it involved a different medium of communication, id., at 127. We explained that "the dial-it medium requires the listener to take affirmative steps to receive the communication." Id., at 127-128. "Placing a telephone call," we continued, "is not the same as turning on a radio and being taken by surprise by an indecent message." Id., at 128.

Finally, unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a "scarce" expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds. The Government estimates that "[a]s many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999."(34) This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought." 929 F. Supp., at 842 (finding 74). We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.

VI
Regardless of whether the CDA is so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render it problematic for purposes of the First Amendment. For instance, each of the two parts of the CDA uses a different linguistic form. The first uses the word "indecent," 47 U. S. C. A.
§223(a) (Supp. 1997), while the second speaks of material that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," §223(d). Given the absence of a definition of either term, this difference in language will provoke uncertainty among speakers about how the two standards relate to each other and just what they mean. Could a speaker confidently assume that a serious discussion about birth control practices, homosexuality, the First Amendment issues raised by the Appendix to our Pacifica opinion, or the consequences of prison rape would not violate the CDA? This uncertainty undermines the likelihood that the CDA has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials.

The vagueness of the CDA is a matter of special concern for two reasons. First, the CDA is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech. See, e.g., Gentile v. State Bar of Nev., 501 U. S. 1030, 1048–1051 (1991). Second, the CDA is a criminal statute. In addition to the opprobrium and stigma of a criminal conviction, the CDA threatens violators with penalties including up to two years in prison for each act of violation. The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images. See, e.g., Dombrowski v. Pfister, 380 U. S. 479, 494 (1965). As a practical matter, this increased deterrent effect, coupled with the "risk of discriminatory enforcement" of vague regulations, poses greater First Amendment concerns than those implicated by the civil regulation reviewed in Denver Area Ed. Telecommunications Consortium, Inc. v. FCC, 518 U. S. ___ (1996).

The Government argues that the statute is no more vague than the obscenity standard this Court established in Miller v. California, 413 U. S. 15 (1973). But that is not so. In Miller, this Court reviewed a criminal conviction against a commercial vendor who mailed brochures containing pictures of sexually explicit activities to individuals who had not requested such materials. Id., at 18. Having struggled for some time to establish a definition of obscenity, we set forth in Miller the test for obscenity that controls to this day:

"(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Id., at 24 (internal quotation marks and citations omitted).

Because the CDA's "patently offensive" standard (and, we assume arguendo, its synonymous "indecent" standard) is one part of the three-prong Miller test, the
Government reasons, it cannot be unconstitutionally vague.

The Government's assertion is incorrect as a matter of fact. The second prong of the Miller test—the purportedly analogous standard—contains a critical requirement that is omitted from the CDA: that the proscribed material be "specifically defined by the applicable state law." This requirement reduces the vagueness inherent in the open-ended term "patently offensive" as used in the CDA. Moreover, the Miller definition is limited to "sexual conduct," whereas the CDA extends also to include (1) "excretory activities" as well as (2) "organs" of both a sexual and excretory nature.

The Government's reasoning is also flawed. Just because a definition including three limitations is not vague, it does not follow that one of those limitations, standing by itself, is not vague. (38) Each of Miller's additional two prongs—(1) that, taken as a whole, the material appeal to the "prurient" interest, and (2) that it "lack[ ] serious literary, artistic, political, or scientific value"—critically limits the uncertain sweep of the obscenity definition. The second requirement is particularly important because, unlike the "patently offensive" and "prurient interest" criteria, it is not judged by contemporary community standards. See Pope v. Illinois, 481 U. S. 497, 500 (1987). This "societal value" requirement, absent in the CDA, allows appellate courts to impose some limitations and regularity on the definition by setting, as a matter of law, a national floor for socially redeeming value. The Government's contention that courts will be able to give such legal limitations to the CDA's standards is belied by Miller's own rationale for having juries determine whether material is "patently offensive" according to community standards: that such questions are essentially ones of fact. (39)

In contrast to Miller and our other previous cases, the CDA thus presents a greater threat of censoring speech that, in fact, falls outside the statute's scope. Given the vague contours of the coverage of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional protection. That danger provides further reason for insisting that the statute not be overly broad. The CDA's burden on protected speech cannot be justified if it could be avoided by a more carefully drafted statute.

VII

We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.
In evaluating the free speech rights of adults, we have made it perfectly clear that "[s]exual expression which is indecent but not obscene is protected by the First Amendment." Sable, 492 U. S., at 126. See also Carey v. Population Services Int'l, 431 U. S. 678, 701 (1977) ("[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression"). Indeed, Pacifica itself admonished that "the fact that society may find speech offensive is not a sufficient reason for suppressing it." 438 U. S., at 745.

It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. See Ginsberg, 390 U. S., at 639; Pacifica, 438 U. S., at 749. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults. As we have explained, the Government may not "reduc[e] the adult population . . . to . . . only what is fit for children." Denver, 518 U. S., at ___ (slip op., at 29) (internal quotation marks omitted) (quoting Sable, 492 U. S., at 128).(40) "[R]egardless of the strength of the government's interest" in protecting children, "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." Bolger v. Youngs Drug Products Corp., 463 U. S. 60, 74-75 (1983).

The District Court was correct to conclude that the CDA effectively resembles the ban on "dial-a-porn" invalidated in Sable. 929 F. Supp., at 854. In Sable, 492 U. S., at 129, this Court rejected the argument that we should defer to the congressional judgment that nothing less than a total ban would be effective in preventing enterprising youngsters from gaining access to indecent communications. Sable thus made clear that the mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into its validity.(41) As we pointed out last Term, that inquiry embodies an "over-arching commitment" to make sure that Congress has designed its statute to accomplish its purpose "without imposing an unnecessarily great restriction on speech." Denver, 518 U. S., at ___ (slip op., at 11).

In arguing that the CDA does not so diminish adult communication, the Government relies on the incorrect factual premise that prohibiting a transmission whenever it is known that one of its recipients is a minor would not interfere with adult-to-adult communication. The findings of the District Court make clear that this premise is untenable. Given the size of the potential audience for most messages, in the absence of a viable age verification process, the sender must be charged with knowing that one or more minors will likely view it. Knowledge that, for instance, one or more members of a 100-person chat group will be minor—and therefore that it would be a crime to send the group an indecent message—would surely burden communication among adults.(42)
The District Court found that at the time of trial existing technology did not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying access to adults. The Court found no effective way to determine the age of a user who is accessing material through e-mail, mail exploders, newsgroups, or chat rooms. 929 F. Supp., at 845 (findings 90-94). As a practical matter, the Court also found that it would be prohibitively expensive for noncommercial—as well as some commercial—speakers who have Web sites to verify that their users are adults. Id., at 845–848 (findings 95–116). These limitations must inevitably curtail a significant amount of adult communication on the Internet. By contrast, the District Court found that "[d]espite its limitations, currently available user-based software suggests that a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be widely available." Id., at 842 (finding 73) (emphasis added).

The breadth of the CDA's coverage is wholly unprecedented. Unlike the regulations upheld in Ginsberg and Pacifica, the scope of the CDA is not limited to commercial speech or commercial entities. Its open-ended prohibitions embrace all nonprofit entities and individuals posting indecent messages or displaying them on their own computers in the presence of minors. The general, undefined terms "indecent" and "patently offensive" cover large amounts of nonpornographic material with serious educational or other value. Moreover, the "community standards" criterion as applied to the Internet means that any communication available to a nation-wide audience will be judged by the standards of the community most likely to be offended by the message. The regulated subject matter includes any of the seven "dirty words" used in the Pacifica monologue, the use of which the Government's expert acknowledged could constitute a felony. See Olsen Test., Tr. Vol. V, 53:16–54:10. It may also extend to discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalogue of the Carnegie Library.

For the purposes of our decision, we need neither accept nor reject the Government's submission that the First Amendment does not forbid a blanket prohibition on all "indecent" and "patently offensive" messages communicated to a 17-year old—no matter how much value the message may contain and regardless of parental approval. It is at least clear that the strength of the Government's interest in protecting minors is not equally strong throughout the coverage of this broad statute. Under the CDA, a parent allowing her 17-year-old to use the family computer to obtain information on the Internet that she, in her parental judgment, deems appropriate could face a lengthy prison term. See 47 U. S. C. A. §223(a)(2) (Supp. 1997). Similarly, a parent who sent his 17-year-old college freshman information on birth control via e-mail could be incarcerated even though neither
he, his child, nor anyone in their home community, found the material "indecent" or "patently offensive," if the college town's community thought otherwise.

The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA. It has not done so. The arguments in this Court have referred to possible alternatives such as requiring that indecent material be "tagged" in a way that facilitates parental control of material coming into their homes, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet—such as commercial web sites—differently than others, such as chat rooms. Particularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA, we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all.

VIII

In an attempt to curtail the CDA's facial overbreadth, the Government advances three additional arguments for sustaining the Act's affirmative prohibitions: (1) that the CDA is constitutional because it leaves open ample "alternative channels" of communication; (2) that the plain meaning of the Act's "knowledge" and "specific person" requirement significantly restricts its permissible applications; and (3) that the Act's prohibitions are "almost always" limited to material lacking redeeming social value.

The Government first contends that, even though the CDA effectively censors discourse on many of the Internet's modalities—such as chat groups, newsgroups, and mail exploders—it is nonetheless constitutional because it provides a "reasonable opportunity" for speakers to engage in the restricted speech on the World Wide Web. Brief for Appellants 39. This argument is unpersuasive because the CDA regulates speech on the basis of its content. A "time, place, and manner" analysis is therefore inapplicable. See Consolidated Edison Co. of N. Y. v. Public Serv. Comm'n of N. Y., 447 U. S. 530, 536 (1980). It is thus immaterial whether such speech would be feasible on the Web (which, as the Government's own expert acknowledged, would cost up to $10,000 if the speaker's interests were not accommodated by an existing Web site, not including costs for database management and age verification). The Government's position is equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books. In invalidating a number of laws that banned leafletting on the streets regardless of their content—we explained that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Schneider v. State (Town of Irvington), 308 U. S. 147, 163 (1939).
The Government also asserts that the "knowledge" requirement of both §§223(a) and (d), especially when coupled with the "specific child" element found in §223(d), saves the CDA from overbreadth. Because both sections prohibit the dissemination of indecent messages only to persons known to be under 18, the Government argues, it does not require transmitters to "refrain from communicating indecent material to adults; they need only refrain from disseminating such materials to persons they know to be under 18." Brief for Appellants 24. This argument ignores the fact that most Internet fora—including chat rooms, newsgroups, mail exploders, and the Web—are open to all comers. The Government's assertion that the knowledge requirement somehow protects the communications of adults is therefore untenable. Even the strongest reading of the "specific person" requirement of §223(d) cannot save the statute. It would confer broad powers of censorship, in the form of a "heckler's veto," upon any opponent of indecent speech who might simply log on and inform the would-be discoursers that his 17-year-old child—a "specific person . . . under 18 years of age," 47 U. S. C. A. §223(d)(1)(A) (Supp. 1997)—would be present.

Finally, we find no textual support for the Government's submission that material having scientific, educational, or other redeeming social value will necessarily fall outside the CDA's "patently offensive" and "indecent" prohibitions. See also n. 37, supra.

IX.

The Government's three remaining arguments focus on the defenses provided in §223(e)(5). First, relying on the "good faith, reasonable, effective, and appropriate actions" provision, the Government suggests that "tagging" provides a defense that saves the constitutionality of the Act. The suggestion assumes that transmitters may encode their indecent communications in a way that would indicate their contents, thus permitting recipients to block their reception with appropriate software. It is the requirement that the good faith action must be "effective" that makes this defense illusory. The Government recognizes that its proposed screening software does not currently exist. Even if it did, there is no way to know whether a potential recipient will actually block the encoded material. Without the impossible knowledge that every guardian in America is screening for the "tag," the transmitter could not reasonably rely on its action to be "effective."

For its second and third arguments concerning defenses—which we can consider together—the Government relies on the latter half of §223(e)(5), which applies when the transmitter has restricted access by requiring use of a verified credit card or adult identification. Such verification is not only technologically available but actually is used by commercial providers of sexually explicit material. These providers, therefore, would be protected by the defense. Under the findings of the District Court, however, it is not economically feasible for most noncommercial
speakers to employ such verification. Accordingly, this defense would not
significantly narrow the statute's burden on noncommercial speech. Even with
respect to the commercial pornographers that would be protected by the defense,
the Government failed to adduce any evidence that these verification techniques
actually preclude minors from posing as adults. (47) Given that the risk of criminal
sanctions "hovers over each content provider, like the proverbial sword of
Damocles," (48) the District Court correctly refused to rely on unproven future
technology to save the statute. The Government thus failed to prove that the
proffered defense would significantly reduce the heavy burden on adult speech
produced by the prohibition on offensive displays.

We agree with the District Court's conclusion that the CDA places an unacceptably
heavy burden on protected speech, and that the defenses do not constitute the sort
of "narrow tailoring" that will save an otherwise patently invalid unconstitutional
provision. In Sable, 492 U. S., at 127, we remarked that the speech restriction at
issue there amounted to "'burn[ing] the house to roast the pig.'" The CDA, casting a
far darker shadow over free speech, threatens to torch a large segment of the
Internet community.

At oral argument, the Government relied heavily on its ultimate fall-back position:
If this Court should conclude that the CDA is insufficiently tailored, it urged, we
should save the statute's constitutionality by honoring the severability clause, see 47
U. S. C. §608, and construing nonseverable terms narrowly. In only one respect is
this argument acceptable.

A severability clause requires textual provisions that can be severed. We will
follow §608's guidance by leaving constitutional textual elements of the statute
intact in the one place where they are, in fact, severable. The "indecency" provision,
47 U. S. C. A. §223(a) (Supp. 1997), applies to "any comment, request, suggestion,
proposal, image, or other communication which is obscene or indecent." (Emphasis
added.) Appellees do not challenge the application of the statute to obscene speech,
which, they acknowledge, can be banned totally because it enjoys no First
Amendment protection. See Miller, 413 U. S., at 18. As set forth by the statute, the
restriction of "obscene" material enjoys a textual manifestation separate from that
for "indecent" material, which we have held unconstitutional. Therefore, we will
sever the term "or indecent" from the statute, leaving the rest of §223(a) standing.
In no other respect, however, can §223(a) or §223(d) be saved by such a textual
surgery.

The Government also draws on an additional, less traditional aspect of the CDA's
severability clause, 47 U. S. C., §608, which asks any reviewing court that holds
the statute facially unconstitutional not to invalidate the CDA in application to
"other persons or circumstances" that might be constitutionally permissible. It
further invokes this Court's admonition that, absent "countervailing considerations," a statute should "be declared invalid to the extent it reaches too far, but otherwise left intact." Brockett v. Spokane Arcades, Inc., 472 U. S. 491, 503-504 (1985). There are two flaws in this argument.

First, the statute that grants our jurisdiction for this expedited review, 47 U. S. C. A. §561 (Supp. 1997), limits that jurisdictional grant to actions challenging the CDA "on its face." Consistent with §561, the plaintiffs who brought this suit and the three-judge panel that decided it treated it as a facial challenge. We have no authority, in this particular posture, to convert this litigation into an "as-applied" challenge. Nor, given the vast array of plaintiffs, the range of their expressive activities, and the vagueness of the statute, would it be practicable to limit our holding to a judicially defined set of specific applications.

Second, one of the "countervailing considerations" mentioned in Brockett is present here. In considering a facial challenge, this Court may impose a limiting construction on a statute only if it is "readily susceptible" to such a construction. Virginia v. American Bookseller's Assn., Inc., 484 U. S. 383, 397 (1988). See also Erznoznik, v. Jacksonville, 422 U. S. 205, 216 (1975) ("readily subject" to narrowing construction). The open-ended character of the CDA provides no guidance whatever for limiting its coverage.

This case is therefore unlike those in which we have construed a statute narrowly because the text or other source of congressional intent identified a clear line that this Court could draw. Cf., e.g., Brockett, 472 U. S., at 504-505 (invalidating obscenity statute only to the extent that word "lust" was actually or effectively excised from statute); United States v. Grace, 461 U. S. 171, 180-183 (1983) (invalidating federal statute banning expressive displays only insofar as it extended to public sidewalks when clear line could be drawn between sidewalks and other grounds that comport with congressional purpose of protecting the building, grounds, and people therein). Rather, our decision in United States v. Treasury Employees, 513 U. S. 454, 479, n. 26 (1995), is applicable. In that case, we declined to "dra[w] one or more lines between categories of speech covered by an overly broad statute, when Congress has sent inconsistent signals as to where the new line or lines should be drawn" because doing so "involves a far more serious invasion of the legislative domain."(49) This Court "will not rewrite a . . . law to conform it to constitutional requirements." American Booksellers, 484 U. S., at 397.(50)

XI

In this Court, though not in the District Court, the Government asserts that—in addition to its interest in protecting children—its "[e]qually significant" interest in fostering the growth of the Internet provides an independent basis for upholding the
constitutionality of the CDA. Brief for Appellants 19. The Government apparently assumes that the unregulated availability of "indecent" and "patently offensive" material on the Internet is driving countless citizens away from the medium because of the risk of exposing themselves or their children to harmful material.

We find this argument singularly unpersuasive. The dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention. The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.

For the foregoing reasons, the judgment of the district court is affirmed. It is so ordered.

SUPREME COURT OF THE UNITED STATES
No. 96–511

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, et al., APPELLANTS v. AMERICAN CIVIL LIBERTIES UNION et al.

on appeal from the united states district court for the eastern district of pennsylvania
[June 26, 1997]

Justice O'Connor, with whom The Chief Justice joins, concurring in the judgment in part and dissenting in part.

I write separately to explain why I view the Communications Decency Act of 1996 (CDA) as little more than an attempt by Congress to create "adult zones" on the Internet. Our precedent indicates that the creation of such zones can be constitutionally sound. Despite the soundness of its purpose, however, portions of the CDA are unconstitutional because they stray from the blueprint our prior cases have developed for constructing a "zoning law" that passes constitutional muster.

Appellees bring a facial challenge to three provisions of the CDA. The first, which the Court describes as the "indecent transmission" provision, makes it a crime to knowingly transmit an obscene or indecent message or image to a person the sender knows is under 18 years old. 47 U. S. C. A. §223(a)(1)(B) (May 1996 Supp.). What the Court classifies as a single "patently offensive display" provision, see ante, at 11, is in reality two separate provisions. The first of these makes it a crime to knowingly send a patently offensive message or image to a specific person under
the age of 18 ("specific person" provision). §223(d)(1)(A). The second criminalizes the display of patently offensive messages or images "in any manner available" to minors ("display" provision). §223(d)(1)(B). None of these provisions purports to keep indecent (or patently offensive) material away from adults, who have a First Amendment right to obtain this speech. Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) ("Sexual expression which is indecent but not obscene is protected by the First Amendment"). Thus, the undeniable purpose of the CDA is to segregate indecent material on the Internet into certain areas that minors cannot access. See S. Conf. Rep. No. 104-230, p. 189 (1996) (CDA imposes "access restrictions . . . to protect minors from exposure to indecent material").

The creation of "adult zones" is by no means a novel concept. States have long denied minors access to certain establishments frequented by adults. States have also denied minors access to speech deemed to be "harmful to minors." (2) The Court has previously sustained such zoning laws, but only if they respect the First Amendment rights of adults and minors. That is to say, a zoning law is valid if (i) it does not unduly restrict adult access to the material; and (ii) minors have no First Amendment right to read or view the banned material. As applied to the Internet as it exists in 1997, the "display" provision and some applications of the "indecent transmission" and "specific person" provisions fail to adhere to the first of these limiting principles by restricting adults' access to protected materials in certain circumstances. Unlike the Court, however, I would invalidate the provisions only in those circumstances.

I

Our cases make clear that a "zoning" law is valid only if adults are still able to obtain the regulated speech. If they cannot, the law does more than simply keep children away from speech they have no right to obtain—it interferes with the rights of adults to obtain constitutionally protected speech and effectively "reduce[s] the adult population . . . to reading only what is fit for children." Butler v. Michigan, 352 U.S. 380, 383 (1957). The First Amendment does not tolerate such interference. See id., at 383 (striking down a Michigan criminal law banning sale of books—to minors or adults—that contained words or pictures that ""tend[e]d to . . . corrupt[t] the morals of youth""’); Sable Communications, supra (invalidating federal law that made it a crime to transmit indecent, but nonobscene, commercial telephone messages to minors and adults); Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 74 (1983) (striking down a federal law prohibiting the mailing of unsolicited advertisements for contraceptives). If the law does not unduly restrict adults' access to constitutionally protected speech, however, it may be valid. In Ginsberg v. New York, 390 U.S. 629, 634 (1968), for example, the Court sustained a New York law that barred store owners from selling pornographic magazines to minors in part because adults could still buy those magazines.
The Court in Ginsberg concluded that the New York law created a constitutionally adequate adult zone simply because, on its face, it denied access only to minors. The Court did not question—and therefore necessarily assumed—that an adult zone, once created, would succeed in preserving adults' access while denying minors' access to the regulated speech. Before today, there was no reason to question this assumption, for the Court has previously only considered laws that operated in the physical world, a world that with two characteristics that make it possible to create "adult zones": geography and identity. See Lessig, Reading the Constitution in Cyberspace, 45 Emory L. J. 869, 886 (1996). A minor can see an adult dance show only if he enters an establishment that provides such entertainment. And should he attempt to do so, the minor will not be able to conceal completely his identity (or, consequently, his age). Thus, the twin characteristics of geography and identity enable the establishment's proprietor to prevent children from entering the establishment, but to let adults inside.

The electronic world is fundamentally different. Because it is no more than the interconnection of electronic pathways, cyberspace allows speakers and listeners to mask their identities. Cyberspace undeniably reflects some form of geography; chat rooms and Web sites, for example, exist at fixed "locations" on the Internet. Since users can transmit and receive messages on the Internet without revealing anything about their identities or ages, see Lessig, supra, at 901, however, it is not currently possible to exclude persons from accessing certain messages on the basis of their identity.

Cyberspace differs from the physical world in another basic way: Cyberspace is malleable. Thus, it is possible to construct barriers in cyberspace and use them to screen for identity, making cyberspace more like the physical world and, consequently, more amenable to zoning laws. This transformation of cyberspace is already underway. Lessig, supra, at 888–889. Id., at 887 (cyberspace "is moving . . . from a relatively unzoned place to a universe that is extraordinarily well zoned"). Internet speakers (users who post material on the Internet) have begun to zone cyberspace itself through the use of "gateway" technology. Such technology requires Internet users to enter information about themselves—perhaps an adult identification number or a credit card number—before they can access certain areas of cyberspace, 929 F. Supp. 824, 845 (ED Pa. 1996), much like a bouncer checks a person's driver's license before admitting him to a nightclub. Internet users who access information have not attempted to zone cyberspace itself, but have tried to limit their own power to access information in cyberspace, much as a parent controls what her children watch on television by installing a lock box. This user-based zoning is accomplished through the use of screening software (such as Cyber Patrol or SurfWatch) or browsers with screening capabilities, both of which search addresses and text for keywords that are associated with "adult" sites and, if the user wishes, blocks access to such sites. Id., at 839–842. The Platform for Internet Content Selection (PICS) project is designed to facilitate user-based zoning by
encouraging Internet speakers to rate the content of their speech using codes recognized by all screening programs. Id., at 838–839.

Despite this progress, the transformation of cyberspace is not complete. Although gateway technology has been available on the World Wide Web for some time now, id., at 845; Shea v. Reno, 930 F. Supp. 916, 933–934 (SDNY 1996), it is not available to all Web speakers, 929 F. Supp., at 845–846, and is just now becoming technologically feasible for chat rooms and USENET newsgroups, Brief for Federal Parties 37–38. Gateway technology is not ubiquitous in cyberspace, and because without it "there is no means of age verification," cyberspace still remains largely unzoned—and unzoneable. 929 F. Supp., at 846; Shea, supra, at 934. User-based zoning is also in its infancy. For it to be effective, (i) an agreed-upon code (or "tag") would have to exist; (ii) screening software or browsers with screening capabilities would have to be able to recognize the "tag"; and (iii) those programs would have to be widely available—and widely used—by Internet users. At present, none of these conditions is true. Screening software "is not in wide use today" and "only a handful of browsers have screening capabilities." Shea, supra, at 945–946. There is, moreover, no agreed-upon "tag" for those programs to recognize. 929 F. Supp., at 848; Shea, supra, at 945.

Although the prospects for the eventual zoning of the Internet appear promising, I agree with the Court that we must evaluate the constitutionality of the CDA as it applies to the Internet as it exists today. Ante, at 36. Given the present state of cyberspace, I agree with the Court that the "display" provision cannot pass muster. Until gateway technology is available throughout cyberspace, and it is not in 1997, a speaker cannot be reasonably assured that the speech he displays will reach only adults because it is impossible to confine speech to an "adult zone." Thus, the only way for a speaker to avoid liability under the CDA is to refrain completely from using indecent speech. But this forced silence impinges on the First Amendment right of adults to make and obtain this speech and, for all intents and purposes, "reduce[s] the adult population [on the Internet] to reading only what is fit for children." Butler, 352 U. S., at 383. As a result, the "display" provision cannot withstand scrutiny. Accord, Sable Communications, 492 U. S., at 126–131; Bolger v. Youngs Drug Products Corp., 463 U. S., at 73–75.

The "indecency transmission" and "specific person" provisions present a closer issue, for they are not unconstitutional in all of their applications. As discussed above, the "indecency transmission" provision makes it a crime to transmit knowingly an indecent message to a person the sender knows is under 18 years of age. 47 U. S. C. A. §223(a)(1)(B) (May 1996 Supp.). The "specific person" provision proscribes the same conduct, although it does not as explicitly require the sender to know that the intended recipient of his indecent message is a minor. §223(d)(1)(A). Appellant urges the Court to construe the provision to impose such a knowledge requirement, see Brief for Federal Parties 25–27, and I would do so.
See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U. S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

So construed, both provisions are constitutional as applied to a conversation involving only an adult and one or more minors—e.g., when an adult speaker sends an e-mail knowing the addressee is a minor, or when an adult and minor converse by themselves or with other minors in a chat room. In this context, these provisions are no different from the law we sustained in Ginsberg. Restricting what the adult may say to the minors in no way restricts the adult's ability to communicate with other adults. He is not prevented from speaking indecently to other adults in a chat room (because there are no other adults participating in the conversation) and he remains free to send indecent e-mails to other adults. The relevant universe contains only one adult, and the adult in that universe has the power to refrain from using indecent speech and consequently to keep all such speech within the room in an "adult" zone.

The analogy to Ginsberg breaks down, however, when more than one adult is a party to the conversation. If a minor enters a chat room otherwise occupied by adults, the CDA effectively requires the adults in the room to stop using indecent speech. If they did not, they could be prosecuted under the "indecency transmission" and "specific person" provisions for any indecent statements they make to the group, since they would be transmitting an indecent message to specific persons, one of whom is a minor. Accord, ante, at 30. The CDA is therefore akin to a law that makes it a crime for a bookstore owner to sell pornographic magazines to anyone once a minor enters his store. Even assuming such a law might be constitutional in the physical world as a reasonable alternative to excluding minors completely from the store, the absence of any means of excluding minors from chat rooms in cyberspace restricts the rights of adults to engage in indecent speech in those rooms. The "indecency transmission" and "specific person" provisions share this defect.

But these two provisions do not infringe on adults' speech in all situations. And as discussed below, I do not find that the provisions are overbroad in the sense that they restrict minors' access to a substantial amount of speech that minors have the right to read and view. Accordingly, the CDA can be applied constitutionally in some situations. Normally, this fact would require the Court to reject a direct facial challenge. United States v. Salerno, 481 U. S. 739, 745 (1987) ("A facial challenge to a legislative Act [succeeds only if] the challenger ... establish[es] that no set of circumstances exists under which the Act would be valid"). Appellees' claim arises under the First Amendment, however, and they argue that the CDA is facially invalid because it is "substantially overbroad"—that is, it "sweeps too broadly . . .
[and] penaliz[es] a substantial amount of speech that is constitutionally protected," Forsyth County v. Nationalist Movement, 505 U. S. 123, 130 (1992). See Brief for Appellees American Library Association et al. 48; Brief for Appellees American Civil Liberties Union et al. 39–41. I agree with the Court that the provisions are overbroad in that they cover any and all communications between adults and minors, regardless of how many adults might be part of the audience to the communication.

This conclusion does not end the matter, however. Where, as here, "the parties challenging the statute are those who desire to engage in protected speech that the overbroad statute purports to punish ... [t]he statute may forthwith be declared invalid to the extent that it reaches too far, but otherwise left intact." Brockett v. Spokane Arcades, Inc., 472 U. S. 491, 504 (1985). There is no question that Congress intended to prohibit certain communications between one adult and one or more minors. See 47 U. S. C. A. §223(a)(1)(B) (May 1996 Supp.) (punishing "[w]hoever ... initiates the transmission of [any indecent communication] knowingly that the recipient of the communication is under 18 years of age"); §223(d)(1)(A) (punishing "[w]hoever ... send[s] to a specific person or persons under 18 years of age [a patently offensive message]"). There is also no question that Congress would have enacted a narrower version of these provisions had it known a broader version would be declared unconstitutional. 47 U. S. C. §608 ("If . . . the application [of any provision of the CDA] to any person or circumstance is held invalid, . . . the application of such provision to other persons or circumstances shall not be affected thereby"). I would therefore sustain the "indecency transmission" and "specific person" provisions to the extent they apply to the transmission of Internet communications where the party initiating the communication knows that all of the recipients are minors.

II

Whether the CDA substantially interferes with the First Amendment rights of minors, and thereby runs afoul of the second characteristic of valid zoning laws, presents a closer question. In Ginsberg, the New York law we sustained prohibited the sale to minors of magazines that were "harmful to minors." Under that law, a magazine was "harmful to minors" only if it was obscene as to minors. 390 U. S., at 632–633. Noting that obscene speech is not protected by the First Amendment, Roth v. United States, 354 U. S. 476, 485 (1957), and that New York was constitutionally free to adjust the definition of obscenity for minors, 390 U. S., at 638, the Court concluded that the law did not "invad[e] the area of freedom of expression constitutionally secured to minors." Id., at 637. New York therefore did not infringe upon the First Amendment rights of minors. Cf. Erznoznik v. Jacksonville, 422 U. S. 205, 213 (1975) (striking down city ordinance that banned nudity that was not "obscene even as to minors").
The Court neither "accept[s] nor reject[s]" the argument that the CDA is facially overbroad because it substantially interferes with the First Amendment rights of minors. Ante, at 32. I would reject it. Ginsberg established that minors may constitutionally be denied access to material that is obscene as to minors. As Ginsberg explained, material is obscene as to minors if it (i) is "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable . . . for minors"; (ii) appeals to the prurient interest of minors; and (iii) is "utterly without redeeming social importance for minors." 390 U. S., at 633.

Because the CDA denies minors the right to obtain material that is "patently offensive"—even if it has some redeeming value for minors and even if it does not appeal to their prurient interests—Congress' rejection of the Ginsberg "harmful to minors" standard means that the CDA could ban some speech that is "indecent" (i.e., "patently offensive") but that is not obscene as to minors.

I do not deny this possibility, but to prevail in a facial challenge, it is not enough for a plaintiff to show "some" overbreadth. Our cases require a proof of "real" and "substantial" overbreadth, Broadrick v. Oklahoma, 413 U. S. 601, 615 (1973), and appellees have not carried their burden in this case. In my view, the universe of speech constitutionally protected as to minors but banned by the CDA—i.e., the universe of material that is "patently offensive," but which nonetheless has some redeeming value for minors or does not appeal to their prurient interest—is a very small one. Appellees cite no examples of speech falling within this universe and do not attempt to explain why that universe is substantial "in relation to the statute's plainly legitimate sweep." Ibid. That the CDA might deny minors the right to obtain material that has some "value," see ante, at 32–33, is largely beside the point. While discussions about prison rape or nude art, see ibid., may have some redeeming education value for adults, they do not necessarily have any such value for minors, and under Ginsberg, minors only have a First Amendment right to obtain patently offensive material that has "redeeming social importance for minors," 390 U. S., at 633 (emphasis added). There is also no evidence in the record to support the contention that "many [e]-mail transmissions from an adult to a minor are conversations between family members," ante, at 18, n. 32, and no support for the legal proposition that such speech is absolutely immune from regulation. Accordingly, in my view, the CDA does not burden a substantial amount of minors' constitutionally protected speech.

Thus, the constitutionality of the CDA as a zoning law hinges on the extent to which it substantially interferes with the First Amendment rights of adults. Because the rights of adults are infringed only by the "display" provision and by the "indecency transmission" and "specific person" provisions as applied to communications involving more than one adult, I would invalidate the CDA only to that extent. Insofar as the "indecency transmission" and "specific person" provisions prohibit the use of indecent speech in communications between an adult and one or more minors, however, they can and should be sustained. The Court
reaches a contrary conclusion, and from that holding that I respectfully dissent.

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Notes (opinion)

(1) "Congress shall make no law . . . abridging the freedom of speech." U. S. Const., Amdt. 1.

(2) The Court made 410 findings, including 356 paragraphs of the parties' stipulation and 54 findings based on evidence received in open court. See 929 F. Supp. at 830, n. 9, 842, n. 15.

(3) An acronym for the network developed by the Advanced Research Project Agency.

(4) Id., at 844 (finding 81).

(5) Id., at 831 (finding 3).

(6) Id., at 835 (finding 27).

(7) Id., at 842 (finding 74).

(8) Id., at 836 (finding 36).

(9) "Web publishing is simple enough that thousands of individual users and small community organizations are using the Web to publish their own personal 'home pages,' the equivalent of individualized newsletters about the person or organization, which are available to everyone on the Web." Id., at 837 (finding 42).

(10) Id., at 838 (finding 46).

(11) Id., at 844 (finding 82).

(12) Ibid. (finding 86).

(13) Ibid. (finding 85).

(14) Id., at 848 (finding 117).

(15) Id., at 844–845 (finding 88).

(16) Ibid.

(17) Id., at 845 (finding 89).
(18) Id., at 842 (finding 72).

(19) Ibid. (finding 73).

(20) Id., at 845 (finding 90): "An e-mail address provides no authoritative information about the addressee, who may use an e-mail 'alias' or an anonymous remailer. There is also no universal or reliable listing of e-mail addresses and corresponding names or telephone numbers, and any such listing would be or rapidly become incomplete. For these reasons, there is no reliable way in many instances for a sender to know if the e-mail recipient is an adult or a minor. The difficulty of e-mail age verification is compounded for mail exploders such as listservs, which automatically send information to all e-mail addresses on a sender's list. Government expert Dr. Olsen agreed that no current technology could give a speaker assurance that only adults were listed in a particular mail exploder's mailing list."

(21) Ibid. (finding 93).

(22) Id., at 846 (finding 102).

(23) Id., at 847 (findings 104–106):

"At least some, if not almost all, non-commercial organizations, such as the ACLU, Stop Prisoner Rape or Critical Path AIDS Project, regard charging listeners to access their speech as contrary to their goals of making their materials available to a wide audience free of charge."

"There is evidence suggesting that adult users, particularly casual Web browsers, would be discouraged from retrieving information that required use of a credit card or password. Andrew Anker testified that HotWired has received many complaints from its members about HotWired's registration system, which requires only that a member supply a name, e-mail address and self-created password. There is concern by commercial content providers that age verification requirements would decrease advertising and revenue because advertisers depend on a demonstration that the sites are widely available and frequently visited."

(24) See Exon Amendment No. 1268, 141 Cong. Rec. S8120 (June 9, 1995). See also id., at S8087. This amendment, as revised, became §502 of the Communications Act of 1996, 110 Stat. 133, 47 U. S. C. A. §§223(a)–(e) (Supp. 1997). Some Members of the House of Representatives opposed the Exon Amendment because they thought it "possible for our parents now to child-proof the family computer with these products available in the private sector." They also thought the Senate's approach would "involve the Federal Government spending vast sums of money trying to define elusive terms that are going to lead to a flood
of legal challenges while our kids are unprotected." These Members offered an amendment intended as a substitute for the Exon Amendment, but instead enacted as an additional section of the Act entitled "Online Family Empowerment." See 110 Stat. 137, 47 U. S. C. A. §230 (Supp. 1997); 141 Cong. Rec. H8468–H8472. No hearings were held on the provisions that became law. See S. Rep. No. 104–23 (1995), p. 9. After the Senate adopted the Exon amendment, however, its Judiciary Committee did conduct a one-day hearing on "Cyberporn and Children." In his opening statement at that hearing, Senator Leahy observed:

"It really struck me in your opening statement when you mentioned, Mr. Chairman, that it is the first ever hearing, and you are absolutely right. And yet we had a major debate on the floor, passed legislation overwhelmingly on a subject involving the Internet; legislation that could dramatically change—some would say even wreak havoc—on the Internet. The Senate went in willy-nilly, passed legislation, and never once had a hearing, never once had a discussion other than an hour or so on the floor." Cyberporn and Children: The Scope of the Problem, The State of the Technology, and the Need for Congressional Action, Hearing on S. 892 before the Senate Committee on the Judiciary, 104th Cong., 1st Sess., 7–8 (1995).

(25) Although the Government and the dissent break §223(d)(1) into two separate "patently offensive" and "display" provisions, we follow the convention of both parties below, as well the District Court's order and opinion, in describing §223(d)(1) as one provision.

(26) In full, § 223(e)(5) provides:

"(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."

(27) American Civil Liberties Union; Human Rights Watch; Electronic Privacy Information Center; Electronic Frontier Foundation; Journalism Education Association; Computer Professionals for Social Responsibility; National Writers Union; Clarinet Communications Corp.; Institute for Global Communications; Stop
Prisoner Rape; AIDS Education Global Information System; Bibliobytes; Queer Resources Directory; Critical Path AIDS Project, Inc.; Wildcat Press, Inc.; Declan McCullagh dba Justice on Campus; Brock Meeks dba Cyberwire Dispatch; John Troyer dba The Safer Sex Page; Jonathan Wallace dba The Ethical Spectacle; and Planned Parenthood Federation of America, Inc.

(28) American Library Association; America Online, Inc.; American Booksellers Association, Inc.; American Booksellers Foundation for Free Expression; American Society of Newspaper Editors; Apple Computer, Inc.; Association of American Publishers, Inc.; Association of Publishers, Editors and Writers; Citizens Internet Empowerment Coalition; Commercial Internet Exchange Association; CompuServe Incorporated; Families Against Internet Censorship; Freedom to Read Foundation, Inc.; Health Sciences Libraries Consortium; Hotwired Ventures LLC; Interactive Digital Software Association; Interactive Services Association; Magazine Publishers of America; Microsoft Corporation; The Microsoft Network, L. L. C.; National Press Photographers Association; Netcom On-Line Communication Services, Inc.; Newspaper Association of America; Opnet, Inc.; Prodigy Services Company; Society of Professional Journalists; Wired Ventures, Ltd.


(30) See also 929 F. Supp., at 877: "Four related characteristics of Internet communication have a transcendent importance to our shared holding that the CDA is unconstitutional on its face. We explain these characteristics in our Findings of fact above, and I only rehearse them briefly here. First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astounding diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers." According to Judge Dalzell, these characteristics and the rest of the District Court's findings "lead to the conclusion that Congress may not regulate indecency on the Internet at all." Ibid. Because appellees do not press this argument before this Court, we do not consider it. Appellees also do not dispute that the Government generally has a compelling interest in protecting minors from "indecent" and "patently offensive" speech.

(31) 390 U. S., at 639. We quoted from Prince v. Massachusetts, 321 U. S. 158, 166 (1944): "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."

(32) Given the likelihood that many E-mail transmissions from an adult to a minor are conversations between family members, it is therefore incorrect for the dissent to suggest that the provisions of the CDA, even in this narrow area, "are no
different from the law we sustained in Ginsberg." Post, at 8.

(33) Cf. Pacifica Foundation v. FCC, 556 F. 2d 9, 36 (CADC 1977) (Levanthal, J., dissenting), rev'd, FCC v. Pacifica Foundation, 438 U. S. 726 (1978). When Pacifica was decided, given that radio stations were allowed to operate only pursuant to federal license, and that Congress had enacted legislation prohibiting licensees from broadcasting indecent speech, there was a risk that members of the radio audience might infer some sort of official or societal approval of whatever was heard over the radio, see 556 F. 2d, at 37, n. 18. No such risk attends messages received through the Internet, which is not supervised by any federal agency.

(34) Juris. Statement 3 (citing 929 F. Supp., at 831 (finding 3)).

(35) "Indecent" does not benefit from any textual embellishment at all. "Patently offensive" is qualified only to the extent that it involves "sexual or excretory activities or organs" taken "in context" and "measured by contemporary community standards."

(36) See Gozlon-Peretz v. United States, 498 U. S. 395, 404 (1991) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion") (internal quotation marks omitted).


(38) Even though the word "trunk," standing alone, might refer to luggage, a swimming suit, the base of a tree, or the long nose of an animal, its meaning is clear when it is one prong of a three-part description of a species of gray animals.

(39) 413 U. S., at 30 (Determinations of "what appeals to the 'prurient interest' or is 'patently offensive'. . . . are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists"). The CDA, which implements the "contemporary
community standards" language of Miller, thus conflicts with the Conferees' own assertion that the CDA was intended "to establish a uniform national standard of content regulation." S. Conf. Rep., at 191.


(41) The lack of legislative attention to the statute at issue in Sable suggests another parallel with this case. Compare 492 U. S., at 129–130 ("[A]side from conclusory statements during the debates by proponents of the bill, as well as similar assertions in hearings on a substantially identical bill the year before, . . . the congressional record presented to us contains no evidence as to how effective or ineffective the FCC's most recent regulations were or might prove to be. . . . No Congressman or Senator purported to present a considered judgment with respect to how often or to what extent minors could or would circumvent the rules and have access to dial-a-porn messages") with n. 24, supra.

(42) The Government agrees that these provisions are applicable whenever "a sender transmits a message to more than one recipient, knowing that at least one of the specific persons receiving the message is a minor." Opposition to Motion to Affirm and Reply to Juris. Statement 4–5, n. 1.

(43) The Government asserts that "[t]here is nothing constitutionally suspect about requiring commercial Web site operators . . . to shoulder the modest burdens associated with their use." Brief for Appellants 35. As a matter of fact, however, there is no evidence that a "modest burden" would be effective.

(44) Transmitting obscenity and child pornography, whether via the Internet or other means, is already illegal under federal law for both adults and juveniles. See 18 U. S. C. §§1464–1465 (criminalizing obscenity); §2251 (criminalizing child pornography). In fact, when Congress was considering the CDA, the Government expressed its view that the law was unnecessary because existing laws already authorized its ongoing efforts to prosecute obscenity, child pornography, and child solicitation. See 141 Cong. Rec. S8342 (June 14, 1995) (letter from Kent Markus, Acting Assistant Attorney General, U. S. Department of Justice, to Sen. Leahy).

(45) Citing Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520 (1993), among other cases, appellees offer an additional reason why, in their view, the CDA fails strict scrutiny. Because so much sexually explicit content originates overseas, they argue, the CDA cannot be "effective." Brief for Appellees American Library Association et al. 33–34. This argument raises difficult issues regarding the intended, as well as the permissible scope of, extraterritorial application of the
CDA. We find it unnecessary to address those issues to dispose of this case.

(46) For the full text of §223(e)(5), see n. 26, supra.

(47) Thus, ironically, this defense may significantly protect commercial purveyors of obscene postings while providing little (or no) benefit for transmitters of indecent messages that have significant social or artistic value.


(49) As this Court long ago explained, "It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully be detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government." United States v. Reese, 92 U. S. 214, 221 (1876). In part because of these separation of powers concerns, we have held that a severability clause is "an aid merely; not an inexorable command." Dorchy v. Kansas, 264 U. S. 286, 290 (1924).

(50) See also Osborne v. Ohio, 495 U. S. 103, 121 (1990) (judicial rewriting of statutes would derogate Congress's "incentive to draft a narrowly tailored law in the first place").


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Appendix C

A Declaration of the Independence of Cyberspace

Governments of the Industrial World, you weary giants of flesh and steel, I come from cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.

We have no elected government, nor are we likely to have one, so I address you with no greater authority than that with which liberty itself always speaks. I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear.

Governments derive their just powers from the consent of the governed. You have neither solicited nor received ours. We did not invite you. You do not know us, nor do you know our world. Cyberspace does not lie within your borders. Do not think that you can build it, as though it were a public construction project. You cannot. It is an act of nature and it grows itself through our collective actions.

You have not engaged in our great and gathering conversation, nor did you create the wealth of our marketplaces. You do not know our culture, our ethics, or the unwritten codes that already provide our society more order than could be obtained by any of your impositions.

You claim there are problems among us that you need to solve. You use this claim as an excuse to invade our precincts. Many of these problems don't exist. Where there are real conflicts, where there are wrongs, we will identify them and address them by our means. We are forming our own Social Contract. This governance will arise according to the conditions of our world, not yours. Our world is different.

Cyberspace consists of transactions, relationships, and thought itself, arrayed like a standing wave in the web of our communications. Ours is a world that is both everywhere and nowhere, but it is not where bodies live.

We are creating a world that all may enter without privilege or prejudice accorded by race, economic power, military force, or station of birth.

We are creating a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity.
Your legal concepts of property, expression, identity, movement, and context do not apply to us. They are based on matter. There is no matter here.

Our identities have no bodies, so, unlike you, we cannot obtain order by physical coercion. We believe that from ethics, enlightened self-interest, and the commonwealth, our governance will emerge. Our identities may be distributed across many of your jurisdictions. The only law that all our constituent cultures would generally recognize is the Golden Rule. We hope we will be able to build our particular solutions on that basis. But we cannot accept the solutions you are attempting to impose.

In the United States, you have today created a law, the Telecommunications Reform Act, which repudiates your own Constitution and insults the dreams of Jefferson, Washington, Mill, Madison, DeToqueville, and Brandeis. These dreams must now be born anew in us.

You are terrified of your own children, since they are natives in a world where you will always be immigrants. Because you fear them, you entrust your bureaucracies with the parental responsibilities you are too cowardly to confront yourselves. In our world, all the sentiments and expressions of humanity, from the debasing to the angelic, are parts of a seamless whole, the global conversation of bits. We cannot separate the air that chokes from the air upon which wings beat.

In China, Germany, France, Russia, Singapore, Italy and the United States, you are trying to ward off the virus of liberty by erecting guard posts at the frontiers of Cyberspace. These may keep out the contagion for a small time, but they will not work in a world that will soon be blanketed in bit-bearing media.

Your increasingly obsolete information industries would perpetuate themselves by proposing laws, in America and elsewhere, that claim to own speech itself throughout the world. These laws would declare ideas to be another industrial product, no more noble than pig iron. In our world, whatever the human mind may create can be reproduced and distributed infinitely at no cost. The global conveyance of thought no longer requires your factories to accomplish.

These increasingly hostile and colonial measures place us in the same position as those previous lovers of freedom and self-determination who had to reject the authorities of distant, uninformed powers. We must declare our virtual selves immune to your sovereignty, even as we continue to consent to your rule over our bodies. We will spread ourselves across the Planet so that no one can arrest our thoughts.

We will create a civilization of the Mind in Cyberspace. May it be more humane and fair than the world your governments have made before.
Davos, Switzerland
February 8, 1996
John Perry Barlow
[This bill, based on the Model Antipornography Civil Rights Ordinance co-authored by Andrea Dworkin and Catharine A. MacKinnon, was introduced into the Judiciary Committee of the Commonwealth of Massachusetts in 1992.]

HOUSE . . . . . . . No. 5194

By Ms. Hildt of Amesbury, petition of Barbara Hildt, Mary Jeanette Murray, Nancy H. Evans, Marc D. Draisen, Barbara Gardner and Sally P. Kerans for legislation to protect the civil rights of women and children from pornography and sex discrimination. The Judiciary.

The Commonwealth of Massachusetts
In the Year One Thousand Nine Hundred and Ninety-Two

AN ACT TO PROTECT THE CIVIL RIGHTS OF WOMEN AND CHILDREN.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. It is hereby found and declared that pornography is a practice of sex discrimination which exists in the commonwealth and threatens the health, safety, peace, welfare and equality of its citizens. Pornography is a systematic practice of exploitation and subordination based on sex that differentially harms and disadvantages women through dehumanization, psychic assault, sexual exploitation, forced sex and prostitution, physical injury and social and sexual terrorism and inferiority presented as entertainment and existing laws have proven inadequate to solve such problem.

It is further found that the bigotry and contempt which pornography promotes and the acts of aggression which it fosters:
(a) diminish opportunities for equality of rights in employment, education, property, public accommodations, and public services;
(b) create public and private harassment, persecution, and denigration; promote injury and degradation such as rape, battery, sexual abuse of children, and prostitution, and inhibit just enforcement of laws against these acts;
(c) demean the reputations and diminish the occupational opportunities of individuals and groups on the basis of sex;
(d) expose individuals who appear in pornography against their will to contempt, ridicule, hatred, humiliation, and embarrassment and target them for abuse and physical aggression;
(e) lower the human dignity, worth, and civil status of women and damage mutual respect between the sexes;
(f) contribute significantly to restricting women in particular from full exercise of citizenship and participation in the life of the community; and
(g) undermine women's equal exercise of rights to speech and action guaranteed to all citizens under the laws and constitution of the commonwealth.

SECTION 2. The General Laws are hereby amended by inserting after chapter 151E the following chapter:

CHAPTER 151F. PROHIBITION OF CERTAIN SEX DISCRIMINATION.
Section 1. As used in this chapter, the term "pornography" shall mean the graphic sexually explicit subordination of women through pictures or words, including by electronic or other data retrieval systems, and shall further include the presentation of women's body parts, including but not limited to, vaginas, breasts or buttocks, such that women are reduced to such parts or the presentation of women:
(a) as dehumanized sexual objects, things or commodities;
(b) as sexual objects who enjoy humiliation or pain;
(c) as sexual objects experiencing sexual pleasure in rape, incest or other sexual assault;
(d) as sexual objects tied up or cut up or mutilated, bruised or physically hurt;
(e) in postures or positions of sexual submission, servility or display;
(f) being penetrated by objects or animals; or
(g) in scenarios of degradation, humiliation, injury, torture, shown as filthy or inferior, bleeding, bruised or hurt in a context that makes these conditions sexual.
(h) The use of men, children or transsexuals in the place of women shall also be deemed to be pornography for purposes of this definition.

Section 2.(a). It shall be sex discrimination to coerce, intimidate or fraudulently induce any person into performing for pornography. The injury incurred hereunder may occur upon any appearance or sale of any product resulting from such performance. The maker, seller, exhibitor or distributor of said pornography may be liable for damages and subject to an injunction to prohibit or eliminate such product from the public view. For purposes of this subsection proof of the following facts shall not, singly or in combination, disprove coercion:
(1) the person is a woman or a girl;
(2) the person is or has been a prostitute;
(3) the person has attained the age of majority;
(4) the person is connected by blood or marriage to anyone involved in or related to the making of the pornography;
(5) the person has previously had, or been thought to have had, sexual relations with anyone, including anyone involved in or related to the making of the pornography;
(6) the person has previously posed for sexually explicit pictures with or for anyone, including anyone involved in or related to the making of the pornography.
(7) anyone else, including a spouse or other relative, has given permission on the person's behalf;
(8) the person actually consented to a use of a performance that is then changed into pornography;
(9) the person knew that the purpose of the acts or events in question was to make pornography;
(10) the person showed no resistance or appeared to cooperate actively in the photographic sessions or events that produced the pornography;
(11) the person signed a contract, or made statements affirming a willingness to cooperate in the production of the pornography;
(12) no physical force, threats, or weapons were used in the making of the pornography; or
(13) the person was paid or otherwise compensated.

(b) It shall be sex discrimination to force pornography on a person in any place of employment, education, home, or any public place. Complaints may be brought only against the perpetrator of the force or the entity or institution responsible for the force.

(c) It shall be sex discrimination to assault, physically attack, or injure any person in a way that is directly caused by specific pornography. Complaints may be brought against the perpetrator of the assault or attack, or against the maker, distributor, seller, or exhibitor of the specific pornography.

(d) It shall be sex discrimination to defame any person through the unauthorized use in pornography of their proper name, image, or recognizable personal likeness. For purposes of this subsection, public figures shall be treated as private persons. Authorization once given may be revoked in writing any time prior to any publication.

(e) It shall be sex discrimination to produce, sell, exhibit, or distribute pornography, including through private clubs. This subsection applies only to pornography made using live or dead human beings or animals. Isolated parts shall not be the sole basis for complaints under this subsection.

City, state, and federally funded public libraries or private and public university and college libraries in which pornography is available for study, including on open shelves but excluding special display presentations, shall not be construed to be trafficking in pornography.

Any woman may bring a complaint hereunder as a woman acting against the subordination of women. Any man, child, or transsexual who alleges injury by pornography in the way women are injured by it may also complain.

Section 3. It shall not be a defense to a complaint brought under this chapter that the respondent did not know or intend that the materials at issue were pornography or sex discrimination.
No damages or compensation for losses shall be recoverable under subsection (e) of section two, or other than against the perpetrator of the assault or attack under subsection (c) of section two, unless the defendant knew or had reason to know that the materials were pornography.

Section 4. Any person who has a cause of action under this chapter, or their state, may complain directly to a court of competent jurisdiction for relief.

Any person who has a cause of action under this chapter, or their estate, may seek nominal, compensatory, punitive damages without limitation, including for loss, pain, suffering, reduced enjoyment of life, and special damages, as well as for reasonable costs, including attorneys' fees and costs of investigation. In claims under subsection (e) of section two, or other than against the perpetrator of the assault or attack under subsection (c) of section two, no damages or compensation for losses shall be recoverable against a maker for pornography made, against a distributor for pornography distributed, against a seller for pornography sold, or against an exhibitor for pornography exhibited, prior to the effective date of this chapter.

Any person who violates this law may be enjoined except that:
(a) In actions under subsection (e) of section two, and other than against the perpetrator of the assault or attack under subsection (c) of section two, no temporary or permanent injunction shall issue prior to a final judicial determination that the challenged activities constitute a violation of this law.
(b) No temporary or permanent injunction shall extend beyond such pornography that, having been described with reasonable specificity by said order, is determined to be validly proscribed under this chapter.

Section 5. The availability of relief under this chapter is not intended to be exclusive and shall not preclude, or be precluded by, the seeking of any other relief, whether civil or criminal.

Section 6. Complaints pursuant to this chapter shall be brought within six years of the accrual of the cause of action or from when the complainant reaches the age of majority, whichever is later.