Missouri Law Review

Volume 68
Issue 3 *Summer 2003*

Article 7

Summer 2003

Community Standards of Utah and the Amish Country Rule the World Wide Web - Ashcroft v. ACLU, The

Matthew Towns

The Community Standards of Utah and the Amish Country Rule the World Wide Web

Ashcroft v. ACLU[1]

I. INTRODUCTION

Since the Supreme Court's articulation of the *Miller* obscenity test in 1973, contemporary community standards have been serving as the measure to determine whether broadcast sound or print materials qualify as criminally obscene.[2] This concept of community standards has proven to mean only the standards of regional communities, usually smaller than a single state.[3] The values and common opinions in these regions today control court determinations of what materials are to be considered obscene, even under federal obscenity statutes.[4]

Challengers of the Child Online Protection Act ("COPA"), a recently enacted federal law prohibiting the posting of materials harmful to children on the Internet, contended that regional community standards should not govern such a broad-based medium.[5] The United States Supreme Court held, however, that the statutory language mandating application of regional community standards in judging Internet content did not run contrary to the First Amendment.[6] This Note supports the continued use of the *Miller* obscenity test, including its community standards criteria, but endorses the position taken by the

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1. 535 U.S. 564 (2002). In justifying his decision that the Child Online Protection Act, 47 U.S.C. § 231 (2000) [hereinafter "COPA"], was untenable under the First Amendment, Judge Garth of the Court of Appeals for the Third Circuit is reported to have inquired, "Are we all going to be remitted to the standards . . . of those residents in Utah or the Amish country?" Sahara Stone, *Child Online Protection Act: The Problem of Contemporary Community Standards on the World Wide Web*, 9 MEDIA L. & POL'Y 1, 7 (2001). As explained in this Note, Judge Garth's ruling was vacated. *Ashcroft*, 535 U.S. at 586.

2. Miller v. California, 413 U.S. 15, 24 (1973). The *Miller* test is comprised of three prongs. Material is held to be obscene if it (1) appeals to the prurient interest as judged by "contemporary community standards," (2) depicts sexual conduct in a patently offensive way, in light of "contemporary community standards," and (3) lacks serious value as literature, art, or in other ways. *Id.*; *see* Pope v. Illinois, 481 U.S. 497, 500 (1987); *infra* note 55. The test largely resolved longstanding disputes concerning how to determine whether materials are obscene, and has remained intact since its inception. *See infra* notes 52-55 and accompanying text.

3. Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 124-25 (1989).

4. *See Ashcroft*, 535 U.S. at 577.

5. *See id.* at 573.

6. *Id.* at 583-84.

concurring Justices that, in the case of the Internet, the test should apply national community standards of obscenity, rather than the community standards of each diverse region of the United States.[7]

II. FACTS AND HOLDING

The Child Online Protection Act[8] is Congress's second attempt to protect children from pornographic internet content,[9] and was born in response to the Supreme Court's abrogation of its predecessor, the Communications Decency Act of 1996 ("CDA").[10] Even before COPA went into effect,[11] a group of Internet users and organizations that either posted sex-related material, or had members who posted such material, instituted a facial challenge to prevent enforcement.[12]

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7. *See, e.g., id.* at 589 (Breyer, J., concurring).

8. 47 U.S.C. § 231 (2000). COPA prohibits any person from "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, mak[ing] any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." *Id.* § 231(a)(1). "Material that is harmful to minors" includes:

> any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—
> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Id. § 231(e)(6).

9. *See Ashcroft*, 535 U.S. at 567-68.

10. Reno v. ACLU, 521 U.S. 844, 882 (1997) (holding that the Communications Decency Act overburdened free speech and was not sufficiently narrowly tailored). *See generally* the Communications Decency Act of 1996, 47 U.S.C. § 223 (Supp. II 1994) [hereinafter "CDA"]. The breadth of the CDA was "wholly unprecedented," and its "general, undefined terms 'indecent' and 'patently offensive' cover[ed] large amounts of nonpornographic material with serious educational or other value." *Reno*, 521 U.S. at 877. Just as some obscenity laws "burn[] the house to roast the pig," the CDA, according to the Court, threatened "to torch a large segment of the Internet community." *Id.* at 882.

11. *See Ashcroft*, 535 U.S. at 571.

12. *See id.* A law is subject to a facial challenge if it restricts substantially more speech than is justified. *Id.* at 591 (citing Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)).

Most of the organizations that challenged the law operated and derived income from their own Web sites, although much of their material was provided to the public free of charge.[13] The Web site operators claimed, inter alia, that the statute violated the First Amendment rights of adults because, in effect, it (1) banned constitutionally protected speech, (2) was not the least restrictive means of accomplishing a compelling governmental purpose, and (3) was substantially overbroad.[14] The focus of their challenge was the language of the statute which mandated that material be judged by "contemporary community standards."[15] Under this provision, the organizations claimed, juries would apply their own local community standards,[16] thus prohibiting the posting of material that might be considered "'harmful to minors' in some communities,"[17] presumably those communities with the most puritanical standards.[18] In contrast, the Attorney General took the position that under the "contemporary community standards" test, jurors would "not consider the community standards of any particular geographic area," but instead would be "instructed to consider the standards of the adult community as a whole, without geographic specification."[19]

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13. *Id.* at 571. The list of challengers included "the American Civil Liberties Union, Androgony Books, Inc., d/b/a A Different Light Bookstores, the American Booksellers Foundation for Free Expression, Artnet Worldwide Corporation, BlackStripe, Addazi Inc. d/b/a Condomania, the Electronic Frontier Foundation, the Electronic Privacy Information Center, Free Speech Media, OBGYN.net, Philadelphia Gay News, PlanetOut Corporation, Powell's Bookstore, Riotgrrl, Salon Internet, Inc., and West Stock, Inc., now known as ImageState North America, Inc." *Id.* at 571 n.4. The Web sites contained material such as "resources on obstetrics, gynecology, and sexual health; visual art and poetry; resources designed for gays and lesbians; information about books and stock photographic images offered for sale; and online magazines." *Id.* at 571 (quoting ACLU v. Reno, 31 F. Supp. 2d 473, 484 (E.D. Pa. 1999), *aff'd*, 217 F.3d 162 (3d Cir. 2000), *vacated by Ashcroft*, 535 U.S. 564).

14. *Id.* at 571-72.

15. *See id.* at 576-77. The "contemporary community standards" language was borrowed from the three-prong *Miller* obscenity test. *Id.* at 570; *see* Miller v. California, 413 U.S. 15, 24 (1973).

16. *Ashcroft*, 535 U.S. at 576.

17. *Id.* at 571. Concerning the necessity of applying the strict scrutiny standard, see *infra* notes 84-89 and accompanying text.

18. The statute did provide defenses for Internet users who restricted access to their Web sites by means of adult identification screens. *Id.* at 570; 47 U.S.C. § 231(c)(1) (2000). The Web site operators argued, however, that the requirement that such screens be used rendered the statute "unconstitutionally overbroad." *Ashcroft*, 535 U.S. at 584. Such screens arguably would dissuade adult Internet users from visiting Web sites that use them. *See* ACLU v. Reno, 31 F. Supp. 2d 473, 495 (E.D. Pa. 1999), *aff'd*, 217 F.3d 162 (3d Cir. 2000), *vacated by Ashcroft*, 535 U.S. 564.

19. *Ashcroft*, 535 U.S. at 576.

The District Court for the Eastern District of Pennsylvania entered a preliminary injunction barring enforcement of the statute.[20] The court held that COPA was unlikely to withstand strict scrutiny[21] because it instituted content-based regulation of speech protected under the First Amendment, and was therefore presumptively invalid.[22] Furthermore, the district court doubted that the Attorney General could meet the burden of proving that the statute was narrowly tailored or used the least restrictive means to protect children from harmful Internet content.[23]

The contemporary community standards issue first came to prominence on appeal in *ACLU v. Reno*.[24] In affirming the district court's decision,[25] the Court of Appeals for the Third Circuit held that because Web site operators were unable, for technological reasons,[26] to restrict the communities to which they broadcast their material, the "contemporary community standards" test likely rendered COPA unconstitutionally overbroad.[27] According to the Third Circuit, to judge the content of the Web sites by community standards would require the site operators either to censor content to comply with the standards of the most puritan community, or to block large amounts of protected speech with age verification screens, thereby curtailing the exercise of free speech.[28]

The United States Supreme Court granted certiorari to consider only the narrow community standards issue that had carried so much weight in the lower courts.[29] Leaving intact the district court's preliminary injunction barring enforcement,[30] the Court held that the reliance of the statute on community standards in determining what materials are harmful to children did not alone make it substantially overbroad in light of the First Amendment.[31]

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20. *Reno*, 31 F. Supp. 2d at 499.

21. *See id.* at 495.

22. *Id.* at 493.

23. *Id.* at 497.

24. *See Ashcroft*, 535 U.S. at 573; *see also* ACLU v. Reno, 217 F.3d 162, 180-81 (3d Cir. 2000), *vacated by Ashcroft*, 535 U.S.564.

25. *Reno*, 217 F.3d at 181.

26. *Id.* Indeed, the court of appeals found that the "community standards" test was generally appropriate to other media, but the Internet constituted a special case. *Id.* at 180.

27. *Id.* at 181.

28. *Id.* at 175.

29. *Ashcroft*, 535 U.S. at 573.

30. The parties did not request that the injunction be lifted. *Id.* at 586. Furthermore, according to the Court, many issues concerning the constitutionality of the statute remained to be considered. *Id.* at 585-86.

31. *Id.* at 585.

According to the majority, there was redeeming value in COPA's additional tests,[32] which required that the material lack serious value and appeal to the prurient interest.[33] The Court viewed these additional tests as safeguards that provided insulation against the potentially harsh effects of the initial community standards test, because all three tests would have to be met before any material would fall under the statute.[34] The judgment of the court of appeals, therefore, was vacated to the extent that it was based on the community standards test, and the case was remanded for consideration of the constitutionality of the statute's other provisions.[35] The Court held that under the First Amendment, no decency in communications statute is facially unconstitutional merely because it employs a contemporary community standards test, so long as the test includes further requirements that the prohibited communications appeal to the prurient interest and lack serious social value.[36]

III. LEGAL BACKGROUND

While the First Amendment generally prohibits government restriction of free speech,[37] this First Amendment protection has long been held not to apply to speech that is obscene.[38] Creating a sufficiently clear and lasting definition of what qualifies as obscene has presented significant difficulty for the courts.[39] The use, as in the CDA and in COPA, of contemporary community standards as a technique for measuring obscenity originally arose in the evolution of common law obscenity standards.[40]

A. Judicial Obscenity Tests

Early common law tests for obscenity, such as the "*Hicklin* test,"[41] declared any material containing even an isolated passage that would offend a

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32. *See* COPA, 47 U.S.C. § 231(e)(6) (2000).

33. *See Ashcroft*, 535 U.S. at 601. Although COPA provides no definition for "prurient interest," the term has been defined in state statutes as "a shameful or morbid interest in nudity, sex or excretion." *See, e.g.*, Ward v. Illinois, 431 U.S. 767, 767 (1977).

34. *Ashcroft*, 535 U.S. at 577-78.

35. *See id.* at 586.

36. *Id.* at 580-82. This holding applies regardless of the medium used or its technological limitations; any publisher choosing to send material into a community must abide by that community's standards. *Id.* at 583.

37. "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

38. *Ashcroft*, 535 U.S. at 574; Roth v. United States, 354 U.S. 476, 484-85 (1957).

39. *See, e.g.*, Miller v. California, 413 U.S. 15, 20 (1973).

40. *See Roth*, 354 U.S. at 489.

41. *See* Regina v. Hicklin, L.R. 3 Q.B. 360 (1868).

"particularly susceptible" member of society to be obscene.[42] But the Supreme Court refused to adopt the *Hicklin* test because of the test's reliance on the standard of particularly sensitive persons.[43] The Court reasoned in *Roth v. United States* that the particularly susceptible person standard might encompass material legitimately dealing with sex-related issues and therefore had to be rejected as unconstitutionally restrictive of speech and press freedoms.[44] The Court thus exhibited a preference for a test that would enforce prevailing societal values rather than the sensitivities of isolated perspectives.

Although the Supreme Court formally adopted contemporary community standards as part of its more modern test in *Roth*,[45] the Court had, in fact, embraced the idea that obscenity should be judged by prevailing community values almost ten years earlier.[46] According to the Court, substituting the views of society in general for the narrow individual perspective created a safeguard to prevent prohibition of constitutionally protected speech.[47]

The *Roth* test used community standards to determine whether material predominantly appealed to the prurient interest.[48] In time, however, the *Roth* test proved insufficiently specific to permit consistent application.[49] Confusion arose in lower courts concerning whether the community standards to be considered were those of the entire United States or of smaller regions.[50] Indeed, there was

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42. *See Roth*, 354 U.S. at 488-89.

43. *Id.* at 489.

44. *Id.*

45. *See id.*; Roman A. Kostenko, *Are "Contemporary Community Standards" No Longer Contemporary?*, 49 CLEV. ST. L. REV. 105, 107-08 (2001). The *Roth* test provided that material was obscene if "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Roth*, 354 U.S. at 489.

46. Winters v. New York, 333 U.S. 507, 515 (1948) (holding that "[w]hen a legislative body concludes that the mores of the community call for an extension of the impermissible limits, an enactment aimed at the evil is plainly within its power, if it does not transgress the boundaries fixed by the Constitution for freedom of expression"). Even under such a standard, however, the Court recognized that the crime "must be defined with appropriate definiteness." *Id.* (quoting Pierce v. United States, 314 U.S. 306, 311 (1941)).

47. *Roth*, 354 U.S. at 489.

48. *Id.*

49. William D. Deane, *COPA and Community Standards on the Internet: Should the People of Maine and Mississippi Dictate the Obscenity Standard in Las Vegas and New York?*, 51 CATH. U. L. REV. 245, 252 (2001).

50. *See, e.g.*, Hamling v. United States, 418 U.S. 87, 147 n.3 (1974) (Brennan, J., dissenting) (quoting erroneous jury instruction based on a national community standard); Miller v. California, 413 U.S. 15, 30-31 (1973) (describing the conflict in lower courts over whether to apply a national or statewide standard). The problem, as stated in *Miller*,

disagreement among the Justices themselves whether to apply a national or local standard.[51]

In *Miller v. California*,[52] the Court at last provided what it called "concrete guidelines" to isolate pornography from other forms of expression.[53] The *Miller* test has withstood challenge for almost thirty years and is still in use today.[54] The test contains three prongs, each of which must be satisfied for a work to fall under an obscenity statute.[55] Contemporary community standards apply only to the first and second prongs.[56] Thus, the jury must decide, under contemporary community standards, whether the work appeals to the prurient interest. Then, applying the same contemporary community standards, the jury must decide whether the work portrays sexual conduct in a patently offensive way.[57] Finally, the court determines whether the work as a whole lacks serious artistic, political, or other value.[58]

In *Miller*, the Court also addressed the question of whether to apply national or local community standards.[59] Writing for the majority, Chief Justice Burger declared the United States too large and diverse to permit the use of a unified national standard.[60] He further cited Chief Justice Warren's dissenting opinion in *Jacobellis v. Ohio*[61] for the assertion that there was "no provable 'national standard,'"[62] and introduced the now familiar argument that the people of Maine or Mississippi should not be forced to tolerate works deemed acceptable in Las

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was that no one could "say with certainty that material [was] obscene until at least five members of this Court, applying inevitably obscure standards, [had] pronounced it so." *Miller*, 413 U.S. at 29 (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 92 (1973)).

51. For an analysis of the various perspectives of the justices, *see* Deane, *supra* note 49, at 253.

52. 413 U.S. 15 (1973).

53. *Id.* at 29.

54. *See* Deane, *supra* note 49, at 254.

55. The *Miller* test consists of the following guidelines for the trier of fact: "(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 (internal citations omitted).

56. Smith v. United States, 431 U.S. 291, 301 (1977); *see* Kostenko, *supra* note 45, at 111 n.36.

57. Kostenko, *supra* note 45, at 111 n.36.

58. *See* Kostenko, *supra* note 45, at 111 n.36.

59. *See* Kostenko, *supra* note 45, at 112.

60. *Miller*, 413 U.S. at 30.

61. Jacobellis v. Ohio, 378 U.S. 184 (1964) (Warren, C.J., dissenting).

62. *See Miller*, 413 U.S. at 32 (citing *Jacobellis*, 378 U.S. at 200 (Warren, C.J., dissenting)); *see also* Hamling v. United States, 418 U.S. 87, 105 (1974).

Vegas or New York City.[63] The *Miller* decision was designed to apply to state obscenity statutes, but later was held to apply to federal statutes.[64]

Since the *Miller* "contemporary community standards" language did not establish national obscenity standards, exactly what size or kind of community should be the source of the standards remained undetermined.[65] The standards need not be statewide,[66] and federal courts have held that the standards may be those of a county or federal judicial district.[67] Indeed, in *Hamling v. United States*,[68] the Court held that the Constitution does not demand that the parameters of the intended community be specified at all.[69] Instead, juries should be allowed to rely on their own understanding of standards in the communities where they live, considering the entire community and not their own subjective opinions or the standards of "a sensitive or . . . callous minority."[70]

The holding in *Hamling*[71] addressed a particularly important issue in the context of Internet communication: whether the use of local community standards renders the *Miller* test unconstitutional because it subjects nationwide distributors of printed materials to the various and unpredictable standards of every community through which the materials may pass.[72] The Court rejected the petitioners' argument that such nationwide distributors should be held to national, rather than local, standards,[73] and likewise refused to adopt Justice Brennan's opinion that to convict the petitioners under a local standards test would deny them due process of law.[74] The Court instead held that local

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63. *Miller*, 413 U.S. at 32.

64. *See* Sable Communications of Cal. v. FCC, 492 U.S. 115, 125 (1989); United States v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123, 130 (1973).

65. *See* Rieko Mashima, *Problem of the Supreme Court's Obscenity Test Concerning Cyberporn: Community Standards Remaining After* ACLU v. Reno, 16 No. 11 COMPUTER LAW. 23, 23 (1999).

66. *See id.*; Jenkins v. Georgia, 418 U.S. 153, 157 (1974).

67. *See* Mashima, *supra* note 65, at 23-24; Martin Karo & Marcia McBrian, *The Lessons of* Miller *and* Hudnut*: On Proposing a Pornography Ordinance That Passes Constitutional Muster*, 23 U. MICH. J.L. REFORM 179, 187-88 (1989).

68. 418 U.S. 87 (1974).

69. *Id.* at 105; *see* Kostenko, *supra* note 45, at 112.

70. Smith v. United States, 431 U.S. 291, 305 (1977); *see* Kostenko, *supra* note 45, at 113.

71. In *Hamling*, the Supreme Court affirmed the conviction of a group of persons for mailing approximately 55,000 graphic advertisements of an obscene book to locations throughout the country. *Hamling*, 418 U.S. at 91-95. The conviction was based on the same federal obscenity statute, 18 U.S.C. § 1461, that had been upheld in *Roth*. *Hamling*, 418 U.S. at 98-99.

72. *Id.* at 106.

73. *Id.* at 104.

74. *Id.* at 106; *see also id.* at 150 (Brennan, J., dissenting).

community standards apply not only to persons based in a local area, who have reason to know of the local standards, but also to persons who operate from a distance and are unaware of the local standards.[75]

If defendants who, like the petitioners in *Hamling*, send obscene materials through the mail may be said to lack control over the places to and through which the materials might travel,[76] the same is all the more true of distributors who send obscene messages to callers by telephone.[77] In *Sable Communications of California v. FCC*, a "dial-a-porn" service sought injunctive relief against a statute that entirely banned indecent or obscene telephone communications.[78] The service would only broadcast its obscene messages when customers took the affirmative step of calling the service.[79] The Court in *Sable* nevertheless reaffirmed its holding that obscenity statutes interpreted under local "contemporary community standards" are constitutional.[80] The Court proposed that such distributors use screening technology to ensure their messages would not be broadcast to areas where the messages would be considered obscene.[81] In other words, the burden lies entirely on the distributor to comply with local standards, regardless of how broadly the distributor sends its messages or how varied are the standards of the communities where the messages are received.[82] Thus, although the Court had previously held that every medium of expression should be judged by standards appropriate to its unique qualities,[83] neither the telephone message service nor the mass mail distributors were entitled to be held to anything other than the broad standards prescribed by the *Miller* test.

B. Substantial Overbreadth

Obscenity statutes must not be so broad, however, that protected speech falls within their ambit.[84] The Court in *Sable* struck down a statute that completely banned indecent or obscene telephone messages, holding that the statute was overbroad to the extent that it covered merely indecent

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75. *See id.* at 106; Ashcroft v. ACLU, 535 U.S. 564, 581 (2002).

76. *See Hamling*, 418 U.S. at 144 (Brennan, J., dissenting).

77. *See generally* Sable Communications of Cal. v. FCC, 492 U.S. 115, 124-25 (1989).

78. *Id.* at 117-18.

79. *Id.*

80. *Id.* at 125.

81. *Id.*

82. *Id.* at 125-26. "If Sable's audience is comprised of different communities with different local standards, Sable ultimately bears the burden of complying with the prohibition on obscene messages." *Id.* at 126; *see also* Ashcroft v. ACLU, 535 U.S. 564, 581 (2002).

83. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975).

84. *Sable*, 492 U.S. at 126-27.

communications.[85] Under the First Amendment, speech that is indecent but not obscene is only subject to government regulation to promote a compelling state interest, and then only if the government uses the least restrictive means to accomplish its purpose.[86] The Court emphasized that there is a compelling interest in protecting the psychological and physical well-being of children,[87] but statutes meant to do so are nonetheless subject to strict constitutional scrutiny: the method of regulation must protect a compelling state interest, and the statute must in fact protect that interest.[88] Such statutes must also be narrowly structured to avoid interfering with speech protected under the First Amendment.[89]

Congress's two successive statutes governing obscenity on the Internet were drafted in light of the case law surrounding the *Miller* obscenity test.[90] The stated purpose of the first statute, the CDA,[91] was to protect children from pornographic Internet content by establishing "a uniform national standard of content regulation."[92] To accomplish this purpose, Congress essentially invoked only the language of the second prong of the *Miller* test, the "patently offensive" prong,[93] when it prohibited the transmission to minors of any sex-related messages patently offensive based on contemporary community standards.[94]

The CDA was struck down due to unconstitutional ambiguities found in two of its provisions.[95] First, the statute prohibited transmission of obscene as well as indecent messages[96] without defining what constituted an indecent message.[97] The term "indecent" thus left ambiguities that would have an impermissible chilling effect on protected speech, especially in light of the statute's threat of criminal prosecution and imprisonment.[98] Second, the provision proscribing

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85. *Id.* at 131. Banning calls that are merely indecent, the Court noted, would have the "effect of limiting the content of adult telephone conversations to that which is suitable for children to hear." *Id.*

86. *Id.* at 126.

87. *Id.*

88. *Id.*

89. *Id.*; *see also* United States v. Playboy Entm't Group, 529 U.S. 803, 813 (2000).

90. *See* Ashcroft v. ACLU, 535 U.S. 564, 570 (2002); Reno v. ACLU, 521 U.S. 844, 873 (1997).

91. 47 U.S.C. § 223 (Supp. II 1994); *see also* 47 U.S.C. § 223 (2000) (most recent version of the CDA).

92. S. CONF. REP. NO. 104-230, at 191 (1996); *see Reno*, 521 U.S. at 874 n.39.

93. 47 U.S.C. § 223(d) (1994); *cf.* guideline (b) of the *Miller* test, Miller v. California, 413 U.S. 15, 24 (1973).

94. 47 U.S.C. § 223(d) (Supp. II 1994).

95. *Reno*, 521 U.S. at 870-71.

96. 47 U.S.C. § 223(a), (d) (Supp. II 1994).

97. *Reno*, 521 U.S. at 871.

98. *See* Praveen Goyal, Recent Development, *Congress Fumbles with the Internet:*

transmission of messages that were patently offensive in light of contemporary community standards was also undefined and open-ended.[99] Although the phrase "patent offensiveness" was part of the second prong of the *Miller* test, the CDA lacked the *Miller* test's requirement that "patently offensive" be analyzed based on applicable state law; thus, the CDA lacked any guidance for how to measure whether materials meet this standard.[100] The result of these flaws was a statute of unprecedented breadth,[101] reaching both protected and unprotected speech,[102] whose lack of narrow tailoring was fatal under strict scrutiny.[103] In so holding, the Court also specifically noted, seemingly contrary to its own precedent, that the application of contemporary community standards to the Internet was a contributing factor to the unconstitutionality of the statute.[104] The Court listed in its reasoning the problem that "the 'community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message."[105] With this statement, the Court provided a basis on which litigants and courts would later assert that inclusion of the community standards measure in any statute governing the Internet would render such a statute overbroad.[106]

C. *Child Online Protection Act*

When Congress drafted COPA, its second law to protect children from pornography, it arguably intended to create a uniform national standard of determination of obscenity rather than one peculiar to any geographic area.[107] Unlike the CDA, the new statute limited its scope to materials displayed on the World Wide Web for commercial purposes,[108] and included in its definition of

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Reno v. ACLU, 21 HARV. J.L. & PUB. POL'Y 637, 641 (1998).

99. *Id.*

100. *See* Vasiliki Pagidas, Note, Reno v. ACLU, *117 S. Ct. 2329 (1997)*, 8 SETON HALL CONST. L.J. 975, 1002 (1998).

101. *Reno*, 521 U.S. at 877.

102. *Id.* at 882.

103. *Id.*; *see also* Ashcroft v. ACLU, 535 U.S. 564, 568 (2002).

104. *Reno*, 521 U.S. at 877-78.

105. *Id.*

106. *Ashcroft*, 535 U.S. at 575.

107. "The Committee . . . understands it as an 'adult' standard, rather than a 'geographic' standard, and one that is reasonably constant among adults in America with respect to what is suitable for minors." H.R. REP. NO. 105-775, at 28 (1998); *see Ashcroft*, 535 U.S. at 590 (Breyer, J., concurring).

108. 47 U.S.C. § 231(a)(1) (2000). The CDA contained no such limitation, but prohibited all knowing transmissions of obscene or indecent communications, regardless of purpose, by means of telecommunications devices to persons under eighteen. *See* 47

what is "harmful to minors" essentially all three prongs of the *Miller* test for obscenity.[109] Despite the Court's holding in *Reno v. ACLU*, Congress again incorporated in the statute the *Miller* test's reliance on community standards.[110] Ultimately, however, the Court held that due to the statute's limitations on coverage and its more detailed definition of materials "harmful to minors," the statute was considerably more narrow in scope than its predecessor.[111]

IV. THE INSTANT DECISION

In *Ashcroft v. ACLU*, the Court reaffirmed prior holdings that obscene speech falls outside of protected speech freedoms,[112] and that the use of contemporary community standards in determining what speech is obscene does not, by itself, render a federal statute unconstitutional,[113] even if publishers of obscene materials are required to abide by the standards of disparate communities.[114] It noted, therefore, that distributors of such materials are not dismissed from compliance with community standards simply because they use the Internet, a medium that broadcasts information to virtually every community in the country.[115] The majority further stated that because COPA's test for determining whether material is harmful to minors was modeled on the well-established *Miller* test[116] (including both a "serious value" and a "prurient interest" prong to narrow the applicability of community standards),[117] the mere use of those standards did not render the statute overbroad.[118] Thus, the Court upheld COPA's use of contemporary community standards,[119] although it left in place an injunction prohibiting enforcement pending constitutional analysis of the statute's other provisions.[120]

The majority was not overwhelming in number; at most, five Justices carried some points of the decision, while other points were decided by a mere

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U.S.C. § 223(a)(1)(B)(ii) (2000).

109. *See* 47 U.S.C. § 231(e)(6) (2000); *cf.* Miller v. California, 413 U.S. 15, 24 (1973). *See also Ashcroft*, 535 U.S. at 578-79.

110. *See* 47 U.S.C. § 231(e)(6)(B) (2000).

111. *Ashcroft*, 535 U.S. at 579.

112. *Id.* at 574.

113. *Id.* at 584-85.

114. *Id.* at 581.

115. *Id.* at 583.

116. *Id.* at 578.

117. *Id.* at 578-79.

118. *Id.* at 585.

119. *Id.*

120. *Id.* at 586.

plurality of three.[121] The opinion is followed by no less than three concurring opinions and one dissent.[122] Justice O'Connor's concurrence emphasized that the Court's precedents did not rule out adoption of a national standard.[123] Indeed, she stated that a national obscenity standard, when applied to the Internet in particular, would be reasonable[124] in light of the admitted absence of any great disparity even between the most and least restrictive communities' interpretations of what would qualify as obscene under COPA.[125] Such a standard would also be desirable because it would prevent overburdening Internet content providers with the task of attempting to limit access to their materials.[126] Therefore, Justice O'Connor concluded that reasonable regulation of the Internet mandated adoption of a nationwide community standard.[127]

Justice Breyer's concurrence focused on Congress's stated purpose of creating a community standard encompassing all of the nation's adults.[128] By enforcing Congress's intent, he noted, conflicts with the First Amendment could be avoided[129] because the most puritan communities would not be given the "heckler's Internet veto."[130] Therefore, Justice Breyer found, applying a national standard would prevent any special need for First Amendment analysis, because the constitutional problems associated with the use of local standards would be avoided entirely.[131]

Justice Kennedy, joined by Justices Souter and Ginsburg, found it impossible to decide whether the use of community standards would ultimately invalidate the statute until the scope of all the other provisions had been assessed.[132] He noted that because the Internet is a new and unique medium,

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121. *Id.* at 565-66.

122. *See generally id.* at 586-612.

123. *Id.* at 587 (O'Connor, J., concurring).

124. *Id.* at 589 (O'Connor, J., concurring).

125. *Id.* at 586 (O'Connor, J., concurring). Justice O'Connor pointed out that in *Miller*, the Court conceded that a community standard could exist covering the entire state of California, one of the largest and most demographically diverse states. *Id.* at 587-88 (O'Connor, J., concurring).

126. *Id.* at 587 (O'Connor, J., concurring).

127. *Id.* (O'Connor, J., concurring).

128. *Id.* at 589-91 (Breyer, J., concurring).

129. *Id.* at 590 (Breyer, J., concurring).

130. *Id.* (Breyer, J., concurring). By use of the term "heckler's veto," Justice Breyer no doubt meant that just as a lone, opinionated critic in the audience at a public debate should not be allowed to force his or her perspective on the rest of the attendees by use of veto power, so also no single community, alone in its discontent, should be empowered to deny the rest of the nation access to materials otherwise considered acceptable.

131. *Id.* (Breyer, J., concurring).

132. *Id.* at 593 (Kennedy, J., concurring).

prior obscenity regulation holdings were not necessarily analogous.[133] The opinion also stated that it would be unclear how much more narrow COPA was than the CDA until lower courts examined such issues as how restricted the "commercial purposes" provision would be,[134] what it would mean to evaluate Web content "as a whole,"[135] and what would be a permissible venue.[136] Justice Kennedy therefore concluded that although the mere presence of the phrase "community standards" did not invalidate the Act, he preferred to narrow the holding to an order for the court of appeals to analyze the Act's overall breadth.[137]

Justice Stevens' dissent emphasized that when applied to the Internet, community standards would infringe on free speech because all persons posting materials on the Internet would be criminally liable for failing to comply with the obscenity standards of the Nation's most puritan community.[138] He, like Justices Kennedy and O'Connor, found that the uniqueness of the Internet precluded application of precedents such as *Hamling* and *Sable*.[139] Justice Stevens further stated that COPA's provision limiting acceptable materials to those having serious social value "for minors"[140] was impermissibly restrictive because it ruled out vast amounts of material with serious value for adults.[141] Justice Stevens therefore concluded that the community standards criterion, by allowing a single community to rid the entire Internet of speech it alone considered offensive, unavoidably rendered the statute overbroad.[142]

V. COMMENT

The main impact of *Ashcroft v. ACLU* on the development of the law will probably stem from the majority's declaration that the Internet may be analogized to mail and telephone communications.[143] This conclusion is at the heart of the Court's reasoning that Internet content may be judged by the same standards as other media.[144] The majority upheld the constitutionality of the

133. *Id.* at 592-93 (Kennedy, J., concurring).

134. *Id.* at 599 (Kennedy, J., concurring); *see* 47 U.S.C. § 231(e)(2)(A) (2000).

135. *Ashcroft*, 535 U.S. at 599 (Kennedy, J., concurring); *see* 47 U.S.C. § 231(e)(6)(A) (2000).

136. *Ashcroft*, 535 U.S. at 601 (Kennedy, J., concurring).

137. *Id.* at 598-99 (Kennedy, J., concurring).

138. *Id.* at 603 (Stevens, J., dissenting).

139. *Id.* at 606 (Stevens, J., dissenting).

140. 47 U.S.C. § 231(e)(6)(C) (2000).

141. *Ashcroft*, 535 U.S. at 607-08 (Stevens, J., dissenting).

142. *Id.* at 608-09 (Stevens, J., dissenting).

143. *Id.* at 580-83.

144. *Id.* at 583.

community standards test largely because it did not feel that the Internet was so unique that it justified reaching a different result than applied to other communications media in the past.[145] This finding could be considered mere dicta, since the majority strictly limited its holding to address the question of whether the Act's reliance on community standards is alone enough to render the statute substantially overbroad under the First Amendment.[146] But the finding that the Internet is not sufficiently unique to merit special treatment follows closely from the Court's narrow holding, and constitutes an important step in the Court's reasoning. Although this case was designed to address only a small issue on the path of determining the ultimate constitutionality of Congress's regulation of Internet content, the Court has set the stage for future decisions concerning laws that govern the Web. The Court's decision is likely to stifle future arguments that the uniqueness of the Internet gives rise to special First Amendment concerns.

Whether the Internet is indeed unique from more traditional media is an issue on which scholars have not reached consensus. In *Reno v. ACLU*, the Court held that the Internet was not so unique that it required application of the higher regulations standards that apply to broadcast media.[147] The Internet was not as invasive as radio or television, so there was a decreased likelihood of audience members accidentally tuning in to content that they did not wish to observe.[148] As telecommunications devices such as the television, radio and computer increasingly merge into a single technological medium, the longstanding practice of treating different media by standards appropriate to their uniqueness may have lost its relevance and perhaps should be abandoned entirely.[149]

One major difference between cyberspace and "real-space" communication may be that social norms and physical space divisions allow for a degree of inherent self-regulation in traditional communication forms, whereas in cyberspace, user anonymity permits individuals to travel from site to site with very few boundaries.[150] The methods of transmission of information available in cyberspace may have no precise real-world counterparts.[151] For these and

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145. *Id.*

146. *Id.* at 584-85.

147. Reno v. ACLU, 521 U.S. 844, 868-69 (1997).

148. *Id.*; *see* Pagidas, *supra* note 100, at 1000-01.

149. Thomas G. Krattenmaker & L. A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719, 1719 (1995).

150. Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 887-88 (1996).

151. *See* Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639, 1676-77 (1995) (advising legislators and judges to use caution in regulating the Internet, due to its unique qualities).

other reasons, scholars in the mid-1990s advanced proposals to permit cyberspace to have its own, separate form of governance.[152]

The finding that the Internet does not merit divergence from earlier models of regulation of communications media made it especially easy for the Court to ground its holding in a strong foundation of precedent. The Court's decision upholds *Miller* and all its progeny; the development of law concerning mass distribution of obscene materials that began with *Hamling* and was refined in *Sable* receives only enhancement and meets no opposition in the instant holding. Community standards, enforceable in the context of mass mailings and telephone communications, have emerged undefeated in the era of cyberspace.

As Justice O'Connor indicated, however, ongoing challenges may arise concerning the application of a national as opposed to a local measure of community standards.[153] The possibility of interpreting community standards to mean the standards of all American adults was not entirely eliminated in a case that claims only to hold that community standards may apply to materials posted on the Internet.[154] After all, the exact size of the community whose standards would apply has always been left to the discretion of courts, and could therefore conceivably be expanded in some cases to be as large as the entire nation.[155] Indeed, the Court has held that in determining First Amendment protection, every medium of expression may be held only to standards that reflect the unique problems it presents.[156] This approach would seem especially useful in the Internet context. A nationwide set of community standards would only be a small departure from precedent and a modest concession to the uniqueness of the medium. The successful implementation by the motion picture industry of a national rating system suggests that in the context of some broadly distributed media, commonly held national standards may exist.[157]

By all appearances, Congress seems to have established a goal to create a nationwide standard of decency for the Web. The legislative history of the CDA and COPA reveal such an intent.[158] To enforce this intent, it would not be

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152. *See id.* at 1666-68.

153. Ashcroft v. ACLU, 535 U.S. 564, 587 (2002).

154. *Id.* at 584-85.

155. *See* Jenkins v. Georgia, 418 U.S. 153, 157 (1974) (upholding a judge's decision to omit from jury instructions any specificity regarding the parameters of the community whose standards should apply, thereby leaving the issue for the jury to determine independently).

156. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975).

157. *See* Stone, *supra* note 1, at 9; *cf.* Mark C. Alexander, *The First Amendment and Problems of Political Viability: The Case of Internet Pornography*, 25 HARV. J.L. & PUB. POL'Y 977, 1029 (2002) (advocating "bottom, up" approaches to governing the Internet, including self-regulation methods such as the Motion Picture Association of America's rating system).

158. *See supra* notes 92 and 107.

necessary to alter the wording of the *Miller* test. In this respect, *Miller* and its progeny would remain unscathed. Instead, the Court could create an exception to the traditional interpretation of the language of the *Miller* test to allow a national standard to apply with respect to materials on the Internet. Justice Stevens insisted that COPA was drafted by Congress under the shadow of unwavering precedent that the phrase "community standards" refers to the standards of local areas, yet Congress did not change the language of the *Miller* test to reveal its preference for a national standard. No evidence suggests that Congress was even aware of the line of cases expanding on the definition of community standards, and after the CDA was struck down as unconstitutional, Congress had an interest in crafting a test that traced as closely as possible the long-standing language of the *Miller* test.

Experience has shown that legal norms relating to the First Amendment do change over time with the advent of new technologies.[159] The adoption of a national community standard would recognize that the new Internet medium should change the way we view the First Amendment,[160] and would even resolve most of the concerns of the concurring and dissenting justices in the instant case. Both Justices O'Connor and Breyer endorsed just such a standard.[161] Justices Kennedy, Souter and Ginsburg were concerned that although the mere use of community standards criterion did not render the statute overbroad, its other provisions, when applied in practice to local community standards, might curtail free speech.[162] A focus of Justice Kennedy's concern was the newness and uniqueness of the Web as a means of expression. Justice Stevens rejected the notion that community standards could be interpreted to permit application of nationwide values as out of harmony with precedent and not demonstrably the will of Congress. But the focus of Justice Stevens' concern was, like that of Justice Kennedy, the uniqueness of the medium.[163] Community standards, as Justice Stevens understood them, would invariably deprive some communities of materials merely because those materials were deemed unacceptable elsewhere.

VI. CONCLUSION

A national standard, either instituted specifically by Congress or read into COPA by the Court, would resolve the dissenting and concurring Justices'

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159. Owen Fiss, *In Search of a New Paradigm*, 104 YALE L.J. 1613, 1614-15 (1995).

160. *Id.*

161. Ashcroft v. ACLU, 535 U.S. 564, 587-91 (2002) (O'Connor & Breyer, J.J., concurring).

162. *Id.* at 597-600 (Kennedy, J., concurring).

163. *Id.* at 610-12 (Stevens, J., dissenting).

concerns by prohibiting only those materials that the entire Nation can agree should be restricted. To implement a national standard would essentially reduce the kinds of materials impacted by COPA and narrow the coverage of COPA's other provisions. Thus, while paying due respect to the language of the statute and to the integrity of the *Miller* test, a national approach to community standards would establish common ground not only among the often divided opinions of the Justices, but across the United States, with regard to what is acceptable on the Internet, a medium that, by its very nature, leads its users to search for commonalities.

MATTHEW TOWNS