RECENT DEVELOPMENTS

FREE SPEECH AND FREER SPEECH: *Glickman v. Wileman Bros. & Elliot, Inc.*, 117 S. Ct. 2130 (1997).

Earlier this century, Justice Oliver Wendell Holmes wrote: "[T]he ultimate good desired is better reached by free trade in ideas . . . [T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."[1] Although these famous words may still contain an "echo of the infinite,"[2] the fundamental idea was soon lost. In 1942, the United States Supreme Court announced that the First Amendment[3] does not protect purely "commercial" speech.[4] Fittingly, on the Bicentennial of our Republic, the Court reversed its position and declared that "commercial speech, like other varieties, is protected" by the First Amendment.[5] But the Court has since adhered to the proposition that "commercial" speech should receive less constitutional protection than noncommercial speech.[6] Today, the Court and its observers

1. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

2. OLIVER WENDELL HOLMES, JR., THE ESSENTIAL HOLMES 160, 177 (Richard A. Posner ed., 1992).

3. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

4. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942) (sustaining an ordinance banning the distribution of commercial handbills in public places). In declining to extend First Amendment protection to "commercial" speech, the Court brusquely held, "[W]e are . . . clear that the Constitution imposes no . . . restraint on government as respects purely commercial advertising." *Id.* at 54. In explaining the *Valentine* Court's distinction, the Court later defined "commercial" speech as speech that does "no more than propose a commercial transaction . . . ." *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973).

5. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) (invalidating on First Amendment grounds a state law prohibiting pharmacists from advertising drug prices).

6. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985). In *Zauderer*, the Court reversed an official sanction of the Ohio state bar imposed on an attorney who ran illustrated and allegedly misleading newspaper advertisements soliciting legal employment and proposing contingent-fee representation in criminal cases. "There is no longer any room to doubt that what has come to be known as 'commercial speech' is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded 'noncommercial speech.'" *Id.* at 637.

continue to struggle with just where to draw the line,[7] and the result has been a trail of cases lacking rational coherence.

Last Term, the Court failed to seize an opportunity to clarify its commercial-speech jurisprudence. In *Glickman v. Wileman Bros. & Elliot, Inc.*,[8] the Court found no First Amendment violation in a federally compelled collective advertising campaign promoting "California Summer Fruits."[9] In fact, the Court found that the case raised no First Amendment issue at all. Rather, applying the rational basis test, it sustained the program as an "economic regulation."[10] In so doing, the Court forewent an opportunity to address the inadequacy of the test for commercial-speech restrictions enunciated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York.*[11] As a result, lawyers and litigants will continue to suffer with the uncertainties of the *Central Hudson* test, which leaves too much room for judicial whim.[12] The Court should replace the uncertainty of the *Central Hudson* test with strict scrutiny for government restrictions on speech, whether commercial or noncommercial.

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7. *See generally, e.g.*, Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 629-31 (1990) (presenting reasons for abandoning the commercial-noncommercial distinction); Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777 (1993) (arguing for more First Amendment protection for commercial speech); *see also* Ronald H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 8-9, 13-15 (1977) (arguing for parallel treatment of "markets for ideas" and "markets for goods"). *But see* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971) ("Constitutional protection should be accorded only to speech that is explicitly political."). Professor Bork bases his conclusion on the view that the First Amendment is not an absolute and that, moreover, its drafters and the Framers had no well-developed theory of free speech. *See id.* at 21, 22.

8. 117 S. Ct. 2130 (1997).

9. *Id.* at 2135, 2139. *Glickman* differs from many prior commercial-speech cases in that it does not involve a per se ban on speech. Instead, *Glickman* is a "compelled" speech case, in which a person alleges a First Amendment violation because he is forced to support a message to which he objects.

10. *Id.* at 2142.

11. 447 U.S. 557 (1980) (finding that commercial speech is accorded First Amendment protection, albeit of a lower grade than that guaranteed other speech forms, if it concerns lawful activity and is not misleading, and holding that the constitutionality of a challenged restriction is evaluated as to (1) whether the asserted governmental interest to be served by the restriction is substantial; (2) whether the regulation directly advances the asserted governmental interest; and (3) whether the regulation is not more extensive than necessary).

12. *See, e.g.*, Valerie D. Wood, Recent Development, *The Precarious Position of Commercial Speech*, 19 HARV. J.L. & PUB. POL'Y 612, 623-25 (1996) (arguing that the vagueness of the *Central Hudson* test promotes severe uncertainty as to the constitutionality of governmental restrictions on commercial speech).

Wileman Bros. & Elliot, Inc. (Wileman) was the largest of several producers, packers, and marketers of California nectarines, peaches, and plums that challenged U.S. Department of Agriculture (USDA) marketing orders regulating crop quality and size[13] and assessments levied to pay for a collective general advertising campaign.[14] After lengthy administrative proceedings and an adverse judicial decision,[15] Wileman and the other petitioners appealed.[16] The Ninth Circuit unanimously ruled that the assessments violated the First Amendment.[17] In doing so, the court applied the *Central Hudson* test, under which an official restriction on otherwise lawful, non-misleading "commercial" speech is unconstitutional unless: (1) the asserted governmental interest is substantial; (2) the restriction directly advances that interest; and (3) the restriction is narrowly tailored.[18] Resting on Ninth Circuit precedent[19]

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13. *See* 7 U.S.C. §§ 608c(15)(A), 608c(15)(B) (1994) (granting fruit handlers a right to petition the United States District Court for relief from an adverse ruling by the Secretary of Agriculture); 7 C.F.R. pt. 916 (1998) (regulating California nectarines).

14. The assessments challenged in *Glickman* were levied pursuant to marketing orders promulgated under the Agricultural Marketing Agreement Act (AMAA) of 1937, 50 Stat. 346 (codified as amended at 7 U.S.C. §§ 601-26 (1994)), authorizing the Secretary of Agriculture to circulate marketing orders for certain fruits and vegetables, regulating the quality and quantity of production. *See* 7 U.S.C. §§ 608c(6), 608c(7) (1994). Expenses for administration, inspection, research, and advertising and promotion are funded through assessments levied on handlers based on shipping volume. *See* 7 U.S.C. § 610(b)(2)(ii) (1994). Industry members are forced to join the programs on the theory that allowing individual producers to "opt out" would create a "free rider" problem—non-participants would profit from the advertising or promotions without paying for them. The "California Summer Fruits" program is one of a constellation of similar "self-financing" promotional measures currently administered by the USDA in other areas of the agriculture industry. *See, e.g.*, 7 U.S.C. §§ 2101-18 (1994) (cotton); 7 U.S.C. §§ 2611-27 (1994) (potatoes); 7 U.S.C. §§ 2701-18 (1994) (eggs); 7 U.S.C. §§ 2901-11 (1994) (beef); 7 U.S.C. §§ 4501-13 (1994 and West Supp. 1998) (dairy products); 7 U.S.C. §§ 4601-12 (1994 and West. Supp. 1998) (honey); 7 U.S.C. §§ 4801-19 (1994) (pork); 7 U.S.C. §§ 4901-16 (1994) (watermelon).

15. Wileman first challenged the generic advertising regulations in June 1988, before an administrative law judge (ALJ). *See Glickman*, 117 S. Ct. at 2135; Wileman Bros. & Elliot Inc. v. Espy, 58 F.3d 1367, 1373 (9th Cir. 1995). In May 1991, the ALJ ruled for Wileman. *See Wileman*, 58 F.3d at 1373. In September 1991, the USDA Judicial Officer reversed the ALJ's decision. *See id.* at 1374. Wileman then joined 15 other fruit growers in a review of the USDA ruling by filing suit in the Eastern District of California, which in January 1993 granted summary judgment in favor of the Secretary. *See id.* (That district court decision is unpublished.)

16. *See Wileman*, 58 F.3d 1367.

17. *See Wileman*, 58 F.3d at 1380, 1386.

18 *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 564 (1980).

19. *See* Cal-Almond, Inc. v. U.S. Dep't of Agric., 14 F.3d 429 (9th Cir. 1993).

interpreting *Abood v. Detroit Board of Education*,[20] Judge O'Scannlain's opinion[21] stated that the "First Amendment right of freedom of speech includes a right not to be compelled to render financial support for others' speech."[22] Although the court agreed that the government's interest in enhancing the profits of peach and nectarine growers was substantial, it held that the advertising program did not satisfy the second or third prongs of *Central Hudson*.[23] The Court agreed that the program appeared to increase peach and nectarine sales, but it was not persuaded that generic advertising was more effective than individualized advertising.[24] The court also noted that the program was not narrowly tailored because it gave the handlers no credit for their individual advertising efforts and because California was the only state in which such programs were operative.[25]

The Supreme Court granted certiorari[26] to resolve a conflict among the circuits.[27] In a 5-to-4 decision,[28] the Court reversed and remanded, holding that the compelled advertising scheme was merely "a question of economic policy for Congress and the Executive to resolve"[29] and "a species of economic regulation"[30] that should be evaluated under the rational basis test.[31] Justice

20. 431 U.S. 209 (1977) (holding that the First Amendment prohibits a union and board of education from requiring as a condition of employment that a teacher finance an ideological cause to which he objects).

21. The opinion was joined by Circuit Judge Tang and Judge Merhige, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

22. *Wileman*, 58 F.3d at 1377.

23. *See id.*

24. *See id.* at 1379.

25. *See id.* at 1380.

26. *See* Glickman v. Wileman Bros. & Elliot, Inc., 116 S. Ct. 1875 (1996) (mem.).

27. Whereas the Ninth Circuit in *Wileman* applied both commercial- and compelled-speech case law to invalidate USDA advertising assessments for the "California Summer Fruits" campaign, the Third Circuit turned only to the associational-freedom case law to reach a different result several years earlier in a strikingly similar case involving USDA assessments in a beef promotional program. *See United States v. Frame*, 885 F.2d 1119 (3rd Cir. 1989), *cert. denied* 493 U.S. 1094 (1990) (mem.) (rejecting a cattle rancher's challenge of mandatory assessments under the Beef Promotion and Research Act of 1976). Though it found a First Amendment issue, the Third Circuit in *Frame* was satisfied that the importance of the governmental interest justified what it called a "slight" incursion on cattle ranchers' associational and free-speech rights. *See id.* at 1137.

28. Justice Stevens delivered an opinion in which Justices O'Connor, Kennedy, Ginsburg, and Breyer joined.

29. *See Glickman*, 117 S. Ct. at 2138.

30. *Id.* at 2142.

31. *See id.*

Stevens's majority opinion dismissed the Ninth Circuit's concern regarding the comparative effectiveness of generic vis-à-vis individualized advertising[32] and declined to apply *Central Hudson.*

In distinguishing past cases triggering First Amendment analysis, the Court advanced three propositions. First, the generic advertising campaign at issue in *Glickman* "impose[d] no restraint on the freedom of any producer to communicate any message to any audience,"[33] which distinguished it from the facts of *Central Hudson, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[34] and *44 Liquormart, Inc. v. Rhode Island.*[35] Second, the advertising program did not "compel any person to engage in actual or symbolic speech,"[36] thus differentiating the regulations found unenforceable in *West Virginia Board of Education v. Barnette*,[37] *Wooley v. Maynard*,[38] *Riley v. National Federation of Blind of North Carolina, Inc.*,[39] and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*[40] Third, the program did not "compel the producers to endorse or to finance any political or ideological views,"[41] unlike the programs invalidated in *International Association of Machinists v. Street*,[42] *Abood*,[43] and *Keller v. State Bar of California.*[44]

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32. *See id.* at 2138.

33. *Id.* at 2138.

34. 425 U.S. 748 (1976) (invalidating on First Amendment grounds a state law prohibiting pharmacists from advertising drug prices).

35. 517 U.S. 484 (1996) (holding that a complete state ban on advertisement of liquor prices violates the First Amendment).

36. *Glickman*, 117 S. Ct. at 2138.

37. 319 U.S. 624 (1943) (holding that the First Amendment bars enforcement of a regulation requiring children in public schools to salute the American flag).

38. 430 U.S. 705 (1977) (invalidating on First Amendment grounds a New Hampshire statute making it a crime to obscure the state motto, "Live Free or Die," on state automobile license plates).

39. 487 U.S. 781 (1988) (holding that professional solicitation of charitable contributions is protected speech and that (1) a state's percentage definition of a reasonable fee was not narrowly tailored to prevent fraud; (2) a requirement that professional fundraisers disclose the ultimate use of funds was unduly burdensome and unconstitutional; and (3) a licensing requirement for professional fundraisers was unconstitutional).

40. 515 U.S. 557 (1995) (holding that the First Amendment bars state courts' application of public accommodation law essentially to require an Irish-American gay, lesbian, and bisexual group to alter content of its expression in a St. Patrick's Day parade).

41. *Glickman*, 117 S. Ct. at 2138.

42. 367 U.S. 740 (1961) (holding that the First Amendment bars a union from supporting political causes with the dues of an objecting employee of a union shop).

To the growers' argument that the advertising assessments offended the First Amendment because they reduced growers' individual advertising budgets, the Court responded that this was merely an "incidental effect," insufficient to trigger strict scrutiny.[45] Moreover, the Court noted that the Ninth Circuit, rejecting this portion of the growers' "expansive" argument, invalidated the assessments instead on the grounds that the assessments compelled speech.[46] But, distinguishing *Barnette* and *Wooley,* the Court rejected the Ninth Circuit's holding as well, noting that the growers are "not required themselves to speak, but are merely required to make contributions for advertising . . . . Furthermore, the advertising is attributed not to them, but to the California Tree Fruit Agreement or 'California Summer Fruits.'" [47]

Whereas the Ninth Circuit read *Abood* to require sufficient government justification for compelling an individual to finance the speech of others,[48] Justice Stevens limited *Abood* to the proposition that the First Amendment protects one from forced contribution to an organization whose expressive activities conflict with one's "freedom of belief."[49] The Court noted that the advertising assessments were not inconsistent with the *Abood* concept of the First Amendment,[50] "that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."[51] The Court did not find a "crisis of conscience"[52] in the fact that Wileman and the other growers

43. 431 U.S. 209 (1977) (holding that the First Amendment prohibits a union and board of education from requiring as a condition of employment that a teacher finance an ideological cause to which he objects).

44. 496 U.S. 1 (1990) (holding that the First Amendment disallows state bar's use of dissenting members' compulsory dues to finance political and ideological activities not necessarily or reasonably related to regulating the legal profession or improving the quality of legal services).

45. *Glickman,* 117 S. Ct. at 2138-39.

46. *See id.* at 2139.

47. *Id.* Justice Souter, in a portion of his dissent joined by Chief Justice Rehnquist and Justices Scalia and Thomas, exposed this distinction as a triviality. *See id.* at 2147 (Souter, J., dissenting).

48. *See* Wileman Bros. & Elliot Inc. v. Espy, 58 F.3d 1367, 1373 (9th Cir. 1995).

49. *Glickman,* 117 S. Ct. at 2139.

50. *See id.* at 2139-40.

51. Abood v. Detroit Bd. Of Educ., 431 U.S. 209, 235 (1977) (citing Elrod v. Burns, 427 U.S. 347, 356-57 (1976); Stanley v. Georgia, 394 U.S. 557, 565 (1969); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940)).

52. *Glickman,* 117 S. Ct. at 2139.

stated that they would prefer to advertise independently, or that they objected to financing the advertising through forced contributions.[53] Rather, it cited *Lehnert v. Ferris Faculty Association*[54] for the proposition that "assessments to fund a lawful collective program may indeed sometimes be used to pay for speech over the objection of some members of the group."[55]

In dissent,[56] Justice Souter criticized Justice Stevens's narrow reading of *Abood*[57] and his broad reading of *Lehnert*.[58] First, Justice Souter asserted that *Abood* did not announce a general approval of enforced speech subsidies that serve the goals of permissible economic regulation.[59] Instead, Justice Souter claimed that *Abood* recognized that even with respect to collective bargaining, forced funding of union activities impinges on employees' First Amendment rights because the employees might disagree with union positions on related issues falling within the First Amendment.[60] Moreover, Justice Souter contended that *Lehnert* further restricted *Abood*'s already limited approval of laws affecting First Amendment interests.[61] *Lehnert* established that a mandatory fee must be "germane to some otherwise legitimate regulatory scheme," "be justified by vital policy interests," and "not add significantly to the burdening of free speech inherent to achieving those interests."[62] Applying *Lehnert* to the "California Summer Fruits" advertising assessments, Justice Souter noted:

> [P]roduce markets can be directly regulated in the interest of stability and growth without espousing the virtues of fruit.

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53. *See id.* at 2140.

54. 500 U.S. 507, 529 (1991). *Lehnert* held that although the First Amendment protects dissenting union members from assessment for the cost of publications unrelated to collective bargaining, it does not prohibit such assessments for those portions of the publications that treat "teaching and education generally, professional development, unemployment, job opportunities, award programs . . . and other miscellaneous matters."). *Id.* at 529.

55. *Glickman*, 117 S. Ct. at 2140.

56. Justice Souter entered a dissenting opinion in which Chief Justice Rehnquist and Justice Scalia joined in full and Justice Thomas joined in part. Justice Thomas also filed a dissenting opinion in which Justice Scalia joined in part.

57. *See Glickman*, 117 S. Ct. at 2142-43 (Souter, J., dissenting).

58. *See id.* at 2146 (Souter, J., dissenting).

59. *See id.* (Souter, J., dissenting).

60. *See id.* at 2145 (Souter, J., dissenting).

61. *See id.* at 2146 (Souter, J., dissenting).

62. *Glickman*, 117 S. Ct. at 2146 (Souter, J., dissenting) (quoting Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 519 (1991)).

> They were, indeed, for a quarter century, and still are under the many agricultural marketing orders that authorize no advertising schemes.[63]

Therefore, according to Justice Souter, because the advertising assessments failed *Lehnert*'s more restrictive test, they also failed *Abood*.

Second, Justice Souter claimed that, even for a non-political or non-ideological message, *Abood* did not justify compulsory funding of speech simply because the government neither forbids speech nor attributes speech to an objector.[64] Rather, Justice Souter declared, speech falling within the First Amendment remains "outside the government's power to coerce or to support by mandatory subsidy without further justification."[65] He noted that, although *Abood* did involve political speech, it held that the coercion of expenditures for protected speech no less infringes on the First Amendment than a prohibition of such expenditures.[66] This, he contended, was a corollary of the bedrock principle that compelled speech is just as offensive as compelled silence.[67]

Third, Justice Souter criticized as uncertain and irrelevant the Court's assumption that Wileman and the other growers did not disagree with the advertisements they were funding.[68] In fact, he maintained, the Court itself noted Wileman's disagreement with some of the advertising messages it was forced to fund. Some of the ads promoted specific varieties of fruit marketed exclusively by Wileman's competitors, and other ads characterized California tree fruits as a fungible commodity, whereas Wileman claimed its fruit was superior.[69] Although the Court trivialized these points of disagreement, Justice Souter argued that "they in fact relate directly to a vendor's recognized First Amendment interest in touting his wares as he sees fit, so long as he does not

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63. *Id.* at 2147 (Souter, J., dissenting).

64. *See id.* at 2147 (Souter, J., dissenting).

65. *Id.* (Souter, J., dissenting).

66. *See id.* (Souter, J., dissenting) (quoting Abood v. Detroit Bd. Of Educ., 431 U.S. 209, 234 (1977)).

67. *See Glickman*, 117 S. Ct. at 2147 (Souter, J., dissenting) (citing Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 573 (1995); Riley v. National Fed'n of Blind of N.C., Inc., 487 U.S. 781, 796-97 (1988); Wooley v. Maynard, 430 U.S. 705, 714 (1977); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943)).

68. *See id.* (Souter, J., dissenting).

69. *See id.* (Souter, J., dissenting) (referring to *id.* at 2137-38).

mislead."[70] Justice Souter also rejected the majority's notion that existing compelled-speech cases impose a requirement of disagreement.[71]

Whereas Justice Souter would have invalidated the assessments under all three prongs of *Central Hudson*,[72] Justice Thomas remained the constitutional maverick: "I continue to disagree with the use of the *Central Hudson* balancing test and the discounted weight given to commercial speech generally."[73] He noted that, in cases such as *Central Hudson*, *Abood*, and *Buckley v. Valeo*,[74] the Court has held that financial support of advertising is speech.[75] Further, the Court has held that compelling speech no less violates the First Amendment than restricting speech.[76] Yet, the Court was now suggesting "that forcing fruit-growers to contribute to a collective advertising campaign does not even involve speech, while at the same time effectively conceding that forbidding a fruit-grower from making those same contributions

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70. *Id.* at 2147-48 (Souter, J., dissenting).

71. *See id.* at 2148 (Souter, J., dissenting).

72. *See Glickman*, 117 S. Ct. at 2149 (Souter, J., dissenting).

73. *Id.* at 2155 (Thomas, J., dissenting). For an earlier instance of Justice Thomas's general objection to *Central Hudson*, see 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 522 (1996) ("I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech") (Thomas, J., concurring in part and concurring in the judgment). In *44 Liquormart*, Justice Thomas grounded his disapproval of *Central Hudson* on two propositions: (1) it is paternalistic; and (2) it necessarily requires an omniscient and activist judiciary. *See id.* at 527-28 (Thomas, J., concurring in part and concurring in the judgment). He noted his objection to the application of *Central Hudson* where

> government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace . . . such an 'interest' is *per se* illegitimate and can no more justify regulation of 'commercial' speech than it can justify regulation of 'noncommercial' speech.

Id. at 518 (Thomas, J., concurring in part and concurring in the judgment).

74. 424 U.S. 1 (1976) (holding that federal limitations on campaign expenditures by the candidate, his supporters, or the campaign itself violate the First Amendment).

75. *See Glickman*, 117 S. Ct. at 2156 (Thomas, J., dissenting).

76. *See id.* (Thomas, J., dissenting) (citing Turner Broadcasting System, Inc. v. FCC, 117 S. Ct. 1174 (1997) (invalidating coerced carriage of broadcast signals by cable providers); Pacific Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1 (1986) (invalidating coerced inclusion of private messages in utility-bill envelopes); PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) (invalidating coerced creation of a speaker's forum on private property); Abood v. Detroit Bd. Of Educ., 431 U.S. 209 (1977) (invalidating coerced payment of union dues used for speech); Wooley v. Maynard, 430 U.S. 705 (1977) (invalidating coerced display of state motto on license plate); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (invalidating coerced right of reply to newspaper editorials); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (invalidating coerced flag salute)).

voluntarily would violate the First Amendment."[77] Justice Thomas summarized the majority's inconsistency:

> Either (1) paying for advertising is not speech at all, while such activities as draft card burning, flag burning, armband wearing, public sleeping, and nude dancing are, or (2) compelling payment for third party communication does not implicate speech, and thus the Government would be free to force payment for a whole variety of expressive conduct that it could not restrict. In either case, surely we have lost our way.[78]

For lawyers and litigants who were expecting the Court to clarify its commercial-speech doctrine, *Glickman* must have been a disappointment. In refusing to recognize a First Amendment issue in this case, the Court blatantly ignored precedent establishing that advertising is speech,[79] that coercing an individual to finance others' speech amounts to coercing speech,[80] and that the First Amendment prohibits compelled speech as it does compelled silence.[81] Furthermore, the Court ignored its ostensible reason for granting certiorari—resolution of circuit disagreement about the appropriate constitutional resolution of commercial-speech issues such as the one raised in *Glickman*.[82] To the contrary, the Court only added to the uncertainty. Rather than seizing this opportunity to clarify commercial-speech doctrine, the Court refused to acknowledge a First Amendment issue at all. Instead, it should have imparted more certainty and clarity on its free-speech jurisprudence by

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77. *Id.* (Thomas, J., dissenting).

78. *See id.* at 2156 (Thomas, J., dissenting) (footnote omitted).

79. *See* Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557 (1980) (ruling that New York may not, consistent with the First Amendment, prohibit electrical utilities from promotional advertising); *see also* Buckley v. Valeo, 424 U.S. 1 (1976).

80. The *Glickman* Court failed to recognize the USDA advertising assessments as impinging on free-speech rights, but it also declined to apply any of the apposite association rights cases. *See, e.g., Pacific Gas & Elec.*, 475 U.S. at 15 (striking down in a plurality decision a state public-utility board requirement that a private utility provide access in its billing envelope to other views, and announcing that a state may not require a public-utility company to "associate with speech with which [it] may disagree"); *see also* Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate"); *Abood*, 431 U.S. at 234-35.

81. *See* Riley v. National Fed'n of Blind of N.C., Inc., 487 U.S. 781, 796-97 (1988) ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say.").

82. *See* Glickman v. Wileman Bros. & Elliot, Inc., 517 U.S. 1232 (1996) (mem.).

abandoning altogether the distinction between commercial and noncommercial speech.

The current state of commercial-speech jurisprudence is uncertain for several reasons. The currently used *Central Hudson* test creates an artificial distinction between "commercial" and "noncommercial" speech. Justice Stevens himself noted that the *Central Hudson* test bears no relation to the reasons for allowing more regulation of commercial speech than other speech.[83] He also lamented the "artificiality [in] a rigid commercial/noncommercial distinction."[84] In creating and enforcing a lower rung for commercial speech on the ladder of First Amendment interests,[85] the Court has followed an established pattern of adopting deceptively simple categorizations. Other well-known examples from other doctrinal areas include the distinctions between "direct" effect and "indirect" effect in the regulation of interstate commerce under the Commerce Clause,[86] and "procedural" and "substantive" due process under the Fourteenth Amendment.[87] While many of these artificial distinctions have already been discredited, the Court still clings desperately to the commercial-noncommercial distinction.[88]

Moreover, the arguments advanced by proponents for the distinction do not withstand scrutiny. First, they contend that the Framers were concerned primarily (if not exclusively) with

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83. *See, e.g.*, Rubin v. Coors Brewing Co., 514 U.S. 476, 493 (1995) (Stevens, J., concurring) ("In my opinion the borders of the commercial-speech category are not nearly as clear as the Court has assumed, and its four-part test is not related to the reasons for allowing more regulation of commercial speech than other speech.").

84. *Id.* at 494 (Stevens, J., concurring) (extending commercial-speech protection to labels on alcoholic beverages, but retaining the commercial-noncommercial dichotomy).

85. *See, e.g.*, Valentine v. Christensen, 316 U.S. 52, 54 (1942). In *Pittsburgh Press*, the Court elaborated on the nature of the distinction. *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973). The Court spent a good part of the next thirty years further defining the commercial-noncommercial distinction, but individual members of the Court quickly called into question the validity of complete exemption of commercial speech from First Amendment protection. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976). For an excellent brief history of the commercial-speech doctrine since *Valentine* and a presentation of reasons for abandoning the distinction, see Kozinski & Banner, *supra* note 7.

86. *See, e.g.*, Smith v. Alabama, 124 U.S. 465 (1888) (justifying state regulation of railroad engineers on the ground that the law addressed safety concerns and that its impact on interstate commerce was merely "indirect," not "direct").

87. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905) (invalidating on Fourteenth Amendment due-process grounds a state law imposing daily and weekly hours limits on the employment of bakery workers).

88. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518-28 (1996).

the value of free political speech as a critical ingredient of self-government.[89] But if original intent is to be the benchmark for First Amendment protection, it should be acknowledged that many types of speech currently protected, such as pornography and flag burning, would lose their First Amendment status.[90]

Second, proponents of the distinction argue that commercial speech is of a fundamentally different nature than noncommercial speech. For instance, commercial speech is allegedly "more objective" than noncommercial speech because its truth is more easily validated.[91] That is, the claims made by advertisers can be more easily verified than the more subjective claims made by politicians. But commercial speech is *not* always more objective than noncommercial speech.[92] Advertising appeals not to consumers' sense of truth, but rather to their individual subjective valuations and emotions. Discerning the "truth" of commercial speech, especially advertising, is nearly impossible.[93] Therefore, any argument for increased regulation of commercial speech that relies on its alleged objectivity is groundless. Additionally, much noncommercial speech, including scientific claims, is more objective than advertising but is granted full First Amendment protection.[94]

Proponents of the commercial-noncommercial distinction also argue that the profit motive "hardens" commercial speech, so that regulation will have little dampening effect.[95] That is, the pecuniary incentives that drive advertising ensure that an advertiser's message will be heard above the din of public discourse, even in the face of regulatory pressure. Commentators have shown that this argument fails on three grounds. First, expressive activity such as newspaper publishing and television and radio broadcasting, though pursued principally for profit, receives full First Amendment protection.[96]

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89. *See* Kozinski & Banner, *supra* note 7, at 632.

90. *See id.* at 633.

91. *Id.* at 634.

92. *See id.* at 634-38.

93. *See id.* at 635. This critique is often referred to as the "negative theory" of free speech. *See generally, e.g.*, FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982) (arguing that government cannot be trusted to make the distinctions necessary in determining the truth or falsity of speech).

94. *See* Kozinski & Banner, *supra* note 7, at 635.

95. *See id.* at 637.

96. *See id.*

Second, the durability of speech does not owe solely to its economic motivation. Stronger forces, such as religious conviction or artistic opinion, are often at work.[97] Third, even were commercial speech more durable than noncommercial speech, there is no principled basis for denying it full First Amendment protection on that ground.[98]

Third, proponents of the distinction subscribe to the theory that unregulated advertising will encourage consumer fraud. But this argument ignores the tonic of counterspeech.[99] A central premise of our twentieth-century free-speech jurisprudence is that truth will drive out falsehood; more speech is better than less.[100] Still another proffered justification for diminished protection for commercial speech is the argument that protecting it at the same level as noncommercial speech will inevitably cause an encroachment on noncommercial speech. But constitutional speech protection is not a zero-sum game.[101] Enhancement of commercial-speech protection need not come at the expense of noncommercial-speech protection because available First Amendment protection is not a finite quantity.

Central Hudson perpetuates the establishment of an inferior "commercial" category of speech, which imposes lighter government burdens to justify restrictions.[102] A government restriction that would otherwise fail strict scrutiny might easily be sustained as a valid curb on speech if the speech at issue were cast as sufficiently commercial. In declining to replace the commercial-noncommercial distinction with a more consistent doctrinal framework, the *Glickman* Court left open the door for the future expansion of federal infringement on free-speech rights.

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97. *See id.*

98. *See id.*

99. *See id.* at 644 (citing Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

100. *See, e.g.*, Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[F]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.... If there be time to expose through discussion the falsehood and fallacies... the remedy to be applied is more speech...."); *see also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas... the best test of truth is the power of the thought to get itself accepted in the competition of the market....").

101. *See* Kozinski & Banner, *supra* note 7, at 648.

102. *See id.* at 648-50, 653.

The *Glickman* Court departed from standard commercial-speech jurisprudence, but it rationalized its departure partly on the grounds that *Glickman* involved a specific statutory context—regulation of the agricultural markets.[103] There is no guarantee that the Court will stop here. Rather than limit *Glickman* to commercial speech by the agricultural industry, it is conceivable that a future, more activist Court might broaden the *Glickman* exception to justify compelled speech in other industries. Although the "California Summer Fruits" ad campaign is a promotional program ostensibly serving the collective commercial interest of the California tree-fruit industry, *Glickman* might provide constitutional support for other federally mandated advertising programs that do not serve the interest of the targeted industry. For example, the federal government might adopt an anti-tobacco advertising campaign and finance it through mandatory assessments levied on each tobacco company based on its retail-market share. Similarly, the government might propose that brewers and distillers pay for ads warning of the dangers of alcohol use. These industries would surely object to being forced to sponsor speech in direct opposition to their interests, but it is unclear whether under *Glickman* such an objection would constitute a "crisis of conscience"[104] sufficiently serious to justify First Amendment scrutiny in the eyes of the Court.[105] As Justice Souter noted, it is unclear whether the compelled speech cases even require that a constitutional petitioner show disagreement.[106] It would be a mistake to let federal judges decide whether an objection is serious enough.

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103. *See Glickman*, 117 S. Ct. at 2138.

104. *Id.* at 2139.

105. Justice Thomas warned in *44 Liquormart*:

> [The "substantial government interest" prong] of *Central Hudson* . . . apparently requires judges to deliberate those situations in which citizens cannot be trusted with information, and invites judges to decide whether they themselves think that consumption of a product is harmful enough that it *should* be discouraged. In my view, the *Central Hudson* test asks the courts to weigh incommensurables—the value of knowledge versus the value of ignorance—and to apply contradictory premises—that informed adults are the best judges of their own interests, and that they are not.

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 527-28 (1996) (Thomas, J., concurring in part and concurring in the judgment) (footnote omitted).

106. *See Glickman*, 117 S. Ct. at 2148 (Souter, J., dissenting).

In the wake of *Glickman*, it is clear that the debate over the wisdom of the commercial-noncommercial distinction is not moot.[107] The *Central Hudson* framework and the untenable commercial-noncommercial distinction it reinforces are impractical because they create uncertainties and allow judges too much latitude. The question remaining is whether an appropriate substitute exists. As a first step toward consistency in free-speech jurisprudence, the Court should abandon the distinction and adopt strict scrutiny for both commercial and noncommercial speech. This would return the Court to its proper role as defender of the Constitution and sentinel of our liberties.

Aaron A. Goach

CONGRESS FUMBLES WITH THE INTERNET: *Reno v. ACLU*, 117 S. Ct. 2329 (1997).

The United States Supreme Court has a history of taking novel approaches to the Free Speech Clause of the First Amendment[1] when it faces new forms of communications technology. This has particularly been true when the Court rules on the constitutionality of restrictions on sexual speech and other kinds of speech considered offensive. For example, in the areas of broadcast and cable television, the Court has generated highly medium-specific principles to govern the scope of the state's power to regulate and restrict indecent speech.[2] Last Term, in *Reno v. ACLU*,[3] the Court again faced the problem of charting the First Amendment contours of a new technological

107. *See id.* at 2155 (Thomas, J., dissenting) ("[I] continue to disagree with the use of the *Central Hudson* balancing test and the discounted weight given to commercial speech generally."). The law-and-economics perspective offers utilitarian justifications for abandoning the commercial-noncommercial distinction. *See, e.g.*, Coase, *supra* note 7, *passim*; *see also* Aaron Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1 (1964).

1. "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

2. *See, e.g.*, Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727 (1996) (upholding a federal statutory provision allowing cable operators to ban indecency on leased access channels); FCC v. Pacifica Found., 438 U.S. 726 (1978) (upholding FCC regulation of indecent broadcasts).

3. 117 S. Ct. 2329 (1997).

medium of speech, this time the Internet. In *Reno*, however, the Court considered and held unconstitutional two provisions of the Communications Decency Act (CDA)[4] without adopting a novel mode of First Amendment analysis for the protection of Internet speech. Although the Court reached the correct result both in striking down the CDA as facially invalid and in refraining from adopting a new medium-specific speech standard for the Internet, its decision does not lay to rest the issue of how to protect constitutionally minors from harmful content on the Internet.

Because of the rapidly changing nature of telecommunications media such as the Internet and the case-specific approach to speech regulation that the Court is likely to adopt in such an area, congressional attempts at direct speech regulation are very likely to be inadequate and constitutionally unsound. As a general legislative body, Congress will be unable to keep up with the frequent shifts in communications technology and the resulting shifts in federal jurisprudence. The *Reno* case demonstrates that an alternative approach to protecting minors from harmful content, such as might be provided by a regulatory agency, is warranted in place of additional congressional attempts at further direct speech regulation.

The CDA constitutes Title V of the Telecommunications Act of 1996 [Act].[5] The bulk of the Act was drafted to reduce regulation and promote competition in the local telephone, multichannel video, and broadcasting markets,[6] whereas Title V was designed to protect minors from exposure to harmful materials over the Internet.[7] Two provisions of the CDA, 47 U.S.C.A. § 223(a) and § 223(d), were the subject of the First Amendment challenge considered by the Supreme Court in

4. 47 U.S.C.A. § 223 (West Supp. 1998).

5. Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15 U.S.C.A., 18 U.S.C.A., and 47 U.S.C.A. (West Supp. 1998)).

6. *See Reno*, 117 S. Ct. at 2337-38.

7. Justice Stevens's majority opinion in *Reno* noted that, although the bulk of the Telecommunications Act was the result of an extensive legislative process, the CDA was the result of executive committee revisions to the Telecommunications Act after the executive committee hearings were concluded, or of amendments offered to the Telecommunications Act during floor debate. *See id.* at 2338. Of course, this aspect of the legislative history should have no bearing on the CDA's constitutionality, but the haste of the CDA's consideration and passage relative to the rest of the Telecommunications Act was noteworthy for the Court.

Reno. Section 223(a) provides that the punishment for the knowing transmission of obscene or indecent materials to any recipient under eighteen years of age shall be fines, imprisonment, or both.[8] Section 223(d) provides the same punishment for the knowing transmission or display of patently offensive materials in a manner that makes the materials available to any recipient under eighteen years of age.[9] The CDA provides two affirmative defenses to prosecution under §§ 223(a) and (d). Under § 223(e)(5)(A),[10] whoever takes "good

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8. Section 223(a) reads, in pertinent part:

> Whoever—
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> (1) in interstate or foreign communications—
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> ....
>
> (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; [or]
>
> ....
>
> (2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity,
>
> shall be fined under Title 18, or imprisoned not more than two years, or both.

47 U.S.C.A. §223(a) (West Supp. 1998).

9. Section 223(d) provides:

> Whoever—
>
> (1) in interstate or foreign communications knowingly—
>
> (A) uses an interactive computer service to send to a specific person of 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.

47 U.S.C.A. § 223(d) (West Supp. 1998).

10. In full, § 223(e)(5) reads:

> (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

faith, reasonable, effective, and appropriate actions" to restrict access by minors to the communications prohibited by §§ 223(a) and (d) will not be prosecuted. Under § 223(e)(5)(B),[11] whoever restricts access to the restricted communications by requiring certain forms of age proof, such as verified credit-card numbers or adult-identification codes, will not be prosecuted.

Immediately after the CDA was signed into law, twenty plaintiffs, led by the American Civil Liberties Union, filed suit against the government in the Eastern District of Pennsylvania, alleging the unconstitutionality of the CDA under the Free Speech Clause of the First Amendment and the Due Process Clause[12] of the Fifth Amendment.[13] District Judge Buckwalter entered a temporary restraining order against enforcement of § 223(a)(1)(B)(ii)[14] insofar as it applied to indecent communications, reasoning that the term "indecent" was too vague to provide the basis for a criminal prosecution.[15] Upon the entering of Judge Buckwalter's order, twenty-seven additional plaintiffs filed suit, and the two cases were consolidated before a three-judge panel, pursuant to the special review provisions in the CDA.[16] The panel, composed of Chief Judge Sloviter of the Third Circuit and District Judges Buckwalter and Dalzell, entered a preliminary injunction against the enforcement of both §§ 223(a) and (d) with respect to indecent or patently offensive communications, but preserved the right of the

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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.

47 U.S.C.A. § 223(e)(5) (West Supp. 1998).

11. *See id.*

12. "... [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...." U.S. CONST. amend. XIV.

13. *See* ACLU v. Reno, No. CIV.A.96-963, 1996 WL 65464 (E.D. Pa. Feb. 15, 1996) (granting a temporary restraining order).

14. *See supra* note 8.

15. *See ACLU*, 1996 WL 65464, at *3-*4.

16. See 47 U.S.C.A. § 223 note (West. Supp. 1998).

government to prosecute the obscenity and child pornography activities prohibited by the CDA.[17]

Writing separate opinions in support of their decision, the panel judges expressed concerns about the CDA's vagueness and overbreadth. Chief Judge Sloviter concluded that, although the government had a compelling interest in the protection of minors from harmful materials, the CDA went further than that interest allowed and was therefore overbroad in violation of the Free Speech Clause of the First Amendment. According to Chief Judge Sloviter, the defenses under § 223(e)(5)[18] effectively rendered the CDA a requirement to screen for minors accessing explicit materials on the Internet. But the difficulties and costs of ascertaining the age and identity of minors on the Internet would operate to bar adults from accessing speech constitutionally protected as to them, simply because minors could not be excluded from also accessing that speech.[19] Moreover, the vagueness of the terms "indecent" and "patently offensive" exacerbated this First Amendment overbreadth.[20] Judge Buckwalter, in addition to concluding that the CDA was overbroad for the reasons articulated by Chief Judge Sloviter, concluded that the term "indecent" in § 223(a) and the terms "patently offensive . . . in context" in § 223(d) were unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment.[21] Judge Dalzell, although not agreeing that the CDA was unconstitutionally vague in violation of the Fifth Amendment, agreed that the statute was overbroad in violation of the First Amendment.[22] Moreover, Judge Dalzell found that, because of the unique features of the Internet, all

17. *See* ACLU v. Reno, 929 F. Supp. 824, 849 (E.D. Pa. 1996). The obscenity and child pornography provisions upheld were not challenged by the plaintiffs; moreover, such prohibitions already existed prior to the passage of the CDA. *See* 18 U.S.C.A. §§ 1465 (West Supp. 1998) (amended 1955 statute criminalizing obscene material); 18 U.S.C.A. §§ 2251-52 (West Supp. 1998) (amended 1978 statute criminalizing child pornography); *see also* New York v. Ferber, 458 U.S. 747 (1982) (upholding a statute prohibiting display of obscenity to children); Miller v. California, 413 U.S. 15 (1973) (setting the standard for what is legally obscene).

18. *See supra* note 10.

19. *See ACLU*, 929 F. Supp. at 853-54 (Sloviter, C.J.).

20. *See id.* at 856.

21. *See id.* at 858-59 (Buckwalter, J.).

22. *See id.* at 867 (Dalzell, J.).

regulation of protected speech in this new medium, and not merely a ban on protected speech, would be unconstitutional.[23]

The government appealed the panel decision to the Supreme Court under the CDA's special review provisions.[24] Justice Stevens, writing for a majority of the Court,[25] held that the CDA was unconstitutionally overbroad in violation of the First Amendment and declined to reach the issue of vagueness under the Fifth Amendment.[26] Justice Stevens stressed, however, the vagueness of the terms "indecent" and "in context . . . patently offensive" as a factor in his conclusion that the statute was overbroad.[27]

Justice Stevens began his analysis of the CDA's unconstitutionality by discussing the inapplicability of three precedents upon which the government relied: *Ginsberg v. New York*[28]; *FCC v. Pacifica Foundation*[29]; and *Renton v. Playtime Theatres, Inc.*[30] In *Ginsberg*, the Court held constitutional a statute banning the sale to minors of materials considered obscene as to them but constitutionally protected as to adults. Thus, under the *Ginsberg* rule, a State might constitutionally restrict the sale to minors of material the State could not constitutionally prevent adults from receiving.[31] Justice Stevens distinguished the statute in *Ginsberg* from the CDA in several ways. Unlike the law in *Ginsberg*, the CDA barred parents from giving their children access to the proscribed speech.[32] Moreover, whereas the statute in *Ginsberg* merely restricted sales to minors, the CDA applied not merely to sales of speech, but to non-commercial expressions as well. Perhaps most important to Justice Stevens's analysis, unlike the law at issue in *Ginsberg* that defined

23. *See id.*

24. *See* 47 U.S.C.A. § 223 note (West Supp. 1998).

25. Justices Scalia, Kennedy, Souter, Thomas, Ginsberg, and Breyer joined in Justice Stevens's opinion.

26. *See Reno*, 117 S. Ct. at 2341.

27. *See id.*

28. 390 U.S. 629 (1968).

29. 438 U.S. 726 (1978).

30. 475 U.S. 41 (1986).

31. *See Ginsberg*, 390 U.S. at 631, 636-37.

32. *See Reno*, 117 S. Ct. at 2341. For example, under the law at issue in *Ginsberg*, a parent might buy for a child material that could not be sold directly to the child. The CDA's broad language, by contrast, bans anyone from giving minors access to a defined class of proscribed communications, independent of parental desire to give children access. *See supra* notes 8-10.

"obscene" material as "utterly without redeeming social importance for minors," the CDA left "indecent" undefined and did not define "patently offensive" to require that such material lack "serious literary, artistic, political, or scientific value."[33]

Pacifica held constitutional an FCC reprimand of a broadcaster for airing indecent material at a time when children were likely to be in the broadcast audience.[34] *Pacifica* thus recognized a medium-specific level of constitutional protection for offensive speech in the area of broadcast. Justice Stevens distinguished the broadcasting medium from the Internet on several grounds. He began by noting the relatively greater ease of children's access to broadcast, as opposed to Internet, material.[35] He also noted the inadequacy of warnings as protection against unexpected harmful broadcasts.[36] Justice Stevens also distinguished the FCC reprimand of a particular indecent broadcast in *Pacifica* from the CDA in two respects. He explained that the *Pacifica* order was an expert agency's determination of *when* particular material could be broadcast, rather than a categorical ban on "indecent" communication as in the CDA. [37] Moreover, the order in *Pacifica* did not carry criminal sanctions, as the CDA did.[38]

Finally, the Court distinguished the ordinance against residential zoning of adult theaters found constitutional in *Renton.* The Court noted that the CDA was directed not at controlling the secondary effects of speech (for example, property values or crime), as was the *Renton* ordinance, but was directed at controlling the content of speech itself. Hence, the CDA could not be analyzed as a time, place, and manner restriction, but should be analyzed as a content-based restriction on speech.[39]

Finding these precedents not controlling, Justice Stevens proceeded to apply the "most stringent review" to the CDA as a

33. *Reno,* 117 S. Ct. at 2341. The Court also noted that, unlike the statute involved in *Ginsberg,* the CDA included 17-year-olds in its application, but the relevance of this distinction to the CDA's constitutionality seems dubious, and the Court did not elaborate on it. *See id.*

34. *See Pacifica,* 438 U.S. at 726.

35. *See Reno,* 117 S. Ct. at 2341-42 (quoting *Pacifica,* 438 U.S. at 748-50).

36. *See id.* at 2342.

37. *See id.*

38. *See id.* (quoting *Pacifica,* 438 U.S. at 750).

39. *See id.* at 2342-43.

content-based restriction on speech.[40] He began by noting that the Internet is not as invasive as broadcasting and that users of the Internet "seldom encounter content 'by accident,'" because warnings precede almost all sexually graphic material.[41] In this respect, explicit Internet communications resemble more the "dial-a-porn" given full First Amendment protection in *Sable Communications of California, Inc. v. FCC*[42] than *Pacifica*'s indecent broadcasts. Like the telephone messages in *Sable*, Internet content requires "affirmative steps" to be accessed, rendering it less invasive than broadcast content.[43] Moreover, according to Justice Stevens, no scarcity of Internet bandwidth exists similar to the scarcity of broadcast spectrum that would render similar government regulation of Internet content constitutional.[44] For the Court, this combination of non-invasiveness, requirement of affirmative steps to access content, and lack of scarcity operated against applying to the Internet a medium-specific standard of speech protection similar to the one applied in the area of broadcast.[45]

The language of the CDA presented significant First Amendment problems for Justice Stevens, just as it had for the Court of Appeals. The vagueness of the terms "indecent" and "patently offensive" and the ambiguities of their relation to each other would have a chilling effect on protected speech, particularly given the potential for criminal conviction and imprisonment.[46] The mere fact that "patently offensive" was a phrase in one prong of the three-prong *Miller v. California*[47] test for obscenity did not save the CDA from a determination of First

40. *Reno*, 117 S. Ct. at 2343. This "most stringent review" is otherwise known as strict scrutiny, requiring that the speech regulation be narrowly tailored to serve a compelling state interest.

41. *Id.* (quoting ACLU v. Reno, 929 F. Supp 824, 844 (E.D. Pa. 1996)).

42. 492 U.S. 115 (1989).

43. *Reno*, 117 S. Ct. at 2343-44.

44. *See id.* at 2344.

45. *See id.* at 2343-44.

46. *See id.* at 2344-45.

47. 413 U.S. 15 (1973). The *Miller* test for obscenity is:

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

Miller, 413 U.S. at 24 (citations omitted).

Amendment vagueness and overbreadth. The *Miller* test is rendered both more precise and narrower in application than the CDA by the presence of further language in the "patently offensive" prong and the two other prongs.[48] Issues of vagueness aside, the *Miller* test has a "societal value"[49] component that is not relative to contemporary community standards and that determines whether speech has objective value[50] for First Amendment purposes, a test absent in the CDA.[51] Important to the Court's analysis, the CDA would burden significant amounts of speech constitutionally protected between adults.[52] Under the CDA, adults would have to refrain from Internet speech unsuitable for minors whenever there was a possibility of minors accessing that speech. Given the problems and costs of age verification and identification on the Internet, it would be impossible for many adult speakers to continue their Internet speech under the CDA—even if such speech were protected as between adults—simply because the costs and difficulties of excluding minors from that speech would be prohibitive.[53] Moreover, the CDA's broad ban operated independent of parental desire to give children access to materials covered by the CDA; proscribed material given by a parent to a child would subject that parent to prosecution.[54]

The combination of these features of the Internet and the CDA led the Court to conclude that the CDA was not narrowly tailored to serve the government's interest in protecting minors from harmful materials.[55] The Court found that currently available user-based software offers a "reasonably effective" alternative to the CDA for parents who wish to prevent their children from accessing materials that the parents believe are harmful.[56] The government failed, in the Court's view, to show

48. *See supra* note 47.

49. Namely, that the work "lacks serious literary, artistic, political, or scientific value." *Miller*, 413 U.S. at 24.

50. Of course, a human judge is making this determination of "objective" value; nonetheless, the purpose of this "societal value" test is to condition the lack of First Amendment protection for obscene material upon something more than disapproval by merely the surrounding community.

51. *See Reno*, 117 S. Ct. at 2345.

52. *See id.* at 2347-48.

53. *See id.*

54. *See id.* at 2348.

55. *See id.*

56. *Reno*, 117 S. Ct. at 2347.

why other less-restrictive means were not available to serve the government interest as effectively.[57] Consequently, except insofar as it proscribed obscenity, which enjoys no First Amendment protection,[58] the Court found the CDA facially overbroad and struck it down.[59]

Justice O'Connor concurred in the judgment in part and dissented in part from the Court's opinion.[60] She would have treated the CDA as a cyberspace "zoning law" that attempted to create separate zones of minor and adult communication on the Internet.[61] According to Justice O'Connor, such a law is constitutional 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."[62] The CDA only passed this test in part, according to Justice O'Connor. To the extent that it proscribed adult speech that is aimed solely at one or more minors, the CDA did not unduly restrict adult access. To the extent, however, that it proscribed adults from making material available to other adults simply because minors could also have access to it, the CDA unduly restricted adult access, "'reduc[ing] the adult population . . . [to] only what is fit for children.'"[63] The CDA would pass the second prong of her "zoning law" test, according to Justice O'Connor, because 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."[64] Using this analysis, Justice O'Connor, unlike the majority, would have construed the CDA narrowly to proscribe adult

57. *See id.* at 2348.

58. *See id.* at 2350 (citing *Miller*, 413 U.S. 15, 18 (1973)).

59. *See id.* at 2348.

60. Chief Justice Rehnquist joined in Justice O'Connor's opinion.

61. *Reno*, 117 S. Ct. at 2351 (O'Connor, J., concurring in judgment in part, and dissenting in part).

62. *Id.* at 2353 (O'Connor, J., concurring in judgment in part, and dissenting in part).

63. *Id.* at 2354 (O'Connor, J., concurring in judgment in part, and dissenting in part) (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)).

64. *Id.* at 2356 (O'Connor, J., concurring in judgment in part, and dissenting in part). The majority did not reach this issue of whether the CDA infringed the First Amendment rights of minors, but rested its decision solely on the constitutional rights of adults. *See supra* text accompanying notes 52-59.

communications aimed solely at minors instead of declaring it facially overbroad.[65]

Although the issue was not recognized by the Court's opinion in *Reno,* the CDA highlights the problem of whether a medium-specific constitutional speech standard is appropriate for the Internet.[66] The Court and Congress took varying approaches to this question; the Court simply failed to discuss it, other than to hold that the Internet is not subject to the doctrinal framework applicable to First Amendment cases involving the broadcast medium,[67] whereas Congress clearly attempted through the CDA to treat the Internet as enjoying some form of medium-specific, limited First Amendment protection, as is evidenced by its use of terms imported from First Amendment jurisprudence in the broadcasting and obscenity contexts.[68] Unfortunately, Congress

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65. *See Reno,* 117 S. Ct. at 2356 (O'Connor, J., concurring in judgment in part, and dissenting in part). Justice O'Connor felt that there was sufficient legislative intent to construe the CDA narrowly in the event of a constitutional challenge. *See id.* at 2355-56 (O'Connor, J., concurring in judgment in part, and dissenting in part). The majority, by contrast, asserted that its jurisdictional posture under the expedited review provisions of the CDA, *see* 47 U.S.C.A. § 223 note (West Supp. 1998), allowed the Court to hear only a facial challenge to the statute. *See Reno,* 117 S. Ct. at 2350-51 (majority opinion).

66. It should be noted that, as a doctrinal matter, both the majority and minority opinions correctly identified the major problems of the CDA; namely, its overbreadth, exacerbated by the vagueness of its terms. As both opinions recognized, the CDA, by its terms alone and combined with the current characteristics of the Internet, would silence a significant amount of speech between adults because the burdens of effectively screening minors from explicit material would be prohibitive for many speakers. *Cf.* Lawrence Lessig, *Constitution and Code,* 27 CUMB. L. REV. 1, 11-14 (1997); Lawrence Lessig, *Reading the Constitution in Cyberspace,* 45 EMORY L.J. 869, 889-92 (1996) [hereinafter Lessig, *Cyberspace*] (arguing that the Constitution, as understood and applied in the current legal environment, would permit this burden as a kind of cyber-zoning law and questioning that current understanding). Moreover, as the lower court and the majority recognized, the terms "indecent" and "in context . . . patently offensive," because of their vagueness, would have a chilling effect on a significant amount of constitutionally protected speech. Although Justice O'Connor's narrow construction of the CDA was most likely a proper reflection of the point at which the CDA's restrictions burdened constitutionally protected speech—when adults without the resources to screen minors refrain from engaging in regulated speech because it is available to any and all comers, *see supra* text accompanying note 63—the majority opinion was almost certainly correct that the Court was in no position to read the statute narrowly in order to save it from a facial challenge. This is because of both the Court's jurisdictional posture on expedited review and the plain language of the CDA. *See* 47 U.S.C.A. § 223 note (West Supp. 1998) (setting forth the jurisdiction over expedited review of challenges to the CDA); *Reno,* 117 S. Ct. at 2350-51. Instead, the majority correctly held that it could hear only a facial challenge and that the CDA was not "readily susceptible" to a construction limiting it to a set of judicially defined applications that would pass constitutional muster. *Id.* Thus, the majority both correctly identified the major problems of the CDA and correctly struck it down as facially invalid.

67. *See Reno,* 117 S. Ct. at 2343-44.

68. For example, the CDA burdens speech that is "indecent" (the same term used by the FCC regulation in *Pacifica*) and "patently offensive" (a term used in the second prong

erred when it attempted to import the weakened First Amendment protection afforded to the broadcast medium into the Internet context; indecent content that is unprotected in the broadcast area should not necessarily be similarly unprotected on the Internet. The rationales invoked for limited free-speech protection in the area of broadcast—namely, ease of access, invasiveness, and spectrum scarcity—simply do not apply to the Internet, at least in its current state.[69]

Similarly, the Court's attempt to import standards from the obscenity cases into the CDA was ill-conceived. The language of the CDA apparently was intended to justify restricting free-speech protections with respect to the Internet by importing the "patently offensive" language that constitutes only one prong of the *Miller* obscenity test; speech that satisfied this standard would receive lowered First Amendment protection even if *Miller*'s other two prongs were not met. As such, the CDA would allow much more speech to fall outside First Amendment protection than if all three components of the Miller test were required to be met in order to trigger lesser speech protection. But there is no reason why the presence of adult material on the Internet is grounds for giving that material any less protection than that afforded by *full* application of the *Miller* standard. In fact, the connection between the presence of speech on the Internet and a relaxed version of the *Miller* obscenity test seems entirely vacuous. Thus, the majority correctly rejected both broadcast and a relaxed obscenity standard as inappropriate analogies for medium-specific speech protection on the Internet.

For a number of reasons, the fact that Congress failed in its attempt to enact constitutionally permissible speech standards for the Internet is not surprising. Nor, if Congress tries to regulate Internet speech again in the future, is the CDA likely to be the last congressional action in this field held to be constitutionally unsound. Congress's predictive task in formulating speech regulations that will be upheld by the Court is made difficult by the Court's current approach to assessing content-based speech restrictions, which is, in effect, a case-by-case balancing exercise. The dilemma is exacerbated by the rapidly shifting nature of Internet technology; given the Court's

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of the *Miller* test). *See* 47 U.S.C.A. § 223(a), (d) (West Supp. 1978); *cf.* FCC v. Pacifica Foundation, 438 U.S. 726, 731 (1978); Miller v. California, 413 U.S. 15, 24 (1973).

69. *See Reno*, 117 S. Ct. at 2343-44.

practice of case-by-case balancing, decisions regarding speech will shift along with shifts in technology. The difficulty of keeping abreast of changes in the technology of cyberspace, along with the difficulty of predicting how the Court's free-speech jurisprudence will reflect or react to these changes, will make it nearly impossible for Congress to foresee which Internet regulations will pass constitutional muster if challenged in the courts. For these reasons, to protect minors from harmful Internet material, an approach other than further congressional attempts at direct speech regulation—creation of a regulatory agency, for example—is warranted.

In determining what kinds of Internet speech regulation would be constitutionally permissible for the protection of minors, Congress will generally find little guidance in the Supreme Court's jurisprudence of content-based speech regulation[70] due to the Court's somewhat artificial use of the "narrow tailoring" standard. Commentators have suggested that the formal language of the narrow-tailoring requirement is belied by the reality of a constitutional balancing act between the "speech-cost" and the "interest-benefit" of a government regulation.[71] This style of reasoning, particularly when applied in a world of changing telecommunications media such as the Internet, will surely result in case-specific determinations of the permissibility of speech regulation, rather than general

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70. Because neither the majority nor the minority in *Reno* declared what an appropriate medium-specific standard would be, or whether one would be appropriate at all, neither opinion offers much in the way of principles to guide lawmakers in this regard.

At the same time, it bears mentioning that declaring the constitutional outer limits of the government's power to regulate Internet content was not necessarily the *Reno* Court's responsibility. In fact, the Court probably wanted to avoid defining a medium-specific level of First Amendment protection for the Internet if possible, and rightfully so; in the context of a facially invalid statute like the CDA, the declaration of such a standard would have had the superfluous character of an advisory opinion.

71. *See* Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141. Professor Volokh criticizes Justice Stevens's formulation of narrow tailoring (which required that there be no less-restrictive, equally effective alternatives) in *Reno*, arguing that it potentially curtails the scope of free-speech protection in the First Amendment because nothing can be more effective in protecting minors than a total ban on certain forms of speech. But, as Professor Volokh recognizes, the actual application of narrow tailoring, both in *Reno* itself and in prior speech decisions, has been more of a balancing act and less of a government-interest-trumps-all approach. *See also* Charles Nesson & David Marglin, *The Day the Internet Met the First Amendment: Time and the Communications Decency Act*, 10 HARV. J.L. & TECH. 113, 121-22 (1996).

standards to which legislators can look for guidance in formulating regulations.

Reno itself illustrates this "narrow tailoring" balancing act. Both opinions acknowledged that the government has a legitimate interest in protecting minors from harmful materials and that a regulation narrowly tailored to serve that interest will pass First Amendment review. Both opinions also concluded that the CDA was not narrowly tailored because it burdened protected speech.[72] But this is a backwards application of narrow tailoring. Justice Stevens stated the narrow tailoring standard in the following way: "[The] 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."[73] Under a formal reading of this statement, only speech that need not be burdened in order to serve the government interest as effectively as if it were burdened gets First Amendment protection; up to that point, speech is not protected from regulation. Both opinions in *Reno*, however, concluded first that speech proscribed by the CDA was protected and then that, for this reason, the CDA was not narrowly tailored.[74] Instead of determining whether the statute was narrowly tailored by determining whether it burdened more speech than necessary to protect minors as effectively, both opinions focused on the fact that the CDA might prevent some speech that is protected because it is only between adults and does not involve a minor. Neither Justice protected speech between adults on the grounds that the government's interest could be as effectively satisfied without burdening that speech, in spite of Justice Stevens's apparent formulation of narrow tailoring quoted above.[75]

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72. *See supra* text accompanying notes 52-59, 63-65.

73. *Reno*, 117 S. Ct. at 2346.

74. *See supra* text accompanying notes 52-59, 63-65.

75. *See Reno*, 117 S. Ct. at 2346. Although the majority did point to the availability of parental-control software as a factor in its decision to hold the CDA overbroad, there was no showing that such software restricted minor access to proscribed material as effectively as the CDA. In fact, the complete effectiveness of such software programs usually depends on cooperation between Internet content providers and the software manufacturers. But there is no obligation on content providers to cooperate in this manner, and there is far too much speech on the Internet for all, or even most of it, to be covered by parental-control software. Hence, the majority only deemed parental-control software a "reasonably effective" alternative to the CDA, rather than an equally

The balancing of First Amendment interests with other state interests that underlies the seemingly contorted application of the narrow-tailoring requirement under strict scrutiny in *Reno* is evident in other First Amendment contexts as well.[76] Under the formal narrow-tailoring analysis set forth above, even the smallest enhancement in the protection of minors from harmful speech would render the speech restriction effecting that enhancement constitutional.[77] Clearly, no regulation could effect as large an increase in the protection of minors from harmful materials as a complete ban on the materials. Thus, if the narrow-tailoring analysis described above were strictly applied, a ban should be constitutional. But no one seriously thinks that the First Amendment allows the government to go that far. Rather, the state's interest in protecting minors is balanced with the value of freedom of speech, as is evidenced by First Amendment decisions standing for the protection of some speech even if its restriction would better serve a legitimate government interest.[78]

This balancing is especially visible in the Court's development of medium-specific speech protection for broadcasting and in the *Reno* Court's comparison of the Internet to broadcast for speech-protection purposes. The *Reno* opinion cites the lesser risk of captive audiences on the Internet,[79] the affirmative steps required to access Internet content,[80] the scarcity of broadcast spectrum bandwidth,[81] and the availability of parental control software[82] as factors in its decision to refrain from treating the

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effective alternative and did not rest its holding solely on the availability of such software. *See id.* at 2347.

76. *See* Volokh, *supra* note 71, at 188-92.

77. For a fuller development of this point, see *id.* at 149.

78. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557 (1969) (holding that possession of obscene material in the privacy of the home cannot be criminalized, even though the state has a legitimate interest in banning obscene materials and even though ostensibly obscene material enjoys no First Amendment protection); Butler v. Michigan, 352 U.S. 380, 383 (1957) (stating that the First Amendment does not allow reduction of the "adult population . . . to reading only what is fit for children," even though a total ban on harmful material would more effectively protect children, and that such a ban would "burn the house to roast the pig");.

79. *See Reno*, 117 S. Ct. at 2343-44.

80. *See id.*

81. *See id.*

82. *See id.* at 2347. At times, the majority opinion seems to favor a view that the government interest might not extend further than protecting children from material their parents would consider harmful, rather than extending further to protect them from harmful material independent of what their parents think is appropriate. *See id.* at 2341, 2348.

Internet like broadcast for purposes of regulating indecency. In the broadcast context, these factors operate to render the interest-benefit worth the speech-cost, whereas in the CDA it is not. Thus, throughout the Court's jurisprudence of content-based speech regulation, the "narrow tailoring" requirement really seems to be a veil behind which speech-cost is balanced against interest-benefit.

The fact that the Court did not attempt to create a medium-specific speech standard for the Internet may be further evidence of the Court's preference for case-by-case balancing. Notably, *Reno* did not generate the kind of dispute about declaring the appropriate medium-specific First Amendment standard that appeared in *Denver Area Educational Telecommunications Consortium v. FCC*,[83] in which Justice Breyer cautioned against the declaration of a rigid standard to govern the evolving medium of cable television, whereas Justices Kennedy and Thomas argued the need for a standard that lower courts, lawmakers, and agencies could follow.[84] It is also notable that, her dissenting narrow construction of the CDA aside, Justice O'Connor's concurrence in *Reno* that the CDA was overbroad did not even go into a "narrow tailoring" analysis, but focused on whether the CDA unduly restricted adult access. Perhaps these are indications that the Court is shying away from demanding of itself new medium-specific First Amendment frameworks for developing communications media, and is opting instead for case-specific balancing of interest-benefit and speech-cost.

Naturally, under the Court's balancing approach, the effects of any given regulation and the features of any given means of communications present an opportunity for the Court to strike an entirely new balance and, of course, for successive Courts to strike different balances. Although this approach may have some advantages,[85] case-specific balancing by the courts does create

83. 116 S. Ct. at 2374.

84. *See id.* at 2380 (Breyer, J., plurality opinion); *id.* at 2414 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 2419 (Thomas, J., concurring in the judgment in part, and dissenting in part).

85. One advantage of this approach is that it wisely avoids binding courts to rigid First Amendment formulae in their analyses of speech restrictions on evolving media when such standards are liable to become outmoded and unfit to apply faster than they are even declared. Regarding the difficulties placed on First Amendment decisionmaking by the evolution of media, see Cass R. Sunstein, *Constitutional Caution*, 1996 U. CHI. LEGAL F.

predictive difficulties for lawmakers seeking to enact constitutionally permissible speech regulations. One of the salient problems in the *Reno* case-specific approach to Internet speech regulation is the rapidity with which Internet technology advances. Due to this factor, courts are liable to create precedent that eventually becomes outmoded because it is based on outmoded facts.[86] Imagine, for example, that tomorrow the number of Internet sites with harmful material increased by twenty percent, the availability of Internet access outside the home increased by twenty percent, Internet access became so cheap that children could buy it themselves, new forms of Internet communication developed, or some other change not yet considered occurred—and the likelihood of minors inadvertently accessing harmful material increased by twenty percent as a consequence. What effect, if any, these changes would have on the Court's assessment of the constitutionality of the CDA is difficult to predict.[87]

An alternative to the Court's balancing approach would be to forge the medium-specific standard that the Court declined to create in *Reno*. But the rapidly changing nature of Internet technology might soon render such a standard obsolete. The

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361 (cautioning against the development of rigid First Amendment standards for evolving communications technologies). Rigidly categorical speech restrictions on rapidly changing media seem particularly out of place when the category of speech being suppressed may be driving the evolution of the medium. *See* Peter Johnson, *Pornography Drives Technology: Why Not to Censor the Internet*, 49 FED. COMM. L.J. 217 (1996). Regarding the tendency of First Amendment standards to become quickly outmoded, see Nesson & Marglin, *supra* note 71, at 134.

86. [The *Reno* panel court's factual findings] were accurate descriptions of where cyberspace was in 1996. But they don't tell us anything about where cyberspace is going, nor about *what it could be*. The courts speak as if they are telling us about the *nature* of cyberspace, but cyberspace has no nature. Its nature is as it is designed. By striking down Congress's efforts to zone cyberspace, the . . . courts are not telling us what cyberspace is, but what it *should be*. They are making, not finding, the nature of cyberspace; their decisions are in part responsible for what cyberspace will become.

Lessig, *Cyberspace*, *supra* note 66, at 904.

Professor Lessig goes on to express an opposite concern to the one expressed here; he fears that the rapidly changing nature of cyberspace will lead to judicial passivity and hesitance to pass judgment upon cyberspace, leading to underprotection of the rights of those on the Internet. *See id.* at 905-06. As a general matter, he may be right; the concern herein expressed that judicial precedents such as *Reno* may tend to leave minors underprotected from harmful material is particular to the outcome in *Reno* and the situation in which courts and Congress will presently find themselves as a consequence.

87. *See* Nesson & Marglin, *supra* note 71, at 124-25 (developing a similar scenario). The general notion is that if speech conditions—the ease of minor access, for example—change, the balance between the speech-cost and interest-benefit of a particular regulation will shift.

Court may sensibly continue to refrain from adopting a rigid speech standard for the Internet, but, without a speech standard, Congress will be left to rely for legislative guidance only on case-specific precedents premised on outdated facts.

In such an environment of uncertainty, there is a real danger of further congressional fumbling with the First Amendment like that witnessed in *Reno*, which might dissolve into congressional abandonment of its attempts to protect the legitimate state interest of protecting minors from harmful materials.

The question remains what a constitutionally sound and effective method of protecting minors might be. It is doubtful that, as a general matter, Congress acting alone can be expected to keep sufficiently abreast of the variable interplay between the Internet medium's changing nature and constitutional norms. A more promising model would be a regulatory model similar to the one involved in *Pacifica*. There, an "expert agency" was responsible for the determination of when particular indecent content could be broadcast. In *Pacifica*, the Court took a watchdog posture over the agency (rather than over Congress), to ensure that the speech-cost of agency regulation did not become too great. In the Internet context, such an expert agency would be less likely than Congress to draw inapt analogies to vastly different regulatory media or to irrelevant constitutional standards. Instead, it could be expected to regulate the Internet according to relevant medium-specific factors, such as the Internet's openness to any and all comers and its capacity to support parental control over access to content. Such an agency would be much more likely than the courts or Congress to keep up to date with developments in its regulatory medium and would not suffer from the kind of legislative inertia characteristic of Congress. Hopefully, such an agency would show a greater sensitivity to constitutional considerations of free speech than Congress demonstrated in the CDA. Such an agency, charged with the task of protecting minors from harmful content, could be responsible for administering a system of content description, a system of content-tagging in conjunction with providers of blocking services, or any number of other functions, the feasibility and value of which are still being debated in the aftermath of *Reno*. And the courts, under such a regime, would adopt the posture

of deferential watchdogs, as did the Supreme Court in *Pacifica*,[88] acting as the final line of defense against illegitimate encroachments on constitutional rights and values.

Some allocation of the responsibility for drawing a balance between speech rights and the state interest of protecting minors must eventually occur, whether by default to *Reno*-like adjudication of congressional enactments, the announcement of some new constitutional standard to govern offensive or harmful speech on the Internet, the creation of a new administrative agency as is urged here, or simple inaction and acceptance of the status quo. The *Reno* court reached the right result in striking down as facially invalid a hastily enacted and ill-conceived content-based restriction on constitutionally protected speech, but the problem of minor access to harmful content persists. Given a world of rapidly changing new telecommunications media like the Internet and a likely growing reluctance on the part of the Court to declare media-specific standards in such a world, Congress is relatively poorly equipped to serve adequately its interest in protecting minors without trampling on significant constitutional rights. Such forays into the brave new world of the Internet are likely to meet the same fate in the courts as did the CDA. Instead of another federal law restricting the content of Internet speech, greater sensitivity to both technological and constitutional considerations, such as might be provided by an expert agency, must be shown if our society is to regulate the Internet responsibly in the interest of protecting minors.

Praveen Goyal

88. *Cf.* Lessig, *Cyberspace*, *supra* note 66, at 905-06 (predicting that the courts will eventually adopt such a position of deference to cyberspace policymakers and regarding that outcome with some degree of anxiety).