Children and the Internet: Legal Considerations in Restricting Access to Content

March 14, 2022

Congressional Research Service
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R47049

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SUMMARY

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March 14, 2022

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Throughout the internet's history, the medium's effect on children has been a recurring topic of interest to legislators and the public. In the internet's early days, much attention focused on children's access to online pornography. Today, commentators have expressed concern with a range of issues including targeted advertising, eating disorders, and self-harm.

One possible legislative approach to issues arising from children's use of the internet is to regulate particular types of content that might pose harms to children. When undertaking such efforts, legislators might consider that laws that restrict the provision of expressive material may infringe on free speech rights guaranteed by the First Amendment of the United States Constitution, and laws that target specific categories of speech based on its content are subject to the demanding *strict scrutiny* standard of judicial review. Congress has attempted to criminalize the provision of internet content that is "harmful to minors," but courts applying the strict scrutiny standard have struck down these statutes as unconstitutional under the First Amendment.

This report provides background on legal concepts implicated in the content-based regulation of expression under the First Amendment. The background focuses on sexually explicit content, as Congress has historically focused on sexually explicit material when it has sought to regulate online content that might be accessed by children. The report then details two congressional attempts to restrict children's access to material online and how courts applying First Amendment jurisprudence reviewed—and ultimately struck down—this legislation. The report concludes with a discussion of considerations for Congress should it again seek to legislate regarding children's access to online material.

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In the waning months of 2021, former Facebook employee Frances Haugen delivered to news media and federal regulators a trove of documents detailing the social media company's internal practices.[1] One of the first news reports to emerge from this disclosure was an article detailing the impact of social media platform Instagram on teenage girls.[2] The reporting on and publication of these documents—subsequently known as the "Facebook Files"—kicked off a burst of legislative activity, including a number of committee hearings and bills focused on the health and safety of children online.[3]

Compared to other forms of media, the internet is a fledgling means of transmitting and receiving information, having entered widespread public use over the past 30 years.[4] During this short history, Congress has not imposed broad internet regulations, but has repeatedly grappled with issues relating to the medium's effect on children. For example, the United States does not have a law that comprehensively protects individuals' personal information on the internet, but the Children's Online Privacy Protection Act[5] creates such protections for children who are under 13 years of age. Even prior to the publication of the Facebook Files, some Members of the 117th Congress had introduced several bills that would address children's use of the internet, including bills focused on data privacy[6] and service provider liability for third-party content.[7] Laws like these that affect children's ability to access particular content on the internet without explicitly restricting the provision of that content might be characterized as indirect restrictions on the material.

Congress has also enacted direct restrictions on content accessed by children over the internet, for example, through statutes that criminalize sending certain types of material to minors.[8] Federal attempts to restrict access to internet content generally have not withstood constitutional scrutiny when challenged in federal courts.[9] There is, however, federal case law recognizing that, in certain circumstances, Congress may enact laws that restrict children's access to particular types of information.[10] Whether a legislative restriction of particular internet content could withstand judicial scrutiny would likely depend on a number of factors, including the existence of a demonstrable harm that a restriction on content may address and the government's ability to ensure that any restriction does not encumber more constitutionally protected speech than is necessary. This report first discusses legal concepts relating to direct regulation of expressive content before providing an overview of congressional attempts to regulate particular content on

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[1] Scott Pelley, *Whistleblower: Facebook Is Misleading the Public on Progress Against Hate Speech, Violence, Misinformation*, CBS NEWS (Oct. 4, 2021, 7:32 AM), https://www.cbsnews.com/news/facebook-whistleblower-frances-haugen-misinformation-public-60-minutes-2021-10-03/.

[2] Georgia Wells, Jeff Horwitz, and Deepa Seetharaman, *Facebook Knows Instagram Is Toxic for Teen Girls, Company Documents Show*, WALL STREET JOURNAL (Sept. 14, 2021, 7:59 AM), https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739?mod=article_inline.

[3] *E.g.*, *Protecting Kids Online: Instagram and Reforms for Young Users, Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 117th Cong. (2021); *Holding Big Tech Accountable: Legislation to Build a Safer Internet, Hearing Before the H. Comm. on Energy & Commerce*, 117th Cong. (2021); Federal Big Tech Tort Act, H.R. 5449, S. 2917, 117th Cong. (2021); KIDS Act, H.R. 5439, S. 2918, 117th Cong. (2021).

[4] *See* Max Roser, Hannah Ritchie, and Esteban Ortiz-Ospina, *Internet*, OUR WORLD IN DATA (2015), https://ourworldindata.org/internet (charting the worldwide growth of internet users from 1990 to 2016).

[5] Children's Online Privacy Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

[6] *E.g.*, Kids PRIVCY Act, H.R. 4801, 117th Cong. (2021).

[7] *E.g.*, CASE-IT Act, H.R. 285, 117th Cong. (2021).

[8] *E.g.*, 47 U.S.C. § 231.

[9] *See, e.g.*, Reno v. ACLU, 521 U.S. 844 (1997); ACLU v. Mukasey, 534 F.3d 181 (3d Cir. 2008).

[10] *See* Ginsberg v. New York, 390 U.S. 629 (1968); FCC v. Pacifica Found., 438 U.S. 726 (1978).

the internet. The report concludes with a discussion of considerations for Congress in drafting legislation that regulates children's access to particular types of internet material.

Legal Concepts: Obscenity and Laws Restricting Speech to Minors

The Free Speech Clause of the First Amendment to the U.S. Constitution limits the government's ability to enact laws that regulate expression.[11] The First Amendment generally prohibits the government from imposing restrictions that burden expression based on the content or viewpoint of its message (known as *content- or viewpoint-based* restrictions).[12] A restriction that regulates speech based on its content is constitutional only if it survives "strict" judicial scrutiny, which requires the government to demonstrate that the restriction is "narrowly tailored to serve compelling state interests."[13] By contrast, *content-neutral* restrictions—restrictions that apply to expressive activity without regard to its viewpoint or message—may survive First Amendment challenges in court if the government demonstrates that the restrictions "advance[] important governmental interests unrelated to the suppression of free speech" and "do[] not burden substantially more speech than necessary to further those interests."[14] This analysis is referred to as *intermediate scrutiny*.[15]

Examples of content-neutral restrictions that the Supreme Court has held do not violate the First Amendment include:

- a law criminalizing the knowing destruction of selective service certificates;[16]
- a regulation prohibiting camping in certain parks;[17] and
- laws requiring cable television operators to carry local broadcast stations.[18]

The Supreme Court has also held that the First Amendment permits content-based restrictions on certain categories of so-called *unprotected* speech without the restriction being subject to strict

[11] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech."). Though it specifically limits the power of "Congress," the Free Speech Clause also applies to state governments through the Fourteenth Amendment and the judicial doctrine of incorporation. Gitlow v. New York, 268 U.S. 652, 665 (1925); U.S. CONST. amend. XIV. For more discussion of the Free Speech Clause generally, *see* Cong. Rsch. Serv., *First Amendment,* CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/amendment-1/ (last visited Mar. 10, 2022).

[12] *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 818 (2000) (observing that "[i]t is rare that a regulation restricting speech because of its content will ever be permissible"); R.A.V. v. City of St. Paul, 505 U.S. 377, 382, 391-92 (1992) (noting that "[c]ontent-based regulations are presumptively invalid").

[13] Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

[14] Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (1997) (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)).

[15] Under the most deferential form of constitutional scrutiny, known as "rational basis" review, a court will uphold a law that is rationally related to a legitimate government purpose. *E.g.*, Heller v. Doe, 509 U.S. 312, 320 (1993). Courts typically do not apply rational basis review in free speech cases.

[16] *O'Brien*, 391 U.S. 367.

[17] Clark v. Community for Creative Non-Violence, 468 U.S. 268 (1984).

[18] *Turner*, 520 U.S. 180.

scrutiny.[19] Categories of unprotected speech include, among others, fighting words,[20] defamation,[21] child pornography,[22] and obscenity.[23]

Of the categories of unprotected speech, obscenity has perhaps been most relevant to prior government efforts to restrict minors' access to certain material.[24] The Supreme Court set forth a three-part test for obscenity in *Miller v. California*,[25] a case involving a prosecution under a state criminal law prohibiting the mass mailing of brochures that included sexually explicit images. Under the *Miller* test, material is obscene for First Amendment purposes if:

1. "the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest";
2. "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law"; and
3. "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[26]

The Supreme Court has upheld laws that prohibit the dissemination of obscenity when obscenity was narrowly defined or construed in accordance with the *Miller* standard.[27] The *Miller* Court and subsequent courts have cautioned, however, that sexually explicit material that does not meet every prong of the *Miller* test is generally subject to ordinary First Amendment protection.[28]

An additional consideration for governments attempting to restrict access to certain material by minors is that minors, like adults, possess First Amendment rights.[29] Governments thus frequently word restrictions for minors in a way to track existing judicial definitions for categories of unprotected speech (such as obscenity).[30] The Supreme Court has held, nonetheless, that material may be obscene for a minor even if it is not obscene for adults. In *Ginsberg v. New York*, the

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[19] *See R.A.V.*, 505 U.S. at 383 (recognizing historical acceptance of restrictions on speech "in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality'") (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)). Only narrow "traditional" categories may be regulated because of their content, standing as exceptions to general prohibitions on content regulation. *See id.* Though often described as "unprotected speech," speech that falls into traditionally unprotected categories is still subject to some First Amendment protection, including prohibitions on viewpoint discrimination. *Id.* at 383–84.

[20] Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942).

[21] Beauharnais v. Illinois, 343 U.S. 250, 254–55 (1952).

[22] New York v. Ferber, 458 U.S. 747, 764 (1982).

[23] Roth v. United States, 354 U.S. 476, 483 (1957); *see also* CRS In Focus IF11072, *The First Amendment: Categories of Speech*, by Victoria L. Killion.

[24] Laws addressing the safety of children on the internet have also addressed child pornography and the exploitation of children. *E.g.*, Children's Internet Protection Act, Pub. L. No. 106-554, 114 Stat. 2763A-335 (2000).

[25] 413 U.S. 15 (1973).

[26] *Id.* at 24 (internal quotations and citations omitted).

[27] *See, e.g.*, Hamling v. United States, 418 U.S. 87 (1974) (upholding constitutionality of federal obscenity statute); Ward v. Illinois, 431 U.S. 767 (1977) (upholding constitutionality of state obscenity statute).

[28] *Miller*, 413 U.S. at 27; *see also* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498–99 (1985) (clarifying that "material that provoke[s] only normal, healthy sexual desires" is not obscene).

[29] *See, e.g.*, Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (holding that school regulation prohibiting students from wearing black armbands violates students' First Amendment rights); Erznoznik v. City of Jacksonville, 422 U.S. 205, 213 (1975) (holding that a city ordinance aimed at preventing minors from viewing nudity was overbroad).

[30] *See, e.g.*, 47 U.S.C. § 231 (defining "material that is harmful to minors" using language from *Miller*).

Court upheld a state criminal conviction for selling magazines depicting nudity to a minor under the age of 17.[31] The Court observed that the magazines at issue would not be obscene for adults,[32] but recognized New York's power to define "obscenity" differently for minors.[33] When the government exercises its power to regulate material that is obscene to minors, however, it must narrowly tailor the regulation to avoid interfering with the First Amendment freedoms of adults.[34] That requirement is not necessarily satisfied by limiting the application of the law solely to material accessed by minors.[35]

On several occasions, the Supreme Court has held that there are limits to what types of expression may be characterized as unprotected speech. Obscenity, for example, does not encompass depictions of violence or material that is "shocking."[36] It extends only to certain depictions of sexual conduct.[37] Government efforts to identify new categories of unprotected speech have routinely failed at the Supreme Court.[38] With respect to minors in particular, the Supreme Court has assessed attempts to expand unprotected speech by asking if "a longstanding tradition" exists of restricting children's access to the particular content—holding, for example, that no such tradition exists of restricting children's access to depictions of violence.[39]

Historical Antecedents: FCC Regulation of Indecent Content

Efforts at the federal level to control content accessed by minors predate the internet altogether. In 1948, Congress amended the Communications Act of 1934[40] to prohibit the broadcast of "obscene, indecent, or profane language."[41] The Federal Communications Commission (FCC) has

[31] 390 U.S. 629 (1968). Although the state law in *Ginsberg* predates the Supreme Court's decision in *Miller*, its language referenced then-contemporary interpretations of obscenity. *Compare* N.Y. PENAL LAW § 484–h, *reprinted in Ginsberg*, 390 U.S. at 645–46, app. A (defining "harmful to minors" as material that appeals to the prurient interest of minors, is patently offensive to prevailing community standards, and is without redeeming social importance), *with* A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Att'y Gen. of Massachusetts, 383 U.S. 413, 418 (1966) (defining obscenity as material that appeals to a prurient interest, is patently offensive to contemporary community standards, and is without redeeming social value).

[32] *Ginsberg*, 390 U.S. at 631.

[33] *Id.* at 641.

[34] *See* Butler v. Michigan, 352 U.S. 380, 382–83 (1957) (striking down a state criminal law banning the sale to the general public of books that "corrupt[] the morals of youth" because such an offense "reduce[s] the adult population . . . to reading only what is fit for children"); *Ginsberg*, 390 U.S. at 634–35 (noting that the state criminal law at issue does not prohibit the sale to adults of material that is obscene to minors and therefore is not invalid under *Butler*). Similarly, the *Ginsberg* court noted, "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children." *Id.*at 639.

[35] *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 876 (1997) (holding that a law prohibiting certain communications to individuals under 18 would burden speech between adults). This case is discussed in more detail at "Reno v. American Civil Liberties Union," *infra*.

[36] Brown v. Ent. Merchants Ass'n, 564 U.S. 786, 792–93 (2010).

[37] Miller v. California, 413 U.S. 15, 24 (1973). Likewise, material may be "indecent" or "patently offensive" without being obscene. *Reno*, 521 U.S. at 877.

[38] *See, e.g.*, United States v. Stevens, 559 U.S. 460, 468–72 (2010) (declining to identify "depictions of animal cruelty" as unprotected speech); *Brown*, 564 U.S. at 792 (holding the same for violent video games).

[39] *Brown*, 564 U.S. at 795–96.

[40] Pub. L. No. 73-416, 48 Stat. 1064 (1934).

[41] Pub. L. No. 80-772, 62 Stat. 683, 769 (1948) (codified as amended at 18 U.S.C. § 1464).

interpreted this provision as granting it authority to impose sanctions on broadcast stations that broadcast indecent language. The FCC first developed a test for indecency in response to a complaint filed with the commission following the broadcast of a satiric monologue.[42] In a declaratory order, the FCC defined indecent speech as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of day when there is a reasonable risk that children may be in the audience."[43] In response to this order, in which the FCC also concluded that the monologue in question was "indecent,"[44] the station's owner sought judicial review. Among other things, the owner argued that the FCC could not constitutionally regulate "indecent" speech, which the FCC itself distinguished from obscenity.[45]

In *FCC v. Pacifica Foundation*, the Supreme Court held that the FCC could regulate the indecent broadcast without violating the First Amendment.[46] The Court explained that, although indecent speech is not without constitutional protection, broadcasting in particular has "the most limited First Amendment protection" of all forms of media.[47] The *Pacifica* court focused on two particular features of broadcast that warranted lesser First Amendment protection. First, broadcasting is "uniquely pervasive" and may reach individuals in public as well as in their homes, and "[b]ecause the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content."[48] Second, "broadcasting is uniquely accessible to children," and a broadcaster, as compared to a bookstore or movie theater, can exercise no control over whether a child receives a particular broadcast.[49] Since the *Pacifica* decision, the FCC has imposed monetary penalties for indecent broadcasting on several occasions.[50] Although broadcasters have repeatedly challenged the FCC's authority, the Supreme Court has not repudiated *Pacifica* or otherwise ruled on whether the FCC's regulation of indecent broadcasts violates the First Amendment.[51]

The Supreme Court emphasized the narrowness of the *Pacifica* holding in *Sable Communications of California, Inc. v. FCC*,[52] a case in which the Court partially struck down a ban in the Communications Act on indecent and obscene commercial telephone messages (also referred to as "dial-a-porn").[53] The ban in *Sable* applied to all indecent telephone messages, regardless of whether adults or children received these messages.[54] After first upholding the portions of the ban

[42] Citizen's Complaint Against Pacifica Found. Station WBAI (FM), 56 F.C.C.2d 94 (1975).

[43] *Id.* at 98.

[44] *Id.* at 99.

[45] *Id.* at 98.

[46] 438 U.S. 726 (1978).

[47] *Id.* at 748.

[48] *Id.*

[49] *Id.* at 749.

[50] *E.g.*, WDBJ Television, Inc., 30 FCC Rcd. 3024 (2015); Fox Television Station, Inc., 25 FCC Rcd. 7074 (2010); Entercom Kansas City License, LLC, 19 FCC Rcd. 25011 (2004).

[51] *See* FCC v. Fox Television Stations, Inc., 567 U.S. 239, 258 (2012) (declining to address First Amendment challenges to FCC's current indecency policy). Some Justices have expressed the view that *Pacifica* was wrongly decided and should be reconsidered. *See id.* at 259 (Ginsburg, J., concurring); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 530–35 (2009) (Thomas, J., concurring) (analyzing *Pacifica* and suggesting that "changes in factual circumstances might well support a departure from precedent").

[52] 492 U.S. 115 (1989).

[53] 47 U.S.C. § 223(b).

[54] *Sable Commc'ns*, 492 U.S. at 127.

that applied to obscene telephone messages,[55] the Court struck down the ban on indecent messages. The Court distinguished the dial-a-porn ban's indecency provisions from the regulatory scheme it upheld in *Pacifica* in two ways. First, the FCC's regulation of indecent broadcasts was not a "total ban" on indecent broadcasts, and instead sought to prevent the broadcast of indecent material at certain times of day.[56] Second, *Pacifica* "relied on the 'unique' attributes of broadcasting," which the *Sable* court noted are "substantially different" from private telephone communications.[57]

The FCC has also declined to regulate indecent material on cable and satellite television, which it argues is outside its statutory jurisdiction.[58] The Supreme Court rejected a legislative effort to require cable operators to segregate indecent programming on leased access channels to a single blocked channel, reasoning that such a regulation was more extensive than necessary to protect children from accessing indecent material.[59] Similarly, the Supreme Court held unconstitutional a federal law that required cable television operators to "scramble" sexually explicit channels to nonsubscribers or limit programming on those channels to certain hours.[60]

In short, federal power over indecent, non-obscene material has been limited to control exercised over broadcast communications. Efforts to expand this power have been unsuccessful, even in similar industries such as telephone communication or cable television.

First Attempt: The Communications Decency Act

The first internet-focused federal legislation to address material accessed by children was the Communications Decency Act (CDA), enacted as part of the Telecommunications Act of 1996.[61] According to the bill's legislative history, Congress intended the CDA as a whole to "modernize the existing protections against obscene, lewd, indecent or harassing uses of a telephone."[62] As originally introduced, the CDA sought to accomplish this goal by extending to the internet existing penalties in the Communications Act and federal criminal law for transmitting obscene or indecent material.[63] A House amendment added to the CDA in conference became the liability protections included in Section 230 of the Communications Act.[64] Although Section 230 is still in

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[55] *Id.* at 124.

[56] *Id.*; *see* Citizen's Complaint Against Pacifica Found. Station WBAI (FM), 56 F.C.C.2d 94, 98 (1975) (proscribing indecent content "at times of the day when there is a reasonable risk that children may be in the audience").

[57] *Sable Commc'ns*, 492 U.S. at 127–28 (noting that dial-a-porn services require callers to call into a service).

[58] *See* Various Complaints Against the Cable/Satellite Television Program Nip/Tuck, 20 FCC Rcd. 4255, 4256 (2005) ("the criminal code restriction on indecency applies only to 'means of radio communication' and therefore not cable communications").

[59] Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 755–56 (1996). In the same case, the Court did uphold a statute permitting cable operators to regulate indecent material, determining that a permissive approach to indecent programming was sufficiently narrow to avoid constitutional concerns. *See id.* at 743–44 (plurality opinion).

[60] United States v. Playboy Enter. Grp., Inc., 529 U.S. 803, 807 (2000).

[61] Pub. L. No. 104-104, tit. V, 110 Stat. 133 (1996).

[62] S. Rep. No. 104-23, at 59 (1995) (Conf. Rep.); *see also id*. ("The decency provisions increase the penalties for obscene, indecent, harassing or other wrongful uses of telecommunications facilities; protect privacy; protect families from uninvited and unwanted cable programming which is unsuitable for children and give cable operators authority to refuse to transmit programs or portions of programs on public or leased access channels which contain obscenity, indecency, or nudity").

[63] *See* Communications Decency Act, S. 314, 104th Cong. (as introduced, Feb. 1, 1995).

[64] *See* Communications Act of 1995, H.R. 1555, 104th Cong. (as amended, Aug. 4, 1995).

force, the Supreme Court held unconstitutional the CDA's provisions pertaining to indecent material on the internet.[65]

Legislative History and Enactment

The CDA was one of several proposed congressional responses to a growing concern among Senators regarding the availability of pornography on the internet.[66] The CDA approached the issue largely through criminalization, amending existing restrictions on obscene telephone calls to cover the use of an "interactive computer service" to distribute certain content that is obscene, "indecent," or "patently offensive."[67] Other proposed legislation sought either to criminalize the transmission of pornography online[68] or to study its prevalence.[69]

The CDA's sponsors revised the bill over time[70] and emphasized its focus on "bad actors,"[71] perhaps to address possible First Amendment vulnerabilities.[72] After the CDA passed the Senate, the conference committee made several other adjustments to bolster the law's ability to withstand constitutional challenges, such as adopting portions of the FCC's formulation of "indecency" from *Pacifica* in describing prohibited material.[73] As enacted, the CDA made it illegal to knowingly use an "interactive computer service"

> to send to a specific person or persons under 18 years of age, or . . . 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

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[65] For more discussion of Section 230 generally, see CRS Report R46751, *Section 230: An Overview*, by Valerie C. Brannon and Eric N. Holmes.

[66] *See generally Cyberporn and Children: The Scope of the Problem, the State of the Technology, and the Need for Congressional Action: Hearing on S. 892 Before the S. Comm. on the Judiciary*, 104th Cong. (1995) (discussing pornography on the internet in connection with another bill).

[67] The term "interactive computer service" is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2). The terms "indecent" and "patently offensive" are left undefined in the CDA, though the law as passed further qualified the term "patently offensive" by measuring the term against "contemporary community standards." *See infra* note 74 and accompanying text.

[68] *E.g.*, Protection of Children from Computer Pornography Act, S. 892, 104th Cong. (1995).

[69] *E.g.*, A Bill to Require the Attorney General to Study and Report to Congress on Means of Controlling the Flow of Violent, Sexually Explicit, Harassing, Offensive, or Otherwise Unwanted Material in Interactive Telecommunications Systems, S. 714, 104th Cong. (1995).

[70] 141 Cong. Rec. S8088–89 (daily ed. June 9, 1995) (statement of Sen. Exon) (detailing revisions made to the CDA "in response to concerns raised by the Justice Department, the profamily and antipornography groups, and the first amendment scholars").

[71] *See* 142 Cong. Rec. S707 (daily ed. Feb. 1, 1996) (statement of Sen. Coats) (noting that "[o]n-line services and access software providers" would be liable under the CDA only "where they are conspirators with, advertise for, are involved in the creation of or knowing distribution of obscene material or indecent material to minors"); *see also* H.R. Rep. No. 104-458, at 187–88 (1996) (Conf. Rep.) (outlining defenses to the CDA's provisions to "assure that attention is focused on bad actors and not those who lack knowledge of a violation").

[72] *See* Fred H. Cate, *Indecency, Ignorance, and Intolerance: The First Amendment and the Regulation of Electronic Expression*, 1995 J. ONLINE L., ART. 5, paras. 19–34 (1995) (discussing potential First Amendment issues with the CDA); Virginia I. Postrel, *Knocking Some Sense Into Senate Censors: A 'Smart Wing' in the House is Crafting a Compromise for Monitoring the Net*, L.A. TIMES (July 2, 1995) (quoting Speaker Newt Gingrich describing the CDA as "a violation of free speech").

[73] H.R. Rep. 104-458, at 201–02 (1996) (Conf. Rep.). In making this change, the conference committee noted that the indecency formulation from *Pacifica* had survived constitutional scrutiny in the broadcast context. *Id.*

> activities or organs, regardless of whether the user of such service placed the call or initiated the communication . . . .[74]

The CDA also prohibited the use of a "telecommunications device" to knowingly create and transmit material that is "obscene or indecent" when the sender knows that the recipient is under 18 years old.[75] The law defined the term "telecommunications device" to exclude interactive computer services, but otherwise left the term undefined.[76]

Congress included two "affirmative defenses" to these prohibitions that would allow someone otherwise liable under the CDA to avoid prosecution: one for taking "good faith, reasonable, effective, and appropriate actions" to restrict access by minors to such indecent or offensive communications, and one for restricting access to such communications "by requiring the use of a verified credit card, debit account, adult access code, or adult personal identification number."[77] The law also included an exemption for individual "access providers" who transmit or store third-party content.[78]

Reno v. American Civil Liberties Union

Following the CDA's passage, civil rights groups sued the United States to challenge the constitutionality of the Act's prohibitions. The Supreme Court struck down portions of the law in *Reno v. American Civil Liberties Union*, holding that the CDA provisions aimed at protecting minors from indecent and offensive internet communications violated the First Amendment.[79]

Writing for the majority, Justice Stevens explained that the government's reliance on *Pacifica* was misplaced because the Court's decision in that case turned in part on unique qualities of broadcast as a medium—qualities that the Court determined "are not present in cyberspace."[80] The Court also emphasized that, in *Pacifica*, it had affirmed the government's ability "to designate when—rather than whether—it would be permissible to air" indecent material, while the CDA imposed "broad categorical prohibitions" that applied at all times.[81] The Court similarly observed that the language in the CDA was vaguer and broader than prohibitions upheld in earlier cases.[82] Having noted these distinctions from its earlier decisions, the Court held that the CDA was a content-based restriction on expressive activity that applied beyond historically unprotected categories of speech (such as "indecent" and "patently offensive" speech).[83]

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[74] Pub. L. No. 104-104, tit. V, § 502, 110 Stat. 133, 133–34 (1996); *see also supra* note 43 and accompanying text.

[75] *Id.* at 133.

[76] *Id.* at 135. Though the CDA's legislative history does not discuss the intended scope of the "telecommunications device" prohibition, a federal district court concluded that the prohibition likely covered "users who traffic in indecent and patently offensive materials on the Internet" while not extending to service providers exempted by the "interactive computer service" carveout. *See* ACLU v. Reno, 929 F. Supp. 824, 828 n.5 (E.D. Pa. 1996).

[77] 110 Stat. at 134.

[78] *Id.*

[79] 521 U.S. 844 (1997). The Supreme Court upheld portions of the CDA prohibiting transmission of obscene material, which the civil rights groups challenging the law conceded could be prohibited consistent with the First Amendment. *Id.* at 883.

[80] *Id.* at 868–69. Those qualities include a history of extensive regulation, a scarcity of available frequencies, and an "invasive" nature. *Id.* at 868.

[81] *Id.* at 867.

[82] *See id.* at 865–66, 870–74 (comparing the CDA to language upheld in *Ginsberg* and *Miller*).

[83] *Id.* at 874.

The Court then applied strict scrutiny analysis and held that the government had failed to demonstrate that the CDA's broad prohibitions were narrowly tailored to achieve the law's purpose.[84] In describing the CDA as unduly broad, Justice Stevens compared the law to the dial-a-porn ban struck down in *Sable*, as both laws involved a total ban on material deemed unfit for children even if the material was shared solely between adults.[85] The CDA's prohibitions applied to speech "display[ed] in a manner available to a person under 18 years of age."[86] The government argued that this prohibition, which on its face applies only to communications made with minors, would not affect communication between adults.[87] In rejecting this contention, the Court observed that, "[g]iven the size of the potential audience for most messages [shared online], in the absence of a viable age verification process, the sender must be charged with knowing that one or more minors will likely view it."[88] Accordingly, in the face of the CDA's criminal punishment, the Court believed that adults would likely decline to transmit protected communications to large online groups, creating an impermissible burden on their communications to adults in the group.[89]

Second Attempt: The Child Online Protection Act

A year after the Supreme Court's decision in *Reno v. American Civil Liberties Union*, Congress again acted to try to make the internet safer for children, passing the Child Online Protection Act (COPA).[90] The House Commerce Committee report stated that COPA was a direct response to the Supreme Court striking down the CDA.[91] The committee opined that COPA would not impose unreasonable burdens on adult communications and thus would avoid the constitutional concerns raised by the CDA.[92]

COPA amended the Communications Act to add criminal penalties for anyone who "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors."[93] For purposes of this restriction, "material that is harmful to minors" is:

> any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—
>
> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or

[84] *Id.* at 879.

[85] *Id.* at 875.

[86] Pub. L. No. 104-104, tit. V, § 502, 110 Stat. 133, 133–34 (1996).

[87] *Id.* at 876.

[88] *Id.*

[89] *Id.*

[90] Pub. L. No. 105-277, div. C, tit. XIV, 112 Stat. 2681-736 (1998).

[91] H.R. Rep. No. 105-775, at 5 (1998).

[92] *Id.*

[93] 47 U.S.C. § 231(a)(1).

> perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.[94]

The committee report claimed that COPA would be consistent with Supreme Court jurisprudence because the law limited its proscriptions to commercial speech on the World Wide Web and because the law's definition of restricted content tracked the Supreme Court's language from *Miller* and *Ginsberg* defining obscenity for minors.[95] COPA also provided that an individual who made a good faith effort to restrict access to material that was harmful to minors might avoid prosecution.[96]

Litigation: *Ashcroft v. American Civil Liberties Union*

Like the CDA, COPA faced constitutional challenges shortly after its passage. Unlike those directed at the CDA, courts did not resolve the objections to COPA in one fell swoop: in all, the law's challengers and the government litigated the Act's constitutionality for more than ten years.[97] The protracted legal battle concluded when the Supreme Court declined to review a Third Circuit Court of Appeals decision permanently enjoining the government from enforcing the law. Though the Supreme Court did not issue any final rulings on COPA's constitutionality, it did issue two decisions addressing the law's relationship to the First Amendment, including one opinion concluding that the law was likely unconstitutional.

The Supreme Court first considered COPA in *Ashcroft v. American Civil Liberties Union* (*Ashcroft I*),[98] confronting the narrow question of whether the Act's use of "community standards" in defining material that is harmful to minors rendered the law unconstitutional. *Ashcroft I* followed a district court order granting a preliminary injunction, which would have prevented COPA's enforcement pending a trial on its constitutionality.[99] On appeal, the Third Circuit affirmed the district court's decision, holding that COPA's "community standards" language would "essentially require[] that every Web publisher subject to the statute abide by the most restrictive and conservative state's community standards in order to avoid criminal liability."[100] The use of "community standards" to define prohibited material originated with the Supreme Court's decision in *Miller*, which required an application of "contemporary community standards" to assess whether particular speech is obscene.[101] For media that predate the internet, "community standards" were based on the geographic distribution area of the material.[102] Both

[94] *Id.* § 231(e)(6).

[95] H.R. REP. NO. 105-775, at 13 (1998).

[96] 47 U.S.C. § 231(c)(1).

[97] Plaintiffs, including civil rights groups and websites, filed a complaint challenging the law in 1998, and the most recent activity in the case is a Supreme Court denial of certiorari in 2009. Complaint, ACLU v. Gonzales, No. 98-5591 (E.D. Pa. Oct. 22, 1998), ECF No. 1; denial of petition for writ of certiorari, Mukasey v. ACLU, No. 07-2539 (U.S. Jan. 21, 2009).

[98] 535 U.S. 564, 566 (2002) [hereinafter *Ashcroft I*].

[99] ACLU v. Reno, 31 F. Supp. 2d 473 (E.D. Pa. 1998). The Third Circuit Court of Appeals affirmed this decision, holding that COPA was likely invalid for overbreadth. ACLU v. Reno, 217 F.3d 162, 166 (3d Cir. 2000).

[100] ACLU v. Reno, 217 F. 3d 162, 166 (3d Cir. 2000).

[101] Miller v. California, 413 U.S. 15, 24 (1973).

[102] *E.g.*, *Miller*, 413 U.S. at 31 (noting that California juries should consider community standards of the State of California); *see also* Sable Commc'ns of California, Inc. v. FCC, 492 U.S. 115, 125 (1989) (applying the *Miller* "community standard" test to a federal statute and concluding that different standards would govern in different federal

the CDA and COPA used "community standards" to define their prohibited material, but the *Reno* Court cautioned that applying a "community standards" test to internet material would mean "that any communication available to a nation wide audience will be judged by the standards of the community most likely to be offended by the message."[103] The question before the Supreme Court in *Ashcroft I* thus turned on this issue: whether relying on "community standards" for what is a nationally accessible medium would burden more speech than necessary.

A divided Court held that the "community standards" element, standing alone, did not violate the First Amendment and vacated the preliminary injunction.[104] Writing for four members of the Court, Justice Thomas observed several differences between COPA's use of "community standards" and the CDA's.[105] Though both the CDA and COPA would impose a community-standards criterion in determining whether particular material was harmful to children, COPA (in contrast to the CDA) required that the material appeal to the prurient interest and excluded material with serious literary, artistic, political, or scientific value.[106] These adjustments, the Court held, avoided concerns raised by the CDA's use of community standards.[107] Several other Justices wrote separately to express their belief that the "community standards" language alone was insufficient to invalidate the law, but that the Court should resolve how to apply a "community standards" test to the internet.[108]

After its decision in *Ashcroft I*, the Supreme Court remanded the case to the Third Circuit Court of Appeals for further proceedings. The Third Circuit then held that COPA was a content-based restriction on speech that was likely not narrowly tailored to serve the interest of protecting minors from harmful material online.[109] Specifically, the Third Circuit observed that the Act's definitions of "material harmful to minors" and "commercial purposes" were unconstitutionally vague and overbroad.[110] The Court of Appeals therefore affirmed the trial court's original order enjoining the government from enforcing COPA. The Supreme Court reviewed and affirmed this decision in *Ashcroft v. American Civil Liberties Union* (*Ashcroft II*).[111] The Court, like the Third

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jurisdictions); Hamling v. United States, 418 U.S. 87, 106 (1974) (same).

[103] *Reno*, 521 U.S. at 877–78; *see also id.* ("[A] parent who sent his 17-year-old college freshman information on birth control via email could be incarcerated even though neither he, his child, nor anyone in their home community found the material 'indecent' or 'patently offensive,' if the college's town community thought otherwise.").

[104] *Ashcroft I*, 535 U.S. at 573. Although eight of the nine Justices agreed that COPA's "community standards" language did not render the law unconstitutional, no opinion received support from a majority of the Court. In these circumstances, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . ." Marks v. United States, 430 U.S. 188, 194 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)). For more information on application of this rule, see CRS Legal Sidebar LSB10113, *What Happens When Five Supreme Court Justices Can't Agree?*, by Kevin M. Lewis.

[105] *Ashcroft I*, 535 U.S. at 577–78 (plurality opinion).

[106] *Id.*

[107] *Id.*

[108] *See id.* at 586 (O'Connor, J., concurring) (advocating the adoption of a national "community standard" for obscenity in light of the development of the internet as a medium); *id.* at 589–90 (Breyer, J., concurring) (same); *id.* at 591–602 (Kennedy, J., concurring) (opining that the Child Online Protection Act's "community standards" language may create constitutional issues if read in conjunction with other portions of the law, even if insufficient to invalidate the law alone).

[109] ACLU v. Ashcroft, 322 F.3d 240, 243 (3d Cir. 2003). The Third Circuit observed that, while COPA's proscribed material used language from the Supreme Court's decision in *Miller*, the *Miller* standard defines material based on how it is perceived by adults, rather than minors. *Id.* at 246. On this basis, the Third Circuit applied a strict scrutiny analysis, as COPA targeted speech outside the traditionally unprotected category of obscenity. *Id.* at 247.

[110] *Id.* at 251.

[111] 542 U.S. 656 (2004) [hereinafter *Ashcroft II*].

Circuit, applied strict scrutiny analysis to assess the law's constitutionality.[112] Writing for five members of the Court, Justice Kennedy held that "a number of plausible, less restrictive alternatives to the statute" existed that would not be less effective.[113] The Court therefore upheld the preliminary injunction,[114] and the case proceeded to trial.

The Eastern District of Pennsylvania held a bench trial on the law's constitutionality and permanently enjoined the Attorney General from enforcing the law after concluding that it was unconstitutionally vague and overbroad.[115] The Third Circuit affirmed on appeal.[116] The Supreme Court declined to review the Third Circuit's decision, ending the litigation.

Considerations for Congress

The Supreme Court's decisions in *Ashcroft I* and *II* and *Reno* offer several glimpses into how the Court might address laws that directly regulate minors' access to internet content. Because both the CDA and COPA were "content-based" restrictions on speech that did not limit their application only to an unprotected category of speech, the Court applied a strict scrutiny analysis, asking if the law at issue was narrowly tailored to achieve a compelling government interest.[117] The strict scrutiny standard is historically difficult to satisfy, as content-based restrictions on speech are "presumptively invalid."[118] A law that restricts children's access to particular types of internet content likely would be assessed under this standard.

A law would be less likely to come under strict scrutiny if it targeted historically unprotected categories of speech. The Supreme Court's historic reliance on *Ginsberg* and *Miller*, which focus on obscene material, illustrates this. As discussed above, obscenity is a narrow category of speech that encompasses only certain sexually explicit material. Obscenity restrictions may therefore fail to reach non-sexually explicit content.[119] Content that is not "obscene" as a legal matter may still fall within one of the other unprotected categories of speech that the Supreme Court has recognized.[120] Congress has passed a number of laws regulating the dissemination of content that falls into these unprotected categories.[121] Recent legislative efforts at both the federal and state

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[112] *Id.* at 660. In dissent, Justice Scalia argued that "[n]othing in the First Amendment entitles the type of material covered by [the Child Online Protection Act]" to strict scrutiny. *Id.* at 676 (Scalia, J., dissenting).

[113] *Id.* at 666–67 (discussing the use of blocking and filtering software as a less restrictive and potentially more effective means of restricting children's access to certain material).

[114] *Id.* at 673.

[115] ACLU v. Gonzales, 478 F. Supp. 2d 775, 816–20 (E.D. Pa. 2007). The district court identified several terms and phrases in the statute that it held to be vague either because the statute did not define the terms or defined them with insufficient precision. *Id.* at 816–19.

[116] ACLU v. Mukasey, 534 F.3d 181, 184 (3d Cir. 2008).

[117] *See* Reno v. ACLU, 521 U.S. 844, 874 (1997); *Ashcroft II*, 542 U.S. at 660. *But see id.* at 676 (Scalia, J., dissenting) (arguing that the material covered by COPA is not protected by the First Amendment and therefore strict scrutiny should not apply).

[118] R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

[119] *E.g.*, Wells, *supra* note 2 (discussing how content on Instagram may have contributed to teen girls developing eating disorders); *Xanax, Ecstasy, and Opioids: Instagram Offers Drug Pipeline to Kids*, TECH TRANSPARENCY PROJECT (Dec. 7, 2021), https://www.techtransparencyproject.org/articles/xanax-ecstasy-and-opioids-instagram-offers-drug-pipeline-kids (exploring the prevalence of drug-related ads and content targeted to teens on Instagram).

[120] *See supra* note 19 and accompanying text.

[121] *E.g.*, 18 U.S.C. § 2252A (criminalizing the online dissemination of child pornography); *id.* § 875(c) (criminalizing the transmission of an interstate or foreign communication containing a threat of kidnapping or injury); *id.* § 1037 (criminalizing activities involving fraudulent and deceptive email messages); *id.* § 119 (criminalizing the publication of

level to define new categories of unprotected speech, however, have been unsuccessful.[122] Whether a legislative attempt to regulate particular content is subject to strict scrutiny may therefore depend on how closely the content being regulated fits into existing categories of unprotected speech.

A federal restriction modelled after *Miller*'s language may also raise questions as to how the *Miller* test applies on the internet in light of the Supreme Court's decisions in *Reno* and *Ashcroft I*. When the Court confronted COPA's "community standards" language in *Ashcroft I*, Justice Thomas suggested that such standards would depend on the views of a local community receiving the material.[123] Justice Thomas's opinion was not a majority opinion, and two Justices voiced support for the development of a national community standard for obscenity, muddying the picture of how lower courts should apply "community standards" to the internet.[124] Lower courts applying obscenity statutes to the internet have inconsistently applied *Ashcroft I*: the Ninth Circuit has construed *Ashcroft I* to hold that a national community standard applies to obscenity on the internet,[125] while the Eleventh Circuit held in an unpublished decision that a local standard applies.[126]

A content-based law that targets protected speech must advance a compelling governmental interest and must be narrowly tailored to serve that interest. The Supreme Court has regularly affirmed that government has a compelling interest in the welfare of children.[127] Although the Court has accepted this interest as compelling without much interrogation in cases involving obscene or indecent material, attempts to protect children against other types of content have faced greater scrutiny. In *Brown v. Entertainment Merchants' Ass'n*, a case involving a state ban on the sale of violent video games to minors, the Court emphasized that government "must specifically identify an 'actual problem' in need of solving" to allege a compelling interest.[128] The *Brown* Court determined that the state's "predictive judgments" that violent video games cause aggression in children, without direct proof of a causal link, did not meet this threshold and could not demonstrate a compelling interest.[129] Alleging a compelling interest sufficient to support restricting children's access to particular online material may prove difficult: the evidentiary value of research like that included in the Facebook Files, for example, may depend on whether that research supports the notion that particular social media content actually causes harm in children.[130]

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personal information of certain people "with the intent to threaten, intimidate, or incite the commission of a crime of violence").

[122] *See* Brown v. Enter. Merchants Ass'n, 564 U.S. 786, 794–99 (2011) (invalidating a state legislature's attempt to treat violent video games as unprotected speech); United States v. Stevens, 559 U.S. 460, 469 (2010) (refusing to consider "depictions of animal cruelty" as unprotected speech).

[123] *Ashcroft I*, 535 U.S. 564, 580–84 (2002).

[124] *Id.* at 586 (O'Connor, J., concurring); *id.* at 589 (Breyer, J., concurring).

[125] United States v. Kilbride, 584 F.3d 1240, 1254 (9th Cir. 2009).

[126] United States v. Little, 365 F. App'x 159, 163 (11th Cir. 2010).

[127] *See* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors."); Denver Area Ed. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 743 (1996) (identifying "the need to protect children from exposure to patently offensive sex-related material" as an interest "this Court has often found compelling").

[128] *Brown*, 564 U.S. at 799 (quoting United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 822–23 (2000).

[129] *Id.* at 799–800.

[130] *Compare* Wells, *supra* note 2 (reporting that internal research at Instagram states that the social media platform "make[s] body image issues worse for one in three teen girls"), *with* Dan Milmo and Kari Paul, *Facebook Disputes Its Own Research Showing Harmful Effects of Instagram on Teens' Mental Health*, THE GUARDIAN (Sept. 30, 2021, 8:59

Another key question for content-based restrictions is whether a given restriction is "narrowly tailored." One means of assessing whether a law is narrowly tailored is whether it impacts more speech than is necessary. The *Reno* court struck down the CDA in part because it failed to limit adequately its impacts on speech unrelated to the law's aims.[131] Additionally, the availability of other means that are equally as effective at achieving the government's interest, without restricting speech, may prove fatal to any direct regulation of access to particular content.[132] Whether a direct regulation of access to internet content by minors survives constitutional scrutiny may therefore depend on what exactly the law restricts, whom the law impacts, and what technology is available that may accomplish the law's goals.

In both *Reno* and *Ashcroft II*, the Court focused on the availability of technological tools capable of restricting access to particular material in assessing whether the CDA and COPA were narrowly tailored.[133] In *Reno*, the lack of available technology to prevent only minors from accessing material led the Court to conclude that the CDA likely would impact protected speech between adults.[134] In *Ashcroft II*, the Court determined that the existence of effective blocking technology suggested that there were less restrictive means of achieving the government's interest.[135] These cases thus provide two related considerations with respect to technology. If technology is insufficiently advanced to address the goals of a piece of legislation, the legislation risks being overly broad by sweeping into its restrictions more speech than is constitutionally permissible. If technology is sufficiently advanced, the use and adoption of particular technology may be a less restrictive alternative to a ban on certain speech.

One consideration in determining how to analyze a particular restriction is that the nature of the internet as a medium may have changed since the Court's decisions in *Reno* and *Ashcroft I* and *II*. In several cases, the Court has opined that "each medium of expression presents special First Amendment problems," and certain media (such as broadcast) may be entitled to lesser protections than others.[136] In *Reno*, the Court distinguished its approach from *Pacifica* by noting several features of broadcast that do not apply to the internet: a history of government regulation, a scarcity of available frequencies, and an "invasive nature."[137] Though the internet still has not been subject to a history of regulation, some legal scholars argue that the trajectory of the internet has positioned it closer to broadcast than it may have been in the 1990s.[138] The *Reno* court

PM), https://www.theguardian.com/technology/2021/sep/29/facebook-hearing-latest-children-impact (reporting on Facebook's release of annotations to this research "stress[ing] that the work is not fit to evaluate causal links between social media and mental health").

[131] *See* Reno v. ACLU, 521 U.S. 844, 875 (1998) (holding that a compelling interest in children "does not justify an unnecessarily broad suppression of speech addressed to adults").

[132] *See Ashcroft II*, 542 U.S. 656, 667 (2004).

[133] *See Reno*, 521 U.S. at 876; *Ashcroft II*, 542 U.S. at 666–67.

[134] *Reno*, 521 U.S. at 876.

[135] *Ashcroft II*, 542 U.S. at 667.

[136] *See* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978); Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975) ("Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."). The Supreme Court has also suggested that characteristics of the medium being regulated may impact the type of First Amendment scrutiny applied to analyze a regulation. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 661 (1994) (declining to apply strict scrutiny to a cable television regulation that the Court deemed "justified by special characteristics of the cable medium," though the Court separately concluded that this regulation was content-neutral and therefore would not be subject to strict scrutiny, *id.* at 652).

[137] *Reno*, 521 U.S. at 868.

[138] *See* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1660–61 (2018); Angela J. Campbell, *The Legacy of Red Lion*, 60 ADMIN. L. REV. 783, 788 (2008) (noting that "[w]hether a medium is analogous to broadcasting is subjective and may change over time" and describing in

observed that "[c]ommunications over the internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'"[139] For modern internet services that can deliver a wide range of content, some commentators have observed that users may not always have control over the content they receive.[140] That the internet may be more analogous to broadcast today than it was 30 years ago may not mean that the internet enjoys lesser First Amendment protections. Supreme Court Justices, appeals court judges, and legal commentators have suggested that, rather, the changing media landscape may suggest that *Pacifica* should be reconsidered and courts should apply the same standards to broadcast that they currently apply to other media.[141]

Another legislative approach to issues relating to the use of the internet by children may be legislation that affects how children may access the internet without prohibiting a particular type of content. Some bills introduced in the 117th Congress may have attempted to take this approach: for example, the Kids Internet Design and Safety (KIDS) Act would prohibit the use of certain "interface elements" on commercial websites targeted to children under 16 years of age.[142] Another bill, the Kids PRIVCY Act, would prohibit the use of children's personal information to target advertisements to children.[143] If a court were to determine that these bills would not target particular speech based on its message or viewpoint, courts could analyze them under the more permissive intermediate scrutiny standard.[144] Content-neutral laws may be more likely to withstand judicial challenges, but even content-neutral laws cannot be unduly broad lest they interfere with the First Amendment rights of children and adults.[145] In short, any attempt to regulate online material accessed by children would likely face consideration of how to take account of a range of potential First Amendment impacts.

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particular changes to the internet since *Reno* was decided).

[139] *Reno*, 521 U.S. at 869 (quoting ACLU v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996)).

[140] *See, e.g.*, Rob Barry et al., *How TikTok Serves Up Sex and Drug Videos to Minors*, WALL STREET JOURNAL (Sept. 8, 2021), https://www.wsj.com/articles/tiktok-algorithm-sex-drugs-minors-11631052944?mod=article_inline (describing how videos automatically displayed on TikTok's "For You" feed change based on user activity); *see also* Roberto A. Cámara Fuertes, *Letting the Monster out of the Closet: An Analysis of Internet Indecency Regulation*, 70 REV. JUR. U.P.R. 129, 136–37 (2001) (describing instances in which minors may unintentionally access particular content, echoing concerns raised in *Pacifica*).

[141] *See, e.g.*, FCC v. Fox Television Stations, Inc., 567 U.S. 239, 259 (2012) (Ginsburg, J., concurring) ("Time, technological advances, and the [FCC's] untenable rulings . . . show why *Pacifica* bears reconsideration."); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 534 (2009) (Thomas, J., concurring) (averring that "dramatic changes in factual circumstances might well support a departure" from *Pacifica*); Action for Children's Television v. FCC, 58 F.3d 654, 673 (D.C. Cir. 1995) (Edwards, C.J., dissenting) ("Whatever the merits of *Pacifica* when it was issued almost 20 years ago, it makes no sense now"); Randolph J. May, *Charting a New Constitutional Jurisprudence for the Digital Age*, 3 CHARLESTON L. REV. 373, 376 (2009) (encouraging the Supreme Court to apply strict scrutiny to broadcast regulation). *But see* William E. Lee, *Books, Video Games, and Foul-Mouthed Hollywood Glitteratae: The Supreme Court and the Technology-Neutral Interpretation of the First Amendment*, 14 COLUM. SCI & TECH. L. REV. 295, 374–79 (2012) (observing discomfort among the Supreme Court with overturning *Pacifica* and speculating that *Pacifica*'s narrowness has helped discourage the Supreme Court from revisiting it).

[142] H.R. 5439, S. 2918, 117th Cong. (2021).

[143] H.R. 4801, § 3, 117th Cong. (2021).

[144] *See "Legal Concepts: Obscenity and Laws Restricting Speech to Minors" supra* for more information. For a detailed discussion of levels of scrutiny applied to internet-related regulations, see CRS Report R45650, *Free Speech and the Regulation of Social Media Content*, by Valerie C. Brannon.

[145] *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 212–13 (1975) (discussing the "significant" First Amendment rights of minors).

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